



Real Estate

Continuing Professional Development

Rural - environmental issues

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Learning outcomes

At the end of this topic, you will be able to

- explain what information a licensee needs to gather prior to listing a rural property
- explain what are the key environmental documents that might be included in a Property Information file
- explain the licensee's role in requesting information from the vendor
- explain common 'red flags' in a rural sale situation.

Introduction

This topic is about environmental issues related to rural property sales.

In recent years there have been several policy changes from central government around clean rivers and clean water.

Licensees need to be aware of Regional council requirements in their region (for example, consented and permitted activities).

When listing a rural property, licensees need to be aware of the requirements for that particular property and need to ensure that accurate, reliable information regarding the property (including council requirements) is available to other licensees taking potential buyers through the property. This is so potential buyers

can rely on accurate information when making a purchase decision.

There are regional plans for each region across the county. They are administered either by Regional councils or unitary authorities. Regional Resource Management Act (RMA) requirements are the main emphasis in these materials. We will not be touching on specific regional plans. Rather, we will be looking at this topic in a generic way.

Note: If this topic refers to reports that are not required in your region, you still need to take note of the information presented. These reports may be required in the future or you may transfer to another region later.

Resource Management Act (RMA)

The Resource Management Act 1991 (known as 'the RMA') sets out how we should manage our environment. The RMA is based on the principle of sustainable management. This means taking into account the life sustaining capacity of land, air and water when making resource management decisions. Under the RMA there are two main types of authority who have this responsibility. District councils (and city councils) generally deal with land use and subdivision consents. Regional councils may also be involved in land use consents where there are soil erosion and flood control issues. However, Regional councils are mainly concerned with discharge, water and coastal consents. Therefore, the rural sector mostly has ongoing dealings with Regional councils.

The RMA

- requires Regional councils to establish rules and policies to achieve compliance with the RMA
- sets standards that must be abided by.

Regional councils are also responsible for enforcement of these rules and policies. The rules and policies differ depending on the region. Some regions have progressed further than others in the development of their rules and policies.

Role of Regional councils

The main responsibility of a Regional council is to manage environmental, resource and transport planning issues for the whole region. A region may include several territorial authorities (district and city councils).

Note: Unitary authorities are territorial authorities that have the role of a Regional council as well.

Regional environmental responsibilities include

- developing regional policy statements
- issuing consents for water discharge and protection of coastal resources
- managing the effects of using freshwater, land, air and coastal waters
- managing rivers
- mitigating soil erosion and flood control
- managing oil spills and other marine pollution.

Permitted and consented activities

Permitted activity

A permitted activity can be carried out without the need for a resource consent if it complies with the Regional council's Regional Plan. This ensures it complies with any requirements, conditions and permissions specified in the RMA, in any regulations, and in any applicable plans or proposed plans.

For example, the RMA allows you to take fresh water for your own domestic needs, drinking water for your animals and for firefighting. The Regional Plan may specify the volume of water that can be taken in a particular region (for example, 1.5m³ per day on sites where a well is within 600m of a coastal marine area).

Consented activity

This is an activity that requires prior consent from the Regional council. Here are examples of different types of consented activities:

- Water consents – may be required for damming, diverting and taking water as it can affect people's ability to use the water, as well as affecting stream plant and animal life.

- Discharge consents – may be required for discharging contaminants into the environment that can affect water, air and soil quality.
- Effluent disposal system consents – may be required for the effluent disposal system used on properties in the region.
- Coastal consents – may be required to help protect coastal resources.
- Land use consents (in conjunction with district councils) may be required for land use that affects water quality, land stability and the incidence of flooding.



Key points

- Regional councils set rules and policies to achieve compliance with the Resource Management Act 1991 (known as the RMA).
- Regional councils are responsible for issuing consents for matters within their region.
- A permitted activity must comply with the Regional council's Regional Plan but does not require a resource consent.
- A consented activity is one that requires resource consent from the Regional council.



Questions

1. What is the difference between a consented activity and a permitted activity?

Gathering information prior to listing a rural property

When preparing to list a rural property, as the real estate licensee who is the listing person, you need to

- gather relevant reports as they make up the Property Information file for the property
- seek out the relevant Regional council information and requirements.

As the listing licensee, you must provide an appraisal prior to completing the listing. The information you collect about the property may be a factor in the value of the property and reflect in your appraisal. You need to gather and record this information in a format that the client can sign off at the time of signing the agency agreement.

This information will be what other licensees in the agency will refer to and rely on when they deal with potential buyers. The accuracy of the information will impact on your reputation and the reputation of other licensees, your agency and the industry. It will also impact on the potential buyer's decision whether to buy or not. Consequently, as the listing licensee, you have an obligation to be thorough in your collation of the Property Information file. All parties must be able to rely on the information provided by you.

It is essential that, as the licensee involved in marketing a rural property, you **know** the property, including consented and permitted activities (and including all notes related to environmental matters). For example, although a Regional council may allow discharge of dairy farm effluent as a permitted activity there are likely to be rules around this (for example, requiring effluent storage facilities, feed pads and stand-off pads to be sealed and setting a standard for that sealing).

