Best Practice Guidelines for

Compliance, Monitoring and Enforcement under the Resource Management Act 1991

New Zealand Government

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Contents

Tables

Figures

Message from the Minister

As Minister for the Environment, it is my pleasure to present the *Best practice guidelines for compliance, monitoring and enforcement under the Resource Management Act* (RMA).

Enforcement of the rule of law will always be essential to encourage broader compliance. This is true in criminal, transport, taxation, or environmental law. Without robust compliance, monitoring and enforcement (CME) practice, RMA plan rules and consent conditions are too often ignored. Voluntary compliance by the majority can be undermined by the minority who do not comply.

Though the RMA allows for a tailored and localised approach to CME, there are models and principles of best practice that can be adapted to suit local circumstances. The purpose of these guidelines is to clarify what best practice looks like by providing guidance and support for front-line staff through standard tools and templates.

There is some good CME work being done by councils and Local Government New Zealand, like the establishment of Waikato Regional Council's 'Basic investigative skills' course. However, a number of reports have observed low levels of monitoring and enforcement by some councils.

A number of councils and individuals have helped with the drafting and testing of the guidelines, including making submissions on draft guidelines released for public consultation in April 2018. My thanks to all contributors for this feedback and advice, which we hope has made for a practical guide to CME.

The Ministry for the Environment will continue to work with councils to support CME as a vitally important part of achieving our broader environmental aspirations for Aotearoa New Zealand. I look forward to this ongoing partnership.

Hon David Parker

Minister for the Environment

Acknowledgements

These guidelines on compliance, monitoring and enforcement (CME) have been developed by the Ministry for the Environment, with support from a panel of CME experts, Dr Marie Brown (The Catalyst Group), and council staff throughout New Zealand.

The panel members are: Patrick Lynch (Manager of Investigations and Incident Response, Waikato Regional Council); Tim Johnstone (Team Leader of Resource Consents, Hutt City Council); Nick Whittington (Partner, Meredith Connell); and Clare Wooding (Principal Policy Advisor, Local Government New Zealand).

The Ministry also acknowledges the work of the following groups and individuals; these guidelines draw on this work.

- The Compliance and Enforcement Special Interest Group (CESIG), which plays an important role in overseeing consistency in the regional sector and developing robust CME practices and procedures. Parts of these guidelines draw on work of the CESIG, including the Regional Sector Strategic Compliance Framework.
- The Waikato Regional Council and Patrick Lynch, in developing the manual on Basic Investigative Skills for Local Government.[1] These guidelines incorporate much of the content of that manual.
- Contributors to the Quality Planning Enforcement Manual, in particular Local Government New Zealand and Karenza De Silva.[2] These guidelines draw upon some of the content of that manual.
- Dr Marie Brown, in drafting the Environmental Defence Society report Last Line of Defence: compliance, monitoring and enforcement of New Zealand's environmental law,[3] and many of the case studies included in these guidelines.
- The council staff who reviewed drafts of this document, including contributors from:
  - Greater Wellington Regional Council
  - Taranaki Regional Council
  - Hutt City Council
  - Waikato Regional Council
  - Waikato District Council
  - Thames-Coromandel District Council
  - Kapiti Coast District Council
  - Marlborough District Council.

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1 *Basic Investigative Skills for Local Government*. Hamilton; Waikato Regional Council. Retrieved from www.waikatoregion.govt.nz/Services/Regional-services/Investigation-and-enforcement/Basic-investigative-skills-for-local-government/.

2 See http://www.qualityplanning.org.nz/index.php/manual.

3 Environmental Defence Society. 2017. *Last Line of Defence: compliance, monitoring and enforcement of environmental law*. Auckland; Westprint Limited.

Overview of the guidelines

Recent reports have highlighted a lack of comprehensive guidance on compliance, monitoring and enforcement (CME) under the Resource Management Act 1991 (RMA).[4] Some guidance existed before these guidelines were developed[5] which primarily focussed on enforcement rather than the full spectrum of CME activities.

While councils have a responsibility to implement the RMA, the Act does not prescribe how councils should carry out CME activities, and councils have considerable discretion in how they fulfil their statutory functions. These guidelines provide advice on how this discretion should be exercised to achieve the purpose of the RMA.

The purpose of the guidelines is to:

- strengthen CME capability and improve rates of compliance by clarifying what best practice looks like
- advise councils on how to strategically approach CME functions
- emphasise the importance of CME as a set of functions, and of robust CME processes
- provide greater transparency and accountability for CME
- support council officers undertaking CME by providing standard tools and templates.

The guidelines cover the full spectrum of CME activities from compliance promotion to enforcement. Examples of how the guidance can be applied to council activities and templates are provided for councils to use.

The RMA allows each council to tailor its CME approach to suit local circumstances and resources. However, certain core characteristics are needed for a CME programme to be effective. Councils should also develop the breadth of their CME knowledge so these guidelines are understood in a broader context, and correctly applied.

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4 For example: Ministry for the Environment. 2016. *Compliance, Monitoring and Enforcement by Local Authorities under the Resource Management Act 1991*. Wellington: Ministry for the Environment; Environmental Defence Society. 2017. *Last Line of Defence: compliance, monitoring and enforcement of environmental laws*. Auckland: Environmental Defence Society.

5 For example the *RMA Quality Planning Resource* website (www.qualityplanning.org.nz); Waikato Regional Council. 2016. *Basic Investigative Skills for Local Government*. Hamilton; Waikato Regional Council. Retrieved from https://www.waikatoregion.govt.nz/services/regional-services/investigation-and-enforcement/basic-investigative-skills-for-local-government/.

Part 1 – Overview of compliance, monitoring and enforcement

What is RMA compliance, monitoring and enforcement?

The purpose of the Resource Management Act (RMA) is to promote the sustainable management of New Zealand's natural and physical resources.[6] Sustainable management enables the use, development and protection of resources in a way that balances the well-being of people and communities with the health and longevity of the environment.

Compliance, monitoring and enforcement (CME) in the context of these guidelines refers to the activities councils undertake to ensure compliance with the RMA.

CME is often interpreted to mean just enforcement. Enforcement is only a subset of CME and is normally taken when other CME activities such as compliance promotion and monitoring efforts have proved unsuccessful, or a breach of the RMA is significant.

The following definitions are used throughout these guidelines:

- **Compliance:** adherence to the RMA, including the rules established under regional and district plans and meeting resource consent conditions, regulations and national environmental standards.
- **Monitoring:** the activities carried out by councils to assess compliance with the RMA. This can be proactive (eg, resource consent or permitted activity monitoring) or reactive (eg, investigation of suspected offences).
- **Enforcement:** the actions taken by councils to respond to non-compliance with the RMA. Actions can be punitive (for the purpose of deterring or punishing the offender) and/or directive (eg, directing remediation of the damage or ensuring compliance with the RMA).

What is the purpose of compliance, monitoring and enforcement?

It is critical that councils perform their CME functions to promote sustainable management of the natural and physical resources in their region. Councils that perform their CME activities poorly can significantly undermine investment in good planning, policy-making, and resource consenting processes.[7] Councils' CME activities set clear expectations for the regulated community on the need to comply, and are necessary to achieve desired behaviour change. CME is important for:

- educating and engaging with the public about how to improve or achieve compliance
- assuring the public that rules and policies are being upheld
- informing plan, policy and resource consent development processes

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6 Section 5 of the RMA.

7 New Zealand Productivity Commission. 2013. *Towards Better Local Regulation*. Wellington: Productivity Commission.

- demonstrating the consequences of non-compliance with the RMA and providing both general and specific deterrents, to prevent future offending
- upholding Treaty of Waitangi obligations
- providing for good environmental outcomes.

Roles and responsibilities of agencies

Role of all councils

The RMA sets out specific duties for councils which apply to CME activities. These include a:

- responsibility to implement the RMA
- duty to collect information on implementing the RMA
- duty to observe and enforce their policy statements, plans and national environmental standards.

CME responsibilities differ between regional councils, unitary authorities, and territorial authorities (district and city councils) due to their different core functions under the RMA.

- **Territorial authorities** carry out CME in relation to their section 31 responsibilities, which relate to the effects of land use, noise, subdivision, and the effects of activities on the surface of rivers and lakes.
- **Regional councils** carry out CME in relation to their responsibilities under section 30, which relate to soil conservation, water quantity and quality, air quality, the coastal marine area, land use to avoid natural hazards, and investigating and monitoring contaminated land.
- **Unitary authorities** carry out CME for both regional council and territorial authority functions.

Responsibility to implement the RMA

Councils are responsible for establishing, implementing and reviewing objectives, policies, and methods to achieve integrated management of natural and physical resources (sections 30(1) and 31(1)).

Although sections 30(1) and 31(1) do not impose a specific requirement on councils to carry out CME, CME is an important part of fulfilling this statutory function. Without CME, councils are unlikely to be able to demonstrate their objectives, policies and methods are meeting the purpose of the RMA.

To influence behaviours and ensure compliance with the RMA, councils:

- promote compliance through, for example, engagement, education, advertisements, and on-site advice (see Part 2 – Strategic approach to achieving compliance)
- monitor activities to check for compliance with the RMA and its subsidiary documents, including regulations, plan rules, resource consents, and directives (see Part 5 – Compliance monitoring and Part 6 – Approach to site inspections and incident investigations)
- take enforcement action where necessary to punish non-compliance and deter future offending (see Part 7 – Enforcement decisions and Part 8 – Enforcement tools).

Duty to collect information on implementing the RMA

Section 35 of the RMA imposes a general duty on councils to gather information, monitor the implementation of the RMA in their region or district, and review the results of their monitoring. This includes monitoring the:

- efficiency and effectiveness of the council's policies, rules and plans and its processes
- exercise of resource consents in its region/district.

Monitoring must be for the purpose of enabling the council to carry out its functions effectively.

Section 35(2) places a duty on councils to carry out state of the environment monitoring. This monitoring serves a different function to compliance monitoring; compliance monitoring determines the adherence to policies and rules, while state of the environment monitoring informs assessment of the overall health of the environment. The effectiveness of CME is likely to have a direct bearing on the state and trends of environmental indicators.

Duty to observe policy statements and plans

Section 84 of the RMA requires councils to observe their policy statements and plans and to "enforce the observance of the policy statement or plan". This creates a general duty on councils to implement their own plans and policy statements, which requires councils to carry out CME to monitor compliance and respond to non-compliance.

Duty to observe national environmental standards

Section 44A(8) requires councils to enforce the observance of national environmental standards, as far as its powers allow it to do so. Unlike national policy statements, which normally need to be incorporated into regional policy statements, and regional and district plans, national environmental standards directly impact on councils' and the public's activities.

Role of central government agencies under the RMA

Minister and Ministry for the Environment

The Ministry is responsible for ensuring the legislation is effectively administered, under its regulatory stewardship role in section 32 of the State Sector Act 1988. It also provides advice to the Minister for the Environment on the application and operation of the RMA (section 31(1) of the Environment Act 1986).

Section 24 of the RMA requires the Minister for the Environment to carry out:

- monitoring of the "effect and implementation" of the RMA (including any regulations in force under it), national policy statements, national planning standards, and water conservation orders
- monitoring of the relationship between the functions, powers and duties of central and local government for the purposes of the RMA
- monitoring and investigating any matters of environmental significance.

These statutory obligations include overseeing that councils are performing their CME functions effectively.

Minister and Department of Conservation

Under section 28 of the RMA the Minister of Conservation is responsible for preparing the *New Zealand Coastal Policy Statement*,[8] and monitoring its effect and implementation.[9] Like the Ministry for the Environment, the Department of Conservation is tasked with overseeing CME by councils in relation to the *New Zealand Coastal Policy Statement*.

Police

Council staff undertaking CME work may require assistance from the Police to execute a search warrant (see Part 6 – Approach to site inspections and incident investigations) or in relation to the health and safety of enforcement officers. See the Worksafe New Zealand website for further information.

Other central government agencies

The responsibilities of councils under the RMA often interact with the roles of other agencies, including the:

- Ministry of Health, for example, through managing drinking water, air quality, or sewage. The Ministry of Health has 20 district health boards across New Zealand, responsible for providing or funding health services in their areas. The Ministry also has public health units throughout New Zealand that focus on environmental health, among other functions. Councils may need to work with the public health units on pollution incidents.
- Environmental Protection Authority, for example, in managing hazardous substances (under the Hazardous Substances and New Organisms Act 1996)
- Ministry for Primary Industries, for example, through its role in regulating forestry, agriculture, fisheries and biosecurity
- Ministry of Business, Innovation and Employment, for example, through its role in regulating building and construction, energy, Crown minerals, and infrastructure
- Ministry of Justice, for example, through its role in collecting fines from prosecutions.

Role of the Courts

The Courts play an important role in CME. They have significant powers to punish offenders, deter future offenders, and direct remediation of damage.

District Court

The District Court hears prosecutions under the RMA in the first instance. The High Court hears appeals from the District Court. For RMA prosecutions, District Court judges must also hold office as an Environment Court judge. For more information on the District Court and judges, see the District Court website.

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8 Department of Conservation. 2010. *New Zealand Coastal Policy Statement*. Wellington: Department of Conservation. Retrieved from http://www.doc.govt.nz/about-us/science-publications/conservation-publications/marine-and-coastal/new-zealand-coastal-policy-statement/new-zealand-coastal-policy-statement-2010/.

9 Resource Management Act 1991, section 28.

Environment Court

The Environment Court is responsible for hearing applications for enforcement orders, among other RMA responsibilities (see Enforcement orders).

The Environment Court is made up of Environment judges and commissioners. Commissioners have knowledge and experience in areas such as local government, resource management, environmental science, and the Treaty of Waitangi. The Environment Court usually sits with at least one Environment judge and one or more Environment commissioners. The Environment Court website has further information about the Environment Court, judges and commissioners.

Managing multiple roles

Regulatory functions

Regional, district and unitary councils all carry out a wide range of other regulatory functions. For smaller councils, often only one team or one staff member carries out a range of regulatory functions under a variety of legislation. It can be difficult for one team or staff member to effectively carry out their RMA compliance, monitoring and enforcement responsibilities as well as their responsibilities under the RMA (eg, consenting and plan-making) and other legislation.

Councils regulating their own activities

Councils at times must regulate their own and other councils' activities under the RMA, as councils are land owners and resource users in their own right. Many projects carried out by councils require consent or must meet permitted activities conditions, such as road projects, flood protection works, tree management, wastewater treatment, and other infrastructure projects. Some councils also operate council-controlled organisations.

Internal compliance by councils is important because of the scale and potential effects of their activities on the environment, and because it is important for councils to hold themselves to the same (or higher) standard than the public as responsible regulators. A number of councils have prosecuted themselves, their staff members, or other councils for breaches of the RMA. Internal compliance is particularly important for unitary councils, as there is no other council in their area to monitor their compliance.

Councils have devised strategies to maintain their credibility and integrity in such situations, including:

- developing a clear separation between the enforcement and political arms of council, such as by developing and adhering to a clear enforcement policy and otherwise minimising interaction with elected representatives
- ensuring adequate separation between the council's compliance functions and the sections of council responsible for carrying out activities under relevant consents (sometimes a challenge for a smaller council)[10]

[10] Note that section 39 of the Local Government Act 2002 requires a separation in regulatory and non-regulatory functions. Implementing a consent is a non-regulatory function.

- ensuring communications between the above parties are clear and recorded in the same way as if the council were a member of the public
- ensuring that the council has sufficient expertise to comply adequately with the conditions of all relevant council-held consents
- contracting out the CME role to either a company or to another agency with the same powers (eg, another council); this can occur across the board or for a specific case.

Part 2 – Strategic approach to achieving compliance

Why create a compliance strategy?

The Resource Management Act (RMA) does not prescribe how councils should carry out their compliance, monitoring and enforcement (CME) functions under the RMA; councils have the discretion to determine the most effective way to carry out these functions. All councils have limited resources to dedicate to CME. Achieving high rates of compliance with limited resources requires that councils undertake a strategic approach to compliance. A strategic approach also ensures decisions are made efficiently, in accordance with agreed principles and in a consistent way.

Components of a compliance strategy

A compliance strategy should include:

- a high-level objective for CME, principles to apply to CME activities (see Key principles to guide all CME activities), and an approach which targets the range of behaviours of the regulated community (see Compliance models)
- how compliance will be promoted, for example through education and engagement programmes (see Compliance promotion)
- how compliance monitoring will be carried out (see Part 5 – Compliance monitoring and Part 6 – Approach to site inspections and incident investigations), including:
  - the methods and frequency of monitoring for different sites/activities (ie, the level of intervention required according to the risk score of a site/activity)
  - criteria to assess likelihood and consequence of non-compliance (ie, how a risk-based approach will be determined)
  - permitted activity monitoring programmes (ie, what type of permitted activities will be proactively monitored, and how, versus incident-based monitoring)
- how incidents (including complaints) will be responded to
- how non-compliance will be dealt with and followed up (see Part 7 – Enforcement decisions and Part 8 – Enforcement tools). The compliance strategy should be closely linked with the council's enforcement policy (see Enforcement policies)
- how CME will be resourced (see Part 4 – Cost recovery and resourcing)
- timeline for implementation (eg, this could be an annual strategy, or a three-to-five-year strategy), and monitoring and evaluation of the strategy (see Evaluating the strategy's effectiveness)
- record-keeping and reporting requirements (see Part 10 – Reporting and record keeping).

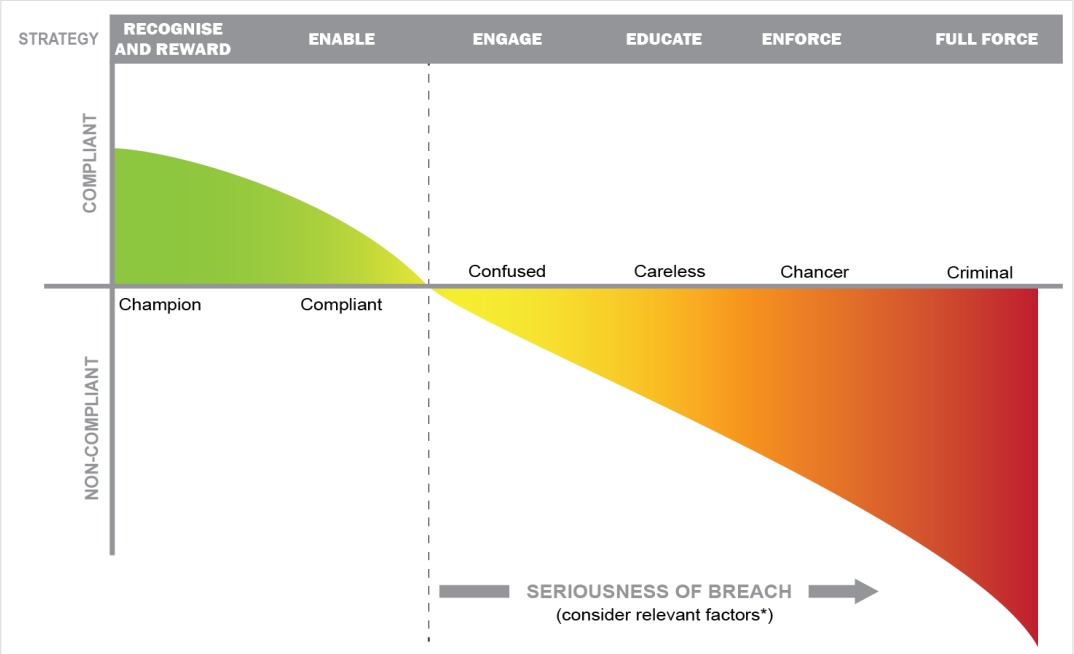
Compliance models

Compliance models help to understand what motivates individuals to comply with regulations, and what interventions are needed to create behaviour change and achieve compliance.

Literature on regulatory best practice recognises a 'spectrum' approach as the most effective way of achieving the highest levels of compliance with regulation.[11] The model below describes a strategic approach to achieving compliance under the RMA. This model suggests that recognition and reward is an appropriate outcome for those that are not only compliant but are a champion of sustainable management above and beyond regulation. However, this model also suggests that those who are non-compliant, depending on the seriousness of the breach, should be dealt with by progressively more coercive tools.

An important point to remember is that the regulator does not necessarily need to complete each part of the strategy themselves, but they do need to know that each part is being done. For example, education of a particular activity by an industry might be completed by an industry-related group, not necessarily by council.

Figure 1: Strategic compliance with the RMA[12]



**The relevant factors are the enforcement decisions factors set out in* Part 7 – Enforcement decisions*.*

11 See for example New Zealand Productivity Commission. 2013. *Towards Better Local Regulation*. Wellington: Productivity Commission.

12 Model developed by the Waikato Regional Council for use in these guidelines.

This approach is endorsed in the 2013 Productivity Commission report *Towards Better Local Regulation*.[13] The Commission explains that:[14]

> The enforcement challenge is striking the right balance between persuasion and coercion in securing regulatory compliance. This balance may differ between regulatory regimes. Similarly, the ideal balance of persuasion and coercion may differ between local authorities due to differences in the populations being regulated.

An effective regulatory system requires a combination and range of different interventions. An approach that relies on enforcement only, without compliance promotion or education, will result in a regulated community that is uncertain of its requirements. Alternatively, an approach that relies purely on compliance promotion without punitive measures is also unlikely to drive the desired behaviour change.[15] Councils should target interventions according to the individual or group's willingness to comply combined with the seriousness of the breach.

The Regional Sector Strategic Compliance Framework

The Compliance and Enforcement Special Interest Group (CESIG) has developed the Regional Sector Strategic Compliance Framework.[16] The Framework helps regional and unitary authorities develop a consistent approach to compliance monitoring, encouraging compliance and dealing with non-compliance. The objective of the Framework is "to assist councils in using a consistent approach to developing strategic compliance programmes and a range of interventions to fix important problems".[17]

Key principles to guide all CME activities

The following principles, developed from the CESIG's Regional Sector Strategic Compliance Framework,[18] should guide all council CME activities, and be included in a council's compliance strategy.

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13 New Zealand Productivity Commission. 2013. *Towards Better Local Regulation*. Wellington: Productivity Commission.

14 Ibid, page 196.

15 Environmental Defence Society. 2017. *Last Line of Defence: compliance, monitoring and enforcement of environmental laws*. Auckland: Environmental Defence Society, page 4.

16 The Compliance and Enforcement Special Interest Group. Unpublished. Regional Sector Strategic Compliance Framework 2016–18.

17 Ibid.

18 Ibid.

Principles to guide all CME activities[19]

Transparency

We will provide clear information and explanations to the regulated community about the standards and requirements for compliance. We will ensure the community has access to information about industry environmental performance, as well as actions taken by us to address environmental issues and non-compliance.

Consistency of process

Our actions will be consistent with the legislation and within our powers. Compliance and enforcement outcomes will be consistent and predictable for similar circumstances. We will ensure our staff have the necessary skills and are appropriately trained, and that there are effective systems and policies in place to support them.

Fairness and proportionality

We will apply regulatory interventions and actions appropriate for the situation.[20] We will use our discretion justifiably, and ensure our decisions are appropriate to the circumstances and that our interventions and actions will be proportionate to the risks posed to people and the environment and the seriousness of the non-compliance.

Based in evidence

We will use an evidence-based and informed approach to our decision-making. Our decisions will be informed by a range of sources, including sound science and information received from other regulators, members of the community, industry, and interest groups.

Collaborative approach

We will work with and, where possible, share information with, other regulators and stakeholders to ensure the best compliance outcomes for our regions. We will consider the public interest and engage with the community, those we regulate, and central government, to explain and promote environmental requirements and achieve better community and environmental outcomes.

Legal, accountable and ethical

We will conduct ourselves lawfully, impartially and in accordance with these principles, as well as relevant policies and guidance.[21] We will document and take responsibility for our regulatory decisions and actions. We will measure and report on our regulatory performance.

Outcomes-focussed

We will focus on the most important issues and problems to achieve the best environmental outcomes. We will target our regulatory intervention at poor performers and illegal activities that pose the greatest risk to the environment. We will apply the right tool for the right problem at the right time.

