



REPORT ON THE JOINT PRELIMINARY INVESTIGATION INTO THE COMPLIANCE PROFILE OF UPL SOUTH AFRICA (PTY) LIMITED

3 October 2021



forestry, fisheries
& the environment

Department:
Forestry, Fisheries and the Environment
REPUBLIC OF SOUTH AFRICA



KWAZULU-NATAL PROVINCE

ECONOMIC DEVELOPMENT, TOURISM
AND ENVIRONMENTAL AFFAIRS
REPUBLIC OF SOUTH AFRICA



water & sanitation



Conservation, Partnerships & Ecotourism

STRUCTURE OF PRESENTATION

- Terms of reference
- Methodology of investigation
- Issues investigated
- Key findings
- Recommendations
- Way forward



RESPONSE PLAN

1

• Actions by Government authorities

- Priority 1 - Stop/ Cease any further environmental Risk (Priority)
- Priority 2 - Guide actions – Pre directives/ S30 response
- **Priority 3 - Investigations = regulatory approvals**

2

• Ensure coordinated response

- Feedback from specialists involved in the project
- Recommendations by government specialists/ Advice
- Remediation approvals expedited

3

• Media and Communications

- Patrols by officials – warnings to public



TERMS OF REFERENCE

- Investigate the incident within the ambit of the regulatory environment applicable to such a facility
- Legality of the operation of the UPL warehouse :
 - the permits/licences/authorisations were required
 - the permits etc. that were applied for, if any
 - permits/licences/authorisations that were refused, if any
 - the permits/licences/authorisations that were issued
- Accountability for the actions leading to environmental damage
- Identify statutory offences and/or non-compliances by UPL
- Make findings and conclusions based on the available information
- Make recommendations on actions to be taken and the way forward



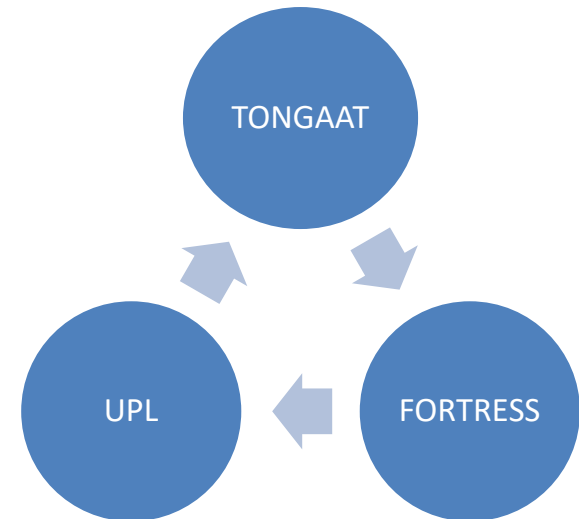
METHODOLOGY OF INVESTIGATION

- Factual assessment of the regulatory approvals that were required by UPL in order to operate at this particular warehouse
- Multi-departmental team – 7 different **environmental regulatory entities** and various pieces of national and local legislation – DTI, SARS (customs) were consulted but did not directly form part of the core team
- **UPL operating in a highly regulated environment** - Legal requirements both prior to the fire incident as well as those that were triggered after the incident
- Gaining an understanding of the extent to which the failure to obtain any required permit/licence/authorisation contributed to the severity of the environmental damage or compromised the preparedness of the authorities to deal with the incident
- Technical and legal expertise – research of legislation / review of available documentation / interviews with relevant officials / Evaluate the linkages between the initial licenses that were issued (Cornubia Phase 1) and how it links with the current establishment
- Important note that within a government institutions there are requirements to obtain multiple approvals
- **Look at overlaps in legislation - (Duty of Care)** which results in overlapping mandates – **essential to coordination of the cleanup effort underway (JOC)** main consideration at the moment



ISSUES INVESTIGATED

- Nature of the operations undertaken by UPL – storage volumes and types of products
- Applicable regulatory framework
- Assess legal obligations and impact on the environment – post fire
- Entities involved and relationship