Property Information file

What does the procuring information (the information in the Property Information file) look like for a listing agent in practice? In terms of putting together a Property Information file, what is required of the listing agent and what is required of the vendor?

You will need to ask the vendor questions such as the following to ensure you obtain the procuring information you need:

Information on plans, tests and reports

- Are there any Resource Consents related to activities carried out on the property?
- Do you have an Effluent Disposal System? Does the Regional council require resource consent for this system? Can you provide me with information on the system used on this property?
- Do you have a Farm Environmental Plan (FEP)?
- Do you have a Farm Implementation programme (FIP) for implementing the FEP?
- Can you provide me with data on the Nitrogen Reference Point?
- Do you have an OVERSEER® (online) report for the property?
- Is a DDT Test available?
- Does the property meet the National Environmental Standard (for contaminants)?
- Are there any contaminant dumps on the property that you are aware of?

Note: Some of the reports, plans and measures mentioned on the previous page have not become an industry standard yet. Consequently, not all rural property vendors will be able to provide this information. However, it is important for you to be aware of them as many of these are likely to become industry standards in the future.

Information on what the purchase includes

The procuring information outlines what is **promised** to be there when the buyer takes possession of the property. Here are examples of procuring information.

Amount of conserved feed to be left by the vendor

This is pasture or grass and may be measured as the closing area of pasture in a given time.

Amount of supplementary feed to be left by the vendor

This may be silage, hay or crops. Crops may include, for example, winter crops or cereal crops. Crops may be measured as kilograms of dry matter per hectare and silage or hay may be measured in bales.

(A winter crop is a crop sown in autumn for growth during winter and maturing in the spring. Cereal crops are mostly grasses cultivated for their edible seeds.)

Whether there is a water consent, its duration, and what is allowed

This is consent for water use. This use must be metered and there are likely to be restrictions (for example, usage per cow or X cubic metres per day). Vendors are required to submit a report with evidence.

It needs to be clear whether consents will be transferred with the sale of the property.

Whether there is consent to irrigate, its duration, and what is allowed

This information needs to include what consents allow irrigation, and daily use restrictions. Information on the provider irrigation company also needs to be included.

Whether regular soil moisture monitoring is in place to make for more efficient water usage

Soil moisture monitoring involves measuring soil moisture to determine irrigation requirements.

Amount of fertiliser application to the property

This could be measured as the amount of fertiliser applied in the spring prior to the day of settlement. Documents or invoices may be provided as evidence of the application of fertiliser.

Any important exclusions in the terms and conditions of sale

As examples, this could include an irrigation plant being relocated to another property or a change affecting Fonterra shares.

Consents and permits for activities on the property

There may be resource consents and permits relating to activities carried out on the property. Under the RMA, there are various types of resource consents, including **discharge permits** and **water permits**.

Normally discharge permits can be transferred to another person who becomes the owner of that site. However, discharge permits may not be transferred to another site, unless this is allowed for in the Regional plan.

Normally water permits can also be transferred to another person who becomes the owner of that site. Water permits for damming or diverting water can only be transferred to other parties if they are the owner or occupier of the site to which the permit relates. Other water permits can also be transferred to another person or another site provided it is within the same catchment area, aquifer or geothermal field, but only if the Regional plan provides for it, and if the consent authority approves an application for transfer.

(An example of a Water Permit is provided in Appendix 1, and the first two pages of a Discharge Permit are provided in Appendix 2.)

It needs to be clear whether any resource consents or permits will be transferred with the sale of the property.

With any resource consent there are two important matters that should always be disclosed. The **conditions** under which the consent is given, and must operate, and the **duration** of the consent.

The duration of the consent can be critical. Under the RMA all discharge and water consents have time limits. The maximum time that can be given is 35 years. If consent is given without a time period being stipulated, then it is only for 5 years. As there is no guarantee that existing consents will be rolled over at the end of the period stipulated, it is important that the duration is disclosed.

In giving consents, Regional councils may impose conditions requiring certain works to be undertaken (for example planting, additional embankments or fencing off areas). These works may not have been undertaken. If these works have not been carried out, the new owner remains responsible. This means careful inspection of the property is needed, as well as attention to the details of the conditions. The licensee should therefore always draw a potential buyer's attention to such conditions. The critical issue for any potential buyer is to know what the consents involve. A copy should always be available.

Consents may specify an end date, and dates for monitoring or for a review of consent conditions. Furthermore, a property you are marketing may have gained a resource consent, but the vendor has not yet implemented it.

In summary, in dealing with your vendor it is important to clarify matters and ensure the documents (if they exist) are included in the Property Information file for the property.

Vendor verification and documentation of information

If any of the information mentioned is quoted in marketing material (for example, that the vendor has consent to irrigate) appropriate supporting documentation must be made available (such as documents and reports). As outlined earlier, it is important to report what is consented and what is being done to meet those consents.

