

## **EMERGENCY WORKS PROVISIONS OF THE RESOURCE MANAGEMENT ACT 1991**

This is a guide only, in that the lawfulness of any decisions made or actions undertaken in terms of the emergency works provisions of the RMA will be established by the facts of the situation to which they pertain. If disputed a final determination would be made through the Courts.

### **1 INTRODUCTION:**

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#### **1.1 Purpose:**

The emergency works provisions of the Resource Management Act (RMA) are an important means to assist emergency response. These provisions suspend any necessary resource consent requirements under sections 9, 12, 13, 14, 15 of the RMA during times of emergency. Consent requirements cover any use of land, the Coastal Marine Area, or the bed of a lake or river, and the taking, using, damming, or diverting of water, and discharges of contaminants into the environment.

Ordinarily resource consent is required for all activities that are not otherwise permitted within a district or regional plan. The emergency works provisions of the RMA recognise that in an emergency it is not always practicable to obtain consent before necessary works or activities are undertaken.

In the past there has been uncertainty among local authorities and network utility providers about the practicalities of applying the emergency works provisions. This uncertainty is most evident during community-wide emergency events, such as widespread flooding and landslips.

This guideline is designed to assist understanding about who may use the emergency provisions of the RMA (including during a state of emergency under the Civil Defence Emergency Management Act 2002), when and how.

#### **1.2 Why have emergency works provisions in the RMA?**

Resource consents are a fundamental means to assist in achieving the Act's purpose of promoting the sustainable management of natural and physical resources. They exist to ensure that activities with potential to adversely affect the environment are carried out in a way that these effects are avoided, remedied or mitigated. In normal circumstances activities requiring resource consent cannot be undertaken until that consent is granted, and any associated conditions are met.

Emergency works are undertaken when immediate action is necessary to rectify a problem that, if left longer, would result in either worse outcomes for the environment or the likelihood of death, injury or serious damage to property. The necessity for immediate action would mean that there is not time to follow normal consent processes. In such cases acting without obtaining the relevant resource consents beforehand is presumed to pose lesser risks to the environment, people and property than waiting till consent is gained.

However, the suspension of consenting requirements until after emergency works have commenced does not do away with concerns that the works could have undesirable adverse effects on the environment. They may also restrict undertaking other legitimate activities, and limit the rights of other people to have a say about how such works may impact on them, their community and the environment.

Deciding when to use the emergency works provisions of the RMA is largely about applying common sense. It requires forming a reasonable opinion that, in the circumstances, it is best to act without delay. In doing so the works manager should be mindful that consent would ordinarily be required for good reason, and that such matters will need to be addressed once the situation is stabilised. As such, considering how to minimise any additional and ongoing effects that the works themselves may cause on the environment is an important part of deciding how to address an emergency situation.

### 1.3 What do the emergency works provisions say?

The provisions of the RMA that enable specific persons or bodies to undertake emergency works are s. 330 and s. 330B. Section 330A (notification), s. 18 & s. 341 (limiting liability for prosecution) and s. 331 (compensation) are also relevant, and are discussed later on.

Section 330 provides as follows:

#### **Resource Management Act:**

330. *Emergency works and power to take preventive or remedial action—*

(1) *Where—*

- (a) *Any public work for which any person has financial responsibility; or*
- (b) *Any natural and physical resource or area for which a local authority or consent authority has jurisdiction under this Act; or*
- (c) *Any project or work or network utility operation for which any network utility operator is approved as a requiring authority under section 167—*

*is, in the opinion of the person or the authority or the network utility operator, affected by or likely to be affected by—*

- (d) *An adverse effect on the environment which requires immediate preventive measures; or*
- (e) *An adverse effect on the environment which requires immediate remedial measures; or*
- (f) *Any sudden [event] causing or likely to cause loss of life, injury, or serious damage to property—*

*the provisions of sections 9, 12, 13, 14, and 15 shall not apply to any activity undertaken by or on behalf of that person, authority, or network utility operator to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency.*

(1A) *Subsection (1) applies whether or not the adverse effect or sudden event was foreseeable.*

(2) *Where a local authority or consent authority—*

- (a) *Has financial responsibility for any public work; or*
- (b) *Has jurisdiction under this Act in respect of any natural and physical resource or area—*

*which is, in the reasonable opinion of that local authority or consent authority, likely to be affected by any of the conditions described in paragraphs (d) to (f) of subsection (1), the local authority or consent authority by its employees or agents may, without prior notice, enter any place (including a dwelling house when accompanied by a constable) and may take such action, or direct the occupier to take such action, as is immediately necessary and sufficient to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency.*

- (2A) Sections 9, 12, 13, 14, and 15 do not apply to any action taken under subsection (2).
- (3) As soon as practicable after entering any place under this section, every person must identify himself or herself and inform the occupier of the place of the entry and the reasons for it.
- (4) Nothing in this section shall authorise any person to do anything in relation to an emergency involving a marine oil spill or suspected marine oil spill within the meaning of section 281 of the Maritime Transport Act 1994.