Responsive and effective

We will consider all alleged non-compliance to determine the necessary interventions (using a risk-based approach) and actions to minimise impacts on the environment and the community and maximise deterrence. We will respond in an effective and timely manner in accordance with legislative and organisational obligations.[22]

Compliance promotion

Compliance promotion is an important part of achieving compliance, although it is often one of the first functions councils cut funding to, as doing so doesn't appear to have obvious or immediate consequences. A compliance strategy should include an overview of how a council intends to encourage and support compliance.

Compliance promotion targets people on the left-hand side of figure 1 – strategic compliance under the RMA (see Compliance models); that is, those who are willing to do the right thing but require assistance or support to understand how to comply.

The Regional Sector Strategic Compliance Framework[23] takes the '4E' approach (engage, educate, enable, enforce) to compliance promotion, as in figure 2 below. With the inclusion of 'enforce', the model recognises that compliance promotion is most effective when more coercive measures are also available, if the softer approach is ineffective in achieving behaviour change.

19 Ibid.

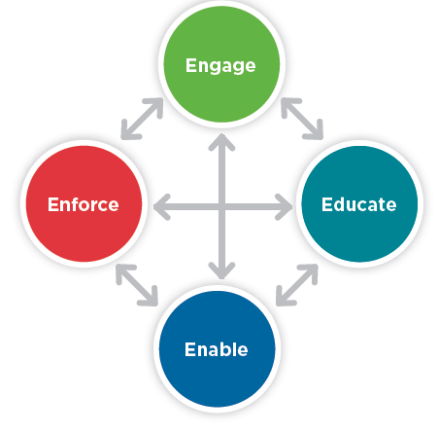
20 Note that Taranaki Regional Council has expanded this to include: "and all classes of consent holders/ resource users may expect to be impartially and fairly treated via the same process regardless of the type and size of resource use".

21 Including the *Solicitor-General's Prosecutions Guidelines* (Crown Law. 2013. *Solicitor-General's Prosecutions Guidelines*. Wellington: Crown Law. Retrieved from www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf).

22 While keeping the costs to the ratepayer to a practical minimum through a system that is not unduly bureaucratic or costly to administer.

23 The Compliance and Enforcement Special Interest Group. Unpublished. Regional Sector Strategic Compliance Framework 2016–18.

Figure 2: The 4E Model[24]



Source: Regional Sector Strategic Compliance Framework

It is important that councils take a comprehensive 'spectrum' approach to encourage the highest levels of compliance, through understanding what influences behaviour change.

The 4E Model is a helpful way of displaying the four components that a comprehensive strategy should have. Different components of the model may be carried out by different parts of an organisation, or even externally. Regardless of who has responsibility for implementing each component of the model, it is vital that they are coordinated and a high level of communication, both within councils and with the public, is maintained to ensure that full effect is being achieved.

The resource and emphasis put into any one area of the model will be determined by an individual council, or part of the council, responsible for ensuring compliance with a particular activity. It may be that councils put more emphasis on different components over time and that the use of the 4Es is dynamic and changes in a coordinated and planned fashion.

Each of the components is explained in more detail:

Engage – consult with regulated parties, stakeholders and community on matters that may affect them. This will require maintaining relationships and communicating until final outcomes have been reached. This will facilitate greater understanding of challenges and constraints, engender support, and identify opportunities to work with others.

Educate – educate regulated parties about what is required to be compliant, and that the onus lies with them to maintain their compliance. Educate the community and stakeholders about what regulations are in place around them, so they will better understand what is compliant and what is not.

Enable – provide opportunities for regulated parties to be exposed to industry best practice and regulatory requirements. Link regulated parties with appropriate industry advisors, and promote examples of best practice.

Enforce – when breaches of regulation, or non-compliance, are identified, a range of enforcement tools are available to bring about positive behaviour change. Enforcement outcomes should be proportional to the circumstances of the breach, and culpability of the party.

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24 Adapted from: The Compliance and Enforcement Special Interest Group. Unpublished. *Regional Sector Strategic Compliance Framework 2016–18*.

The following case studies provide examples of ways in which councils are promoting compliance through educating, enabling or engaging the community.

CASE STUDY 1: A SIGNIFICANT SUBDIVISION IN AN URBAN AREA

A significant Wellington subdivision generated community concern about how the site was being managed following the effects of significant and adverse rain events and the impact on the local environment. To communicate effectively with the wider community, the Wellington City Council (together with the Greater Wellington Regional Council) opted to 'front foot' their concerns by publishing updates in flyer form detailing:

- the nature of the consents granted
- what matters are within council jurisdiction
- the frequency of each council's monitoring on the site
- background details of any recent incidents
- helpful information to the community on how to notify the council of an incident regarding the site, and what the community could do to assist the council (eg, taking photographs, noting times, calling without delay).

The flyer provided details that linked the type of concern a community member might have, with the appropriate phone number or email address. The developer opted to provide their consultant's details also. Wellington City Council's compliance manager believes this proactive approach helped direct community concern and defuse tension. It is an approach the Council is likely to employ again.

Notifications from members of the public make up a significant portion of most CME officers' workloads. The public 'eyes and ears' are a crucial information source for regulators. To make the best use of this information source, many councils have developed material to guide the notifications process, which includes:

- what is in a council's jurisdiction and what is not
- the kind of information to include when notifying the council of an incident
- other sources of advice and assistance.

CASE STUDY 2: NEWSPAPER COMMUNICATION

Many home owners in the Coromandel only use their homes over the summer. The Thames-Coromandel District Council receives many notifications at this time about possible unconsented works and activities taking place, due to owners either noticing changes that other homeowners have made to their homes or properties, or looking to make changes to their own properties.

The types of reported non-compliance activities have included unconsented building work, opening of home businesses to cash in on the summer population swell, removing or pruning of significant trees and other vegetation clearance, earthworks to create large camping areas, and other breaches of the District Plan.

A couple of years ago, the Council decided to take a proactive approach to this surge of notifications by putting out a media release in the local newspaper recommending homeowners contact the Council to check whether any work they propose on or at their property is permitted.

The media release communicated that it is better to check first than to act and find themselves facing inconvenience and possible expense through enforcement action. The release also included an outline of the Council's obligations under the RMA, and stated that the Council would prefer to "educate customers how to comply rather than punish them for not complying".

CASE STUDY 3: COUNCIL WEBSITE COMPLIANCE SECTIONS

Council websites can be a valuable tool to communicate compliance-related information to the community. Councils can create dedicated compliance web pages for this purpose. This is a low cost method, and should be available to all councils, providing they have staff with the expertise to prepare the materials. The following are examples of the effective use of web material to help resource users:

- Thames-Coromandel District Council guides website visitors through the 15 steps of getting a resource consent, the final one being to ensure ongoing compliance. The information sets out, in simple and easy-to-understand language:
  - what consent holders are required to do
  - the resources council has available to assist and procure compliance
  - the penalties for failing to comply.
- Greater Wellington Regional Council's website includes a comprehensive outline of RMA enforcement, clearly setting out the types of matters council will consider when deciding what action to take on a confirmed breach.

Evaluating the strategy's effectiveness

Each of the elements outlined above need to be regularly reviewed to ensure they are effective, and allow for continuous improvement. A review may consider whether specific parts of the strategy are working, or evaluate the effectiveness of the framework overall. The compliance strategy should be amended to reflect the findings of any evaluation.

An evaluation should consider how resources are being used, and how this aligns with the council's compliance strategy. Where gaps or weaknesses in the compliance strategy are identified, councils should consider allocating resources to address this. For example, the evaluation may find that council staff need further training in recognising non-compliance on earthworks sites.

Specific evaluation questions could include:

- Has compliance increased or decreased since the last review? What has contributed to this trend? Is compliance increasing or decreasing in each activity category (eg, earthworks, dairy farming)?
- How effective has council promotion of compliance been (eg, through education or on-site support)?
- How effective have council responses to non-compliance been (eg, enforcement actions taken)?
- What proportion of CME costs have been recovered through charges? What proportion was paid by council funds (ie, the ratepayer)?
- Has deterrence been achieved at an individual or community level?
- How have public communications performed? Have the correct messages been received and relayed by the media?

Councils may wish to develop performance indicators to evaluate the effectiveness of the compliance strategy. Performance indicators can allow councils to:

- set their own performance expectations
- improve the transparency of their activities, and enable the public to hold councils accountable to the set performance expectations
- identify what data they need to collect to measure against these indicators (see also Part 10 – Reporting and record-keeping)
- provide a structure to identify issues and target efforts to improve performance.

Performance indicators might include:

- numbers of sites with significant non-compliance, moderate non-compliance, low-risk non-compliance and compliance, as set out in the compliance grades in Part 10 – Reporting and record-keeping (this can be used either to give the overall level of non-compliance, or can be broken down by activity type)
- types of incident notifications received and council responses to these incidents, including time taken to respond
- number of consents, and percentage of total consents, monitored per financial year
- number of enforcement actions taken, by action type (ie, prosecution, abatement notice, etc), and percentage of total non-compliance.

Performance indicators should be considered in the context of the wider compliance strategy, and councils should choose their indicators carefully to ensure they are true indicators of progress towards the strategy objectives. For example, a decrease in numbers of incident notifications may not mean that levels of compliance have increased; there may be other reasons for this trend.

Part 3 – Working with iwi

Working with iwi and other Māori groups on compliance, monitoring and enforcement (CME) under the Resource Management Act (RMA) can have many benefits for both parties, including:

- building relationships with iwi and improving the understanding of and supporting one another's expectations and aspirations
- enabling tangata whenua to more fully carry out their kaitiaki responsibilities
- providing opportunities to establish shared projects, enabling more efficient and effective use of council and iwi resources
- incorporating mātauranga Māori (Māori customary knowledge) into CME activities to improve both parties' understanding of the health of the environment and environmental trends.

This Part outlines opportunities for councils to work with iwi and other Māori groups on CME, and sets out key statutory requirements influencing how these parties work together.

Iwi/Māori interest in compliance, monitoring and enforcement

In Te Ao Māori, or the Māori worldview, the natural environment has its own mauri, or life force, that provides for people. The environment is integral to Māori identity and culture, and is seen as an interconnected whole; its health is assessed in the same way. All parts of the environment – animate and inanimate – are infused with mauri and are connected by whakapapa – the descent of all living things from the original creators of life, and the genealogical relationships between all lives. Māori express this relationship by identifying with their environment, often with awa or moana (river or lake) or a landform such as maunga (mountain).

In return, local iwi are the kaitiaki, or guardians, of their environment. Kaitiakitanga (guardianship) is therefore a special reciprocal relationship between Māori and the whenua (land) – a practice of guardianship and environmental management grounded in a Māori world view. The environment supports the economy and provides resources for Māori, and Māori recognise that along with the privileges the environment provides comes the responsibility to care for the environment and maintain it for future generations.

Kaitiakitanga

Kaitiakitanga is based on mātauranga Māori (Māori knowledge), a body of knowledge founded on Māori cultural practice, rather than Western scientific frameworks. Customary rights and use of the environment represent the permanent and unique relationship Māori have with the environment.

In Te Ao Māori the degradation of the physical natural environment also weakens its mauri, and has corresponding consequences for the well-being of the people who are supported by the whenua. Iwi therefore have a strong interest in ensuring councils fulfil their CME obligations effectively to help preserve the mauri of the whenua. For a further explanation

of the Te Ao Māori and Māori values see the Māori Values Supplement on the Ministry for the Environment website.

The Waitangi Tribunal described the exercise of kaitiakitanga in resource management in its WAI 262 report:[25]

> Where, in the balancing process, it is found that kaitiaki should be entitled to priority; the system ought to deliver kaitiaki control over the taonga in question. Where that process finds kaitiaki should have a say in decision-making but more than one voice should be heard, it should deliver partnership for the control of the taonga, whether with the Crown or with wider community interests. In all areas of environmental management, the system must provide for kaitiaki to effectively influence decisions that are made by others, and for the kaitiaki interest to be accorded an appropriate level of priority. And the system must be transparent and fully accountable to kaitiaki and the wider community in delivering these outcomes.

The principles of the Treaty of Waitangi

Section 8 of the RMA requires councils to take into account the principles of the Treaty of Waitangi in exercising their functions and duties, which includes CME functions. A summary of the principles of the Treaty are provided below, adapted from Te Puni Kōkiri guidance.[26]

Principles of the Treaty of Waitangi

The Treaty of Waitangi, as New Zealand's founding document, sets out obligations for the Crown to provide for the rights and interests of Māori. The Treaty has never been codified in domestic law, and for the Treaty to have application in the present day, the Waitangi Tribunal and the Courts have considered the broad intentions and goals of the Treaty, and identified its principles on a case-by-case basis. Te Puni Kokiri has produced a document that aims to capture the principles of the Treaty as expressed by the Courts and the Waitangi Tribunal.[27] These principles are described below.

The principle of partnership (or the principle to act in good faith)

The principle of partnership, used to describe the relationship between the Crown and Māori, is well-established in Treaty jurisprudence. Partnership can be usefully regarded as an overarching theme, from which other key principles have been derived. It is arguably the most important principle in the context of resource management.

The concept of partnership emphasises a duty of both parties to act reasonably, honourably, and in good faith. These duties are derived from the principles of reciprocity and mutual benefit. The Tribunal has emphasised the equal status of the Treaty partners, and the need for accountability and compromise in the relationship.

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25 Waitangi Tribunal. 2011. *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (Wai 262 report).* Wellington: Waitangi Tribunal. Page 272.

26 Te Puni Kōkiri. 2001. *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*. Wellington: Te Puni Kōkiri. Retrieved from www.tpk.govt.nz.

27 Ibid.

The principle of active protection

The Crown's duty of active protection encompasses the Crown's obligation to take positive steps, rather than only reactionary steps, to ensure Māori interests are protected. The Courts have considered the principle primarily in association with the property interests, guaranteed to Māori in Article II of the Treaty.

The Waitangi Tribunal has elaborated the principle of protection as part of its understanding of the exchange of sovereignty for the protection of rangatiratanga, and has explicitly referred to the Crown's obligation to protect the capacity of Māori to retain tribal authority over tribal affairs, and to live according to their cultural preferences. Later Tribunal reports also place emphasis on the Crown's duty to protect Māori as a people, and as individuals, in addition to protecting their property and culture.

The principle of redress

The Court of Appeal has acknowledged that it is a principle of partnership generally, and of the Treaty relationship in particular, that past wrongs give rise to a right of redress. The primary mechanism for recognising this right is through Treaty settlements.

Consultation principle

The consultation principle has developed over time. Originally the Tribunal regarded it as a courtesy for the Crown to consult Māori, but in later years this strengthened into a view that the Crown had a duty to consult Māori on issues that affect them.

Legal requirements

A number of requirements in the RMA, Local Government Act 2002, and other legislation require councils to involve iwi and other Māori groups in carrying out their functions. Although these requirements do not impose any specific obligations on councils regarding CME activities, the general requirements need to be applied through CME practice.

Resource Management Act 1991 (RMA)

The RMA contains a number of general provisions requiring "all persons exercising functions and powers" under the RMA to:

- recognise and provide for "the relationship of Māori and their culture and traditions within their ancestral lands, water, sites, wāhi tapu, and other tāonga" (section 6(e))
- have particular regard to kaitiakitanga when deliberating decisions (section 7(a))
- take into account the principles of the Treaty of Waitangi (section 8), as explained above.

When preparing plans and policy statements, councils are also required (under Schedule 1 Part 1 and Part 5 of the RMA) to:

- consult tangata whenua (through iwi authorities) and summarise responses to advice given by iwi in the reports councils prepared under section 32

- prepare the policy statement or plan in accordance with any Mana Whakahono ā Rohe (iwi/council participation agreement)[28]
- take into account iwi participation legislation.

The RMA allows councils to transfer their functions, powers and duties to a public authority (which includes an iwi authority) under section 33. This provision has not yet been used by any council to transfer powers to iwi.

Local Government Act 2002

A number of provisions in the Local Government Act 2002 (LGA) give effect to Māori rights and interests, and also apply to councils' CME activities. Section 4 of the LGA refers to the Treaty of Waitangi and recognises the need to "maintain and improve opportunities for Māori to contribute to local government decision-making processes".

Part 6 provides principles and requirements for local authorities facilitating participation by Māori in decision-making processes. Section 81 requires local authorities to:

- provide opportunities for Māori to contribute to decision-making processes
- consider ways to foster the development of Māori capacity to contribute to decision-making
- provide relevant information to Māori for the purpose of achieving this.

The LGA was amended in 2014, and two new provisions were added that enhance Māori participation:

- section 76AA requires local authorities to have a "significance and engagement policy"
- clause 11 of Schedule 10 requires that all long-term plans contain a summary of that policy.

The effect of this is that the engagement of local authorities with Māori will be available for public scrutiny.

What this means in practice

It is important that councils understand the objectives and aspirations of local iwi and Māori generally, and how this affects their CME activities. Early engagement with iwi and hapū on matters impacting these objectives will help build a positive working relationship (for example, engagement on significant non-compliance incidents in their rohe (traditional lands) such as an oil spill).

Some councils have memoranda of understanding, joint management arrangements, advisory boards to council, or informal arrangements that establish how councils and iwi will work together. Some arrangements specifically affect council's CME activities, such as the joint management arrangement between Waikato Regional Council and Te Arawa River Iwi Trust, set out below.

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[28] Ministry for the Environment. 2017. *Resource Legislation Amendments 2017 – Fact Sheet 3, Changes to Maori participation in the Resource Management Act 1991*. Wellington: Ministry for the Environment. Retrieved from: http://www.mfe.govt.nz/sites/default/files/media/fact-sheet-3-%20changes-to-m%C4%81ori-participation-in-the-rma.pdf.

Mana Whakahono ā Rohe (iwi participation arrangements) are another mechanism for iwi authorities and councils to agree ways that tangata whenua, through their iwi authorities, may participate in RMA decision-making processes. These agreements are intended to facilitate improved working relationships between iwi and councils, and enhance Māori participation in resource management processes. The RMA requires a discussion on how iwi may participate in the development of monitoring methodologies as part of the arrangement. This provides an opportunity for iwi authorities and councils to agree on ways in which iwi could contribute to CME, and how councils will communicate with iwi on their CME activities.

Examples of council/iwi agreements

The Waikato Regional Council is party to several joint management agreements (JMA) with iwi around the region. The JMAs require the Council to discuss CME issues, efforts and outcomes and make available information, training and resources to the parties.

One example is the JMA between the Council and Te Arawa River Iwi Trust. The agreement requires that the Council undertakes certain procedures as it carries out its CME role where it relates to the Upper Waikato River Act.

Other examples include:

- Greater Wellington Regional Council's natural resources committee, Te Upoko Taiao, in which half the members are appointed by iwi. The committee's responsibilities include overseeing the development of the regional plan. The Council is also looking across frameworks to determine how cultural health can be integrated into CME.
- Local iwi and hapū are represented on a number of Taranaki Regional Council's committees, and are consulted closely on resource management consenting and planning processes. Where appropriate, the Council involves iwi and hapū in the design and operation of compliance monitoring programmes. Iwi and hapū have also had input into some investigations and prosecutions.
- A number of councils appoint cultural health officers, who provide support to council staff on working with iwi and other Māori interest groups, including on CME matters. Some councils have an agreement with iwi to inform them of significant non-compliance incidents in their rohe, and seek cultural impact statements from iwi that help determine how to respond to the incident and the enforcement action to take, where appropriate.

CASE STUDY 4: RŪNANGA INPUT INTO COMPLIANCE MONITORING

Environment Canterbury has a project underway to engage Ngā Papatipu Rūnanga (mana whenua) resource and environmental management advisory entities to support CME activity. The entities will work with ngā papatipu rūnanga (mana whenua) to further define their culturally sensitive sites, concerns and resource consents of interest so this information can be used in CME.

The Council assesses resource consent applications against risk rating criteria (which includes whether the affected environment has cultural values) which is then used to prioritise compliance monitoring inspections. This information is also used to understand whether an environmental incident is impacting an area with high papatipu rūnanga values.

Mātauranga Māori in compliance monitoring

Working with iwi/Māori on compliance monitoring provides opportunities for councils to enhance their knowledge of the environment and improve environmental outcomes.

A number of examples of iwi being involved in councils' state of the environment monitoring, and cultural health indicators have been developed to help with this. For example, in the Waikouaiti Catchment, matauranga Māori has assisted in monitoring notable sites and establishing a reporting framework with an active dialogue between scientists and tangata whenua, Kāti Huirapa ki Puketeraki.[29]

Manaaki Whenua (Landcare Research) have recently developed Wai Ora, an online application that takes a kaupapa Māori approach to assessing the condition of fresh water in accordance with Māori values. The tool provides a way for iwi, hapū and kaitiaki groups to measure resource condition and impact related to human activities and land management practices, for example resource degradation, water quality and mauri.

There is an opportunity for matauranga Māori to be built into compliance monitoring, and a number of councils are exploring this.

Iwi/Māori in enforcement decisions

In determining the appropriate enforcement response to non-compliance, many councils consider the impact of non-compliance on iwi by considering questions such as 'was the receiving environment of particular significance to iwi?' or 'is this enforcement approach an appropriate way to enable iwi/Māori to exercise kaitiakitanga?' Some councils, such as Taranaki Regional Council, seek impact statements from iwi to inform the enforcement response.

CASE STUDY 5: IMPACT STATEMENT FROM TANGATA WHENUA (TARANAKI REGIONAL COUNCIL)

RMA non-compliance can have significant implications for Māori cultural values.

Where a prosecution is undertaken, Taranaki Regional Council has a policy to approach the relevant iwi or hapū for an impact statement. Tangata whenua concerns form part of the summary of facts for court proceedings, and participants respect the confidentiality of that process.

The participation is recognised as a dimension of the exercise of kaitiakitanga, and an important part of their relationship with the Council as a regulator and resource manager. Impact statements are often referred to in court decisions.

[29] Retrieved from http://archive.stats.govt.nz/browse_for_stats/environment/environmental-reporting-series/environmental-indicators/Home/Fresh%20water/kaitiakitanga-waikouaiti-catchment.aspx.

One council is exploring the possibility of recruiting honorary Māori RMA enforcement officers, as described below.

CASE STUDY 6: HONORARY MĀORI ENFORCEMENT OFFICERS

Waikato Regional Council is exploring the possibility of developing a programme of honorary Māori RMA enforcement officers. This community-based initiative is to follow the Ministry for Primary Industries' successful fisheries model, by establishing a network of officers to respond in the first instance to nearby incidents, alone or alongside council officers.

Iwi-based honorary officers can help identify breaches that are of particular significance to Māori, and will provide a practical dimension of co-management.

Environment Canterbury runs a restorative justice programme (see also Restorative justice) through which local iwi and hapū are often requested to attend as community members or 'victims' of the offender's non-compliance. The iwi and hapū representatives are asked to explain how the non-compliance has impacted them and their people, and to contribute to developing a remedial plan to address the non-compliance. Sometimes the representatives are compensated by the offender for the time and resources required to attend the hearing, though not always.

Part 4 – Cost recovery and resourcing

Given the significance of compliance, monitoring and enforcement (CME) for implementing the Resource Management Act (RMA) and providing for good environmental outcomes, it is critical that CME activities are adequately resourced. Resourcing decisions made by councillors and senior management need to align with a council's compliance strategy so the strategy can be effectively implemented, and resources can be targeted at the CME activities identified as high priority.

Minimum resource requirements

There are certain CME functions councils should, at a minimum, support with sufficient resources. The list has been drafted so that it applies to all types and sizes of councils. For a well-functioning and effective CME programme, there are many other functions councils should consider resourcing.