The information/material needs to be collated **prior** to the vendor signing the agency agreement. The information needs to be signed off by the vendor. You can only provide information to a third party if this has been approved by the vendor.

If you find out something about the property that needs to be disclosed to potential buyers, you need to get this information verified by the vendor before you pass the information on. For example, if you received information from a neighbour that 44-gallon drums of chemicals were dumped on an area of the farm in the past, or planting required in a consent has not yet happened, you would need to send an email to the vendor to verify this. **It is critical that you record this in writing.** The written reply (such as an email response) is a very important document that you need to file carefully.

It is crucial that you document all conversations regarding information or documentation related to the property.



Key points

- When you are the listing licensee you need to gather and record all relevant information in a Property Information file. This may include reports and Regional council information and requirements and needs to be done **prior** to the vendor signing the agency agreement.
- You must be thorough in compiling the Property Information file as the agency, other licensees and potential buyers all rely on its accuracy.
- It is essential that the licensees involved in the marketing **know** the property, including its permitted and consented activities and the conditions under which the consents are to operate, their duration and what is being done to meet the consents.
- As the listing licensee you will need to ask the vendor specific questions to obtain the information required.
- If any procuring information is quoted in marketing material (for example, that the vendor has consent to irrigate) appropriate supporting information must be available in writing (such as documents or reports).

Read the following case study and answer the questions that follow.

Case study 1

This case relates to the sale of a rural property and the information provided to potential purchasers by a salesperson licensee prior to the sale of the property. The case was taken to a Complaints Assessment Committee.

The Complainants were the purchasers of the Property.

The case is summarised below.

The Background

At the beginning of July, the Property was listed by the Licensee and his vendor clients. The listing documentation stated that the Property had 'commercial supply irrigation'. The information given to the Licensee by his client referred to the then current supply agreement with an irrigation company.

The marketing of the Property, including at open homes, was to the effect that it had a 'commercial' irrigation water supply. However, any new purchaser would have to 'apply' for a 'commercial' supply of irrigation water. The Complainants viewed the Property and indicated to the Licensee that they had in mind using it as a riding school.

The Complainants signed a sale and purchase agreement. The document stated that "the vendors must do everything necessary to transfer the vendor's existing water rights in the Water Company to the purchaser on settlement."

Following settlement, the Complainants met with the Water Company. They were advised that since 2010 there had been a non-commercial irrigation agreement in place with the previous owner. The contract arrangements meant that, even if a commercial agreement had been in place with an owner, any such agreement would not necessarily be approved for a new owner.

The Complainants entered into an agreement with the Water Company for a 'transfer' of the non-commercial water rights held by the previous owner. They said their understanding that there would be irrigation available at a 'commercial' level and quantity was an important factor in their decision to buy the Property. This was because irrigation of a reasonably significant quantity would be required to maximise the grazing of their horses. In a letter to the Licensee, the vendor's lawyer said that when her client stated that the Property had commercial irrigation it was because it had the capacity for commercial irrigation rather than referring to it currently receiving a commercial supply. The letter also stated the Water Company's confirmation that commercial water supply agreements would only be given to properties which are operating a commercial activity.

The Decision

The Complaint Assessment Committee's findings were that the Licensee knew the Complainants were buying this Property to operate a business from it and the Committee believed he was aware of the nature of that commercial activity, and that water supply would be a factor of some importance. The Committee stated that the Licensee elected to market this Property as having commercial irrigation.

The Committee said the expression 'commercial' irrigation had, in this context, substantial economic significance, and there was a clear distinction between 'commercial' and 'residential' irrigation.

The Licensee stated that he indicated to all interested parties that they should check with the irrigation company or get their lawyer to look into the matter if they wished to buy the Property and required a commercial supply. He said he told the Complainants to research the water issue. However, in their submission to the Committee, the Complainants were adamant that no such advice was given.

The Licensee argued that the Complainants were under a duty of 'due diligence' and had failed to act accordingly. The Committee noted the obligations of disclosure by real estate agents with regard to properties they are marketing. They commented on the agent's duty to actively disclose that

- the existing water supply was 'residential' and limited, and
- whether a 'commercial' supply would be available could ultimately be at the discretion of the water supplier.

They found that the agent had made a positive, express and specific representation that the Property had commercial irrigation when that was palpably wrong, false and misleading. The Committee noted that the Licensee failed to properly check and verify whether the Property had commercial irrigation immediately available to the Complainants following their purchase.

The Committee felt that the Licensee's position appeared to be that, having said what he did about this Property (that it had commercial irrigation), his customers should then have checked that what he was saying was true. The Committee felt that such an argument was untenable.

The Committee said there was some suggestion that the Licensee contacted the Water Company about the water supply, but the company refused to provide him with this information for 'privacy' reasons. The Committee felt that if the Licensee did approach the Water Company he did so because he thought this issue (regarding the water supply) was such that the situation needed checking. If he was refused access to the information, he simply could (and should) have gone to his clients and asked them to authorise the release of the required information.