Section 330B provides as follows:

**Resource Management Act:**

330B. *Emergency works under Civil Defence Emergency Management Act 2002—*

- (1) *If any activity is undertaken by any person exercising emergency powers during a state of emergency declared under the Civil Defence Emergency Management Act 2002, the provisions of sections 9, 12, 13, 14, and 15 of this Act do not apply to any activity undertaken by or on behalf of that person to remove the cause of, or mitigate any actual or adverse effect of, the emergency.*
- (2) *If an activity is undertaken to which subsection (1) applies, the person who authorised the activity must advise the appropriate consent authority, within 7 days, that the activity has been undertaken.*
- (3) *If such an activity, but for this section, would contravene any of sections 9, 12, 13, 14, and 15 of this Act and the adverse effects of the activity continue, the person who authorised the activity must apply in writing to the appropriate consent authority for any necessary resource consents required in respect of the activity, within 20 working days of the notification under subsection (2).*
- (4) *If the application is made within the time stated in subsection (3), the activity may continue until the application for a resource consent and any appeals have been finally determined.*
- (5) *A person does not commit an offence under section 338(1)(a) of this Act by acting in accordance with this section.*

Part 5 (sections 74-94) of the Civil Defence Emergency Management Act 2002 contains the emergency powers, and are discussed in section 2.5 below.

## **2 WHO CAN UNDERTAKE EMERGENCY WORKS UNDER THE RMA**

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### **2.1 Specified persons or bodies may carry out emergency works:**

The persons or bodies that may carry out emergency works under the RMA are:

- a local authority;
- a network utility operator (as defined by s. 166 of the RMA);

- a person having financial responsibility for a public work (such as a Minister of the Crown or Chief Executive of a government agency).

When a state of emergency is in force over a defined area under the Civil Defence Emergency Management (CDEM) Act, the effect of s. 330B of the RMA is that the above list is extended to include:

- a CDEM Group exercising its powers under the section 85 of the CDEM Act<sup>1</sup>;
- any person that is directed to cease or requested to undertake an action by Controller appointed under the CDEM Act<sup>2</sup> or a member of the Police, or by persons acting under authority of a Controller or a member of the Police.

## 2.2 Local authority:

A local authority may do such work in regard to:

- any public work for which it has financial responsibility (including flood control works, water, wastewater and sewerage networks and local roads), or;
- a natural and physical resource or area for which it has jurisdiction under the RMA.

A local authority, as the relevant consent authority, may act in regard to any natural or physical resource, including those in private ownership or that exist on private land. It may also act in terms of those public works on private land for which it has responsibility. To allow for this section 330(2) provides a local authority with the rights to:

- enter on to any land, structure, building (including a home when accompanied by the Police)<sup>3</sup>;
- take action to remove the cause of, or mitigate, any actual or likely adverse effect;
- direct the occupier to take action;

if, in the reasonable opinion of the local authority, there is an adverse effect that requires immediate preventative or remedial action, or a sudden event likely to result in death, injury or serious damage.

The form and extent of an entry, a direction or an action is to be sufficient to achieve this end, and no more.

Because these rights conflict with the ordinary rights of the property owner or occupier, the local authority must be reasonable in exercising them (see section 3.6). For example, for an emergency situation to exist suggests that there is not time to issue an abatement notice, or apply for an enforcement order or an interim enforcement order, or that the owner or occupier is not responsible for, or is unwilling or incapable of, acting alone.

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<sup>1</sup> A CDEM Group consists of the local authorities within a defined area, and sixteen groups currently exist covering all areas in New Zealand. Each one may be regarded as a person for the purpose of section 330B, in that it is treated in the CDEM Act as being a legal person. The CDEM Group also appoints persons who can exercise emergency powers.

<sup>2</sup> Controller refers to a person appointed under the CDEM Act 2002 as National Controller (section 10), a Group Controller (section 26), and Local Controller (section 27). The National Controller may exercise powers over the whole of New Zealand or any areas or districts for which a state of national emergency exists. A Group and Local Controller may exercise powers in the area, or any district or a ward for which they are appointed and for which a state of local emergency exists.

<sup>3</sup> A similar power is provided to a local authority under section 173 of the Local Government Act 2002.

### **2.3 Network utility operator:**

A network utility operator may do such work in regard to any project or work or network utility operation for which it is the approved requiring authority under s. 167 of the RMA.