Agriculture – products in store

List of products	Number of product
Validated Products	373
Products which do not require validation from Agriculture	202
Products with an unknown classification	94
Product classification which requires further investigation	45
Products in store destined for re export (Zambia)	4
Products in store destined for re export (Mozambique)	1
Products in store destined for re export (Malawi)	1
Labelling products	836
Packaging Products	127



Compliance Profile – assessment

Laws involved	Government Authorities	Compliance Status
Hazardous substances Act	Department of Health	Green
National Water Act	DWS	Yellow
Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act	Agriculture	Yellow
Major Hazardous Installation Regulations + OHSA	Department of Employment and Labour	Red
EIA regulations (NEMA) obligations	EDTEA + DFFE	Red
NEMPAA + NEMBA	Ezemvelo KwaZulu-Natal	Orange
Planning Laws: <ul style="list-style-type: none"> • Zoning • Building Plans • Certificates of occupation • Scheduled Activities permit linked to MHI • Fire 	eThekweni Metropolitan Municipality	Orange

KEY FINDINGS

Before the fire

- UPL's operations involved the unlawful storage of chemicals classified as “a dangerous good”
- The volumes of chemicals stored in the warehouse was significant (exceeding a volume of 500 cubic meters) therefore constituting a “Listed Activity” identified in terms of the National Environmental Management Act which may not commence without environmental authorisation
- An Environmental Authorisation would have been required prior to the storage operations commencing - it would have been necessary to follow an EIA process and submit all relevant documents / reports to the competent authority to enable it to make a decision on whether or not to issue an EA
- The EIA process would have, among other things, assessed the readiness of the facility to respond to an emergency situation. Furthermore, any EA issued would have been subject to a number of conditions aimed at mitigating risks identified



KEY FINDINGS

Before the fire

- UPL may undertake the necessary assessment required in terms of the Occupational Health and Safety Act (OHSA) read with the Major Hazard Installation (MHI) Regulations. **This risk assessment process** would have determined whether or not this facility constituted an MHI as defined in the OHSA. However, and considering the **volumes and nature of the chemicals** stored at this particular location, it is reasonable to conclude (based on the information at the disposal of the investigative team) that the facility fell within the definition of a MHI and was subject to the legal requirements for such installations
- **A Scheduled Activities Permit (SAP)** was not obtained by UPL from the EThekweni Metropolitan Municipality. This SAP would have taken into **consideration the requirements of the risk assessment** which was one of the steps to determine whether or not this facility would require MHI certification. The SAP would have also been subject to a number of conditions aimed at mitigating risks identified



KEY FINDINGS

Before the fire

- The building plan for a proposed subdivision of the warehouse for use by two tenants and proposed flammable liquids store was recommended for approval by the eThekweni Fire Department; however, approval for occupation would only have been supported after the subdivision was constructed and was deemed compliant with fire requirements which was required before the business could be operated
- The occupation of this warehouse by two different tenants was not authorised by EThekweni.



KEY FINDINGS

After the fire

- The **unlawful establishment and operation of the UPL facility created a point source of pollution** in that particular location, close to a river system, a residential neighborhood, a sensitive protected area and the coastal environment
- The environment in this area is considered to be significantly damaged as a result of the pollution from this incident which may have resulted in an entire ecosystem service loss
- The National Environmental Management Act as well as the National Water Act recognises that any unlawful and intentional or negligent conduct which results in serious pollution or degradation of the environment and a water resource is considered to constitute criminal conduct. Further investigation is required to determine whether UPL, as a result of its failure to comply with specific legal requirements (either in terms of NEMA or other relevant legislation), acted negligently by creating a point source of pollution which resulted in significant environmental impacts, despite the fact that the fire was started by other individuals.