The Committee found the Licensee had breached Rules 5.1 and 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. They found that it was very clear that the real estate agent

- failed to exercise appropriate care and diligence to check and verify an important aspect of the marketing of this property to the market including, in particular, these specific purchasers (the Complainants). This was a breach of Rule 5.1.
- provided false and misleading information to customers. This was a breach of Rule 6.4.

The Committee found the Licensee guilty of unsatisfactory conduct.

The Complainants submitted that by way of an order for 'rectification', the Committee should order the Licensee to meet the cost of providing the Property with a bore hole, water tank and two pumps. The Committee stated that they do not have the power to order compensation.

The Licensee was censured and fined \$2,000.

Complaint number: C04597

Date: 3 October 2014

You can read about this complaint and decision in the REA decisions database which you can find at the top of the homepage at rea.govt.nz



Questions

2. The Committee found that the licensee had breached rules 5.1 and 6.4. How did the licensee breach these rules?

3. What were the implications for the purchasers of the breaches the licensee made?

4. What did the Committee say the licensee should have done when the Water Company refused to provide information on the water rights for privacy reasons?

Plans, reports and test results

Plans, reports and test results need to be provided by the vendor and included in the Property Information file.

Third party reports are independent 'arms-length' reports for the buyer and should be addressed to the vendor. In the future, more reporting will be required regarding what is consented and what has been done to meet consents. For example, has effluent storage been updated to a standard that will meet the Regional council's future consent requirements?

The following are examples of reports/information that may be included in the Property Information file:

Farm Environment Plan (FEP)

A Farm Environment Plan (or FEP) involves recording information that affects the environment. It is a tool to help farmers recognise environmental risks on the farm. Then a Farm Implementation Programme (FIP) is developed to set out a programme to manage the risks identified in the FEP.

The FIP outlines management practices, as well as monitoring and recording the programme to implement and achieve the required environmental targets and outcomes.

Each Regional council sets guidelines for FEPs in its region.

Increasingly farms across the country are being required to have their own FEP, and this must meet Regional council requirements (and the RMA). The FEP includes levels the Regional council has set for what the farmer can do on that particular property (for example, how much nitrate is able to be spread on the land).

The FEP reflects the local climate and soils, the type of farming operation, and the goals and aspirations of the land user. It includes nutrient information and environmental risk information. Nutrient information includes nutrient budgets and may include an OVERSEER® report. Environmental risk information includes supporting test results such as DDT tests or soil tests.

A completed Farm Environment Plan with fictional information is provided on the Waikato Regional Council website as an 'example FEP template' :

<https://www.waikatoregion.govt.nz/council/policy-and-plans/plans-under-development/healthy-rivers-plan-for-change/for-landowners/farm-environment-plans/>

The type of nutrient information provided in the FEP may include the Nitrogen Reference Point (NRP).

Nitrogen Reference Point (or Baseline)

An NRP is information on a property's nitrogen leaching losses. This is the measure Regional councils will use in the future to determine restrictions on the use of nitrogen and any other fertiliser (for example, phosphate) in the fur. The reference point is provided in a written report by an independent consultant doing this kind of work and sets the value that is not to be exceeded.

The NRP can be calculated using an approved model. The OVERSEER® tool is currently the most recognised online tool. This tool records nutrients in and out of the system, and whether the farm is conforming to local or Regional council requirements. It can also send monitoring data to authorities. However, its accuracy depends on correct data being entered into the system and this data being updated regularly. The tool is used to produce a report, which is usually drawn up by the farmer and their farm consultant.

The following section examines the type of information used to calculate the NRP.

Nutrient Information

This information may include

- Evidence of stock numbers (from annual accounts and sale and purchase invoices)
- Dairy production data (from receipts from the milk supply company)
- Records of fertiliser applied to the land (from invoices or fertiliser proof of placement data)
- Records of sale or purchase of feed supplements (from invoices)
- Records of water use for irrigation (average irrigation over a set number of years and the irrigated area are used to calculate irrigation application rates)
- Records of crops grown and grazed (for example, from seed company invoices or harvest contractor receipts)
- Diaries of horticulture crops or NZGAP records for vegetable growers
- Any soil test data available
- A map showing the property boundaries and the different management units on the farm (such as farm, forestry, effluent block, non-productive area)
- Certificate of title and legal description information
- Soil type maps and related data.

Environmental risk information

This information may include

- DDT tests
- Soil tests results (values)
- Effluent disposal report (certifies what the effluent system runs like and includes the type of system, the conditions, the timeframe and whether it is consented)
- Phosphate levels (prescribed in many regions)
- Irrigation management results
- Notifiable diseases (for example, Mycoplasma Bovis, Tuberculosis, Infectious bovine rhinotracheitis abortion).

In this section further explanation is given on the information listed on the previous page:

Nutrient budget

Nutrient budgets estimate the nutrient flows in a farming system and include estimates of nitrogen and phosphorus loss to water through leaching and/or run off. This is used to plan fertiliser application.