Network utility operators are defined under s. 166 of the RMA and may include gas distribution companies, operator of telecommunications and electricity networks, operators of water supply, drainage or sewerage systems, rail and road operators, and airport authorities.

The RMA does not confer a right of entry to these operators on to private land to carry out emergency works, though such rights may be available under other legislation<sup>4</sup>. Alternatively the operator may have an existing easement or pre-negotiated agreement allowing for emergency access. Network operators should ensure that relevant staff are aware of the form of legal right or agreement for emergency access, and the company's procedures for applying them.

### **2.4 A person in charge of a public work:**

The person with direct or delegated responsibility for a work (and land used for such) that any Crown agency or local authority is authorised to construct, undertake, establish, manage, operate, or maintain under the Public Works Act 1981 or any other Act. This authorisation includes anything required directly or indirectly for any such work or use.

Such works may include those of an Education Authority under the Education Act 1964, any university under Universities Act 1961, existing or proposed public reserves under the Reserves Act

1977 [http://www.legislation.govt.nz/libraries/contents/om\\_isapi.dll?clientID=3417263421&hitsperheading=on&infobase=pal\\_statutes.nfo&jump=a1977-066&softpage=DOC - JUMPDEST\\_a1977-066](http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=3417263421&hitsperheading=on&infobase=pal_statutes.nfo&jump=a1977-066&softpage=DOC - JUMPDEST_a1977-066), and any national park purposes under the National Parks Act 1980. [http://www.legislation.govt.nz/libraries/contents/om\\_isapi.dll?clientID=3417263421&hitsperheading=on&infobase=pal\\_statutes.nfo&jump=a1980-066&softpage=DOC - JUMPDEST\\_a1980-066](http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=3417263421&hitsperheading=on&infobase=pal_statutes.nfo&jump=a1980-066&softpage=DOC - JUMPDEST_a1980-066)

### **2.5 During a state of emergency:**

During a state of emergency the above bodies or persons may still carry out emergency works under s330 within the area for which a state of emergency exists. In this regard they are carrying out their role in responding to and recovering from the emergency. If these works are a significant part of the overall management of the emergency, they should be in communication with the local Emergency Operations Centre about them.

The CDEM Group for the area can also carry out emergency works if necessary to effectively manage the emergency. These works could be similar to those ordinarily performed by the bodies or persons listed under s. 330. It may be that the CDEM Group is assisting or acting in place of such a body or person when they are incapacitated or overextended by the emergency. In these cases the CDEM Group is exercising an emergency power under Part 5 of the CDEM Act, as provided for in s. 330B of the RMA.

There are a wide range of powers under Part 5, though the ones that may require emergency works are most likely to be sub-sections 85(1)(a) & (g) as follows<sup>5</sup>:

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<sup>4</sup> For example, section 23 of the Electricity Act 1992, section 125 of the Telecommunications Act 2001, and section 24 of the Gas Act 1992 relate to inspecting, maintaining and operating existing works.

<sup>5</sup> Sub-sections 85(1)(b)-(f) & (h)-(j) cover welfare, traffic control, first aid and the like and therefore are less likely to involve activities necessitating emergency works under the RMA.

**Civil Defence Emergency Management Act:**

85. *Emergency powers of Civil Defence Emergency Management Groups—*

*(1) While a state of emergency is in force in its area, a Civil Defence Emergency Management Group may-*

*(a) carry out or require to be carried out all or any of the following:*

*(i) works:*

*(ii) clearing roads and other public places:*

*(iii) removing or disposing of, or securing or otherwise making safe, dangerous structures and materials wherever they may be:*

*...*

*(g) undertake emergency measures for the disposal of dead persons or animals if it is satisfied that the measures are urgently necessary in the interests of public health*

Usually the Group Controller or Local Controller will have authority to make these decisions on the behalf of the CDEM Group (see section 2.7 below on delegations).

The Controller, the Police and other authorised persons also have an emergency power as follows:

**Civil Defence Emergency Management Act:**

91 *Power to give directions*

*While a state of emergency is in force, a Controller or a member of the police, or any person acting under the authority of a Controller or member of the police, may-*

*(a) direct any person to stop any activity that may cause or substantially contribute to an emergency*

*(b) request any person, either verbally or in writing, to take any action to prevent or limit the extent of an emergency.*

In these circumstances, as part of the overall response to the emergency, any person could be asked to begin, to continue or to cease an activity that, as a direct or indirect consequence, necessitates contravening the resource consent requirements of the RMA. They are, in effect, acting in accordance with the emergency works provisions as provided for in s. 330B of the RMA.

These persons may include a local authority, network utility or public work personnel whom might otherwise carry out an emergency work under s. 330.