As a minimum requirement, all councils should have sufficient access to resources to support:

- development and regular review of a compliance strategy, which includes an approach for addressing different behaviours, as set out in Part 2 – Strategic approach to achieving compliance
- trained and qualified staff to undertake the CME role, including a combination of scientific, planning, regulatory, investigative and legal skills, as explained in Part 11 – Training, networking and support.
- proactive programmes (eg, education and engagement) to achieve national, regional and local environmental objectives
- monitoring high-risk resource consents, and most medium-risk resource consents (see Taking a risk-based approach to compliance monitoring)
- responses to and investigation of significant incidents, including appropriately trained investigation staff
- public reporting on CME at least once a year, fulfilling the minimum information requirements set out in Part 10 – Reporting and record keeping
- internal systems to support monitoring and reporting, including hardware/software to support the record-keeping requirements set out in Part 10 – Reporting and record keeping
- enforcement action (including taking a prosecution), ensuring staff are appropriately trained and qualified to do so (see Part 11 – Training, networking and support)
- access to legal representation and expertise in enforcement and prosecution
- administrative support for the CME function, for example to support financial matters such as charging for compliance monitoring.

Who should pay for compliance, monitoring and enforcement?

There are a number of general guidance documents on setting charges and collecting rates which these guidelines should be read in conjunction with, including:

- The Treasury *Guidelines for Setting Charges in the Public Sector*
- *Guidance from the Controller and Auditor-General* on how taxes and rates should be spent.

Councils need to bear in mind a number of general principles when determining whether cost recovery is appropriate. These are set out below.

Key considerations in cost recovery[30]

Cost recovery regimes are 'living' regimes. The decision to recover costs is only part of the process. The cost recovery charges also need to be designed, implemented, monitored and regularly reviewed.

Throughout the different parts of the process, an open book approach should be followed. As part of this, the following should be considered:

- **Authority:** Does the public entity have legal authority to charge a fee for the goods and services provided?
- **Effectiveness:** Are resources allocated in a way that contributes to the outcomes being sought by the activity? Is the level of funding fit for purpose? Does it enable the cost-recovery activity to be delivered at a level that is appropriate for the circumstances (eg, it should not be 'gold-plated' or conversely at a poor level of performance that impedes the ability of organisations to do business)?
- **Efficiency:** Are decisions on volume and standards of services, and costs to recover and when to recover, consistent with the efficient allocation of resources? What efforts have been made to ensure there are reasonable constraints on charging, to demonstrate efficiency, particularly in the context of variable or hourly fees? Have options for pricing been considered in terms of what would be most efficient?
- **Transparency:** Is information about the activity and its costs available in an accessible way to all stakeholders? Has the cost-recovery analysis been approached in an 'open book' manner? Is detailed information about the cost drivers and the components that make up the charges available to stakeholders?
- **Consultation:** Has the entity engaged in meaningful consultation with stakeholders, and is there opportunity for stakeholders to contribute to the policy and design of the cost-recovery activity?
- **Equity:** Have the impacts of the proposed or existing cost-recovery regime been identified? Will stakeholders be treated equitably? Have impacts over time been identified?
- **Simplicity:** Is the cost recovery regime straightforward and understandable to relevant stakeholders? Have the costs of participation been kept low and evasion opportunities mitigated to acceptable levels?

30 The New Zealand Treasury. 2017. *Guidelines for Setting Charges in the Public Sector*. Wellington: Treasury. Retrieved from http://www.treasury.govt.nz/publications/guidance/planning/charges.

- **Accountability:** Public entities are accountable to Parliament and to the public. In practical terms, this must be demonstrated by consultation with stakeholders about change, through recording any surpluses and deficits generated by cost recovery regimes, through reporting on performance, and through reviews of the use of powers to set fees under regulation.

Cost recovery under the RMA – general principles and legal basis

The purpose of cost recovery for CME activities is to ensure the cost burden is fairly shared and that councils have a mechanism for recovering resources expended. Councils need to make a principled decision on how they manage cost recovery, in light of the principles set out above.

Cost recovery should not be used to penalise non-compliance. Enforcement actions are the appropriate mechanism for punishing non-compliance.

Councils can recover the costs of CME through:[31]

- **Cost recovery levies:** charges imposed on a group of individuals or organisations (eg, an industry) as a proxy for the individuals or individual organisations who directly receive or benefit from the good, service or regulation, for example, targeted rates.
- **Cost recovery fees:** charges imposed on a *specific* individual or organisation for a good, service or regulation *directly* provided to (or *directly* benefiting) that individual or organisation, for example charges for monitoring resource consents.

Targeted rates (cost recovery levies)

Most councils fund part of their CME programme through general rates collected from their communities. Councils may also wish to ensure the cost burden of consent monitoring lies with resource users by adopting a targeted rating strategy. This can be used to offset the costs of monitoring permitted activities. For example, Waikato Regional Council collects targeted rates from some rural farms to cover the costs of dairy farm monitoring.

Specific charges (cost recovery fees)

Cost recovery for resource consent monitoring

Section 36(1)(c) enables councils to "fix charges" to recover the costs of "its functions in relation to the administration, monitoring and supervision of resource consents" from resource consent holders.

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31 The New Zealand Treasury. 2017. *Guidelines for Setting Charges in the Public Sector*. Wellington: Treasury. Retrieved from www.treasury.govt.nz/publications/guidance/planning/charges.

Where fixed charges are "inadequate to enable the council to recover its actual and reasonable costs in respect of the matter concerned",[32] the council may require the resource consent holder to pay an additional charge.

Section 36(2) requires that fixed charges must be either specific amounts or determined by reference to scales of charges or other formulae.

These provisions allow councils to fully recover the costs of resource consent monitoring. There are several ways resource consent monitoring can be charged including:

- fixed charging in advance of monitoring (for simple consents)
- charging through an initial deposit charge plus an invoice after monitoring is complete with an additional charge (for complex consents)
- charging by way of scales of charges or formulae (for simple and complex consents).

All charges must be set in accordance with the process set out in Process for setting charges.

Fixed charging in advance of the monitoring

Some resource consent monitoring will be routine, involving a simple site inspection and the completion of a site visit form. These inspections might be one-off and after events begin, or occur annually. In these cases, monitoring fees could be fixed and charged in advance.

Where a simple post-commencement or construction monitoring inspection is required, councils can invoice for that monitoring inspection at the time the consent is deemed to begin. However, this prevents councils from charging additional costs incurred if the inspection takes more time than was estimated when setting the fixed charge.

If monitoring does not occur as planned, any fixed monitoring charge already paid should be refunded or partially refunded.

Initial deposit charge and an additional charge

More complex resource consents may require councils to carry out more significant monitoring, for example taking of samples, or multiple visits each year. For these consents, councils can collect a fixed initial charge in advance, which acts as a deposit. This charge should be based on the anticipated actual time and costs of monitoring each consent.

Councils can "top up" this amount by collecting "actual and reasonable" costs (see explanation below) of monitoring by invoice after the monitoring is complete. The council's annual plan should specify that any additional costs over and above the initial fixed charge/deposit will be charged if additional monitoring is required.

If the monitoring of complex resource consents is not carried out as planned, or costs less than the initial fixed deposit charged in advance, then a partial or full refund of the deposit should be made.

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32 Resource Management Act 1991, section 36(5).

Actual and reasonable costs

Where the charges fixed by the council under section 36 are "inadequate to enable the council to recover its actual and reasonable costs in respect of the matter concerned", the council may require the person who is liable (eg, the holder of the resource consent) to pay an additional charge under section 36(5). As this charge is "additional" and only applies where existing charges are "inadequate", the additional charge must relate to the monitoring covered by the initial deposit charge.

This provision is particularly useful when council staff detect non-compliance with a resource consent, and the time required to monitor the consent is not covered by the initial charge.

Charging by way of scales of charges or formulae

Section 36(2) allows councils to set charges "by reference to scales of charges or other formulae". This enables councils to charge for "actual and reasonable costs" incurred on an ongoing basis as they occur, and can be used for all consent types (simple and complex).

An example of such a formula, which must be included in a council's annual plan (set in accordance with the process set out below), is given below.

> Charge = (staff time x set charge rate) + direct costs including disbursements.

The set charge rate should also be included in the council's annual plan.

Process for setting charges

Resource consent monitoring charges (described above) must be fixed in the manner set out in section 150 of the Local Government Act 2002 and using the special consultative procedures in section 83 of that Act. This is explained below.

Charges must also be fixed in accordance with section 36AAA of the RMA. Section 36AAA requires that the "sole purpose of the charge is to recover the reasonable costs incurred by the local authority in respect of the activity to which the charge relates", and sets out criteria in section 36AAA(3) to guide this assessment. This provision also allows councils to set different charge rates for different areas or classes of person (eg, consent holders), or where the council's own costs are reduced as a result of the activity.

Local Government Act 2002

Section 150(3) of the Local Government Act provides that fees and charges may be prescribed either by way of bylaw, or by using the special consultative procedure set out in section 83. This special consultative procedure must also be used if a council proposes to adopt its own discount policy under section 36AA of the RMA.

Section 150(4) of the Local Government Act additionally requires that any charges must not be for more than reasonable costs incurred by the council for the matter for which it is charged. This is consistent with section 36(4)(a) of the RMA.

While section 150 of the Local Government Act provides the option of setting consent charges by way of bylaw, it is good practice to set charges for consent processing and compliance monitoring as part of the council's normal annual plan development and notification process. A schedule of charges should be included as part of the annual plan developed under section

95 of the Local Government Act. This is consistent with the Local Government Act requirement to include a funding impact statement in the annual plan.

Section 83 of the Local Government Act requires that council staff set out the proposed charges in a written proposal, which is considered by the council, publicly notified and held open for public submissions for at least one month. Submissions are to be heard at an open meeting of the council.

Councils are also required to prepare long-term plans under section 93 of the Local Government Act. These are higher level documents, with a 10-year planning horizon.

The amount of annual revenue anticipated from consent charges will need to be included in the long-term plan at an activity level; however, it is not generally necessary to include the detailed schedule of charges in the long-term plan, as this would duplicate the contents of the annual plan.

Councils should clearly identify in the annual plan what the fixed charge for monitoring is designed to cover. If the charge is based on the cost of undertaking a site visit and associated file maintenance for a compliant site, then this should be stated in the council's charging policy (where the charges are listed by consent category or consent type).

Cost recovery for monitoring (other than resource consent monitoring)

Permitted activity monitoring

Councils can recover costs for permitted activity monitoring under a national environmental standard (NES), where the NES states that permitted activity monitoring is cost recoverable (sections 36(1)(cc) and 43(8)(A)). For example, the National Environmental Standards on Plantation Forestry enables cost recovery for permitted activity monitoring for certain activities.

Cost recovery for "inspections"

Councils can also recover the costs of "inspections" under section 332 of the RMA, using the powers in section 150(1)(b) of the LGA, which enable fees to be prescribed through the consultation process set out in section 82 of that Act (or by bylaw).

"Inspections" would include a one-off examination (eg, a response to an incident or notification that a resource consent is not being complied with), but would not include ongoing monitoring (eg, resource consent monitoring or routine permitted activity monitoring). For resource consent monitoring councils have the ability to recover fees pursuant to section 36(1)(c) of the RMA, as explained in Cost recovery for resource consent monitoring.

Note that under section 332(1) the inspection needs to be for the purpose of determining whether or not –

(a) the RMA, any regulations, a rule of a plan, a resource consent, section 10 (certain existing uses protected), or section 10A (certain existing activities allowed), or section 20A (certain lawful existing activities allowed) is being complied with; or

(b) an enforcement order, interim enforcement order, abatement notice, or water shortage direction is being complied with; or

(c) any person is contravening a rule in a proposed plan in a manner prohibited by any of sections 9, 12(3), 14(1), 15(2), and 15(2A).

Cost recovery for enforcement

Where non-compliance is detected and an enforcement action is taken, there are a number of options for recovering the costs of the time and resources incurred in taking enforcement actions. The costs associated with enforcement action could result from:

- the enforcement officer's time for preparing the enforcement action
- legal fees
- technical expert fees (eg, if expert witnesses are required to support the prosecution).

If the enforcement option relates to a breach of a resource consent condition, councils can invoke section 36(1)(c) and recover the costs of "its functions in relation to the administration, monitoring and supervision of resource consents" from resource consent holders, if the charges are "fixed" as set out in Process for setting charges.

The administration and/or supervision of a consent may include the costs associated with:

- identifying non-compliance with consent conditions
- determining the appropriate level of enforcement response
- undertaking abatement notice and environmental infringement notice actions.

However, if such matters escalate to the Environment Court, the council should cease directly charging the consent holder for staff time, as the Court will award costs based on the submissions of all parties.

Abatement notice

There are no fines attached to abatement notices. However, councils can recover costs where the non-compliance relates to the "administration, monitoring or supervision" of resource consents, as set out in section 36(1)(c) of the RMA.

Infringement notices

Infringement fees are attached to infringement notices, and are fixed according to the Resource Management (Infringement Offences) Regulations 1999. This fee is paid directly to the council.

As with abatement notices, councils can recover costs where the non-compliance relates to the "administration, monitoring or supervision" of resource consents, as set out in section 36(1)(c) of the RMA.

Enforcement orders

Courts do not issue fines with enforcement orders. However, under section 314(1)(d), the Court can direct a person to reimburse any other person (eg, the council) for the "actual and

reasonable costs and expense which that other person has incurred or is likely to incur in avoiding, remedying, or mitigating any adverse effect on the environment."

Prosecutions

The costs of taking a prosecution can be significant. Except in certain circumstances (eg, jury trials, see Prosecutions), the prosecuting council covers these costs. The costs of taking a prosecution can be recovered if the prosecution is successful. However, councils risk bearing those costs if the prosecution is unsuccessful and even when the prosecution is successful, councils often do not recover the full costs of taking the prosecution.

The costs and risks of taking prosecutions can, however, be substantially reduced if the prosecution is run well, and councils engage specialist investigative staff.

Most councils have caps on their enforcement budgets, which means they may have to be selective about which prosecutions they take. While this approach may be necessary (given councils' limited resources), the best practice approach is for councils to take the prosecution if it is warranted, regardless of potential costs to council or (partial) cost recovery through fines.

There are two means of recovering the costs of taking prosecutions through the Court process – fines and Court-imposed costs.

Fines

Under section 342 of the RMA, councils are entitled to receive 90 per cent of the total of fines imposed by a successful prosecution (the Crown retains 10 per cent as a processing fee). This fine is recovered by the Ministry of Justice and forwarded to the council (not the CME team/division in the council). It is up to the council to determine where the fine is directed. The council is unlikely to recover the full costs of taking a prosecution through a fine; this depends completely on the costs of taking the prosecution, the quantum of the fine imposed and whether it is, in fact, recovered from the defendant.

Costs

Councils can also apply for costs, and receive an award for costs from the defendant, if the prosecution is successful. The District Court may order the defendant to pay a sum it thinks just and reasonable towards the costs of the prosecution.

Costs are defined as "any expenses properly incurred by a party in carrying out a prosecution" and are limited to costs incurred after the decision to prosecute has been made. The costs are ordinarily scaled in accordance with the Costs in Criminal Cases Regulations 1987, unless the Court is satisfied that the difficulty, complexity or importance of the case is significantly greater than is ordinarily encountered.

In practice it is relatively rare for the Courts to impose costs, and the council should not rely upon this as a sure way of recovering the costs of prosecution.

Payment of fines/costs

Payment of Court-imposed fines

Where a prosecution is initiated by a council, the Court-imposed fines for RMA offences are recovered by the Ministry of Justice and the fines are forwarded (less 10 per cent) to the council. The Court is responsible for enforcing payment of the fine. If a fine is not paid within 28 days, the Court can take an enforcement action against the offender through, for example, seizing and selling the offender's property.[33]

Non-payment of costs/fines

Where an individual or company is insolvent, enforcement of Court fines and penalties is more difficult and in some cases the Court can be forced to remit the fine. This is common if the company or individual no longer exists or has no assets with which to pay the fines.

The RMA requires that where a person is convicted of an offence and the Court imposes a fine (in situations where a council brings proceedings), the Court will order that the fine be paid to the local authority.[34] While costs are paid directly to the prosecuting council, fines are not. The Ministry of Justice is responsible for recovering the fine and forwarding it on to the council. Fines owing to council following RMA cases are only one of many fines that the Ministry of Justice is required to recover and some fines take many years to recover.

Councils can make arrangements with the Ministry of Justice to receive reports on the status of fines administered, and be advised if a decision to remit a fine is made. Councils are not consulted on the decision to remit a fine unless the council proactively communicates with the Ministry of Justice to discuss non-payment.

Fines may be remitted in the following circumstances:

- The Ministry of Justice may decide to remit the fine under section 88 of the Summary Proceedings Act 1957, for example, where the offender is difficult or impossible to contact, has died, or the company has gone into liquidation.
- Court registrars may remit very small fines (less than $50).
- Judges have broader powers, and may remit larger fines (greater than $50). An individual filing for insolvency or bankruptcy is not, however, grounds for a fine to be remitted.

Councils have the ability to challenge registrar decisions by filing an application for review of the decision with the Court. This decision will be reviewed by a judge.

A number of substantial RMA fines have never been recovered by the Ministry of Justice, and the fines have been 'remitted', often due to a company going into liquidation or receivership, or the offender absconding. For example, several fines owed by the Crafar Farms owners to the Waikato Regional Council were remitted because the company went into liquidation.

In cases of company liquidation, councils may be able to recover part of the debt owed before the company is struck off the Companies Register, where the Ministry of Justice is able to contact the liquidator while company assets remain.

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33 Summary Proceedings Act 1957.

34 Resource Management Act 1991, section 342(1).

Part 5 – Compliance monitoring

What is compliance monitoring?

Compliance monitoring refers to the activities carried out by councils to assess compliance with the Resource Management Act. This can be proactive (eg, resource consent or permitted activity monitoring) or reactive (eg, investigation of suspected offences).

Compliance monitoring ensures non-compliance is identified to allow for appropriate action to be taken. It can also enable early detection and prevent adverse environmental effects.

Compliance monitoring allows councils to:

- check when resource consents have been given effect to (and identify those that have lapsed)
- assess compliance with permitted activities, standards, and resource consents conditions
- highlight areas that require further monitoring or where action needs to be undertaken (such as enforcement action or increased compliance promotion or targeted monitoring)
- respond to and investigate incident notifications
- provide feedback on the effectiveness of policies, plans, rules and consents that may lead to changes to policies and plans, and help councils make informed decisions
- contribute to assessing long-term environmental trends.

Who should carry out compliance monitoring?

When planning compliance monitoring activities, it is important to consider and plan for resourcing this task. A diversity of skills (including scientific, regulatory, legal, and investigative), either within the compliance team or in other teams which support the compliance team, is desirable. To determine who should carry out the monitoring, and how it should be carried out:

- Consider who has the appropriate skills to carry out monitoring of different activities. Are dedicated or specialist staff required (eg, for noise, odour, a specific industry or activity, light and glare)?
- Ensure people carrying out compliance have the correct delegation assigned to them, and carry the appropriate warrant of authority (see Part 6 – Approach to site inspections and incident investigations).
- Consider whether other sections of the council will be involved and whether external expertise is required.
- Consider whether self-monitoring is appropriate. This may be where the consent holder conducts monitoring themselves and advises council of their findings. This can be a cost-effective method of monitoring for the council, but raises issues with ensuring accuracy of reporting. These issues can be managed by the council completing checks and audits to ensure the integrity of the self-monitoring.
- Consider joint monitoring with other councils or agencies on certain types of activities.

Taking a risk-based approach to compliance monitoring

A strategic and risk-based approach to compliance monitoring helps councils determine the appropriate monitoring frequency and intervention method for an activity, depending on the risk to the environment from that activity.

Taking a risk-based approach allows councils to focus their resources to achieve the best possible outcomes for their communities.[35]

A council's monitoring approach should be set out in a compliance monitoring strategy (which may be part of the broader compliance strategy (as explained in Part 2 – Strategic approach to achieving compliance).

Have a clear purpose for compliance monitoring

Be clear in your strategy about the purpose of compliance monitoring. For instance, the purpose could be to:

- check that consent holders are meeting the conditions of consent (administrative/process monitoring)
- check that members of the public are complying with the RMA
- monitor environmental, economic, social or cultural effects of activities, to help assess the effectiveness of policy statements and plans and provide information for state of the environment monitoring and reporting
- enable reporting to the public about levels of compliance, and reporting to the Ministry for the Environment through the National Monitoring System.

A combination of all these purposes is the most desirable approach in a monitoring strategy.

Risk-based approach

The risk-based approach to monitoring is an effective way of targeting activities that pose a higher risk of non-compliance, or where non-compliance poses a more severe risk of adverse effects occurring, and will assist with developing a compliance strategy or compliance, monitoring and enforcement (CME) work programme.

A risk-based approach to monitoring:

- enables limited monitoring resources to be prioritised according to the level of risk to the environment
- allows for efficient use of those resources
- provides for robust and transparent decision-making
- provides for consistency.

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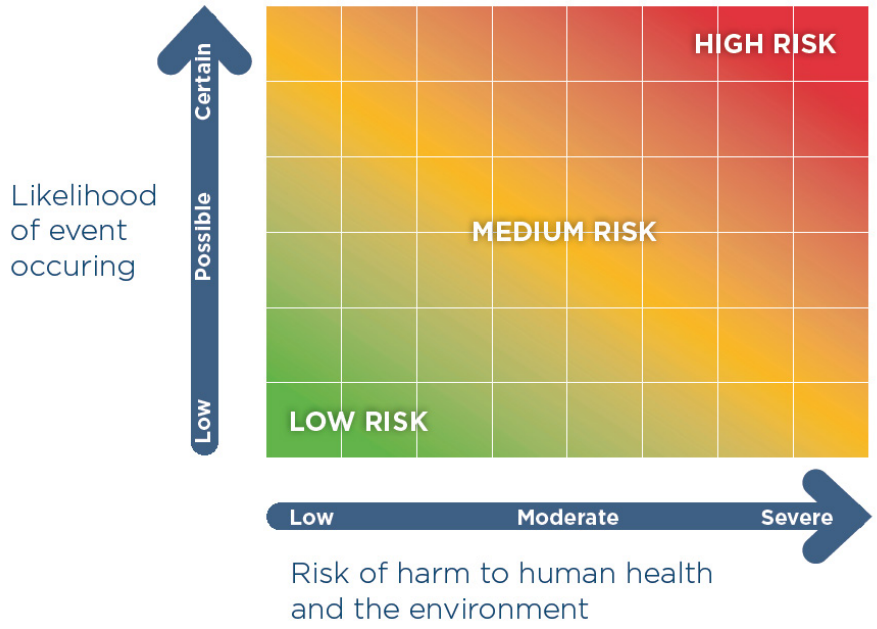
35 Compliance and Enforcement Special Interest Group. Unpublished. *Regional Sector Strategic Compliance Framework 2016–18*.

A risk-based approach requires councils to assess:

- whether an activity is low, medium or high risk
- how frequently an activity (whether a consented or permitted activity) should be monitored based on the risk assessment
- what effect the risk category will have on the response to an incident – whether it is responded to, and the timing of the response.

A risk-based assessment takes into account the likelihood of an event occurring, and the risk of harm to human health and the environment. These two factors form a 'risk matrix', shown in figure 3. The level of risk determines the appropriate response, including the frequency, type and scale of monitoring required.

Figure 3: Environmental risk matrix[36]



How the risk-based approach will be carried out specifically in a CME programme should be set out in the compliance strategy.

The risk-based approach should determine the method and frequency that specific activities or consents in a 'high' or 'medium' risk category are monitored. For example, where a consent is granted for a 'high risk' activity (eg, a discharge of a contaminant to land into a sensitive receiving environment) the compliance strategy may set out that this is to receive monitoring on a monthly, or even more frequent, basis.

Where a consent has been granted for a 'minor' or 'low' risk activity, this may only be scheduled for monitoring once every three to five years.

36 Compliance and Enforcement Special Interest Group. Unpublished. Regional Sector Strategic Compliance Framework 2016–18.

CASE STUDY 7: BAY OF PLENTY REGIONAL COUNCIL'S RISK-BASED APPROACH TO MONITORING

Bay of Plenty Regional Council uses a risk-based approach to monitoring, which is explained in its Pollution Prevention and Compliance Report 2014–2015[37].

How often an activity is assessed depends on its environmental risk profile and the consent holder's compliance history. Environmental risk is determined by a number of factors, including the type of activity being undertaken (eg, large scale pulp and paper processing site compared to a lake structure), the sensitivity of the receiving environment (eg, discharge of a process wastewater to a waterway, compared to a stormwater discharge to land soakage), and site specific risks (eg, a dairy farm with effluent storage near a water way compared to one with no surface water near the storage ponds).