Nitrate levels

Allowable nitrate levels are established from historical data, stock numbers, and their application to the land. They relate to the levels of nitrate shown in the soil test results **and** the amount being excreted onto the land by animals **and** the amount applied to the land due to spreading of fertilisers.

The Nitrate level figure can change. The Regional council may set future levels that must be complied with. For example, a property may be currently running at 75 parts per million, with a future requirement to run at 35 parts per million. This has significance for the sale of the property in that the reduction in allowable nitrate levels may impact on future stock levels (which may need to be reduced), and the future land value. In this case, as the listing licensee, you would need to ask the vendor whether they have an action plan in place to reduce the nitrate level. Nitrate levels may be reduced through such methods as using nitrogen inhibitors or changing winter feed or other crops grown.

Phosphate levels

Different Regional councils may have different phosphate levels.

Soil Tests

A soil test is where a soil sample is analysed to determine nutrient content (such as nitrogen or phosphate), composition, and other characteristics such as the acidity or pH level. The purpose of the test may be to use for organic certification, to ascertain fertiliser requirements or to measure contamination in soils, as examples.

It is best to look at soil test results over a period of time to observe trends, as a number of factors may affect the nutrient levels.

DDT Tests

DDT is a pesticide previously used to control grass grub on agricultural pastures. DDT has a soil life of around 100 years as it adheres to soil fat and dilutes at a very slow rate. It was banned in 1970, however it is still showing some presence in a number of regions. Dairy cows can ingest DDT contaminated soil during grazing. There are obviously human factors regarding DDT, and farms producing elevated DDT levels suffer financial penalties. DDT residue tests are commonplace, particularly within the dairy industry. These are random tests carried out on milk on an ongoing basis. It is important that new farms are tested for DDT prior to conversion to Dairy.

Effluent disposal report

This report outlines whether the effluent system has been monitored and, if so, by whom and what the results are.

If an owner is found to be guilty of a breach of the requirements of an Effluent disposal consent, the Environment Court could

- cancel the consent and order the environment to be restored

- order monetary penalties (which could involve a significant amount of money and can include ongoing fines for every day an offence continues).

Rectifying effluent disposal breaches can involve significant cost.

Irrigation management report

Water rationing is generally controlled by the Regional councils. Some areas have water restrictions at certain times of the year. For example, for some of the year they may be able to apply 250m³ per day, but for a certain period of the year they may only be able to apply 100m³ per day. It is important that this is disclosed to a potential buyer because it may affect how they are able to run their planned farming/ horticulture business.

National Environmental Standard (for Contaminants)

The National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (NESCS) is a nationally consistent set of planning controls and soil contamination values. It ensures that land affected by contaminants in soil is appropriately identified and assessed before it is developed. In the main, contamination has been caused by practices in past years, including the storage and use of hazardous substances, and disposal of hazardous wastes. In some cases, the land may need to be remediated or the contaminants contained to make the land safe for human use. Further information on the NESCS may be found on the following website:

<https://www.mfe.govt.nz/land/nes-assessing-and-managing-contaminants-soil-protect-human-health/about-nes>

Regional councils are required to identify and monitor contaminated land. In order to do this, most Regional councils maintain a contaminated sites database.

The NESCS classifies permitted activities. This means that no resource consent is required for the following if the stated requirements are met:

- removal or replacement of fuel storage systems (and associated soil sampling and subsurface soil sampling)
- soil sampling
- small-scale (no greater than 25 cubic metres per 500 square metres of affected land) and temporary soil disturbance activities (no more than two months' duration)
- sub-dividing land or changing land use where a preliminary investigation shows it is highly unlikely the proposed new use will pose a risk to human health.



Key points

- Increasingly, farms across the country are being required to have their own Farm Environmental Plan (FEP). The FEP includes nutrient information and environmental risk information on the farm.
- From the FEP a Farm Implementation Programme (FIP) is developed to manage the risks identified in the FEP.
- A Nitrogen Reference Point (NRP) is information on a property's nitrogen leaching losses. This is the measure Regional councils will use in future to determine restrictions on the use of nitrogen and any other fertiliser (for example, phosphate).
- Licensees need to be aware that **there are levels and restrictions** related to the way the land is used, and **in broad terms what they measure**.
- The National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (NESCS) is a nationally consistent set of planning controls and soil contamination values.

Read the following breach example and answer the questions that follow.

Regional Council breach example

A case was brought against a company who farmed a property, and a director, under the Resource Management Act. This case related to illegal effluent discharge on the farm.

The Regional Council took the farm company to court following a series of inspections where they found over-irrigation of effluent. Effluent from an underpass to an adjoining property was also being pumped directly to land in large volumes. Both practices posed a real risk of effluent contaminating groundwater.

Similar breaches had been found by the council in 2016 and 2017 and formal warnings and infringement notices had been issued for those breaches. An abatement notice to cease the illegal practices had also been served on the company in 2016.

The Council investigations officer said there was no expansion of dairy effluent infrastructure when herd numbers increased from 380 to 700 cows, following the purchase of a neighbouring farm. The farm had only one day worth of effluent storage when it should have been up to 100 times larger

than that. The officer said that there had been “regular and frequent unlawful discharges of dairy effluent into the environment for years”.