There are other emergency powers in Part 5 of the CDEM Act that conceivably could require an emergency work. These are the evacuation of premises and places (section 86), closing roads and public places (section 88), removal of aircraft, vessels, vehicles etc. (section 89), and power to requisition equipment (section 90). For example, in order to quickly shut down an industrial plant to safely evacuate an area could necessitate the non-consented discharge of a contaminant.

## **2.7 Delegation of authority for emergency works:**

A range of different persons or bodies may potentially use the emergency works provisions under s. 330 or s. 330B of the RMA. In many cases these persons or bodies will employ staff or contract other entities to provide services, for example road maintenance contactors.

In the case of staff, the person or body responsible should ensure that clear authorisation or delegation is in place beforehand for those staff that are to form an opinion about undertaking emergency works on its behalf. Also procedures should be set in place whereby operational staff who may identify and fix emergency related problems, but are not otherwise directly responsible for them, understand the need for clear instruction from an authorised person or body.

A local authority may delegate functions, powers and duties to employees under s. 34A of the RMA. A local authority may also transfer functions, duties and powers to another public authority under s. 33 of the RMA (see also section 17 of the Local Government Act 2002). For example, the function of maintaining a stopbank could be transferred to another local authority.

For network utility and public works operators no provisions exist in the RMA to delegate any functions or powers to other persons or bodies. However a commercial contract with another party for services in managing or maintaining networks or facilities could mean that this party is in effect an 'employee' of the operator for the purposes of s. 330. This point was addressed in *Canterbury Regional Council v Doug Hood Ltd (AP192/98)* where Doug Hood Ltd. entered into a contract to construct a dam on behalf of Opuha dam Ltd, a network utility operator. The Court found that Doug Hood Ltd. were acting on behalf of Opuha Dam Ltd. in taking steps to remove the cause or mitigate the effects of a subsequent emergency in accord with s. 330(1). Network utility operators, and persons in charge of public works, are however advised to check and, as necessary, seek legal advice in regard to contracting other parties that may be required to undertake emergency works on their behalf. The particular requirements may vary for different circumstances.

The CDEM Group exercises powers under s. 330B. Under section 18 of the CDEM Act a Group may delegate any of its functions to its local authority members, the Group Controller, a local controller or other persons.

Section 18 of the CDEM Act states as follows:

#### **Civil Defence Emergency Management Act:**

18 General powers of Civil Defence Emergency Management Groups -

(1) A Civil Defence Emergency Management Group has all the powers that are reasonably necessary or expedient to enable it to perform its functions, including the power to delegate any of its functions to members, the Group Controller, or other persons."

This arrangement recognises that the CDEM Group's principal role is coordinating an overall response to an emergency, and not necessarily to have a direct involvement in all operational matters.

Emergency works under the direction of the Controller, a member of the Police, or persons authorised by them, is by instruction rather than delegation.

Furthermore, during a community-wide emergency, instructions may be given to take steps that, at the time, are not specifically identified as having the consequence of being an emergency work under s. 330B. As part of standard operating procedures for CDEM records should be kept, as any actions subsequently deemed to be an emergency work will need to be addressed through the RMA process at a later stage.

### **3 WHEN CAN EMERGENCY WORKS BE UNDERTAKEN UNDER THE RMA**

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#### **3.1 What is an emergency?**

There must be an event that can be reasonably described as an emergency. Emergency is not defined in RMA and therefore common definitions will apply. Though circumstances

may vary, emergencies usually consist of a sudden, uncontrolled event involving negative consequences or danger, and that requires immediate and extraordinary steps to manage.

Given the particular circumstances a reasonable opinion must be formed that an emergency situation exists whereby a public work, project, network, or a natural or physical resource or area, *is* affected by or *is likely* to be affected by:

- an adverse effect on the environment requiring *immediate preventative measures*; or
- an adverse effect on the environment requiring *immediate remedial measures*; or
- any *sudden event* causing or is likely to cause loss of life, injury or serious damage to property.

### **3.2 What is meant by *likely to be affected*?**

Recognising that something *is* affected is straight forward as the adverse effect concerned has occurred or is occurring. However deciding upon future events, no matter how imminent, is more problematic. Absolute knowledge is not available, and therefore a judgement must be formed.

Use of the word *likely* introduces an element of probability as opposed to a mere possibility or potential. A probable event is one that is expected to occur or to exist. In other words, there is a greater chance of it happening than not happening given the circumstances.

Establishing the exact likelihood or probability is not necessary in order to act. Nor need a specific threshold be arrived at that triggers action. An opinion need only be formed that sufficient certainty or probability exists, and therefore *immediate* action is called for.