CASE STUDY 8: WAIKATO DISTRICT COUNCIL'S RISK-BASED APPROACH TO MONITORING RESOURCE CONSENTS

Waikato District Council uses a risk-based score to monitor resource consents, which enables the Council to determine the priority and frequency of monitoring, and target monitoring at the higher risk consents. The Council has a key performance indicator for the compliance monitoring team to monitor every high risk consent at least once per year.

To determine the risk associated with a consent, the Council applies a risk matrix, which takes into account the public interest in monitoring the consent (publicly notified, limited notified, affected parties, no affected parties), the activity status (non-complying, discretionary, restricted discretionary or controlled), and the environmental effects (major, medium, minor, less than minor).

Frequency of monitoring

When planning and developing a monitoring strategy or CME programme, the frequency of monitoring should be determined based on the nature of an activity or consent type and by using a risk-based approach. The following are examples of monitoring frequency and considerations to help determine which is the most appropriate in each circumstance:

- one-off monitoring might be all that is required for activities with minor effects or effects that are limited to the time of construction, for example installation of a culvert
- regular inspections might be appropriate for activities of an ongoing nature, for example the disposal of dairy effluent
- tailor-made, site-specific monitoring programmes might be needed for large activities or those with the potential to generate significant adverse effects, for example a monitoring programme for a large roading project being completed over several years

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37 Bay of Plenty Regional Council. 2015. *2014/2015 Pollution Prevention and Compliance Report.* Whakatane: Bay of Plenty Regional Council. Retrieved from https://www.boprc.govt.nz/compliancereports.

- performance-based monitoring may be appropriate to ensure environmental standards are met; the consent holder may be able to undertake this and, if compliance and environmental results are consistently good, then less frequent monitoring/site visits may be appropriate.

Consents databases and GIS systems can also help to efficiently plan and implement consent monitoring at the most appropriate time, and this could be particularly helpful for councils that manage larger districts or regions.

Types of compliance monitoring

Resource consent monitoring

Section 35(2) of the RMA requires every council to monitor the exercise of resource consents that have effect in its region or district and take appropriate action where this is shown to be necessary (see Part 8 – Enforcement tools).

Monitoring of resource consents involves checking:

- when resource consents have been 'given effect to' (the activity has begun)
- compliance with consent decisions and associated conditions
- the effectiveness of consent conditions
- monitoring the impact of consented activities on the environment.

Developing a resource consent monitoring strategy

Councils should apply the risk-based approach and their compliance strategy to determine whether monitoring should be undertaken, and the method and frequency of monitoring. Councils should consider the activity the consent relates to, and the environmental risk posed by the activity, as well as the conditions of the consent (contained in the decision report or consent certificate).

The extent and nature of monitoring will vary according to the resource consent. This involves council staff considering the risks posed by the activity, and the period of time during which those risks will persist. Some consents will require only a minimal level of monitoring, while other consents will require regular site visits to monitor compliance with conditions. Councils must set priorities for monitoring, due to the large number of consents that are active at any time.

At the lowest end of the spectrum will be consents for land use and subdivision where the effects of the activity do not change over time once the activity is completed (eg, where a building has been completed or a subdivision received certification under section 224(c)). In these cases, the council may have a policy of not actively monitoring the resource consent (beyond the initial inspections during the time of construction, or building completion), but responding to incident notifications.

At the other end of the spectrum will be consents that involve ongoing activities that have a greater risk of harm to the environment (eg, a consent for discharging dairy effluent). These activities will require regular monitoring such as monthly, quarterly or annual site visits, depending on the degree of environmental risk. The compliance strategy might include the ability to review monitoring conditions for consents, to take account of changing

circumstances, and increased or decreased levels of risk. For example, consistent high performance in complying with consent conditions may lead to less frequent monitoring. See Monitoring methods for resource consents.

Monitoring methods for resource consents

Resource consents can be monitored through the use of one, or a combination, of the following:

- **Desktop audits** to review information provided. Staff will need to specifically check that information has been provided within the correct timeframes and meets the requirements specified in conditions (eg, submission of an annual report, photographic records, a post-construction report, or as-built drawing). This could include a technical review of monitoring data or other information provided by the consent holder (ie, review of water quality data or an erosions and sediment control plan).
- **Site inspections** to check that the activity being undertaken is within the scope of the consent and in accordance with the requirements of the consent conditions (ie, to check compliance with a site management plan, or to ensure actual effects resulting from an activity are within the limits specified in the consent). Site inspections can also check that any other activities being undertaken on a site are compliant with the plan and RMA requirements. See Inspections for further information on inspections. For some consent conditions it may be necessary to take environmental samples during a site visit to help determine compliance.

Frequency of resource consent monitoring

Frequency of monitoring will depend on the type of activity the consent is issued for, the risk profile associated with it, and perhaps the compliance history of the consent holder. The nature of activities for which regional council and unitary authorities are responsible, and the duration of their consent, means that the majority of resource consents issued by these councils require some form of ongoing monitoring to check compliance (eg, to check compliance with a water take consent).

In contrast, the majority of resource consents issued by territorial authorities may only need to be checked once to ensure ongoing compliance (eg, to check compliance with a land-use consent to construct a dwelling).

Permitted activity monitoring

Permitted activity monitoring is undertaken to check compliance with and assess the effectiveness of plan provisions. Permitted activities in plans include conditions that ensure adverse effects to the environment are avoided, mitigated or remedied. In some cases, conditions of permitted activities can be reasonably extensive, and non-compliance with the conditions can have serious risk of adverse effects to the environment.

Under section 84(1) of the RMA, councils are required to enforce the observance of policy statements and plans. Many incidents of non-compliance (with plan rules) occur where there is no resource consent and no incident notification is received by the council. Without a permitted activity monitoring programme, this non-compliance would go undetected. Councils are therefore encouraged to establish a proactive and targeted permitted activity monitoring programme.

There are many approaches to permitted activity monitoring – ranging from organised, proactive programmes targeting different permitted activities over a set period (eg, annual, bi-annual, or one-off checks) through to ad-hoc monitoring in response to complaints or reports from members of the public (see Response to incident notifications).

Factors that influence a council's approach to permitted activity monitoring include:

- access to resources, as in many cases there may only be a limited amount of resources allocated given that the RMA does not provide for cost-recovery mechanisms for plan-permitted activity monitoring (see Part 4 – Cost recovery and resourcing)
- local issues a region or district is facing, emerging issues, or those perceived as most important to the community
- the type of activities that fall under permitted activity monitoring, as plan provisions vary between councils. For example, where dairy effluent is a permitted activity in some regions, it may be a controlled activity elsewhere, requiring consent.

In addition, a risk-based approach may be applied to decide if, how, and when a permitted activity may be monitored.

Councils should decide on an approach that is tailored to their local circumstances, and should be clear and transparent about their approach (ie, this approach should be set out in the compliance strategy). Examples of different approaches to proactive permitted activity monitoring follow.

Proactive monitoring of non-consented activities over winter

Over winter, many of the activities that take up significant compliance resourcing time cease. Some councils find this variable workload can be difficult to manage, while others find it a valuable time for proactive compliance approaches to be adopted, helping to relieve the non-compliance burden during busier times.

Over the winter, the Taranaki Regional Council's compliance staff carry out annual inspections of permitted activities. They undertake about 300 inspections of small industrial sites each year. In 2016, there was a 1.7 per cent non-compliance (re-inspection) rate. This proactive work can help to build strong relationships, as well as identifying areas to be targeted in the future through education campaigns or other engagement activities.

CASE STUDY 9: PLANNER REFERRAL PROCESS (THAMES-COROMANDEL DISTRICT COUNCIL)

The Thames-Coromandel District Council's (TCDC's) planning team often advise customers, or approve certain activities that are potentially very close to being non-compliant. In the past, once planning gave its approval, the customer carried out the building work or activity and, unless an incident notification was received, no monitoring of that activity would take place.

TCDC is putting in place a process to proactively monitor permitted activities to ensure compliance with the District Plan at all times. The process will enable planners to 'tag' a borderline activity to the attention of monitoring officers when, based on plans and other information provided, the activity appears to comply, but has the potential to end up non-compliant. Monitoring staff will then keep an eye on the activity to ensure it complies.

The process to be used is:

1. Planners respond to a duty planner query about a proposed activity, and advise it would comply based on the information provided.
2. If the planner thinks the activity is borderline, they will raise a request for service (RFS) record in Council's database, which will record automatically against the property file in the electronic filing system.
3. The record is automatically forwarded by email prompt to TCDC's Compliance Management Team, alerting them to the fact that an activity, while appearing to be compliant, may require ongoing monitoring.
4. The TCDC Compliance Management Team will then allocate the RFS to the appropriate monitoring officer in the area.
5. The RFS record can be updated with notes and photos, and has a good reporting function to maintain adequate record keeping of the monitoring of permitted activities. These then form part of the permanent record for the site in the Council's database.

The monitoring of permitted activities will:

- allow the Council to ensure compliance continues to be met
- enable the Council to communicate with and educate customers on the importance of their activity not morphing into non-compliance
- encourage customers to communicate with Council staff if they are uncertain.

The Council believes it will be helpful for officers to form relationships with their customers in a helpful and educative capacity, rather than only being visible when things go wrong.

The Compliance Management Team at TCDC has a robust procedure manual prescribing all the monitoring and compliance processes carried out within the team, and the new planner referral process will be included in that manual.

CASE STUDY 10: PERMITTED ACTIVITY MONITORING FOR DAIRY FARMS AND FORESTRY (NORTHLAND)

The Northland region has approximately 900 active dairy farms. Each farm has a record in the Northland Regional Council (NRC) database, and compliance statistics are reported to councillors and the public for all farms.

Of the current farming operations, about 675 have resource consents that allow the discharge of treated effluent to water under certain conditions, and the remaining 225 are required to meet the permitted activity criteria outlined in the Regional Plan rules. The Council has collaborated with DairyNZ to produce detailed guidance to help farmers manage dairy effluent.[38]

NRC undertakes annual inspections of all dairy farms, and has done so since 2003. Staff carry out the inspections without prior notification between mid-August and 20 December each year. The permitted activity farms are treated exactly as the consented farms, except that compliance is measured against the regional rules as opposed to individual consent conditions.

The procedures followed are clearly laid out on the Council's website. The proportion and severity of non-compliance has reduced since the programme began. Where non-compliance is identified, NRC tends to rely on lower-level enforcement options, such as abatement notices and infringement notices, before proceeding to prosecution. Where prosecution is used, the penalties can be very significant (the most recent farm dairy effluent prosecution netted fines of $225,000).

The same approach will be rolled out for permitted forestry activities (under the National Environmental Standard for Plantation Forestry Regulations 2017). These results will also be publicly reported.

Marginal and temporary non-compliance with permitted activities

Section 87BB of the RMA was introduced by the Resource Legislation Amendment Act 2017. This section gives councils the power to deem some activities to be permitted activities where they involve "marginal or temporary non-compliance" with a permitted activity. Councils have discretion to use this provision where non-compliance meets the requirements of section 87BB(1).

Section 36(1)(ae) was also included in the amendments, allowing councils to charge for issuing a notice under section 87BB.

More detailed guidance on section 87BB can be found in *A technical guide to Deemed Permitted Activities under the Resource Management Act 1991* on the Ministry for the Environment website.

[38] DairyNZ. 2015. *A Northland farmer's guide to managing farm dairy effluent; a good practice guide for land application systems.* Hamilton: DairyNZ. Retrieved from https://www.dairynz.co.nz/media/2240372/managing-farm-dairy-effluent-northland.pdf.

Response to incident notifications

Councils respond to notifications of incidents (including complaints), which is also a form of compliance monitoring. Staff receive the notification of potential non-compliance and assess whether, in fact, non-compliance is occurring. Notifications may relate to:

- activities that have resource consent (where conditions are perhaps not being met, or the activity or effects occurring may be outside of the scope of the consent)
- permitted activities being undertaken (where the conditions of the permitted activity are perhaps not being met)
- where there has been an environmental incident and information is received of adverse effects being experienced (ie, an oil spill in a harbour, paint in a stream).

Section 35(5)(i) of the RMA specifies that councils must keep a summary for five years of all written complaints they receive concerning alleged breaches of the Act or a plan, and information on how each of these complaints was dealt with. It is important then that all councils have a stated policy for how different complaints are to be responded to and reported on, which will ensure a consistent and transparent process.

An incident notification policy could be set out in a compliance strategy, or be a standalone document (and used alongside a compliance strategy). This policy should set out:

- how the public will be informed about the council's incident notification services
- how notifications will be received (eg, a hotline, online portal, mobile app)
- how notifications will be recorded, and their progress tracked
- methodology for prioritising calls and determining the appropriate mode of response
- a timeframe for responding to notifications once prioritised
- circumstances in which a site inspection:
  - is required
  - should be carried out
- circumstances in which a notification about a certain type of activity will not be responded to
- procedures (including contact details) for contacting relevant stakeholders about individual incidents (eg, iwi/hapū if there is a perceived cultural impact)
- procedures (including contact details) for cross-agency or cross-jurisdictional responses to incidents. This may include memoranda of understanding with other agencies.

Reduced response protocols and guidelines on managing unreasonable complainant conduct can be found on the website of the Office of the Ombudsman[39] (see also Reduced response protocols).

[39] Office of the Ombudsman. 2012. *Managing unreasonable complainant conduct - at a glance*. Wellington: Office of the Ombudsman. Retrieved from www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/447/original/managing_unreasonable_complainant_conduct_-__short_guide.pdf?1349391242.

Over time it may be possible for councils to use their complaints monitoring to develop trend data and add value to their state of the environment reporting. Monitoring data should also be used to help develop and review a compliance monitoring strategy, or work programme planning (ie, to inform areas for targeted focus or proactive monitoring of permitted activities).

Incident notifications can also provide useful information on compliance, or areas where policies and plans are not meeting the desired and anticipated environmental outcomes. State of the environment reporting and incident notifications can provide useful information for monitoring the effects of permitted activities.

Reduced response protocols

As part of developing an incident notification response policy or procedures manual, councils should develop a reduced response policy or protocol. Staff can use this for dealing with repeat complainants, where:

- the complainant's expectations exceed the council's jurisdictional requirements
- multiple responses to the complaint are unable to confirm non-compliance.

Reasons for developing and implementing a reduced response protocol include:

- alignment with compliance strategy or risk-based approach
- prioritisation of resources
- transparency and consistency of process.

CASE STUDY 11: REDUCED RESPONSE PROTOCOL (GREATER WELLINGTON REGIONAL COUNCIL)

Greater Wellington Regional Council (GWRC) established a reduced response protocol in 2010, after identifying a need to reduce the level of response to certain people calling in RMA-related incidents, and a procedure to formalise this response.

The protocol specifies that a complainant should be considered a candidate for reduced response when "it is identified through their patterns of reporting incidents to the Environmental Regulation Department, that they have expectations of our response service which exceed our jurisdiction under the Resource Management Act 1991 (RMA), or if repeated responses determine that there is no cause for concern in terms of environmental effects."

Factors considered in determining when the reduced response protocol will apply include:

- enforcement officers attend multiple incidents in response to the caller's notifications where they are unable to confirm a breach of the RMA
- notifications of incidents are outside of GWRC's jurisdiction under the RMA
- the complainant may have sensitivity to certain environmental stimuli that may not affect the general public or the officer(s) attending the incident.

The protocol sets out a procedure to be followed when considering a complainant for reduced response.

Ask yourself:

- Is the person a repeat caller?
- Have any environmental effects been detected? Or has no non-compliance been detected in most investigations?

Consider:

- Do their expectations of response exceed our jurisdiction under the RMA?
- Does the notifier have sensitivity to certain environmental stimuli?

Actions:

1. Take all reasonable steps to investigate and prevent or identify possible non-compliance, eg, mail-out, media release.
2. Present a referral to the Enforcement Decision Group, which includes:
    - history
    - number of notifications
    - actions taken
    - inter-agency meetings
    - any environmental effects or non-compliance that may have been detected.
3. Final sign-off of referral form by the team leader, with department and division managers to sight and initial.
4. Apply reduced response.

Monitoring methods (for all types of compliance monitoring)

This section explains the main methods of compliance monitoring.

It is important to note that often a combination of these approaches may be required, depending on the nature of an activity and the permitted activity standards or conditions included in a resource consent.

Inspections

Inspections may be carried out:

- to visually check compliance with the RMA, plans and resource consents
- as part of a compliance programme
- in response to an incident notification (which includes complaints).

As well as checking compliance, inspections are also used to gather information and evidence for CME investigations, and assess the seriousness of actual or potential environmental effects.

Table 1 describes why site inspections might be carried out for compliance monitoring.

Table 1: Purpose of site inspections for compliance monitoring

Purpose	Description
Monitoring resource consent compliance	As part of consent compliance, officers carry out site inspections to assess whether the consent holders' on-site activity complies with the consent conditions. CME staff may bring a copy of the consent decision report or certificate to check against specific conditions. For example, that a management plan was being adhered to, or that the exercise of the consent was not giving rise to any effects outside of its scope, or beyond the limits specified. Compliance inspections may be one off, or on an ongoing or regular basis, depending on the type of the consent and/or compliance history.
Checking compliance with an abatement notice or enforcement order	Abatement notices and enforcement orders are directive enforcement tools requiring certain actions to be taken, or to cease, within a specified time. Site inspections are carried out to assess compliance against these requirements.
Monitoring permitted activity	Inspections to check that the activity is meeting permitted activity standards of plans, national environmental standards, and regulations.
Responding to incident notifications	CME staff may carry out site inspections in response to incident notifications received by council. These may be complaints about a consented activity, or of any other activity at any location in the council's district or region. The purpose of the inspection will be for the CME staff to assess whether there are any breaches of a consent (if one exists), a rule in a plan, a national environmental standard, or the RMA, and to collect evidence.
Responding to environmental incidents	CME staff may be called to an environmental incident by a member of public, the responsible party, or emergency services (eg, Police or Fire and Emergency New Zealand). CME staff will attend the incident to ensure the responsible party takes all practicable steps to minimise adverse effects on the environment, and to carry out an investigation into what has occurred, and whether there are any breaches of a consent (if one exists), a rule in a plan, a national environmental standard, or the RMA.

Further information on undertaking a site inspection, including access rights and timing of inspections can be found in Part 6 – Approach to site inspections and incident investigations.

Desktop audits and review of reports and monitoring data

For certain activities, compliance monitoring assessments can sometimes be done from the office, without any physical inspection (or in addition to an inspection). The type of activity or consent being monitored will determine whether desktop audits are also needed. Desktop audits are used to:

- monitor data submitted to meet a consent condition, or in relation to a permitted activity (eg, water quality monitoring data for a discharge consent, or water abstraction records for a surface water take consent)
- review photographic records submitted to meet a consent condition, which may have specified the consent holder submit photographic records of works undertaken in place of a CME staff undertaking an inspection (eg, photographic records of stream-works, or to show compliance with a planting plan)
- review of a technical document or plan, to ensure it is of a good standard and consistent with the requirements of a consent (eg, an erosion and sediment control plan for an earthworks site)

- review as-built drawings or work completion documents to ensure an activity has been carried out in accordance with, and within the scope of, a resource consent, or permitted activity standards.

In many cases, CME staff may need to consult with technical experts when reviewing certain types of monitoring information (ie, an environmental scientist to review water quality records). There is a risk in relying solely on desktop audits or self-reporting (without undertaking any physical inspections), as it is difficult to ensure accuracy of the information received. Councils should consider carrying out random inspections for activities where desktop audits and self-reporting are the default monitoring methods.

Dealing with non-compliance

Councils must have robust and transparent processes and strategies for dealing with non-compliance. Part 7 – Enforcement decisions includes guidance on responding to non-compliance.

Part 6 – Approach to site inspections and incident investigations

Much of this material draws on the Waikato Regional Council's publication *Basic Investigative Skills for Local Government, with particular emphasis on enforcement of the Resource Management Act*.[40] The entire skills manual can be found on the Waikato Regional Council's website.

Introduction

Councils carry out site inspections or investigations for a number of reasons. This could be to:

- check compliance with:
  - resource consents
  - an abatement notice or enforcement order
  - permitted activity standards
- investigate incident notifications (including complaints).

Further details of these activities can be found in table 1, in Part 5 – Compliance monitoring.

It is important that councils follow the same best practice approach for all site visits and scene investigations they undertake, regardless of the reason for them.

In each case, a site visit or investigation will determine whether a site (a company or a person) is complying with their responsibilities under the Resource Management Act, and if non-compliance is detected it can:

- establish liability
- help collect evidence to confirm a breach
- help with making an informed decision about what, if any, enforcement action may be taken.

Provisions in the RMA for inspections

Definition of an enforcement officer

Under section 38, 'enforcement officers' are empowered to enforce the RMA. While the specific job title of a council staff member undertaking this function may vary between councils, any staff member undertaking compliance, monitoring and enforcement (CME) activities with the appropriate warrant is an enforcement officer under the RMA.

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[40] Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

Warrants of authority

Section 38(1) of the RMA allows councils to authorise any of its staff (or any staff from another council, the Department of Conservation, or Maritime New Zealand) to carry out the functions and powers of an enforcement officer under the RMA. Councils must supply enforcement officers with a warrant, which authorises the enforcement officer to carry out their functions and powers under the RMA. The warrant of authority acts as a general authority to access sites in the relevant district or region; enforcement officers do not require site-specific warrants.

Enforcement officers must carry the warrant of authority at all times while exercising their functions and powers. In practice, this means an enforcement officer undertaking any of their duties (eg, carrying out an inspection relating to compliance monitoring, or collecting evidence in an investigation into a breach of the RMA) must carry their warrant.

Section 38(6) requires enforcement officers to "produce if required to do so, his or her warrant and evidence of his or her identity". The warrant must be produced upon initial entry to a site for inspection (under section 332(3), explained further in Power of entry), and if requested while on site. The identification requirement can be met by including photographic identification of the enforcement officer on the physical warrant.

Enforcement officers must surrender their warrants to the council on termination of their appointment to that role (section 38(7) of the RMA).

Power of entry

Enforcement officers have the power to enter a site to carry out an inspection under section 332 of the RMA. This section states that an enforcement officer who has been specifically authorised in writing by a council is allowed to enter a place or structure (excluding a dwelling house) at any reasonable time to determine compliance with the RMA, regulations, plans, or resource consents. It also states that during the inspection they may take samples of soil, water, air, or organic matter, and of any substance that may be a contaminant.

When and how power of entry for inspections can be used[41]

The power may be used at all reasonable times

This is dictated by the context of the event or actions that require inspection. For example, a night-time visit to a farm that is allegedly discharging effluent into a stream at night would be reasonable. On the other hand a routine inspection at 4.00 am might be viewed as unreasonable.

The power allows the enforcement officer to go on, into, under or over a place or structure except a dwelling house

Authority to enter a dwelling house is explicitly excluded from section 332. It is important to note that a dwelling house can have quite a broad application and can include such things as

[41] Excerpts taken from: Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

caravans, the bunkhouse of a commercial fishing vessel, or anywhere a person might expect to have privacy associated with personal living space.

What is allowed by this section is a fairly exhaustive inspection of everywhere else on a particular property or structure. The power allows for all manner of inspections that you might be involved in, which may range from a brief look at a surface water pump through to a full inspection of a landfill construction.

The authority for inspection is very wide and is obviously designed to allow the council to test compliance under the RMA. But that authority is limited in a wider sense and doesn't authorise entry for any reason. For example, entry to collect a debt on behalf of the council is not authorised.

Samples of water, air, soil or organic matter (or any substance that might be a contaminant of those things) may be taken

Section 332 sets out that samples may be taken for two distinct purposes. An enforcement officer may take samples of water, air, soil or organic matter for the purposes of determining compliance.

An officer may also take samples of any substance that they have reasonable cause to suspect is a contaminant of any water, air soil or organic matter.