The farming company was found guilty of illegal effluent discharges and fined \$131,840.

After the verdict the owners started work constructing a new effluent pond, which would hold three million litres, be concrete-based and would provide over 90 days of storage.

Case details:

Source: Press release from Waikato District Council

<https://www.scoop.co.nz/stories/AK1903/S00082/record-fine-for-waikato-farmer-following-third-prosecution.htm>

Date: 5 March 2019



Questions

5. Why did the Regional council inspectors find the effluent management systems on the farm were inadequate?

6. What was considered the risk posed by the two illegal effluent management practices used on the farm?

7. If a person or company buys a farm with a current effluent discharge problem that they are unaware of, what are the potential risks for that new owner?

Licensee's role in requesting information

Your role, as licensee, is to request information from the vendor. You need to ask a lot of questions. Some of the answers could be added to the Agency Agreement and used in information packs. You may need to put some pressure on a vendor to gather the information if it is going to be an important component of the information for buyers. The emphasis is on gathering the correct information. This involves properly checking and verifying information about the property in Information packs, marketing information and included with the sale and purchase agreement.

You need to keep in mind the requirements of Rule 5.1, Rule 9.8 and Rule 9.9:

- Rule 5.1 – A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
- Rule 9.8 – A licensee must not take advantage of a prospective client's, client's, or customer's inability to understand relevant documents where such inability is reasonably apparent.
- Rule 9.9 – A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for signature unless all material particulars have been inserted into or attached to the document.

Asking questions of vendors

As a licensee you need to consider what questions a buyer would ask and, before the property is marketed, endeavour to have answers to these questions and have the associated documentation available for potential buyers (such as reports, tests or plans).

Here are examples of the types of questions buyers may ask.

Effluent disposal report

Does the effluent disposal system comply with resource consent requirements?

There should be a report on whether the system complies with resource consent requirements. If there are issues, under resource consent requirements, there may be a warning notice outside the property or, more seriously, an abatement notice may have been issued under the RMA.

Nitrate levels

What are the future levels for the property, as advised by the Regional council?

For example, the nitrogen reference level may be running at 75 kilograms per hectare, but the future reference point set by the Regional council may be 35 kilograms per hectare.

If the future levels are lower than the current levels, does the vendor have an action plan to reduce the levels? What will the reduced levels mean for the future of the property?

Right to irrigate

Is there consent to irrigate? What are the details of this consent?

Does the vendor use a New Zealand Irrigation accredited programme?

Have monitoring requirements been adhered to?

When does the consent expire?

If an irrigation consent is mentioned in the marketing material, a copy of this consent should be available.

Emissions

Is the vendor registered under the Emissions Trading Scheme (ETS NZ) and, if so, what is the status of any forest on the property and any associated carbon credits?

Is the vendor undertaking any measures to reduce or control methane gas production?

There is a great deal of information for licensees to learn about ETS, which we will not touch on in this material. Information can be found on the following websites:

<https://www.mpi.govt.nz/>

<https://fmnz.co.nz/>

Change of use

Is the new use a permitted use or is it a consented use?

A permitted use doesn't need consent, but a consented use requires consent (often from both the district and Regional council). This applies where a current owner is in the process of, or has made, such changes.

Licensees should always ask a buyer what they intend to use the property for. If it is for a purpose other than the current one, they should recommend that the potential buyer seeks legal advice prior to submitting an offer to determine whether their intended use of the property is permitted or may require resource consent(s).

Example

If a dairy farm is being changed to cropping, would the buyers require consent to change the use?

Are there any specific requirements for this new use of the land? (For example, if the land use was changed to cropping, ploughing may not be allowed within 10m to 15m of a drain or you may not be allowed to plant on a slope greater than 30 degrees or you may not be allowed to increase the fertilizer content.)

The main issue here is whether a change must be consented. If it does need consent, a buyer is likely to require a due diligence clause in the sale and purchase agreement. Alternatively, the buyer could make the contract conditional upon the approval being granted.

You will need to consider what information about change of use needs to go into the Information pack. A general statement should be made that any buyer contemplating a change in land use may require additional consents.

Other information relevant to the sale

Information related to Fresh Water Management

The National Policy Statement for Freshwater Management has been in effect since 2014. It is a national policy statement regarding how freshwater is to be managed. Regional councils have until 2025 to fully implement it.

Licensees need to be aware of local progress on this in their area and how the property they are marketing may be affected by it.

Information on risks to the land

Common risks to the land include erosion, earthquake risk, or flooding.

Has any engineering, geotechnical, soil, contamination, flood, liquefaction or other hazard-related report been undertaken or required for the property?

If there have been any reports, potential buyers will want to see copies.

Information on any protected areas

Although these have not been our focus here, licensees should also look for reports or details of wahi tapu and other heritage items, protected significant natural areas of bush or wetlands, QE2 covenants or landscape protection rules, access issues where properties border main roads and any proposed or existing designations for public works such as walkways, reserves or transmission lines. All farms must also have a health and safety plan in place including, for example, the required notices on farm gates.