### **3.3 What constitutes an *immediate measure*?**

Undertaking emergency works requires forming an opinion that the circumstances require an *immediate* response whether preventative or remedial. As such, the focus is on the necessity or urgency of responding to the consequences of the event, and not because of its suddenness or unexpectedness.

The need for an immediate response is also a primary consideration in responding to a sudden event causing or likely to cause loss of life, injury or serious damage.

Evidence of a kind that is sufficient to show that the situation requires an immediate response should be collected and, as far as practicable, kept as a record supporting subsequent decisions and actions.

### **3.4 What is a *sudden event*?**

'Sudden event' is not defined in the RMA. The common meaning of sudden relates to an abrupt or abnormally rapid occurrence that is unexpected or without warning.

What is an abrupt or abnormal occurrence must be seen in context. For example, the discovery of the imminent collapse of a rusted structure may necessitate emergency works even though the rusting is a longstanding process. The risks of a collapse, and not its cause, are what matters.

### **3.5 What is the relevance of *whether or not the event is foreseeable*?**

Section 330(1) applies whether or not the adverse effect or sudden event was foreseeable (subsection 330(1A)).

This recognises that a person or body may anticipate that a sudden event could occur sometime in the future and decide to put in place measures designed to cope with the contingency. On the other hand, a person or body may decide not to act in such away, whether through lack of finance or community support, other practical constraints or ongoing uncertainty as to what can be done. In either case the future need for emergency provisions are foreseen. Regardless this fore knowledge, and any prior action or inaction, does not alter the facts of the event once it occurs, nor should it constrain what is necessary to respond to them.

In other words knowing in advance whether or not a situation exists (or could exist) which may lead to an emergency is not relevant to the decisions made under s. 330 to act once the emergency occurs. The focus is rightly on what is necessary 'on the day', and not what has happened beforehand.

### **3.6 What else should be considered in forming an opinion?**

While not stating so, it may be concluded from s. 330 that the opinion should be reasonable in the circumstances. Reasonableness is as much about the process of forming the opinion, as the opinion reached. The person or body might be expected to gather as much information and relevant facts as possible, make logical assumptions and assessments of risks and options for managing them, and draw on suitable levels of knowledge and experience in making judgements and decisions.

An emergency implies a situation involving a sense of urgency, additional uncertainties, and that calls for decisive leadership. These mitigating factors will also help in deciding what is reasonable in the circumstances. For example, there is generally not time to undertake a full study into the effects of some activities, as ordinarily would be expected, if immediate action is required to prevent damage to life or property.

Whether an opinion reached is reasonable should be capable of proof independent of the person or body forming it. On the same basis, for an opinion to be held unreasonable would require evidence supporting this contrary finding (see section 3.10 on risk of prosecution).

In other words, it is an objective test as to whether the situation is one in which *any* reasonable person or body would consider qualifies for emergency action. Reviewing and discussing previous cases with experienced colleagues and like agencies, and consulting with relevant consent authorities, will assist decision-makers in determining what is likely to be reasonable in different circumstances.

### **3.7 What sort of *measures* may be undertaken?**

Measures can be any physical work or action specifically directed at removing the cause of or mitigating any actual or likely adverse effect of the emergency (s. 330(2)).

*Preventative measures* could for example include:

- breaching a stopbank to release flood waters to avoid overtopping in more vulnerable areas downstream;
- removing a registered tree that is about to topple and cause a major power outage;
- bulldozing a fire break through native bush to prevent the spread of a fire.

*Remedial measures* could include:

- clearing and disposing of slip debris from a road way after an earthquake;
- repairing a railway embankment in the coastal marine area following storm surge.

The scope of the action undertaken must be immediately necessary and sufficient for that purpose (the response) and no more. It is not intended that action is taken that exceeds removing the cause of, or that exceeds mitigation of, any actual or likely adverse effect of the emergency. For example, taking extra steps to widen a road following a slip, simply because the equipment is there, is not what is intended by having emergency works provisions in the RMA<sup>6</sup>.

One factor to consider in deciding on measures is the implications of them on the environment. For example washing silt into a stream may cause adverse effects temporarily, while cutting down a registered tree will result in a permanent change to the environment. A person or body should therefore consider whether, on balance, the preventing or remedying of the anticipated adverse effects of the emergency would outweigh any foreseeable and irreversible adverse effects on the environment resulting from the emergency works. They should also consider whether any less damaging, yet suitable, alternative measures are available.

Possibly the full extent of adverse effects of the emergency or the works measures cannot be readily determined. In these cases using general information and best practice approaches for works must suffice. Seeking the advice of the consent authority is recommended whenever possible (see below).