Warrant of appointment and written authority must be produced on entry or upon any reasonable request

If practical, the first step the enforcement officer must take on entering the property is to attempt to find the owner or occupier and produce their warrant. This does not mean for the enforcement officer to release it from their possession – produce it, but do not hand it over. In addition, if an owner or occupier asks to see the warrant again, it should be shown. If more than one enforcement officer inspects, each officer should produce his or her warrant. It is not sufficient for only one to do so.

Using any reasonable assistance

An enforcement officer exercising any power under section 332 may use such assistance as is 'reasonably necessary'. This may include people or equipment needed to complete the inspection. For example, an enforcement officer might ask a wetland ecologist to accompany them to determine if a particular wetland meets the requirement of special classification in a regional plan.

Notice of inspections[42]

If the owner or occupier is not present at the time of inspection, the enforcement officer is required (under section 332(4)) to leave a notice of inspection in a prominent position, outlining the date and time of the inspection, and the enforcement officer's name. An officer can use common sense to identify a prominent position, which is not necessarily the point of

[42] Excerpts taken from: Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

entry. If an officer enters a paddock several kilometres from the farm owner's house, it would be sensible to call at the house and leave a notice there. It is also good practice for an officer to take a photograph (and record in their notebook) where they left the notice, in case its existence is disputed later.

An example of a notice of inspection is provided in Waikato Regional Council's Basic Investigative Skills Manual.

Search warrants

As noted above, enforcement officers have power of entry to most locations under section 332 of the RMA. However, in circumstances that are excluded from section 332 a search warrant may be required. A search warrant would also be required if an enforcement officer returns to the property to gather further information or evidence for the same investigation as the original inspection or entry to the property, or to enter a dwelling house, or to seize exhibits (such as documents) which are not samples covered by s332(2) or s332(2A).

An officer can also obtain a written statement of informed consent from the landowner as an alternative to obtaining and executing a search warrant.

Applying for and executing a search warrant

For comprehensive guidance on applying for and executing a search warrant, refer to the Waikato Regional Council's Basic Investigative Skills Manual.

Scene attendance (practical)

This section does not cover health and safety requirements and considerations for enforcement officers while carrying out site inspections and investigations.

All councils should have health and safety policies and procedures in place, consistent with the Health and Safety and Work Act 2015. More information can be found at www.worksafe.govt.nz.

Field kit[43]

Councils should develop and maintain a field kit that is readily available for CME staff. Field kits go beyond the notebook and warrant of authority, which should be on an officer at all times.

As well as personal protective equipment, an enforcement officer's field kit should include:

- clothing appropriate to all possible weather
- notebook (discussed below)
- templated forms (such as a notice of inspection)
- camera, with video capability

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[43] Excerpts taken from: Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

- global positioning system
- spare batteries
- cellphone (and radio where appropriate for remote locations)
- 12-volt charger/device charger
- sampling gear (usually carried in vehicles), including:
  - chillybin or portable fridge
  - range of sampling bottles, to allow testing of a range of different contaminants or substances
  - a range of plastic and paper sealable bags
  - sampling stick
  - disposable gloves
  - hand sanitiser
  - spare pens/pencil for writing in wet
- spill kit.

Prior notice of inspections

Section 332 of the RMA, power of entry for inspection, allows an enforcement officer to enter a property "at any reasonable time". It does not require the council to give any prior notice of inspection. Unexpected inspections decrease the likelihood of consent holders hiding non-compliance, and help in establishing what is really happening on the site.

However, giving prior notice of inspections may be justified in some situations. Councils should have a clear and consistent approach to giving notice and the circumstances in which they may give prior notice of inspection. This will need to be set out in the council's compliance strategy.

Councils should consider the following when determining whether to give a site or activity prior notice of inspection.

- The reason for the inspection – is the inspection for the purposes of monitoring compliance with a resource consent, permitted activity monitoring, or as the result of an incident notification? While it may sometimes be appropriate to give prior notice for routine inspections, prior notice for a response to an incident notification will almost always be inappropriate. Enforcement officers need to respond swiftly in these circumstances to ensure adverse effects on the environment can be addressed as soon as possible to reduce the potential for environmental harm arising from the non-compliance. If the council has a contact person and details for the site/activity involved, and their presence may be of assistance, the council may want to contact them en route to the inspection. However, this should be done with some level of caution, depending on the event and seriousness of it, as prior notification could hinder the enforcement officer's potential to collect sufficient evidence.
- Activity-based considerations – for some activities it may be appropriate to give prior notice, to allow the enforcement officer to meet and speak with someone on site. For example, if the officer needs to be shown around the site and have the activities or processes being undertaken explained.

- The probability of significantly reducing the chance of finding non-compliance – this is linked to the type of activity that the inspection is for. If prior notice is given, it may give the consent holder an opportunity to make quick changes to cover up non-compliance (eg, by moving pumping equipment that had been used to discharge contaminants unlawfully into the environment).
- Health and safety considerations – certain sites may not be safe for an enforcement officer to enter alone, and they will require an escort around site during the inspection. This could include heavy industrial sites like active processing factories, quarries or landfills. It is important to note, however, that inadequate health and safety is not a valid reason for a person or company to 'deny' entry to an enforcement officer, and they should provide the officer with assistance to safely access the site.

Notebooks

Enforcement officers need to keep a detailed, accurate and permanent record of what they see and do on site. Notebooks, tablets or other record-keeping devises are useful for this purpose. Officers should take notes during or immediately after their inspection. This will allow them to remember or refresh their memory on events and observations at any point in the future.

Enforcement officers may be required to present their observations of an incident or site inspection months or even years down the track (eg, 12–18 months later in the case of a defended hearing for a prosecution) – and they will need to rely on their contemporaneous notes for this evidence.

The following is a list of things that officers should record in a notebook during a site inspection or investigation:

- date and time of inspection (ie, time of entering the property)
- job number (ie, link to incident notification database) or consent number/name – if applicable
- names and contact details of who the officer met with on site – including when and to whom they produced their warrant; if no one is present on site, then a record of the notice of inspection left
- detailed records of conversations had on site (including interviews)
- detailed observations (include sketches and diagrams) of what is seen on site, and when (include timestamps along the way)
- environmental observations (eg, weather conditions, ground conditions)
- records of photographs taken (of what, and when)
- records of any evidence taken (of what, when, and how, including photographs documenting collection of evidence)
- time of leaving the site
- following on from the inspection, the enforcement officer may also record in their notebook any follow-up conversations held about the inspection (eg, follow-up phone calls or emails).

If any of the provisions of section 332 (power of entry for inspection) are not strictly adhered to (eg, recording the time of presenting warrants for inspection, or time and location at which

an inspection notice was left), then the burden of proof is on the enforcement officer to prove they have acted lawfully. This may result in any evidence or information collected in the site inspection being unlawful and inadmissible in Court.[44]

On completion of an inspection, it is good practice for enforcement officers to find time immediately to review their notes and record any additional notes that were not written down at the time. Officers should write any such additional notes sequentially, following the notes taken on site, including recording the time that the additional notes were made. Officers should not edit their original notes. Enforcement officers may also find it useful to have a 'checklist' of information to be included in their notes to check off before they leave the site (or immediately after).[45]

Evidence collection

'Evidence' is a term given to information that supports a party's assertion of a fact, and for the council may include:

- photographs
- samples
- documents (such as sample results)
- maps
- records of interviews
- containers
- vehicles
- equipment
- a physical item.

The council must be able to prove that it is linked to the offence. It must contain its original qualities, and not have been swapped, tampered with, or otherwise corrupted (see also Chain of custody). Councils therefore need to develop quality assurance systems to ensure confidence in the chain of custody of items to be produced at Court, and preserve their qualities and integrity.[46] This could be as simple as scanning notebook pages to PDF documents as soon as they are final and have been signed and dated.

Photographs and video

During an inspection, an enforcement officer should take photographs or videos, provided they are relevant to their lawful purpose for being there. Photographs and videos can be used to strengthen evidence, and support or aid the memory of an enforcement officer (such as to provide a reconstruction of what has occurred on site). However, they cannot be relied upon on their own, as the primary evidence that will be relied upon in any Court is the testimony

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44 Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

45 Ibid.

46 Ibid.

and observations made by the enforcement officer. This means that contemporaneous notes taken during the investigation are the most important form of evidence, with photographs and videos being a tool to assist.[47]

When taking photographs and videos, it is important that enforcement officers record in their notebook what photographs or videos they took (ie, what they were showing, to put them in context when they are reviewed later). Officers need to ensure these images tell a story – this may include taking background or 'zoomed out' photographs, to be able to place a close up image in its context. Or for example, where a discharge is occurring, photographs or videos could be used to show the source of the contamination through to the end point where it is discharging. Any effects on the environment or any wildlife should also be photographed. Councils should consider training enforcement officers in taking evidential photos and videos.

Evidence collection – sampling

For the purposes of determining compliance, an enforcement officer is authorised (under section 332(2) and (2A)) to take samples of water, air, soil or organic matter, and of any substance they have reasonable cause to suspect is a contaminant of any water, air, soil or organic matter.

Enforcement officers should receive competency-based training in taking and handling samples for evidence collection, and have procedural documents readily available to them (ie, stored with the sampling kit). The analysed results of samples taken will often be required as evidence in an enforcement case, and the credibility of evidence will be tested there (eg, how it was taken, using what procedures, how it was handled and stored). Insufficient training in sampling techniques and handling could be enough to stop enforcement action from being taken, or a proceeding failing in Court.

Chain of custody

The chain of custody is the trail of accountability that ensures the security and integrity of a piece of evidence (eg, records, samples). The chain of custody ensures the piece of evidence is handled and stored correctly, and maintains its integrity as being in its original condition, without any tampering or interference.

Chain of custody can be proven by the use of a property record sheet, or a chain of custody form. These forms should specify:

- the name of the enforcement officer who took the sample or piece of evidence
- descriptive details of the item (ie, sample name/code and location)
- date and time taken
- location of the place the item was taken from
- who it was handed to (ie, at the laboratory, including time/date)
- where it was securely stored (eg, the council's secure evidence storage space).

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47 Adapted from: Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

Storage locations within council buildings should have restricted access.

In addition to chain of custody forms, the enforcement officer should take adequate notes in their notebook, and ensure all items of evidence are correctly labelled (ie, time/date, location, description, name of officer taking the item).[48]

File notes and preparation of an investigation file

Once an enforcement officer has undertaken the physical inspection of a site or incident, they should prepare a file note and case file (if applicable). A case file will only be required in a situation where non-compliance or potential non-compliance (ie, a breach of the RMA) is being investigated that may result in enforcement action. For a standard compliance inspection that does not uncover any non-compliance (or only a few minor issues), then a file note will suffice, along with any follow-up actions or communication to the consent holder.

File notes

A file note is written based on the contemporaneous notes taken in the enforcement officer's notebook at the time of the inspection. The file note should contain a summary of what the officer saw and did during the inspection, and include reference to any photographs or follow-up communications or actions undertaken.

The officer should complete file notes as soon as practical following the site inspection, and sign and date them. Officers won't generally be able to refer to a file note during an enforcement proceeding (unlike a notebook entry), but they can help an officer in refreshing their memory ahead of a hearing.[49]

Case/investigation file preparation

Councils should put together case files for any non-compliance where they have yet to decide whether to take enforcement action. Case files pull together all information and evidence to enable the council to make a decision as to what action they can or should take. Councils can use these case files to put together an enforcement decision recommendation to be taken to an enforcement decision group (see Part 7 – Enforcement decisions).

Officers should ensure that case files contain all information relevant to the matter under enquiry. This may include (note that some of these may not be applicable to every file):[50]

- case file index
- the document that alerted the officer to the incident (eg, an email from the council call-taker)
- notebook entries (where legible a photocopy of notebook, otherwise a photocopy of notebook and typed transcript)

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48 Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

49 Ibid.

50 Excerpts taken from: Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

- all other notes made in respect of the incident (such as file notes)
- all photographs taken, even if they are repetitive or of poor quality; only a few may be referred to or used, but they must all be retained and available for disclosure
- list of physical exhibits
- property record sheets
- analysis results
- copies of and transcripts of interviews and maps
- all background material (including planning and investigation information)
- certificate of title searches proving land ownership
- company register search results
- search warrant and application
- all correspondence (including emails), particularly if directly with an offender
- statements for each witness, or file notes for council staff members who are witnesses (a brief of evidence can be prepared on this if the defendant enters a plea of not guilty)
- media releases and subsequent articles.

Interviewing and statements

Interviewing is an important activity for any enforcement officer, and includes interviewing both witnesses and people who may have some culpability for RMA breaches. An interview is simply the formal asking of questions, to obtain information and facts or to corroborate information already gathered. The end result of an interview will be a written statement or an audio/video recording. A statement can be defined as a formal account of facts. 'Taking a statement' requires that a:

- person is interviewed by a council staff member, generally an enforcement officer
- record is made, either in writing or through an audio/video recording, of that person's account of the facts related to the inquiry.[51]

All statements taken from witnesses or offenders are voluntary. Section 22 of the RMA provides for an enforcement officer to take only limited information from a person that they have reasonable grounds to believe is breaching or has breached any section of the RMA. The information an enforcement officer may direct a person to give is:

- their full name, address and date of birth (or just full name and address if they are not a natural person)
- the full name, address and date of birth of another person on whose behalf person A is acting (or just a full name and address if they are not a natural person).

It is an offence not to comply with section 22 under section 338(2) of the RMA.

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[51] Section taken from: Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

Witness statements

An enforcement officer can use witness statements to determine what has happened and who was involved, to help determine culpability. As stated above, a witness statement is voluntary, and the officer should brief the witness on what their statement may be used for. Generally, a witness statement would not be admissible evidence for the prosecution in Court, but can be used by the witness for any oral evidence they may be asked to present in an enforcement proceeding.

While an enforcement officer can take contemporaneous notes in their notebook of a conversation with a witness, a detailed account should be written out (this can be done by the enforcement officer on behalf of the witness) in the first person (of the witness) and signed by the witness and the enforcement officer. Alternatively, an audio recording can be taken of the interview with the witness.

A witness statement should include the following:[52]

- name and contact details of the witness and the enforcement officer (including signatures at the end of the statement)
- date, time and location of the incident or observation
- description of observations or sequence of events recorded in chronological order.

Enforcement officers should include witness statement templates as part of their field kit. An example of a witness statement is provided in Waikato Regional Council's *Basic Investigative Skills* manual.

Offender interviews

Unlike a witness statement, an offender interview can be used as evidence in Court during an enforcement proceeding. Enforcement officers must take into account and adhere to legal considerations when conducting an offender interview. These include requirements in the Evidence Act 2006 and the Bill of Rights 1990; these Acts ensure fairness to the offender (or suspected offender) and protection of their rights. When undertaking an investigation into a breach of the RMA, and in particular undertaking an interview with an offender, any breach of the Evidence Act 2006 or Bill of Rights Act 1990 will likely make any evidence or statements inadmissible in Court.

The sections below provide guidance on ways to ensure the rights of the offender are protected.

Cautioning an offender/suspect

When conducting an interview with an offender, the enforcement officer can fulfil their obligations under the Bill of Rights by issuing a 'caution' to the offender.[53] The caution the officer uses needs to advise the offender:

- of the reason for the interview, and the allegations they are facing (the specific breach of the RMA and what this may mean for them)

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52 Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

53 Ibid.

- that they are not required by law to say anything, and that anything they do say can be used in evidence
- that they are not detained
- that they have the right to consult with a lawyer.

Before proceeding with the interview the officer should confirm with the offender that they understand this advice. The caution given, plus the offender's confirmation of their understanding, needs to be a part of the interview record.

Interviews can be very challenging, and officers without appropriate training may carry out interviews incorrectly, seriously undermining the investigation. Only trained and experienced staff should carry out offender interviews, especially for serious matters that are likely to end up in Court.

The following guidelines have been taken directly from the Waikato Regional Council's *Basic Investigative Skills* manual[54] and represent best practice in undertaking a suspect or offender interview. Part 7 of the manual, 'Interviews and statements', provides further details around the Evidence Act and Bill of Rights and their application in an enforcement investigation context. It also contains further reading on the general principles of interviewing.

[54] Excerpts taken from: Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

GUIDELINES FOR INITIATING A SUSPECT INTERVIEW

Should you come across someone during the course of your work who may have committed an offence under the RMA and enforcement action is a possibility, you are obliged to seek their explanation. There are certain legal requirements that must be followed to ensure that their explanation is useable (admissible) should the enforcement action be defended or challenged. Essentially you are initiating a suspect interview. Whether this is recorded in your field notebook, or in a more formal setting, use the following format to ensure admissibility. Remember any comments made by the subject prior to them being properly cautioned, as below, may NOT be admissible:

Introduction

Introduction of self (name and designation), time, date, place.

Introduction of person being interviewed and anyone else present (other staff or lawyer etc).

Confirm personal details of interviewee:

- full name
- date of birth
- occupation
- employer
- work contact details
- home address
- home contact details.

Advice and caution

The purpose of this interview is to seek your explanation, or your version of events. In respect of ....(purpose of interview, factual subject matter, type of allegations).

Such matters may constitute an offence or offences under the Resource Management Act 1991.

I advise you that you are not obliged to say anything and anything you do say may be used in evidence.

I have asked you to take part in this interview but I must stress that you are here of your own free will and you are not detained nor have you been charged in respect of this matter.

I also advise you that you have the right to consult and instruct a lawyer without delay and in private. Do you understand this advice?

(If lawyer present)

Should you wish to confer with (lawyer) during this interview please let me knew and a facility to speak in private will be provided.

Do you understand that this interview is being recorded by way of video? (Only if interview recorded.)

Guidelines

Then commence interview, record both your questions and their answers. (Q and A) In a written statement it is not possible to capture every word said 'verbatim'.

If their answers are overly long or not relevant to your questions it is okay to paraphrase their answers. Explain this to them so they do not think you are changing their words.

Head up each new page with "(Surname) statement continued (page number)".

At the conclusion of the interview allow person to read the statement, or read it to them. They are entitled to make any additions or amendments they wish.

Ask them to initial any amendments then sign each page endorsing the end of the statement with

"I have read this statement, it is true and correct."

Conclude interview by signing each page yourself then writing at the end of the statement.

"Statement taken and signature witnessed by (your name and designation)."

End with your signature and time of conclusion.

Part 7 – Enforcement decisions

Overview of enforcement decisions

While the Resource Management Act (RMA) and subsidiary instruments (eg, plans, national environmental standards) set out the framework for determining where a breach has occurred, these instruments do not prescribe how councils should respond to a suspected breach. Councils have discretion to determine the appropriate response. It is important that councils have robust processes to guide this decision-making process.

This section explains how enforcement decisions should be made, including who should be involved in making decisions and what factors should be considered.

When a council detects non-compliance with the RMA, it can choose to address the non-compliance informally (eg, through education or a verbal warning) or take enforcement action, or a mixture of both. The purpose of enforcement action is to punish the offending, deter future offending, and/or direct remediation of the damage. **Non-compliance** means any breach of a rule, condition, standard, direction or regulation made under the RMA.

A range of non-statutory and statutory enforcement tools are available to councils to respond to non-compliance, so they can tailor their response to the nature and severity of any offending.

The RMA provides enforcement tools that are either:

- punitive (infringement notice and prosecution)
- directive (abatement notice, enforcement order).

Non-statutory tools include written or verbal directions, further inspections, and written or verbal warnings. For information on enforcement tools see Part 8 – Enforcement tools.

In *Machinery Movers Ltd v Auckland Regional Council*,[55] the High Court noted that the wide range of enforcement powers available under the RMA allows for "a flexible and innovative approach to sentencing, which seeks not only to punish offenders but also to achieve economic and educative goals".[56] Councils must give careful thought as to which tools to use, and monitor the effectiveness of the tool in achieving compliance (eg, through follow-up inspections); and escalate the response when needed.

It is important councils have robust enforcement decision-making processes in place to ensure:

- consistency of decision-making – to ensure a fair outcome for the individuals involved, decisions need to be made in a consistent manner
- efficiency – an established process will enable decisions to be made efficiently
- transparency – an established process, especially if this process is documented and made publicly available, will allow the public to understand how their non-compliance will be dealt with, enabling predictability of outcomes

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55 *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC).

56 Ibid.

- legality – decisions need to be legally robust and, if Court processes are involved, meet all related standards
- independence – decisions are free of political influence, and decision-makers appropriately manage any conflicts of interest
- public interest – the outcomes account for public interest factors relevant to both the offender and the public.

The RMA does not prescribe a process for making decisions on enforcement actions, nor give indication of the scale/severity of the offence justifying each enforcement action; so councils have discretion to determine their own processes. This section provides guidance on how to exercise this discretion and make good enforcement decisions.

The *Solicitor-General's Prosecutions Guidelines*[57] also need to be applied when making decisions about prosecutions. While not directly applicable to other enforcement decisions, councils may also wish to consider the principles set out in the Solicitor-General's guidelines in making all enforcement decisions.

Why take an enforcement action?

Enforcement actions have five main purposes. To:

- penalise the offender
- deter the offender from future offending (specific deterrence)
- deter future offenders (general deterrence)
- prevent further or future non-compliance (eg, through the use of abatement notices or enforcement orders)
- direct remediation of any damage.

Taking enforcement actions also helps regulators build credibility:

> Each higher-order enforcement response carries with it a multiplier effect in its deterrent value. Initially, to build credibility, officials may be forced to utilize more costly formal administrative or judicial action. When a track record is established the expectation is that in most instances a simple notice will send violators scrambling to resolve quickly a compliance problem or negotiate its resolution cooperatively.[58]

Who can bring enforcement actions?

Enforcement action for non-compliance is normally brought by councils (as described in this section). Private individuals/organisations are also able to apply for an enforcement order and take a prosecution under the RMA. However, only enforcement officers (authorised by a council under section 38 of the RMA) can issue an infringement or abatement notice.

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57 Crown Law. 2013. *Solicitor-General's Prosecutions Guidelines*. Wellington: Crown Law. Retrieved from www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf.

58 Wasserman C. 1992. Federal Enforcement: Theory and Practice. In: TH Tietenberg (ed) *Innovation in Environmental Policy*. Cheltenham: Edward Elgar Publishing. Pages 21–23.

Actions brought by individuals/organisations

Any person may apply to the Environment Court for an enforcement order (section 316(1)) or an interim enforcement order (section 320). These actions are described in Part 8 – Enforcement tools.

The Criminal Procedure Act 2011 applies to offences under the RMA and allows any person to take a prosecution under the RMA. The person beginning the prosecution must have good cause to suspect the defendant has committed the offence.[59] Private prosecutions under the RMA are rare, because of the considerable costs and time involved, and the difficulties obtaining evidence. Further, it is the role of councils (rather than the public) to implement the RMA, which includes taking prosecutions where appropriate.

Individuals and organisations also have the option of seeking injunctive or other public law remedies, including:

- judicial review in the High Court, if it is alleged the decision, action or omission by a public authority (which includes councils) is invalid or unlawful (see the Ministry of Justice website for further information)
- an Environment Court declaration (under section 311), to clarify whether any particular action or incident complies with a plan rule, resource consent condition or regulation
- a damages claim, in which compensation is sought in the general Courts (either District Court or High Court, depending on the monetary value of the claim) (see the Ministry of Justice website for further information).

Who can an enforcement action be brought against?

An enforcement action can be brought against any person who has breached the RMA.[60] A 'person' is defined in section 2 as including "the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporated."

There may be multiple parties who contributed to the breach (or breaches) of the RMA, each with differing levels of responsibility/culpability for the breach. Each party needs to be separately considered (applying the enforcement factors outlined in Determining what enforcement action to take) as to the appropriateness of an enforcement action.

When can an enforcement action be taken?

The table 2 sets out when an enforcement officer can take enforcement action in response to non-compliance. Part 8 – Enforcement tools provides a summary of the enforcement tools that can be used to penalise/deter non-compliance.

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59 Criminal Procedure Act 2011, section 16(2)(c).

60 Note that not all breaches constitute an offence against the RMA punishable by infringement notice or prosecution (see table 2).