(Wahi tapu is defined in the Heritage New Zealand Pouhere Taonga Act 2014 as meaning a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense.)

What are 'red flags' in a rural sale situation?

In the context of real estate sales, a 'red flag' is a warning sign that there might be an issue with the property or something that requires further investigation.

Potential issues may be signalled by something unusual in the Land Information Memorandum (LIM) report for the property, or from the various tests, reports, consents and other documentation on the property.

Here are some examples of situations that may raise a 'red flag', from documentation and when physically inspecting the property:

- The sale and purchase agreement doesn't state that a Regional council resource consent for irrigation is to be transferred.
This may indicate a future change in permitted/consented activities in terms of taking water from the land or use of water on the land.
- There is a warning sign on the outside of the property relating to a disease on the property.
- The LIM report includes a note about 'ponding' in one area of the property.
This may indicate an issue with effluent treatment and possible leaching risk.
- Soil tests for one area of the property show an unexpectedly high DDT level.
This may indicate that this area of the farm has been used as a 'dumping ground' for contaminants in the past. If this is the case, it could be a risk in terms of complying with Regional council rules and/or it could be costly to rectify.
- The vendor says there is resource consent for the irrigation system on the farm. However, when asked for the consent document, you are told it is not available.
- There is any vagueness as to the contents of a report or a consent.
- There is any indication that the works required for a consent may not have been carried out.
- Any properties with river, stream or lake frontage where fencing is, or may have been, required.
- There are extensive earthworks or new tracks on a property.
- There is evidence of damming or diverting of water sources, or their discoloration.
- There has been disclosure of wahi tapu on the property, and the need to provide access.
- There are any designations or proposed designations, for example for roading, power transmission or reserves.

If any of the above raises a 'red flag', it is advisable to highlight the issue to the buyer and obtain written evidence that this has been done. Where possible, it is good practice to obtain written acknowledgement from the buyer that they have been advised of the issue.

Lack of information/reports

If information that you would expect to be available isn't, this also raises a red flag. For example, if a lawyer is looking for a report and the vendor says, "We haven't been able to get this information", you, as licensee, should 'front foot' this. You need to be transparent and disclose to the buyer, "The vendor has not been able to get this information". Do not make up information or mislead prospective buyers or those acting for them.



Key points

- You will need to request information from the vendor. This will involve asking many questions. Remember to document any verbal discussion.
- The buyer needs to know what they can and can't do with the property. Regional and district plans will need to be consulted.
- If a consent or permit is quoted in marketing material it should be available to potential buyers.
- You need to watch for 'red flags', such as a report 'not being available'.
- If you note a 'red flag', it is advisable to highlight the issue to the buyer and obtain written evidence that this has been done. Where possible, it is good practice to obtain written acknowledgement from the buyer that they have been advised of the issue.




Putting my learning into practice

Describe **at least three** key learnings you will take away from this 'Rural – environmental issues' topic.

Describe **at least one** change you will make to the way you work as a result of this topic.

Appendix 1: Example of Water Permit

 environment SOUTHLAND	File No: [REDACTED] Consent: [REDACTED]
	Cnr North Road and Price Street (Private Bag 90116) Invercargill Telephone (03) 211 5115 Fax No. (03) 211 5252 Southland Freephone No. 0800 76 88 45
<h3>Water Permit</h3>	
<p>Pursuant to Section 104B of the Resource Management Act 1991, a resource consent is hereby granted by the Southland Regional Council (the "Council") to [REDACTED] (the "consent holder") for the [REDACTED] from 12 April 2010.</p>	
<p>Please read this Consent carefully, and ensure that any staff or contractors carrying out activities under this Consent on your behalf are aware of all the conditions of the Consent.</p>	
<h4>Details of Permit</h4>	
Purpose for which permit is granted:	To take groundwater for a dairy operation
Location	- site locality - map reference - groundwater zone - catchment
Legal description of land at the site:	[REDACTED]
Expiry date:	12 April 2020
<h4>Schedule of Conditions</h4>	
1. This consent is granted for ten years and shall commence on the expiry or surrender of consent [REDACTED]	
<p><i>(Note: Pursuant to Sections 123 and 124 of the Resource Management Act 1991, a new consent will be required at the expiration of this consent. The application will be considered in accordance with the plans in effect at that time, and the adverse effects of the proposed activity).</i></p>	
Water Permit [REDACTED]	Environment Southland is the brand name of the Southland Regional Council

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File No: [REDACTED]
Consent: [REDACTED]