### **3.8 Is the opinion of the consent authority needed?**

Sections 330 and 330B do not require the approval or advice of the relevant consent authority (the regional, city or district council) in deciding upon, or in the undertaking of, emergency works<sup>7</sup>. However taking an opportunity to consult with them prior to, or during emergency works, may prove useful.

The local authority may be able to provide advice on:

- the potential effects of proposed emergency works;
- the relative impact of these effects compared with the adverse effects of the emergency;
- whether consent is ordinarily required and the types of conditions attached;
- other options for emergency works.

The consent authority may also be able to give advice in relation to the potential for, and nature of, adverse effects for different emergency scenarios, even when no emergency is actually happening. They may also provide general guidance on suitable emergency works practices, for example silt debris removal and dumping.

The consent authority's advice may enable an operator to pre-plan some of their decision-making processes and response actions. An added advantage is that acquiring any subsequent resource consents, or undertaking additional post-emergency works, could be made easier (see section 3.9 below).

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<sup>6</sup> See also *Fugle L.W. and Hutchman v Cowie* [1997] NZRMA 395 (High Court). This case made clear that works without resource consent are not acceptable to address the potential for an emergency where there was no imminent threat and therefore a need for immediate action.

<sup>7</sup> The Minister of Conservation is the consent authority for an emergency work contravening a Restricted Coastal Activity consenting requirement.

For the same reason advising other relevant agencies and interested parties could also prove useful, as long as this does not unduly delay the taking of immediate action.

### 3.9 What are the requirements for notifying the consent authority after the event?

Section 330A requires notifying the appropriate authority or council of the emergency work within 7 days of the work being carried out. It also requires applying for resource consent within 20 working days of notification, should any adverse effects of the activity continue. As such, knowing what consents and conditions ordinarily would be required and, as far as practicable, addressing likely concerns early on in the process should prove beneficial (see section 3.8 above).

Section 330A provides:

#### **Resource Management Act:**

330A. *Resource consents for emergency works—*

- (1) *Where an activity is undertaken under section 330, the person (other than the occupier), authority, or network utility operator who or which undertook the activity shall advise the appropriate consent authority, within 7 days, that the activity has been undertaken.*
- (2) *Where such an activity, but for section 330, contravenes any of sections 9, 12, 13, 14, and 15 and the adverse effects of the activity continue, then the person (other than the occupier), authority, or network utility operator who or which undertook the activity shall apply in writing to the appropriate consent authority for any necessary resource consents required in respect of the activity within 20 working days of the notification under subsection (1).*
- (3) *If the application is made within the time stated in subsection (2), the activity may continue until the application for a resource consent and any appeals have been finally determined.*

Making an application for a resource consent within 20 working days allows the emergency work activity to continue until such time as the resource consent, and any appeals, have been finally determined. In effect this carries over the intent of the emergency works provisions in enabling the continuance of a non-consented activity that ordinarily would be subject to enforcement procedures. Similar requirements and provisions exist for those exercising emergency powers during a state of emergency under the CDEM Act.

The consent process under s330A is the same as would otherwise occur under sections 88 to 120 of the RMA. It is critical, given that a retrospective consent is being sought, that full records are kept of what has occurred, particularly in relation to effects on the environment. Those records may include written documentation, photographic and digital imagery, sound recordings and the like. Demonstrating good environmental practice during the emergency response is also likely to be looked upon favourably, as reliance on s. 330 does not otherwise limit general responsibilities and duties under the RMA.

### 3.10 Is there any risk of prosecution?

3.11 The RMA provides that no person may be prosecuted for acting in accordance with s. 330.

Section 18(2) states inter alia<sup>8</sup>:

18. *Possible defence in cases of unforeseen emergencies—*
- (2) *No person may be prosecuted for acting in accordance with section 330 (which relates to certain activities undertaken in an emergency).*

There is however the risk of prosecution if the work is not carried out by authorised persons, the circumstances are not deemed to be an emergency, or the works are inappropriate in type or scale for addressing the emergency only. To avoid such risks sound procedures should be followed, and importantly include the recording of all key steps and factors underpinning decisions throughout the process. Again early consultation with the consent authority should assist in identifying and avoiding such a risk.

There is conflicting case law as to whether the onus of proof rests on the prosecution, usually the consent authority, to prove that s. 330 does not apply to the action. The alternate view is that the onus is on the defendant to prove that s. 330 does apply, and therefore no prosecution can be brought.

Regardless, a defence may still be available to the person or body under s. 341, if s. 330 does not apply, though the balance of tests and burden of proof may be different<sup>9</sup>.

In any case, a person or body acting reasonably and responsibly through out, and maintaining records of such, would be in a better position of avoiding a charge, or defending against prosecution if charged.