INCIDENTAL BUT IMPORTANT - UMHLANGA LAGOON NATURE RESERVE - EZEMVELO KZN Wildlife

- Free Access Nature Reserve
- **Prime Recreational Area (underpins the tourism economy)**
 - Key birding site (638 bird species the protected area and surrounding areas)
 - 80 bird species that may be directly impacted upon by the chemical spill
 - Key nature- and family-based tourism site (picnicking, kiteboarding. etc)
 - Fishing (recreational and subsistence)
 - Mudbanks prime source of mudprawn – prime fishing bait
- **Ecological Value**
 - Important refuge area and breeding & nursery habitats for fresh and marine species
 - Important habitat for migratory species – particular marine and avifauna
 - Breeding grounds to a host of amphibian and reptilian species
- **Prime Research area**



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UMHLANGA LAGOON NATURE RESERVE

EZEMVELO KZN Wildlife

- Post Spill
 - Ezemvelo Rangers discovered the spill (blue water) and raised alarm
 - Massive fish die-off
 - Water body found to be highly toxic during initial investigation
 - 1 species (limited individuals) found alive
 - Chemicals compounds toxic to both plant and animal life
 - Functioning of estuary and NR collapsed
 - Extent of contamination to be determined
- Key Considerations – Post Emergency Intervention
 - Remedial actions post emergency to restore damaged biodiversity, uMhlanga Nature Reserve and other values
 - Restorative justice including compensation, offsetting, criminal liability, etc.
 - Cost recovery



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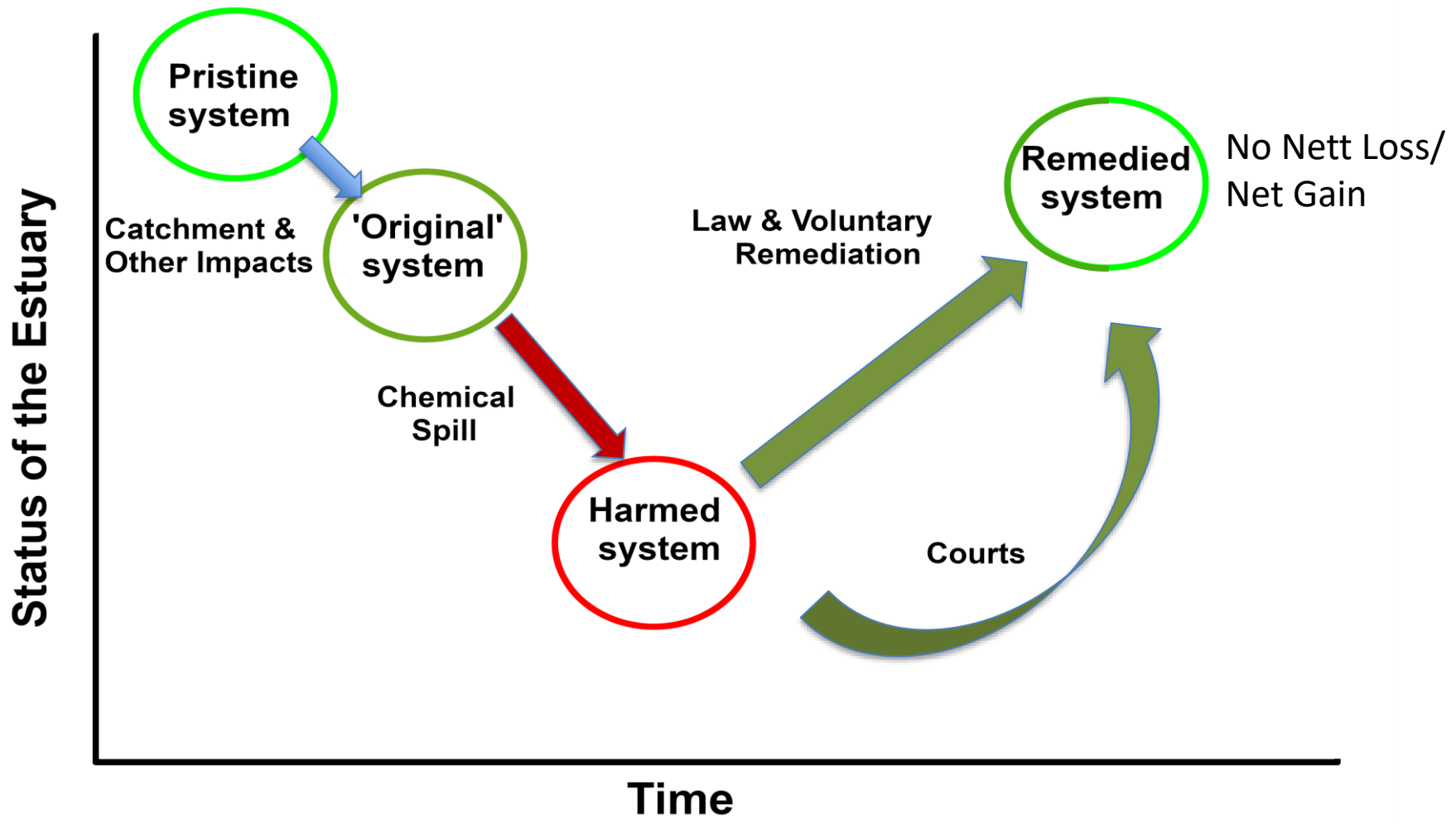
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Recovery Process