2. This consent authorises the abstraction of water from bore/well number [REDACTED] at about NZMS [REDACTED]
 3. The rate of abstraction shall not exceed 45,000 litres per day.
 4. The consent holder shall install a backflow prevention device or take other appropriate measures to ensure water and/or contaminants cannot return to the water source.
 5. The consent holder shall monitor water usage to ensure compliance with Condition 3 of this consent, as follows:
 - (a) by installing flow meters:
 - (i) capable of accuracy to within 5% of the true flow rate, on each abstraction;
 - (ii) the meters shall be installed in accordance with the manufacturer's instructions;
 - (iii) the water meters shall record volumes in litres or cubic metres; and
 - (b) by recording the volume of abstraction, at or about the same time each month when the consent is being exercised.
- A copy of this record is to be provided to the Council's Compliance Manager by 30 May each year.
6. The consent holder shall pay an administration and monitoring charge to the Southland Regional Council collected in accordance with Section 36 of the Resource Management Act, payable in advance on the first day of July each year.
 7. The Council may, in accordance with section 128 and 129 of the Act, serve notice, during the period May to July each year, of its intention to review conditions for the purpose of:
 - (a) Dealing with any adverse effects on the environment which may arise from the exercise of this consent; and/or
 - (b) Requiring monitoring of the rate of, or the effects of, the abstraction; and/or
 - (c) Requiring efficiency of water use; and/or
 - (d) Complying with the requirements of a regional plan.

for the **Southland Regional Council**

[REDACTED]
Director of Environmental Management

Appendix 2: Example of Discharge Permit

Just the first two pages of the permit are shown, as an example of the nature of the content.

 environment SOUTHLAND	File No: [REDACTED] Consent: [REDACTED]
	Cnr North Road and Price Street (Private Bag 90116) Invercargill
	Telephone (03) 211 5115 Fax No. (03) 211 5252 Southland Freephone No. 0800 76 88 45
<h3>Discharge Permit</h3>	
<p>Pursuant to Section 104A of the Resource Management Act 1991, a resource consent is hereby granted by the Southland Regional Council (the "Council") to [REDACTED] (the "consent holder") for the [REDACTED]: from 12 April 2010.</p>	
<p>Please read this Consent carefully, and ensure that any staff or contractors carrying out activities under this Consent on your behalf are aware of all the conditions of the Consent.</p>	
<h4>Details of Permit</h4>	
Purpose for which permit is granted:	To discharge dairy shed effluent and milk processing wastewater to land
Location - site locality - map reference - receiving environment - catchment	[REDACTED]
Legal description of land at the site:	[REDACTED]
Expiry date:	12 April 2020
<h4>Schedule of Conditions</h4>	
<p><i>These conditions should be read in conjunction with the best practice recommendations that are appended. These will reduce the risk of non-compliance with the consent conditions.</i></p>	
<p>1. This consent is granted for ten years and shall commence on the expiry or surrender of consent [REDACTED]</p>	
Discharge Permit	Environment Southland is the brand name of the Southland Regional Council

***Note:** Pursuant to Sections 123 and 124 of the Resource Management Act 1991, a new consent will be required at the expiration of this consent. The application will be considered in accordance with the plans in effect at that time, and the adverse effects of the proposed activity.*

2. This consent authorises the discharge of dairy shed effluent and milk processing wastewater onto land, via a land disposal system, as described in the application, on land known as [REDACTED] and [REDACTED] Survey District. The land within the property to which effluent can be applied is shown in Appendix 1.

Subject to the approval of the Director of Environmental Management, the effluent disposal area shown in Appendix 1 can be altered and/or extended if the consent holder submits a new plan showing the new effluent disposal area, and providing the written approval(s) of any person whose property boundary will be closer that area.

3. (a) No dairy shed effluent and/or milk processing wastewater shall be discharged to any surface watercourse by overland flow, runoff, or via a pipe. nor shall there shall be any surface run-off/overland flow, ponding or contamination of water resulting from the exercise of this consent. **See Best Practice Notes 1 & 2.**
- (b) The land disposal system shall be operated and maintained to ensure that there is no offensive or objectionable odour beyond the property boundary, or any spray drift into or beyond the buffer zones specified in Condition 5.
- (c) The consent holder shall install and maintain an alarm and automatic switch-off system as a contingency measure in the event of an effluent system failure such as a sudden pressure drop, irrigator stoppage or breakdown. **See Best Practice Note 3.**
4. (a) Subject to Condition 3(a), the land disposal system is limited to the following:
- (i) a maximum depth of application of 8 mm for each individual application.
 - (ii) a minimum return period of 28 days between applications to any one area;
 - (iii) a maximum combined depth of application of 25 mm per year to any land area; and
 - (iv) the maximum loading rate of nitrogen onto any land area shall not exceed 75 kg of nitrogen per hectare per year from dairy shed effluent. **See Best Practice Note 4.**
- (b) Before this consent is exercised, the consent holder shall measure the application rate of the irrigator as installed to confirm the operating conditions required to ensure compliance with condition 4(a).
- (i) The consent holder shall notify the Council's Compliance Manager in advance of the measurement.
 - (ii) The Council may audit the measurement of the application rate to ensure accuracy. The consent holder shall pay the costs of auditing the measurement in accordance with Section 36 of the Resource Management Act.

The result of the measurement shall be forwarded to the Council's Compliance Manager within 10 working days of the measurement being completed.