### **3.11 Section 331 – reimbursement or compensation for emergency works**

Where a local authority or consent authority takes action under section 330(2) because of the default [the inaction] of any person, the authority may require reimbursement from that person of its actual and reasonable costs. 'Actual and reasonable costs' are defined in s. 314(2), and may include those costs associated with investigation, supervision, and monitoring of the adverse effects on the environment, and the costs of any actions required to avoid, remedy, or mitigate the adverse effects.

Where no payment of costs is made within 20 working days of being required then an enforcement order can be sought seeking payment.

If a person associated with property suffers loss or damage as result of the local authority's actions under s. 330(2), they may seek compensation. The loss or damage however must not have arisen from any failure of that person to bide by their duties under the RMA. A claim for compensation is made, and determined, under the Public Works Act 1981.

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<sup>8</sup> Section 18(1) provides for possible defences in the case of unforeseen emergencies where a section 330 exemption would not apply. When a prosecution is commenced for an alleged contravening of sections 9 – s15B inclusive (which require resource consents for various activities), then the defendant may raise an applicable defence that is referred to in s. 341 or s. 341A or s. 341B of the RMA.

<sup>9</sup> Section 341(2) of the RMA provides any party with a defence to prosecution, in a case of breaching resource consent requirements, if proven that the party was acting in circumstances not dissimilar to that which might be expected for a person or body under s. 330. The onus of proof, based on a balance of probabilities, is on the defendant. The emergency must not have been reasonably foreseen, and the effects of the action or event must be mitigated or remedied. This defence recognises that unexpected emergency events, causing adverse effects on the environment, can happen to anyone. In these cases, allowing reasonable action to be taken without delay, and not punishing those for doing so, may be the best solution.

If a state of emergency exists the CDEM Act also provides for compensation, in defined circumstances, for losses and damage resulting from an authorised person's exercising of emergency powers (see sections 107- 109).

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## HOW TO UNDERTAKE EMERGENCY WORKS UNDER THE RMA

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*This section provides a step-by-step guide to deciding upon and undertaking emergency works under section 330 of the RMA.*

### **Suggested steps prior to the onset of an event requiring emergency works:**

The following should be done as part of internal risk management, business continuity and asset management programmes, as far as practicable:

- identify the potential for incidents that could require emergency works. This may be in general terms only, or relate to known trouble spots. For example, those sections of roads that are particularly prone to slips, or bridge abutments and the banks of rivers that are undercut by regular flooding;
- check contractual arrangements, and seek legal advice if in doubt, on when a contractor may act on behalf of the person or body authorised to carry out emergency works under section 330. Ensure that contractors understand the procedures that are necessary to follow;
- discuss with the consent authority the form and extent of any anticipated emergency event and adverse effects, and the emergency works that may be necessary to respond to them;
- seek advice and, if appropriate, gain some form of agreement on best practicable remedial or mitigation options, and guidelines or procedures to follow, that will assist your decision-making and actions when working under emergency conditions;
- if practicable, seek consent in advance to cover emergency situations where the effects and actions to address them can be anticipated with some certainty, for example establishing spoil disposal sites near known slip hazard zones.

Possibly a work group involving all relevant consent authorities and other interested parties could agree on common guidelines, for example an emergency works protocol on slip debris clearance practices for all road operators and their contractors within a district or region.

### **Steps to follow once an emergency situation has arisen:**

These steps cover the undertaking of emergency works under s. 330 of the RMA. Those person or bodies authorised to carry out such works should operate in this way in all cases where no state of emergency is in force under the CDEM Act. This includes the recovery period following the termination of a state of emergency.

During a state of emergency authorised persons and bodies may continue to follow these steps to undertake emergency works under s. 330 within the area for which a state of emergency exists. For most emergencies this arrangement should prove satisfactory.

In exceptional circumstances only, any person or body (including those persons or bodies ordinarily authorised under s330) may be directed or requested to carry out emergency works (or possibly to desist, modify or reprioritise the carrying out of works) by a Group or Local Controller, a member of the Police, or persons authorised by one of the above. In these circumstances s. 330B may come into play. Regardless such persons or bodies undertaking the emergency works are still expected to follow best practice approaches, and otherwise fulfil general duties and responsibilities under the RMA, as much as possible.

**STEP ONE:** Determine if the person or party considering action under section 330 is entitled/qualified to utilise that section, being:

- a person who has financial responsibility for any public work: or
- a local authority or consent authority which has jurisdiction under the RMA for the natural and physical resource or area; or
- a network utility operator who is approved as a requiring authority under the RMA for the network utility, project or work that is affected or likely to be affected by the event.

Ensure that any staff or contractors that are to act on behalf of an entitled person or organisation have the necessary authorisations to do so (see **Prior Steps** above).