RECOMMENDATIONS

- Independent team of investigators comprising of Environmental Management Inspectors from the DFFE and the EDTEA to urgently initiate a criminal investigation (work with other regulatory authorities)
- Criminal investigation should consider the role of the various entities, namely Tongaat, Fortress and UPL
- Samples of the various affected media must be taken immediately in line with protocols for criminal investigation
- Although this report only summarises briefly the actions taken to respond to this incident, the response of the authorities to the incident should be evaluated and any failings identified for appropriate departmental action

No pronouncement on innocence/ guilt – following the criminal investigation, a decision as to whether or not to proceed with prosecution will be made by the NPA. Thereafter a court will determine whether any of the parties



RECOMMENDATIONS

- **Baseline compliance profile assessment** of the agrochemical storage and manufacturing sector – need to be identified for a national compliance and/or enforcement programme targeting the sector
- Given the range of authorisations required by the sector, review the protocols / processes within the different relevant departments / units with the aim of **streamlining these processes and improving communication and co-ordination**
- Based on the evaluation of the authorities' response to this incident, determine the need to establish an **interdepartmental rapid emergency response team** to deal with a certain category of incidents
- **Assessment of whether or not the environmental risk posed by the incident** should be used as a guide to assign lead competence – review of Section 30 of the NEMA
- **The establishment of a panel of intergovernmental specialists** which could be called upon to provide expert advice
- **The feasibility of creating a mobile command centre** which has the basic equipment which can be used to assist in a government response to these types of incidents should be considered

WAY FORWARD

- **Criminal investigation was initiated in September due to urgency** – green scorpions will continue to lead this process (Verulam CAS 06/09/2021)
- **Baseline compliance profile of the agrochemical manufacturing sector** to commence early in 2022 – not a traditional compliance assessment but will evaluate efficacy of the regulatory loop/ connections and make recommendations to improve on this
- Evaluation of the response by the authorities with the view to ensure that all relevant authorities subscribe to the same **incident management procedures** – None subscribed to within environmental regulation
- MINTECH Working Group 4 to begin a review of the **guidelines on the administration of NEMA section 30 incidents (2019) and legislation** to determine the need to make revisions in relation to the mandated authority to co-ordinate an intergovernmental response to high risk emergency incidents
- **Engage Environmental Assessment Practitioners Association of South Africa** to investigate the creation of a mechanism whereby specialists are selected and appointed by government but for which the polluter pays – **eliminate bias (Polluter Pays Principle)**
- Identify capability shortfalls within the toxicology and chemical scientific disciplines and identify capable external individuals to serve on a panel of experts



THANK YOU!

Thank You



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