Table 2: Types of non-compliance

Breach of:	Explanation/example	Offence against the RMA?	Relevant sections of the RMA
Resource consent condition	A breach of a consent condition means the activity to which the breach relates is no longer expressly authorised by the council. For example, a consent condition specifies that the consent holder must submit a farm management plan, and the consent holder fails to do so.	No (unless there has been a breach of one or more of the other categories below, which are offences against the RMA). However, the activity to which the breach relates is no longer expressly authorised by the council.	Sections: • 322(1)(a)(i) (on abatement notices) • 314(1)(a)(i) (on enforcement orders) • 338(1)(a) and (b) (for breach of an abatement notice or enforcement order)
Regional or district rule	Where the activity falls outside of what is permitted in the plan (eg, in relation to noise, light spill, height of buildings, discharge rates or volume of earth that can be moved), or by failing to comply with the requirements, conditions and permissions specified in a permitted activity rule. A breach of a plan rule means the activity to which the breach relates is not expressly authorised by the council.	Yes	Section 87A and sections 9(2) and 9(3)
National environmental standard	A person burns a tyre, in contravention of clause 7(1) on the Resource Management (National Environmental Standards for Air Quality) Regulations. This amounts to an offence against the RMA.	Yes	The relevant national environmental standard and section 9(1)
Designations and heritage orders	A person demolishes an historic bridge that is subject to a heritage protection order. This amounts to an offence against the RMA.	Yes	Sections 338(1)(a), 9(4), 176, 178, 193 and 194
Duties and restrictions set out in sections 9, 11–15 of the RMA (concerning the use of land, the coastal marine area, the beds of certain rivers and lakes, water, and discharges of contaminants)	Breaches of sections 9, 11–15 amount to offences against the RMA, unless they are expressly authorised by a regional or district plan rule, national environmental standard, regulation, or resource consent. For example, discharge of: • effluent into a river • oil into coastal marine area.	Yes	Sections 9, 11–15, 338(1) and (1B)
Duty to avoid unreasonable noise	Breach of duty to avoid unreasonable noise (unless permitted by a plan, national environmental standard or resource consent).	No	Sections 16, 322(1)(c), 326–328 and 338(2)

Breach of:	Explanation/example	Offence against the RMA?	Relevant sections of the RMA
Breach of an excessive noise direction or an abatement notice for unreasonable noise	A person has been issued an excessive noise direction and/or an abatement notice for unreasonable noise and fails to comply with that direction.	Yes	Sections 327; 322(1)(c) and 338(2)(d)
Administrative matters set out in section 338(3)	Miscellaneous matters relating to the administration of the RMA, including obstruction of enforcement processes. For example, if a person obstructs an enforcement officer from carrying out an inspection, they are committing an offence under section 338(3) of the RMA.	Yes	Sections 338(3), 283, 41, 237C
Breach of an abatement notice, enforcement order or water shortage direction	Failure to comply with an abatement notice, enforcement order, or water shortage direction constitutes an offence under the RMA.	Yes	Sections 338(1)(b), 338(1)(c) and 338(1)(d)

Enforcement policies

All councils should have an operational enforcement policy, which the council uses to determine what enforcement action (if any) to take in response to non-compliance. The enforcement policy should be consistent with the council's compliance strategy (see Part 2 – Strategic approach to achieving compliance), and may be a part of that document.

Enforcement policies provide for consistency and transparency in decision-making, and ensure enforcement decisions are robust and taken in appropriate circumstances. Many councils have made their enforcement policies publicly available. This allows the public to better understand how the council is likely to respond to non-compliance and know what to expect.

An enforcement policy may cover how:

- a suspected offence will be responded to and an investigation will be conducted, evidence gathered, and an explanation sought from the offender (see Part 6 – Approach to site inspections and incident investigations)
- any actual or potential effects of non-compliance will be addressed – for example, through written/verbal direction, an abatement notice, or enforcement order to prevent further environmental damage starting or continuing
- the enforcement response will be determined – what factors will be considered, how decisions will be made (and who will make them)
- the enforcement decision will be monitored for effectiveness, and further enforcement action will be taken, if needed.

Examples of good enforcement policies include:

- Tasman District Council's Enforcement Policy
- Waikato Regional Council's Enforcement Policy.

The Public Prosecution Unit (Crown Law) can help councils develop enforcement policies. The Waikato Regional Council's Enforcement Policy, for example, was reviewed by the Public Prosecution Unit.

Making enforcement decisions

Council staff should consider a number of factors in determining whether an enforcement action is appropriate and what enforcement action to take in response to non-compliance.

The first step in the process is to establish whether a breach of the RMA has occurred. To determine this, the enforcement officer should consider the ingredients (or elements) of the offence. All ingredients of the offence need to be present and able to be proven through evidence. This should be checked and verified by the officer's supervisor.

Ingredients of the offence[61]

The ingredients of offences are described as the details or components that are unique to a specified offence. Where there is a selection of ingredients available under one section, it is up to the enforcement officer to identify which is the most appropriate ingredient to pursue (ie, it is very important to determine whether it is an 'and' or an 'or').

For example: An enforcement officer has identified that a dairy farmer has unlawfully discharged dairy effluent directly from his irrigator into a stream. The separate ingredients of this offence are found in section 338(1)(a) and 15(1)(a) of the RMA. Ingredients of the offence:

- a person (identify the offender)
- on or between a particular date(s)
- at a particular location
- contravened section 15(1)(a) of the RMA by permitting the discharge of a contaminant (namely farm animal effluent) into water (namely the 'example' stream) when the discharge was not expressly allowed for by a national environmental standard or other regulations, a rule in a regional plan, or a resource consent.

Each of these ingredients have to be individually considered, established and to be able to be proven beyond reasonable doubt if an alleged offender is to be found guilty of committing this offence.

The terms 'elements' and 'ingredients' are sometimes confused and used interchangeably. In practice, the difference is academic. What is important is that enforcement officers understand how to identify and define the components of an offence that they must prove.

61 Extract taken from *Basic Investigative Skills for Local Government*. Hamilton: Waikato Regional Council. Retrieved from www.waikatoregion.govt.nz/Services/Regional-services/Investigation-and-enforcement/Basic-investigative-skills-for-local-government/.

As well as establishing the 'ingredients' of the offence, the council should also consider:

- The **statutory limitation period** (for infringement notices and prosecutions):
  - For prosecutions – under section 338(4) of the RMA, any charging document must be filed **within six months** "after the time when the contravention giving rise to the charging document first became known or should have become known" to the council.[62] If the decision is being made outside of this period, the council cannot prosecute, but other enforcement actions can be taken.
  - For infringement notices – it is best practice for councils to issue an infringement notice as soon as practicable after the offence has been detected and information is collected. However, to comply with the reminder notice and court enforcement provisions in section 21 of the Summary Proceedings Act 1957, the initial infringement notice should be issued promptly and, in any event, within **three and a half months** of the date of the alleged offending.
- **Enforceability of the rule or condition** (see also Part 9 – Writing consent conditions and plan provisions to allow for compliance, monitoring and enforcement) – is the consent condition or plan rule clearly drafted so that non-compliance can be determined? It is very difficult to establish non-compliance against an ambiguously drafted plan rule or consent condition.
- The **standard of proof** required – will the council be required to establish the breach beyond reasonable doubt or on the balance of probabilities? See Part 8 – Enforcement tools.
- **Statutory defences** – does the offender have a statutory defence under sections 340 and 341 of the RMA?

Determining what enforcement action to take

Once a council has established that a breach has occurred, a number of factors should be considered to determine the severity of the breach and what enforcement action to take. The factors (set out below) are a combination of:

- the factors developed by the Solicitor-General in the *Prosecution Guidelines*[63]
- the factors applied by the High Court in Machinery Movers Ltd v Auckland Regional Council[64]
- other factors developed by CME staff in councils.

These factors can be applied to determine the appropriate response to the non-compliance, and may be incorporated into a decision matrix (see Use of an enforcement decision matrix).

Decision-makers should not consider factors relating to other legislation – for example, whether a person has also breached the Building Act 2004.

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62 A charging document is a document that begins proceedings in the District Court. This process is also sometimes referred to as 'laying information'.

63 Crown Law. 2013. *Solicitor-General's Prosecutions Guidelines*. Wellington: Crown Law. Retrieved from www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf.

64 *Auckland Regional Council v Machinery Movers* [1994] 1 NZLR 492.

Factors to consider in determining the response to non-compliance

1. Impact of the non-compliance – the significance of the actual or potential effects
    - What were, or are, the actual adverse effects on the environment?
    - What were, or are, the potential adverse effects on the environment?
    - What is the value or sensitivity of the receiving environment or area affected?
    - What is the toxicity of discharge?
    - Was the receiving environment of particular significance to iwi?
2. Nature of the offending
    - Conduct of the offender: Was the breach as a result of deliberate, negligent or careless action? What degree of due care was taken and how foreseeable was the incident? Was there any profit or benefit gained by the alleged offender(s)?
    - Action taken or degree of remorse shown by the offender: What efforts have been made to remedy or mitigate the adverse effects? What has been the effectiveness of those efforts?
    - History of the offender: Is this a repeat non-compliance, or has there been previous enforcement action taken against the alleged offender(s)? Was there a failure to act on prior instructions, advice or notice?
    - Potential of reoccurrence: Is this incident a one-off, or is it likely to reoccur? Have steps been put in place to prevent future occurrence?
3. Legal considerations
    - How does the unlawful activity align with the purpose and principles of the RMA?
    - If being considered for prosecution, how does the intended prosecution align with Solicitor-General's *Prosecution Guidelines*[65]?
4. Desired outcomes
    - Is there a desired environmental outcome? What enforcement action is appropriate to achieve this outcome?
    - Degree of specific/general deterrence required: Is there a degree of specific deterrence required for the alleged offender(s)? Is there a need for a wider general deterrence for this activity or industry?
    - Is the proposed enforcement action the most cost-effective for the particular level of offending and the desired outcomes sought?

Not all of these factors will be applicable in every case. Experienced officers will probably give consideration to many of these almost subconsciously. However, while experienced officers just 'know' when action needs to be taken, this knowledge still needs to be verbalised and committed to paper. An example of an enforcement template is provided below. This record demonstrates that appropriate consideration has been given to each point and the subsequent decision can be justified.

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65 Crown Law. 2013. *Solicitor-General's Prosecutions Guidelines*. Wellington: Crown Law. Retrieved from www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf.

Enforcement recommendation for an enforcement decisions group[66]

- Date
- Incident title
- File reference
- Location of offence
- Action taken already
- Date offence occurred
- Date council became aware of the offence
- Evidence of offences (summary of offence, witness statements etc)
- Adverse effects (actual and potential, value and sensitivity of the area affects etc)
- Evidence collected (copy of resource consent, field notes and sketches, incident summary report etc)
- Responsible parties (complete for every responsible party):
  - person/company
  - address
  - role (eg, landowner)
  - breaches (eg, consent condition, RMA regional rule etc)
  - mitigating and aggravating factors (eg, degree of foreseeability, attitude, action taken to deliberativeness, motivation)
  - defences
  - compliance history
  - recommendation
  - reason
- Officer's comments on public interest
- Additional information
- Officer's name, date and signature

It may be helpful to review case law involving similar breaches to understand how a Court deals with the offending. Anyone can search for similar Environment Court decisions and District Court decisions. Case law summaries are provided by legal databases, such as Westlaw, LexisNexis and rma.net.

The following factors must also be considered when a prosecution is being contemplated.

66 Adapted from an internal document provided by Greater Wellington Regional Council.

Factors to consider in taking a prosecution

The Solicitor-General's *Prosecution Guidelines*[67] require two tests to be met for a prosecution to be taken:

1) **The evidential test:**

   There's a reasonable prospect of a conviction if there is credible evidence that the prosecution can present to a Court in regard to the identifiable person (whether natural or legal), and on which a jury (or judge) could be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

2) **The public interest test:**

   Broadly, the public interest requires the person (natural or legal) is prosecuted where criminal law has been contravened. This provides the starting point for considering each individual case. In some instances the serious nature of the case will make the public interest in prosecuting a very strong one. However, prosecution resources are not limitless. There will be circumstances in which, although the evidence provides a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest. Prosecutors for instance should consider the appropriateness of any diversionary option (especially if the defendant is a youth).

Factors relevant to the public interest, which the prosecuting agency may wish to consider, include:

- seriousness or triviality of the alleged offence
- mitigating or aggravating factors
- age, physical and/or mental health of the offender
- degree of culpability of the offender
- effect of a decision not to prosecute on public opinion
- whether the prosecution might be counter-productive
- availability of alternatives to prosecution
- prevalence of the offence and need for specific and general deterrence
- whether consequences of a prosecution would be unduly harsh and oppressive
- reparation or compensation issues on conviction
- victim's or complainant's attitude to the crime
- length and expenses of a prosecution
- cooperation of the accused.

[67] Crown Law. 2013. *Solicitor-General's Prosecutions Guidelines*. Wellington: Crown Law. Retrieved from www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf.

Equally important are matters that must not be taken into account:

- colour, race, ethnicity, sex or marital status, religious, ethical or political beliefs
- personal knowledge of the offender
- political advantage or disadvantage to the prosecuting agency
- the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

Use of an enforcement decision matrix

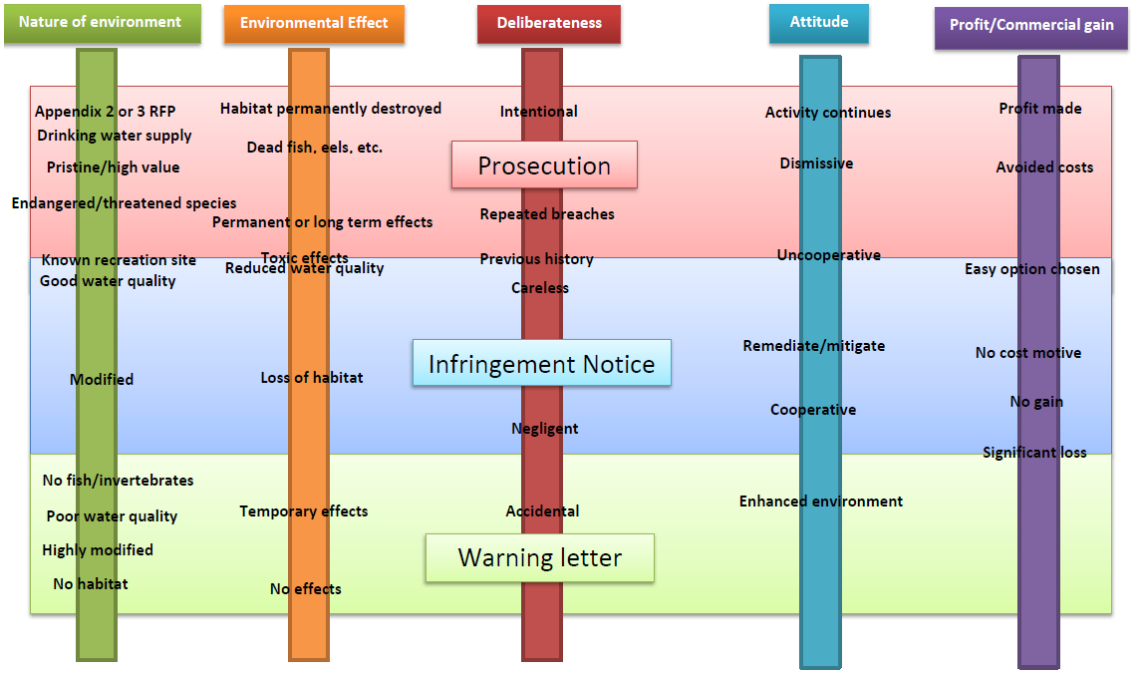
Some councils use an enforcement decision matrix to determine the appropriate enforcement action (if any) to take in response to non-compliance. Other councils prefer not to use a matrix approach, but to consider the circumstances of each breach, weighing and balancing the relevant enforcement factors (set out above).

The matrix can be used as an aid for having conversations (eg, by the enforcement decisions group or CME staff member and manager) on the appropriate response to non-compliance, and should not be used as a formula for determining the appropriate response in every case.

Some councils use weighted enforcement matrices, by giving each of the relevant factors a score and a weighting (eg, for significant factors, such as the adverse effects on the environment, this might be multiplied by three). The weighted scores can be added together to give an indication of the level of severity of the response – for example, if the score is very high, a prosecution may be justified. Weighted enforcement matrices should be used as an indication of the appropriate response, rather than a formula that will definitively determine the response.

An example of an enforcement matrix is provided below.

Figure 4: Enforcement decision matrix (Greater Wellington Regional Council)



Enforcement decision-making process

Decision-making processes on enforcement actions vary between councils. This section sets out processes and policies that are recognised as good practice.

Where non-compliance is detected, enforcement officers should discuss the response with their colleagues and manager or team leader before initiating the action, to ensure the most effective and appropriate tool is used, and a consistent approach is taken in addressing non-compliance.

For minor breaches (weighing up the enforcement factors above), the decision on the response may be made by the frontline enforcement officer and/or his or her team leader or manager.

Where the breach is significant (taking into account the enforcement factors above) and an infringement notice, enforcement order or prosecution is contemplated as a response, the decision should be referred to an enforcement decision group, if the council has one, or a group of experienced staff to determine the appropriate response.

Before the case is referred to an enforcement decision group, the CME team leader/manager should check to ensure there is sufficient evidence to support the case (assuming the case could result in an infringement notice or prosecution). The team should also complete a case write-up for referral of a decision to an enforcement decisions group.

Enforcement decision group

It is good practice for councils to establish an enforcement decision group, to consider cases where an infringement notice, enforcement order, or prosecution is recommended as the appropriate response.

Enforcement decision groups ensure decisions are made in a consistent way, and that the decision is robust and credible. The group can also protect the relationship of frontline enforcement officers with the public, as the decision to take an enforcement action is not solely the staff member's.

Membership

If an enforcement decision group is used, the composition of the enforcement decision group may consist of:

- a CME staff member (not the staff member responsible for the case, although that staff member should attend to help present the case and answer questions)
- the CME team leader
- the group manager.

Some councils have an open enforcement decision group, which can be attended by any interested staff members. This allows other council staff who have an interest in the case (eg, an engineer responsible for work on the site, or the staff member who processed the resource consent) to inform and contribute to the discussion. The final decision, however, should sit with the core members of the group.

Decision-making process

If a council has an enforcement decision group set up, the frontline enforcement officer responsible for the case should present the case and make a recommendation on the appropriate response. Once the initial presentation is made, the enforcement officer should hand over the case to the group to make the final decision.

The enforcement decision group then discusses the case, applying the:

- relevant decision-making factors (set out in Determining what enforcement action to take)
- council's compliance strategy and enforcement policy (if separate).

In cases where there is insufficient information or evidence to support the decision, the group may refer the case back to the team leader/frontline enforcement officer to investigate further, before the group considers it again.

When considering prosecution as a response to the non-compliance, some councils have an additional (or alternative) step where the decision, after being considered by the enforcement decision group, is referred to a prosecution group. The prosecution group will have similar membership to the enforcement decision group, but may also include a lawyer. This group may seek independent legal review of the case, to ensure the case is complete and there is sufficient evidence to support a prosecution, before making a final decision on whether to take a prosecution.

The enforcement decision or prosecution group's decisions to prosecute should be contingent upon independent legal review which is carried out before a prosecution is initiated, to ensure the public interest and evidential-sufficiency tests are met. If the legal opinion suggests both of these tests are met then the council has the final decision as to what charges are filed, and against which defendant.

Role of councillors in enforcement decision-making

Councillors are responsible for setting policy and reviewing council performance, in accordance with their local government statement.[68]

Councillors can be involved in setting compliance policy for CME activities. A report by the Auditor-General in 2011[69] explained that "councillors should endorse an enforcement policy and expect staff to apply such a policy equally".[70]

However, decisions about whether to take an enforcement action in any particular case **should not** be made by councillors, due to the risk or the perception of, decisions favouring certain groups/individuals.

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68 A statement prepared under section 40 of the Local Government Act 2002, which sets out how the council will engage with their communities.

69 Crown Law. 2013. *Solicitor-General's Prosecutions Guidelines*. Wellington: Crown Law. Retrieved from www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf. Page 68.

70 Controller and Auditor-General. 2011. *Managing freshwater quality: challenges for regional councils*. Wellington: Controller and Auditor-General. Retrieved from www.oag.govt.nz/2011/freshwater.

The Auditor-General has stated that councillors should not be involved in any enforcement decision-making.[71] The Auditor-General recommended in 2011 that councils review their delegations and procedures for prosecuting, to ensure any decision about prosecution is free from actual or perceived political bias.

The 2013 *Solicitor-General Prosecution Guidelines* also state that:[72]

> … the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise. All government agencies should ensure the necessary processes are in place to protect the independence of the initial prosecution decision.

Although the Solicitor-General's Prosecution Guidelines are intended to guide prosecution decisions, the principles in the Guidelines can be applied to enforcement decisions more broadly.

Role of chief executives in enforcement decision-making

Under the Local Government Act 2002 (LGA), chief executives must ensure as far as practicable that the management structure of the council "reflects and reinforces the separation of regulatory responsibilities and decision-making processes from other responsibilities and decision-making processes".[73] This reinforces the need for a separation of governance functions, as set out in section 39(c) of that Act.

Chief executives are appointed by elected representatives and may be perceived as being subject to administrative or political pressures to make a particular decision. To ensure the final decision-maker is seen to be free from political influence, it is good practice for final enforcement decisions to be delegated to the regulatory manager or other suitable decision-maker in the council. Chief executives and other executive council staff should be briefed on all moderate and significant risk enforcement decisions.

Currently a number of councils have a policy of the chief executive approving prosecutions. This practice is acceptable, provided appropriate measures are in place to ensure a robust and transparent decision-making process. The chief executive must be independent of political influence, have enforcement knowledge and experience, and an understanding of the council's enforcement policies and priorities.

Evaluating the effectiveness of the enforcement response

Once a decision to take (or not to take) an enforcement action is made, and the effects of the response can be observed, the effectiveness of the response should be assessed. Where the enforcement action has been unsuccessful (eg, the person fails to take the action needed to address the non-compliance), the council should consider escalating the response, which may

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71 Crown Law. 2013. *Solicitor-General's Prosecutions Guidelines*. Wellington: Crown Law. Retrieved from www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf.

72 Ibid.

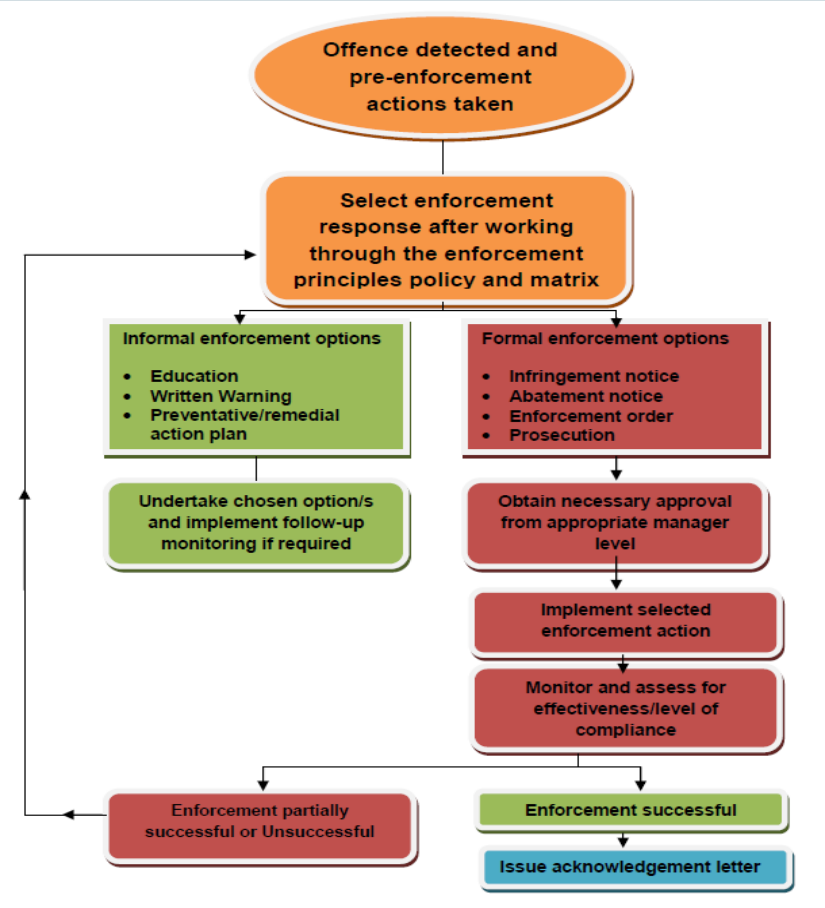
73 Local Government Act 2002, section 42(3).

be to take more severe enforcement action. The evaluation process is set out in Tasman District Council's Enforcement Policy, shown below.