**STEP TWO:** The person, authority or network utility operator must form an opinion that the public work, or the natural or physical resource or area, or the project or work or network utility operation, is actually affected by or likely to be affected by:

- an adverse effect on the environment which requires immediate preventative measures; or
- an adverse effect on the environment which requires immediate remedial measures; or
- any sudden event causing or likely to cause loss of life, injury, or serious damage to property.

**STEP THREE:** The person or authority or network utility operator should, as far as practicable, inform the consent authority and other interested parties of their intentions for the purpose of:

- further assessing the environmental and public risks involved;
- gaining advice on intended management options;
- providing general notification as part of good practice.

**STEP FOUR:** Determine the best practicable form of works to be undertaken by or on behalf of that person, authority, or network utility operator to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency. Best practice considerations are:

- exploring the range of alternative means available to effectively address the problem or cause, and that are no more than is necessary to overcome the emergency situation;
- taking into account any additional or ongoing effects as a result of any works when deciding upon a course of action that both resolves the emergency and causes the least effects on the environment.

[**Local authorities only**: if required to enter onto private property follow **Step 4A** below].

**STEP FIVE:** The person or authority or network utility operator should undertake to record all relevant information supporting their decision-making processes, their actions and the outcomes (including environmental effects resulting from the works), as well as any witnesses or expert advice received. Records can be written material, photographs, sound and visual recordings.

### **Consequential steps for emergency works under section 330:**

#### **STEP SIX: Notification and resource consent application (under s330A)**

Notify the consent authority within **seven days** of any activity that has been undertaken under s. 330.

If a consent would normally have been required to undertake the activity performed under s.330 and the adverse effects of that activity continue then a written application for resource consent is required to be lodged with the appropriate consent authority within **20 working days** of the above notification (see *Applying for a resource Consent [ME 752]* and *A Guide to Preparing a Basic Assessment of Environmental Effects [ME 767]*).

If a resource consent application is made within the 20 working day period the activity may continue until the application for resource consent and any appeals have been finally determined.

A local authority may seek compensation for its actual and reasonable costs if appropriate (see **Step 6A** below)

**STEP SEVEN:** Review all prior steps for accuracy and completeness. Undertake a review of how the emergency provisions of the RMA were utilised for the purpose of checking compliance, streamlining processes and enhancing outcomes for like events in the future, and for the professional development of staff.

### **ADDITIONAL STEPS FOR A LOCAL AUTHORITY ONLY:**

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The steps below involve enforcement actions that may be challenged either at the time, or subsequently in the Courts. It is therefore important that employees and agents follow due process and best practice approaches to ensure that their decisions and actions are defensible.

The Enforcement Manual on the Quality Planning website provides more advice on the process and practice. <http://www.qualityplanning.org.nz/rma-enforcement>

#### **STEP 4A: Entry to private land or property:**

Where a local authority or consent authority has financial responsibility for any public work or has jurisdiction under the RMA in respect of any natural and physical resource or area which is in the reasonable opinion of that local authority or consent

authority likely to be effected by any one of the conditions described in **Step Two** above, then:

- determine the need for, and make a reasonable decision about, exercising the 330(2) power enabling entry of employees or agents on to private land or premises without prior notice to take such action, or direct the occupier to take such action, as is immediately necessary and sufficient to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency.
- ensure the operations staff and agents have the appropriate warrants and IDs at all times during the operation. As soon as practicable after entering the property staff and agents must identify themselves and inform the occupier of the reasons for entry. If no occupier is present at the time, a notice of the reasons for entry and actions taken should be left in a place that it can be found by the occupier.
- if necessary to enter a dwelling house, the Police are to be contacted and staff and agents must wait till a Police constable can accompany them upon entering the house.
- log and keep records of all decisions and actions.

#### **Return to STEP FOUR**

#### **STEP 6A: Recovering costs:**

Where a local authority or consent authority has acted under s. 330(2) it may:

- form a reasonable opinion as to whether, because of the default of any person, it requires reimbursement from that person of its actual and reasonable costs;
- prepare an itemised record of those costs and provide an invoice to that person demanding payment;
- seek an enforcement order under section 314(1)(d) of the RMA requiring payment if not paid within 20 working days of sending an invoice.

The local authority should further note that any person with an interest in the property, and whom suffers a loss or damage as a result of it's exercising a power under s. 330(2), is entitled to compensation from the authority. Compensation is only payable in respect of loss or damage that is not a result of any failure of that person to abide by his or her duties under the RMA.

Such compensation will be determined in accordance with Part V of the Public Works Act 1981, and the provisions of that Act apply with all necessary modifications.

#### **Return to STEP SEVEN**