Figure 5: Enforcement Policy (Tasman District Council)[74]

To develop an effective enforcement process in council, staff should evaluate all enforcement action undertaken by officers for effectiveness in achieving the desired outcome. In both successful and unsuccessful actions where further enforcement action was required it is useful to examine what was effective or not, and what could have been improved or changed to make the process more effective. This information should be fed back to the Regulatory Manager and Environmental Information Manager to implement change if necessary.

The following diagram presents an overview of the enforcement selection process that should occur in deciding an appropriate response to detected offending.



[74] Tasman District Council. 2016. *Tasman District Council Enforcement Policy and Guidelines.* Richmond: Tasman District Council. Retrieved from http://www.tasman.govt.nz/policy/policies/enforcement-policies/.

Part 8 – Enforcement tools

Overview of enforcement tools under the RMA

While Part 7 – Enforcement decisions gives councils guidance on making a decision in response to non-compliance, this section describes how each tool works and what they achieve.

A range of formal enforcement tools is available to councils to respond to non-compliance. The Resource Management Act provides enforcement tools that are both punitive (infringement notice, prosecution) and directive (abatement notice, enforcement order). Formal written warnings and letters of direction are non-statutory options available to councils to admonish offenders and direct restorative action.

The range of enforcement options allows councils to tailor their response to the nature and severity of offending. A full description of the enforcement tools in the RMA is provided in table 3.

Table 3: Summary of non-statutory and statutory enforcement tools for responding to RMA non-compliance

Enforcement actions	Description	Directive or punitive?	Relevant section(s) of the RMA	Maximum penalty available
Verbal or written direction	Advice (either verbal or written) that a breach of the RMA has occurred (or may occur) and that the offending party needs to take or cease a particular action.	Punitive and/or directive	Non-statutory tool	None
Formal warning letter	A formal warning letter informs a person/company that they have breached the RMA. The letter forms part of the formal history of non-compliance, which can be used to inform future enforcement decisions, and can also be used as evidence in Court, if a prosecution is later taken. A formal warning can have a range of uses, and councils can tailor the tone and content of the letter as appropriate.	Punitive and/or directive	Non-statutory tool	None
Water shortage direction	Where there is a "serious temporary shortage of water", regional and unitary councils may issue a direction to apportion, restrict or suspend the "taking, use, damming, or diversion of water" or "the discharge of any contaminant into water".	Directive	Section 329	The direction itself does not carry a penalty, but breach of a direction is a prosecutable offence under section 338(1).

Enforcement actions	Description	Directive or punitive?	Relevant section(s) of the RMA	Maximum penalty available
Abatement notice	An abatement notice is a formal written direction, requiring certain actions to be taken or to cease within a specified time. Generally, abatement notices are used when non-compliance has been detected and the offender needs to 'avoid, remedy or mitigate' the damage to the environment.[75]	Directive	Sections 322–325B	The abatement notice itself does not carry a penalty, but breach of an abatement notice is a prosecutable offence under section 338(1).
Infringement notice	An infringement notice is a written notice accompanied by a fee, which informs a person that an offence has been committed under the RMA. The purpose of infringement fees is to deter conduct that is of relatively low seriousness and that does not justify the full imposition of the criminal law. No criminal convictions can be imposed through infringement notices.	Punitive	Sections 343A–343D; and Resource Management (Infringement Offences) Regulations 1999	Fines currently range between $300–$1,000, as set out in Schedule 1 of the Resource Management (Infringement Offences) Regulations 1999 (except under section 360(1)(bb) in relation to stock exclusion, where the fine can be up to $2,000).
Enforcement order	An enforcement order is an order made by the Environment Court that requires certain actions to be taken or activities to cease within a specified time, where the Environment Court believes the activity breaches or is likely to breach the RMA. An application for an enforcement order can be made by any person to the Environment Court.	Directive	Sections 314–319 and 321	The Environment Court may direct the offender to pay costs to 'avoid, remedy or mitigate' the damage to the environment. Breach of an enforcement order is a prosecutable offence under section 338(1).
Interim enforcement order	An interim enforcement order is similar to an enforcement order and is used in circumstances where the need for the order is urgent. Applications are usually dealt with by the Environment Court without a hearing and without serving notice on the other party, although a substantive hearing is scheduled for a later date. A council may obtain an interim enforcement order in as little as two or three days, depending on the availability of evidence (by affidavit) and an Environment Judge.	Directive	Section 320 (and 314–319 and 321 on enforcement orders)	The Environment Court may direct the offender to pay costs to 'avoid, remedy or mitigate' the damage to the environment.

75 See the Resource Management Act 1991, section 322(1)(b).

Enforcement actions	Description	Directive or punitive?	Relevant section(s) of the RMA	Maximum penalty available
Excessive noise direction	An enforcement officer (or constable) may issue an excessive noise direction after investigating a noise incident and forming an opinion the noise is excessive. An excessive noise direction directs the occupier of the place from which the sound is being emitted, or any other person who appears to be responsible for causing the excessive noise, to immediately reduce the noise to a reasonable level.	Directive	Sections 326–328	The excessive noise direction does not carry a penalty, but breach of an excessive noise order is a prosecutable offence under 338(2)(a).
Prosecution	A prosecution establishes the guilt or innocence of an accused party and, if necessary, results in a sanction imposed by the Courts. This process is administered within the criminal jurisdiction, and offences carry criminal penalties. RMA prosecutions are considered in the District Court by District Court judges who also hold office as an environment judge.[76] Charges must be filed in the District Court within six months of "the time when the contravention giving rise to the document first becomes known, or should have become known."[77]	Punitive and/or directive.	Section 338. Many other sections are also relevant –see Prosecutions.	Depending on which section of the RMA is breached, there are varying levels of maximum fine available to be imposed by the District Court on conviction. The maximum penalty available for RMA offences[78] is a $300,000 fine for individuals or two years' imprisonment, and $600,000 for organisations.[79] See Penalties for further information.

Non-statutory responses to non-compliance

Verbal or written direction

Verbal or written directions are usually reserved for cooperating parties and where there is a likelihood that the breach will not continue. This is a quick, simple and effective way of achieving compliance by parties that are likely to cooperate. Both verbal and written directions can be given while on site (eg, through a standard form that an enforcement officer fills out), or following the site visit (eg, by phone call, email or post).

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76 Resource Management Act 1991, section 309(3).

77 Resource Management Act 1991, section 338(4).

78 Available for breaches of sections 338(1), (1A), or (1B) of the Resource Management Act 1991.

79 Note that before the enactment of the Resource Management (Simplifying and Streamlining) Amendment Act 2009, the maximum penalty for breaches of the RMA was a $200,000 fine for both individuals and organisations and up to two years' imprisonment for individuals.

This is used as an early intervention tool, and doesn't exclude the use of formal tools. For example, a written direction may be issued while on site, but the enforcement officer also issues an abatement notice following the visit.

Directions are not legally enforceable.

Formal warning letter[80]

A formal warning is an effective response in relation to:

- administrative, minor or technical breaches
- minor or trivial actual or potential effects
- where the subject has no prior history of non-compliance
- where the matter can be put right simply.

A formal warning could also be used in conjunction with other enforcement tools and/or directed at different liable persons/organisations – for example where an infringement notice is issued against a company, a council may wish to issue the directors with formal warning letters.

It is important to formally document the fact that a company or person has a poor environmental history, particularly if they are likely to continue non-complying or offending. Officers can then allude to the formal warning if future offending occurs. This is particularly helpful when a company later wrongly tries to claim they have an excellent environmental history to attempt to mitigate any enforcement action or penalty they are facing.

As with abatement notices, copies of formal warnings should also be forwarded to company directors. This is in an effort to promote voluntary, and internally motivated, compliance.

Formal warnings must contain certain information or they will not 'count' as part of a formal history of non-compliance. They must state:

- an offence has been committed by this party
- what the offence is
- what the potential penalty is
- that the warning will be reconsidered if further offending occurs.

An example formal warning letter is provided in Waikato Regional Council's *Basic Investigative Skills* manual (see page 106).

[80] The content in this section is taken from the manual developed by Waikato Regional Council on 'Basic Investigative Skills for Local Government' https://www.waikatoregion.govt.nz/Services/Regional-services/Investigation-and-enforcement/Basic-investigative-skills-for-local-government/.

Advisory notice

Another effective non-statutory approach, used by Greater Wellington Regional Council, is an advisory notice. This is described in the case study below.

CASE STUDY 12: ADVISORY NOTICE (GREATER WELLINGTON REGIONAL COUNCIL)

Many councils have developed additional non-statutory tools to better address non-compliance. For example, Greater Wellington Regional Council has developed the advisory notice – a non-statutory direction instrument. The notices can be issued on the spot and set out what is needed to achieve compliance.

They are an effective way of ensuring on-site directions are clear, and these directions can be drawn on at a later stage. Their stated purpose is to '…quickly identify the non-compliance issue and to outline the action or actions required to rectify the problem'.[81]

In the 2015/16 year, 75 of these notices were issued. The key advantage of the notice is that instructions from council staff are written clearly, state the timeframe within which the recipient must comply, and so are less likely to be misinterpreted than if provided only verbally. If they are disregarded, the Council also has a clear record of the exact instructions given and so a record of non-compliance if they need to escalate action. In addition to being issued on the spot, the notices can also be sent out by email or post if there is not anyone present on site, or where non-compliance is being addressed via a desktop audit or review of monitoring data.

Abatement notice

An abatement notice is a formal, written directive, and is an efficient mechanism for encouraging compliance with the RMA. Most abatement notices issued are eventually complied with, so it can be a cost-effective way of achieving positive behaviour change and should be the enforcement officer's primary tool.

Enforcement officers serve abatement notices on persons breaching a provision of the RMA,[82] a rule in a RMA plan, any regulations, or a resource consent. Unlike enforcement orders, they can be issued directly by a council enforcement officer and do not require an application to the Environment Court. Only enforcement officers (authorised under section 38 of the RMA) can issue abatement notices; private individuals cannot.

Abatement notices can be issued where an enforcement officer believes they are required. However, if the recipient appeals the abatement notice to the Environment Court (see Appealing an abatement notice), the council will be required to establish, on the balance of probabilities, the grounds to support its abatement notice. Where the notice is breached and becomes part of criminal proceedings (if a prosecution is taken), the abatement notice becomes part of the 'beyond reasonable doubt' test (see Standard of proof).

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81 www.gw.govt.nz/assets/Environmental-Regulation-Cards-2016-Enforcement-v3.pdf.

82 Noting that section 17 allows an enforcement officer to issue an abatement notice or enforcement order whether or not there is an identifiable breach.

What does an abatement notice achieve?

An abatement notice:

- instructs an individual or company to:
  - cease an activity
  - carry out a specified action
- prohibits the individual or company from beginning an activity.

The recipient of the abatement notice must comply within the period specified in the notice (subject to the rights of appeal).

Noise abatement notices

For abatement notices for noise (under section 322(1)(c)), if the person fails to reduce the noise, an enforcement officer may take reasonable steps to reduce the noise and, when accompanied by police, to confiscate the noise source (see section 323(2)).

Once a noise source is confiscated, an owner may apply to have it returned (section 336 RMA). The council must return the noise source unless it considers that it would lead to further noise emissions beyond a reasonable level. If the owner does not claim it within six months (or if doesn't apply to the Court within six months under section 325), the council can dispose of the noise source (section 336(5) RMA).

Types of abatement notices

The types of abatement notices are set out below. The abatement notice itself must specify the subsection of section 322 that the enforcement officer relies on. Sometimes it is appropriate to apply more than one subsection of section 322.

Abatement notice to cease or not commence an action

Section 322(1)(a)(i) requires that a person stops, or doesn't start, an action that the enforcement officer believes contravenes or is likely to contravene:

- the RMA
- any regulations made under the Act
- a rule in a plan
- a resource consent.

A variation of this abatement notice is provided for in section 322(1)(a)(ii), which requires that person stops, or doesn't start, anything that is (or is likely to be) noxious, dangerous, offensive or objectionable that has (or is likely to have) an adverse effect on the environment.

Abatement notice to take an action

Section 322(1)(b)(i) requires the person to take action that the enforcement officer believes is needed to ensure the person complies with the RMA, any regulations made under the Act, a rule in a plan or a proposed plan, or a resource consent, and are also needed to avoid, remedy, or mitigate any possible adverse effects on the environment caused by or on behalf of the person.

A variation of this abatement notice is provided for in section 322(1)(b)(ii), which applies the same grounds as section 322(1)(b)(i), but relates to any land the person owns or occupies. This provision is particularly useful if the person who actually caused the effects cannot be identified or it will be difficult to prove they were responsible for the offence.

Abatement notice for noise

Section 322(1)(a) outlines that abatement notices for noise require a person who is contravening section 16 of the RMA (relating to unreasonable noise) to take steps to ensure the emission of noise from that land or water does not exceed a reasonable level. A person is defined as an occupier of the land, or a person carrying out any activity in, on, under or over a water body or the water in the coastal marine area

Abatement notices relating to proposed plans

Cease or not commence an action (for proposed plans)

Under section 322(2)(a) an abatement notice may be issued requiring a person to stop, prohibit that person from starting, or have anything done on their behalf where the enforcement officer believes the person is under a duty not to contravene a rule in a proposed plan under sections 9, 12(3), 14(2) or 15(2).

Take an action (for proposed plans)

Section 322(2)(b) outlines that where a person is under a duty not to contravene a rule in a proposed plan under sections 9, 12(3), 14(2) or 15(2), an abatement notice may be issued requiring that person to do something that the enforcement officer believes is necessary to ensure the person complies with a rule in a proposed plan.

Content and form of an abatement notice (section 324)

Section 324 of the RMA sets out the contents of an abatement notice. Abatement notices must be written in the form prescribed in the Resource Management (Forms, Fees and Procedure) Regulations 2003 (see Form 48). An example infringement notice is provided in Waikato Regional Council's *Basic Investigative Skills* manual (see page 111).

The following information must be included in the abatement notice:

- **Location** – The recipient must be able to identify the location the abatement notice relates to. The most obvious way to identify the property is by including its physical address, but it may also be necessary to include the legal description and/or a New Zealand Map Series reference. The appropriate description depends on the circumstances. For example, if the recipients are undertaking the activity on a particular lot of land and they own a number of lots of land for which the physical address is the same, the lot number should be stated in the abatement notice.
- **Reasons for and requirements of the notice** – officers must give a clear explanation as to why the notice was issued (eg, breach of a resource consent condition (specify condition) or breach of section 15(1)(a) for discharge of a contaminant into water). The notice should also provide precise details of the actions required to be taken, ceased, or not commenced.

Appealing an abatement notice

A recipient of an abatement notice can lodge an appeal under section 325 of the RMA. An applicant can apply for an appeal, which operates as a 'stay' on some types of abatement notices. This means the recipient doesn't need to comply with them until the matter is resolved.

A hearing of an appeal to the Environment Court against an abatement notice (depending on the issues) can be both expensive and time consuming. Councils may choose to cancel an abatement notice that has been appealed, and apply for an enforcement order, rather than spend money and time defending a notice that has relatively limited scope.

Section 325 of the RMA provides for appeals against abatement notices and applications for a stay. Notices of appeal must be in the prescribed form under the Resource Management (Forms, Fees and Procedure) Regulations 2003 (see Form 49).

Amendment and cancellation of an abatement notice

Section 325A of the RMA says that a council can cancel the abatement notice if it considers the notice is no longer required. Written notice of cancellation must be given. See the form for the cancellation of an abatement notice for an example of how a cancellation notice should be written.

Application by any person to cancel or amend a notice

Any person directly affected by the abatement notice may apply in writing to the council to change or cancel the notice. The council must give written notice of its decision.

If the council, after considering an application to change or cancel the abatement notice, confirms the abatement notice or changes it in a way other than that sought, the person who applied for the cancellation or change may appeal to the Environment Court under section 325(2) of the RMA. Note that if the recipient has missed the deadline for appealing an abatement notice, this provides a fresh avenue for pursuing concerns about the notice in the Environment Court.

Infringement notice

What do infringement notices achieve?

An infringement notice is a useful tool for enforcement officers, as it acts as an instant fine that can be issued at the time, or after, an offence has been found to have been committed. Infringement notices are used for less serious offences than prosecutions, and no conviction is imposed as a result of issuing an infringement notice.

Infringement notices cannot be used for contravention of an enforcement order. The notices can only be issued by a council enforcement officer (authorised under section 38 of the RMA).

The level of fees for infringement offences are set in Schedule 1 of the Resource Management (Infringement Offences) Regulations 1999. Councils can keep all infringement fees received for notices issued by its enforcement officers (section 343D).

Content and form of an infringement notice

The form of an infringement notice is prescribed in Schedule 2 of the Resource Management (Infringement Offences) Regulations 1999. An example infringement notice is provided in Waikato Regional Council's *Basic Investigative Skills* manual (see page 101).

An infringement notice must specify:

- the details of the time, place, and nature of the alleged offence (under section 343C(3) of the RMA)
- whether the party "contravened" or "permitted a contravention" (section 338). Councils should use "contravened" where the party carried out the physical act. "Permitted a contravention" should be used if the situation was more passive, such as by negligence or lack of maintenance, or if the party was only vicariously involved.

Note that section 21 of the Summary Proceedings Act 1957 limits the time in which an agency can issue an infringement notice. To comply with the reminder notice and Court enforcement provisions in the Summary Proceedings Act, the initial infringement notice should be issued promptly and, in any event, within about **three and a half months** of the date of the alleged offending.

Multiple infringements

There may be multiple infringement notices arising from a single inspection. If this is the case then additional information may be required for each infringement notice, so the subject knows specifically what each one is for.

Checklist for completion of an infringement notice:

1. The notice is accompanied by a summary of rights.
2. The infringement fee is set out.
3. The name of the offender is correctly identified.
    a. For companies, the full and correct company name should be used (check the Companies Register).
    b. For an individual, their full name should be used.
4. Ensure the correct address for service is included.
5. Check the notice 'fairly informs' the person of why they are being infringed. This requires each ingredient of the offence to be identified in the wording of the infringement notice (see Part 7 – Enforcement decisions).

Service and delivery of the infringement notice

Any enforcement officer (but not necessarily the officer who issued the notice) may deliver the infringement notice or a copy of it to the person alleged to have committed an infringement offence (section 343C(2)). Delivery may be in person or by post addressed to that person's last known place of residence or business. In the case of postal delivery, the notice or copy shall be deemed to have been served on that person when it was posted.

Where the infringement notice is disputed

The person served with the infringement notice (or an informant) may choose to raise "any matter relating to circumstances" of the offence. This must be in writing to the council within 28 days of the date on which the infringement notice was served or delivered to the person (Resource Management (Infringement Offences) Regulations 1999, Schedule 2).

If the council accepts the circumstances that are raised as grounds not to pursue the infringement fee, it can choose to take no further action. This scenario is the most common that councils deal with. If the council does not accept the circumstances, it will continue with the infringement process by issuing a reminder notice unless the infringement fee is paid (see section 343C(4)).

Payment of the infringement fee

The defendant has 28 days from the date of service of the infringement notice to pay the infringement fee or request a hearing. If the recipient does not pay the infringement fee, and does not request a hearing, the council can issue a reminder notice. The form prescribed for the reminder notice is prescribed in the Resource Management (Infringement Offences) Regulations 1999. Once a reminder notice has been issued, the person receiving the notice has 28 days after the date of issue of the reminder notice to pay the infringement fee.

The recipient can opt to pay the infringement fee in instalments (see section 21 of the Summary Proceedings Act).

Tracking infringement notices

Councils should consider establishing a system of 'tracking' infringement notices. The kind of information that is required includes:

- the day on which the notice is to be served
- whether payment has been received.

If the fee is not paid in 28 days a reminder notice should be sent. If unpaid after a further 28 days, a decision will be made on whether to place the non-payment of infringement fees before the Court.

Enforcement officers should keep their files in good order. Copies of the infringement notice, reminder notice, and notice of hearing should be placed on the file. Any draft notices should be discarded so there is no confusion as to which one was actually issued.

Prosecutions

What does a prosecution achieve?

The two principal purposes of prosecution are to punish the offender and to deter potential further reoffending by the offender or others.

Prosecution is the most serious enforcement tool, and should only be taken in cases of significant non-compliance (as explained in Part 7 – Enforcement decisions). Prosecutions under section 338(1), (1A) or (1B) of the RMA carry a significant maximum penalty (a fine of up to $300,000 or up to two years imprisonment for individuals, or $600,000 for companies) and the Court will usually impose criminal convictions if the prosecution is successful.

Taking a prosecution – key considerations

The *Solicitor-General's Prosecution Guidelines*[83]

The Solicitor-General has published guidelines for making decisions to prosecute. These are summarised in Part 7 – Enforcement decisions.

Limitation period

Any charging document must be filed "within 6 months after the time when the contravention giving rise to the charging document first become known, or should have become known" as explained in Making enforcement decisions. Where the offence charged is a continuing offence, time runs from each and every day the offence continues.[84]

These are very tight timeframes, and it is vital to identify matters that may end up in prosecution or infringement early. Councils should allow plenty of time to investigate a matter thoroughly and for staff to report and make decisions on it through the appropriate channels.

Standard of proof

Before prosecution can be considered as an option the chances of success must be carefully considered based on the evidence. If challenged, the prosecution must establish guilt to the criminal standard, which is 'beyond reasonable doubt'.

'Beyond reasonable doubt' means the Court must be satisfied or sure that a defendant committed the offence. It is not a calculation of probability; a Court must acquit a defendant if it is not satisfied or sure that the defendant committed the offence.

In New Zealand, most judges direct juries on the basis that the standard of proof beyond reasonable doubt is met if they "are sure", or "feel sure", that the accused is guilty (see *R v Harmer* CA324/02, 26 June 2003). Reasonable doubt is referred to as a doubt that the jury regards as reasonable in the circumstances of the case. What a reasonable doubt is, is sometimes explained as being more than a "vague or fanciful doubt" (see *R v Ross* CA224/98 18 March 1999 at [14]-[18] (refer *R v Wanhalla* [2007] 2 NZLR 573)).

Strict liability

For prosecutions taken for an offence of contravening or permitting any of sections 9 or 11–15, it is not necessary to prove that the defendant intended to commit the offence (section 341 of the RMA).

This is a variation from most other criminal proceedings, where the prosecutor has to approve both the *mens rea* (the existence of the mental element of the offence, which is normally intention or recklessness), and the *actus reus* (that the person committed the offence).

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83 Crown Law. 2013. *Solicitor-General's Prosecutions Guidelines*. Wellington: Crown Law. Retrieved from www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf.

84 See *Waikato Regional Council v Ross (Des) Britten Limited* [2009] CRI-2009-024-527.

A number of defences are available to defendants (see Defences), some of which relate to a defendant's lack of intention to commit the offence, such as if the defendant's conduct was reasonable in the circumstances (section 341(2)(a)(ii)).

Does the defendant have a possible defence?

Councils should consider whether a defence is available under section 340 and/or section 341 of the RMA in determining whether to take any enforcement action. If the council believes the defendant has a defence, a prosecution should not be pursued. A description of the defences is included in Defences.

Initiating a prosecution – the process

Filing a charge

Criminal proceedings begin when the council files a charge by filing it with the Court.

Except where the RMA provides otherwise, a separate charge must be laid for each offence. The charging document must contain sufficient detail to fairly inform the defendant of the substance of the offence they are charged with (section 17 of the Criminal Proceedings Act 2011).

Right to elect trial by jury

Where the defendant pleads not guilty, the defendant has the right to choose trial by jury.[85] This has a significant impact on the proceedings, as the case is taken over by the Crown. A Crown Solicitor will manage the process and the Crown bears the costs of the proceedings.

Sentencing and penalties

Overview of sentencing

Sentencing is the process a Court takes to arrive at an appropriate punishment for offending. It is a balancing exercise in which a range of factors are weighed. Councils, through their legal counsel, can take an active part in sentencing. This can be done through:

- making submissions on appropriate penalties
- suggesting other sentencing options, including restorative (reparation) orders.

In practice in RMA cases there can be much debate between the prosecution and the defence when it comes to sentence. Even for relatively straightforward cases there are often lengthy written and oral submissions from both parties relating to sentencing factors. Generally defence lawyers will try and minimise any aggravating factors that will cast a negative light on their client while making much of any mitigating factors.[86]

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[85] Section 50 of the Criminal Procedure Act 2011 states that for offences that are punishable by imprisonment for a term of two years (Category 3 offences), a defendant has the right to elect trial by jury.

[86] Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

Sentencing factors

The relevant matters for sentencing under the RMA were considered in *Auckland Regional Council v Machinery Movers*, where the High Court noted that:[87]

> Like many other statutes, the RMA is silent on the matters which may be taken into account on sentencing. To a large extent, the relevant criteria must be inferred from a consideration of the broad legislative objectives.

In *Machinery Movers* the High Court identified the following factors to consider in determining the severity of the sentence. The:

- nature of the environment affected
- extent of the damage afflicted
- deliberateness of the offence
- attitude of the accused.

In sentencing companies convicted of offences, the Court should also consider the:

- size, wealth, nature of operations, and power of the corporation
- extent of attempts to comply
- remorse
- profits realised by the offence
- criminal record or other evidence of character, good or otherwise.

The sentencing factors in *Machinery Movers* are now well-established factors to consider when sentencing under the RMA.

Sentencing options

If a defendant pleads guilty, the Court can:

- convict and sentence the defendant
- convict and discharge without sentence (with no penalty imposed)
- discharge without conviction under section 106 of the Sentencing Act 2002
- suspend the sentence
- convict but require the defendant to come up for sentence if called on (see sections 11, 106 and 108 of the Sentencing Act 2002).

Penalties

The Court can also award a penalty. The penalties imposed by the Court have four main purposes:

- punish the offender
- deter the offender from offending again (specific deterrent)
- deter other possible offenders (general deterrent)
- direct remediation of the damage.

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87 *Auckland Regional Council v Machinery Movers* [1994] 1 NZLR 492 at 501.

Section 339 of the RMA allows a Court to sentence a person convicted of an offence to fines, community work, and imprisonment. In addition to, or instead of, imposing a fine or imprisonment, the Court can also:

- issue an enforcement order, in accordance with section 314 (see Enforcement orders)
- require the "consent authority" (normally the council) to review a resource consent held by the defendant under section 339(5), if the act or omission by the defendant contravened the consent.

The Sentencing Act 2002 also applies, allowing the Court to issue a wider range of sentences. Section 20 of the Sentencing Act 2002 provides guidance on the use of a combination of sentences.

In practice, the Courts rarely impose imprisonment; fines, enforcement orders, and community work are the preferred sentencing options.

Fines

Depending on which section of the RMA is breached, there are varying levels of maximum fine available to be imposed by the District Court on conviction:

- The maximum penalty available for RMA offences[88] is a $300,000 fine for individuals or two years' imprisonment, and $600,000 for organisations.[89]
- A maximum fine of $10,000, and a further fine of $1,000 for every day during which the offence continues is available for contravention of section 338(2) of the RMA (including contravention of an abatement notice or excessive noise direction).
- A maximum fine of $1,500 for breaches of section 338(3) of the RMA (including wilful obstruction of an enforcement officer from carrying out his/her duties).

Under section 342 of the RMA, councils are entitled to receive 90 per cent of the total of fines imposed by a successful prosecution (the Crown retains 10 per cent as a processing fee).

Restorative justice

Restorative justice is becoming increasingly popular in the wider criminal justice system and in RMA offending. Its main purpose in criminal justice is to:

- provide an opportunity for the offender to understand the impacts of their offending, and for the offender to display remorse for the wrong-doing
- produce practical outcomes that restore harm done, educate the offender, and achieve a change in his or her attitude, and provide a basis for the community to begin to trust the offender again.

This is an alternative to traditional sentencing. It is intended to bring victims and the community together with the offenders to address the wrongdoing. The Court adjourns for the course of the restorative justice process.

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88 Available for breaches of sections 338(1), (1A), or (1B) of the Resource Management Act.

89 Note that before the enactment of the Resource Management (Simplifying and Streamlining) Amendment Act 2009, the maximum penalty for breaches of the RMA was a $200,000 fine for both individuals and organisations and up to two years' imprisonment for individuals.

For RMA offences, the term 'victim' is construed broadly to include the person against whom an offence is committed, as well as persons who suffer loss or damage to property, physical harm, or who are disadvantaged from the offence.

The Sentencing Act 2002 (section 24A) allows restorative justice to be used under the following conditions:

(a) an offender appears before a District Court at any time before sentencing; and

(b) the offender has pleaded guilty to the offence; and

(c) there are 1 or more victims of the offence; and

(d) no restorative justice process has previously occurred in relation to the offending; and

(e) the Registrar has informed the court that an appropriate restorative justice process can be accessed.

The defendant's acknowledgement of guilt, and of the fact that he or she may have caused harm, is a crucial pre-requisite for restorative justice. Defendants must show genuine remorse and a willingness to address the harm they caused.

If the prosecutor supports the application then the Court will engage an independent third party to coordinate the restorative justice process. This will generally involve a public apology by the defendant, consultation with a relevant sector of the community, and participation by the defendant in a community supported project in lieu of a fine.[90] Any restorative justice measures agreed to by the parties may be considered by the Court in sentencing (section 10 of the Sentencing Act 2002).

Some councils have found restorative justice to be helpful for offenders to understand the impacts of their wrongdoing, for victims' vindication, and to come up with practical solutions to address the wrongdoing and restore the damage.

Other councils have encountered difficulties with the process, due to a lack of genuine remorse from the defendant and involvement of defence lawyers leading to an adversarial (rather than restorative) process. As the prosecutor must support the application for restorative justice, councils should use this opportunity to put forward their views on whether the case is appropriate for restorative justice.

[90] Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

Alternative Environmental Justice

Environment Canterbury has developed Alternative Environmental Justice, a combination of restorative justice and the Police Adult Diversion scheme. Alternative Environmental Justice is designed to "provide a lawful way to exercise prosecutorial discretion, and has been created with the interests of offenders, victims, communities, the criminal justice system, and Environment Canterbury in mind."[91]

The process has provided an effective way to deliver reparation to communities affected by offending, and restoration of the environment. It provides opportunities for engagement in outcomes that can be complex and as a process it enables relationships to be built. Environment Canterbury reports that no party who has taken part in Alternative Environmental Justice has reoffended and the feedback on the process has been positive.

Environment Canterbury has developed guidance on using Alternative Environmental Justice.

Costs

Section 342 allows for councils to recover some (or all) of the costs of taking a prosecution. Councils can also apply for costs, and receive an award for costs from the defendant, if the prosecution is successful. See Cost recovery for enforcement for further information.

Defences

Overview of defences

Defendants have a number of defences available to them under the RMA. Defences should be considered by councils as part of the initial enforcement decision, as set out in Making enforcement decisions. If the council believes the defendant has grounds for a defence, enforcement action should not be pursued.

A defendant must prove a defence on the balance of probabilities, and if successful, they will avoid the relevant charges.

Statutory defences can be complex and technical – councils should seek support from experienced investigative staff and independent legal advice in determining whether a defence exists.

A defence available to all offenders is the defence of total absence of fault. The defendant has "the burden of showing on the balance of probabilities that he [or she] and all those for whom he [or she] is responsible acted honestly and with all due diligence".[92]

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91 Environment Canterbury. 2012. *Guidelines for Implementing Alternative Environmental Justice*. Environment Canterbury: Christchurch. Retrieved from www.ecan.govt.nz.

92 Test derived from *Millar v Ministry of Transport* [1986] 1 NZLR 660 and cited in *Auckland City Council v Selwyn Mews Ltd* [2003] CRN2004067301-19 and *Canterbury RC v Pattullo* [2010] CRI-2010-009-14493.

The RMA also provides statutory defences for two groups of people:

- principals – people who appointed others to act on their behalf, who then carried out or permitted the contravening act
- managers and directors of companies, including directors and managers of Crown organisations and unincorporated groups.

Strict liability defences (for breaches of sections 9 and 11–15 only)

The defence of due diligence (reasonable care) is available for a strict liability offence in common law. The defences in section 341(2) are a codification of that common law defence.

Section 341(2)(a) of the RMA provides a defence to the strict liability offences in section 341(1) in certain emergency situations, provided the conduct was all of:

- necessary for the purposes of saving life, health, or preventing serious damage
- reasonable in the circumstances
- adequately mitigated or remedied by the defendant after they occurred.

Similar provisions exist in sections 341A and 341B of the RMA for discharges contrary to sections 15A and 15B.

Section 341(2)(b) of the RMA provides a defence where the action or event was beyond the control of the defendant (such as through natural disaster, or sabotage), could not have been reasonably foreseen, and was adequately mitigated or remedied by the defendant after the offence occurred.

Defendant must give notice of defences

If a defendant intends to rely on one of the defences in section 341(2) of the RMA, the defendant must give written notice to the prosecutor, specifying the facts that support the defence, within seven days of service of summons. If the defendant fails to give notice within a seven-day period, they must seek an extension of time from the Court. In such cases the Court may grant an adjournment.

Defences available to principals (for all offences)

Under section 340, a principal is a person (a natural person or a person other than a natural person) who appoints another who commits an offence while acting as their agent or employee. A principal is liable for the acts of its employees and agents, including any contractor.

If charges are laid against the principal, the principal has a defence available to them under section 340(2) if they can prove they:

- did not know (nor could reasonably be expected to have known) about the offence, OR
- took all reasonable steps to prevent the commission of the offence, AND
- took all reasonable steps to remedy any effects of the offence.

The Courts have been careful to prevent principals ‘passing the buck’ to employees and agents. ‘Culpable knowledge’ includes situations where the principal was aware that the offending act

was likely to arise if something they had control of through their employees and agents did not occur, and had not taken adequate precautions to ensure the employees and agents performed accordingly.

Defences for managers and directors of convicted companies (for all offences)

To obtain a conviction against a director of the defendant or a person involved in the management of the defendant, section 340(3) of the RMA says the council must prove both that:

- the act or omission that constituted the offence took place with his or her authority, permission or consent
- he or she knew or could reasonably be expected to have known that the offence was to be or was being committed, yet failed to take all reasonable steps to prevent or stop it.

There is one common situation that in practice means a director of the defendant, or a person involved in managing the defendant, might be convicted without proof of the requirements under section 340(3) of the RMA. Particularly in smaller companies, a director of the defendant or a person involved in managing the defendant might be in direct (and/or sole) control of activities that result in the offence on site. If this is the case, that person can be charged with permitting a contravention in terms of section 338 of the RMA, and the council therefore does not need to charge that person as a principal under section 340 of the RMA.

Enforcement orders

What does an enforcement order achieve?

An enforcement order is similar in some respects to an abatement notice in that it is used to stop a person doing something that contravenes a rule in a plan, a requirement in the RMA, or something that is dangerous, noxious or offensive. It can also be used to require an offender to do something necessary to ensure compliance or avoid, remedy or mitigate adverse effects.

Unlike abatement notices, enforcement orders are issued by the Environment Court (see sections 314–319 and 321 of the RMA). As set out in section 4(6) of the RMA, an application for an enforcement order can be made against an instrument of the Crown but only if:

(a) it is a "Crown organisation"; and

(b) a council applies for the order; and

(c) the order is made against the Crown organisation in its own name.

Enforcement orders offer more options than an abatement notice, including the ability to recover clean-up costs incurred or likely to be incurred in avoiding, remedying or mitigating any adverse effect on the environment.

The Court may also order restoration of a natural or physical resource. Where the offender has failed to comply with an order, the council, with the Court's consent, may go ahead and comply on the respondent's behalf and recover the cost of doing so under section 315 of the RMA.

It can be useful to begin enforcement order proceedings to alert offenders to the seriousness of their actions, and make them more amenable to solutions. If a problem or the options to resolve it are complex, enforcement proceedings provide a Court-supervised procedure for bringing about a conclusion, and if problems are encountered during the implementation of the solution, the parties can return to Court for direction.

Scope of an enforcement order

Under section 314, an enforcement order may require a person to:

- cease, or refrain from starting, anything the Environment Court believes contravenes or is likely to contravene the RMA, any regulations under the RMA, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section 20A (certain existing lawful activities allowed)
- cease, or refrain from starting, anything the Environment Court believes is or is likely to be noxious, dangerous, offensive or objectionable to the extent that it has or is likely to have an adverse effect on the environment
- do something necessary to comply with the RMA, any regulations under the RMA, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent
- do something necessary to avoid, remedy, or mitigate, any actual or likely adverse effect on the environment caused by or on behalf of that person
- remedy or mitigate any adverse effect on the environment caused by or on behalf of that person
- pay money to, or reimburse any other person for, actual and reasonable costs and expenses (see section 314(2) of the RMA) incurred or likely to be incurred in avoiding, remedying or mitigating any adverse effect on the environment, where the person against whom the order is sought fails to comply with an enforcement order, an abatement notice, a rule in a plan or proposed plan, a resource consent, or any of that person's other obligations under the RMA
- restore a natural or physical resource to its state before the occurrence of the adverse effect.

The applicant for an enforcement order has to be able to prove, if challenged, on the balance of probabilities, that an enforcement order is required. In applying this standard of proof, they must consider the seriousness of the consequences of making an enforcement order. If there is cause for doubt, the Court will give benefit of doubt to those against whom orders are sought.

Whether an activity is objectionable or offensive enough to warrant an enforcement order under section 314(1)(a)(ii) of the RMA is an objective test. For example, in *Zdrahal v Wellington City Council* [1995] 1 NZLR 700, the High Court held that the following factors are relevant:

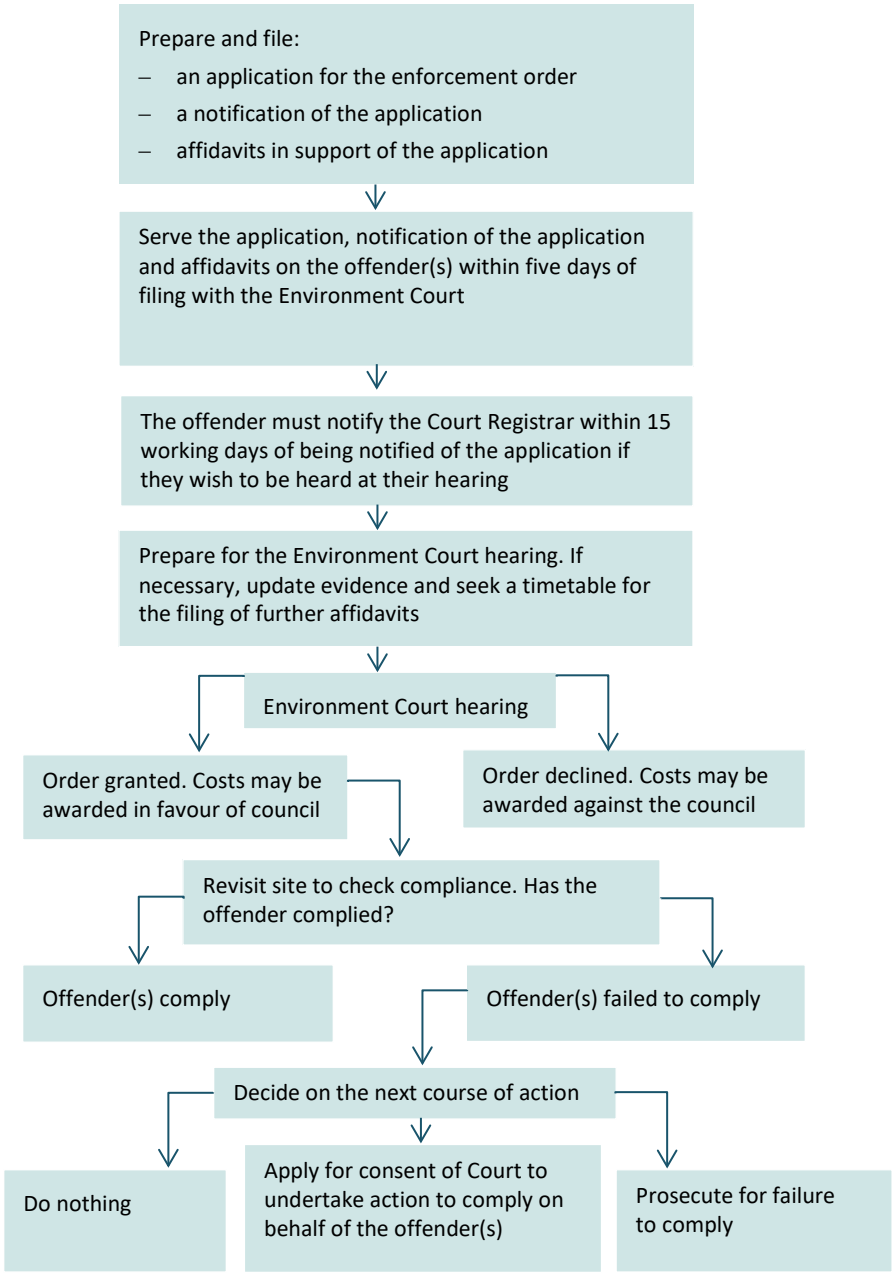
- Is the assertion of the person seeking an enforcement order honestly made?
- If so, is the activity noxious, dangerous, offensive or objectionable, or likely to be so?
- If so, is it of such extent that it is likely to have an adverse effect on the environment?
- In all the circumstances, should the Court's discretion be exercised and an enforcement order made?

See Cost recovery for enforcement.

Process for enforcement order application

The process for making an enforcement order application is set out in sections 316–318 of the RMA, and is summarised in figure 6 and the following explanation.

Figure 6: Enforcement order application process



Seeking an enforcement order through sentencing

Councils can also seek an enforcement order through sentencing (where a prosecution is taken), under section 339(5)(a). This can be an efficient and cost-effective way of obtaining an enforcement order. The matter is normally dealt with during sentencing by the District Court, but may be deferred to the Environment Court to consider, if complex.

Preparing and hearing an application

An application for an enforcement order must be made in the prescribed form under the Resource Management (Forms, Fees and Procedure) Regulations 2003, and be lodged with the Environment Court (see Form 43). The applicant must also serve notice of the application in the prescribed form (see Form 44) of the Resource Management (Forms, Fees and Procedure) Regulations 2003) on every person directly affected by the application within five working days after the application is made.

Before deciding an application for an enforcement order, the Environment Court must hear the applicant and any person against whom the order is sought who wishes to be heard, provided that person has given the Court 15 working days' notice of their intention to be heard.

Enforcement orders must be written in precise terms that are capable of enforcement and should not contain information that is debatable or conjectural.

Decision on application including defences

Section 319 of the RMA provides that, after hearing an application, the Court can refuse the application or make any of the orders outlined in section 314 of the RMA. The Court has discretion to refuse an order even when the grounds are made out. For the Court to have jurisdiction on an enforcement order, there does not need to be a high degree of adverse effects on the environment.[93]

The discretion to grant or refuse an order is subject to the restrictions or **defences** in section 319(2) of the RMA.

Amend or cancel an enforcement order

Section 321 of the RMA provides that anyone directly affected by an enforcement order may at any time apply to the Court to change or cancel the order. This provision provides an obvious route for the recipient of an interim enforcement order, who was not heard at the time, to address the effect of that interim order upon them. The application is made in accordance with the Resource Management (Forms, Fees and Procedure) Regulations 2003 (see Form 46).

Failure to comply with an enforcement order

If the respondent fails to comply with the enforcement order, any person may, with the consent of the Environment Court under section 315(2) of the RMA:

a. comply with the order on behalf of the respondent, and for this purpose, enter any land or structure (with a Police officer if the structure is a dwelling house)

b. sell or otherwise dispose of any structure or materials salvaged in complying with the order

c. after allowing for any moneys received under b., if any, recover the costs and expenses of doing so as a debt due from that person.

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93 See *AMP v Gum Sarn Property Ltd*[93] [1992] 2 NZRMA 119.

Section 338(1)(b) of the RMA states that it is an offence to contravene, or permit the contravention of, an enforcement order.

Interim enforcement orders

What does an interim enforcement order achieve?

Interim enforcement orders allow for urgent action, and applications are usually dealt with by the Court without a hearing and without serving notice on the other party, although a substantive hearing is scheduled for a later date. A council might seek and obtain an interim enforcement order in as little as two or three days, depending on the availability of evidence (by affidavit) and an Environment Court judge.

Process for applying for an interim enforcement order

An application for an interim enforcement order is made under section 320 of the RMA. Sections 314–319 of the RMA also apply to an interim order, except where they are varied by section 320. The scope of an interim enforcement order is the same as that for an enforcement order pursuant to section 314 of the RMA.

Section 320(3) outlines that before making an interim enforcement order, the judge shall consider:

- what the effect of not making the order would be on the environment
- whether the applicant has given an appropriate undertaking as to damages
- whether the judge should hear the applicant or any person against whom the interim order is sought
- other matters as the judge thinks fit.

An undertaking to pay damages is generally relevant but not decisive in determining an application.[94]

If an interim enforcement order is made, the Court will direct the applicant to serve a copy on the respondent. The order takes effect from when it is served, or any later date the order directs.

An interim enforcement order stays in force until an application for an enforcement order under section 316 is determined, or until the order is cancelled either under section 320(5) or section 321 of the RMA.

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94 *Walden v Auckland City Council* [1992] A03/92.

Water shortage direction

Scope and procedure for issuing a water shortage direction

Under section 329 of the RMA, regional councils and unitary authorities can issue water shortage directions at any time there is a serious temporary shortage of water in its region or any part of its region. The direction may apportion, restrict, or suspend:

a. the taking, use, damming, or diversion of water

b. the discharge of any contaminant into water.

The direction should set out the extent and manner of the apportionment, restriction or suspension associated with water shortage direction. Newspapers should be used to notify the direction under section 329(6) of the RMA. Where practicable, as a matter of good public relations, a copy of the notice should be personally delivered by council staff to each affected household.

As good practice, the following information should be included in a water shortage direction:

- clear identification of the area to which the notice applies
- the reasons for the notice
- a clear statement of the extent and manner of the apportionment, restriction or suspension
- the period during which the direction applies, including the number of days and the dates involved.

Duration of direction

Section 329(3) of the RMA provides that a direction cannot be longer than 14 days, but may be amended, revoked or renewed by subsequent direction. If the direction is required for more than 14 days, the council must renew the direction by giving a subsequent direction.

Failure to comply with a water shortage direction

Section 338(1)(d) of the RMA states that it is an offence to contravene a water shortage direction. In the case of a natural person the maximum penalty is two years imprisonment or a fine not exceeding $300,000. For other persons, the maximum penalty is a fine not exceeding $600,000. The maximum fine for a continuing offence is $10,000 per day or part of a day during which the offence continues.

Contravention of a water shortage direction is not a strict liability offence. This means it is necessary to prove beyond reasonable doubt that the defendant intended to commit the offence. Proving knowledge of the direction will usually be sufficient, but it important that councils draft directions so they are clear, to reduce the potential for confusion, which is a relevant factor the Court considers in determining whether there is reasonable doubt.

Part 9 – Writing consent conditions and plan provisions to allow for compliance, monitoring and enforcement

Good resource consent conditions and plan rules are fundamental to ensuring actual or potential adverse environmental effects of an activity are appropriately avoided, remedied or mitigated. It is critical that councils draft resource consent conditions and plan rules carefully so the consent holder and other parties understand exactly what the requirements are and, if necessary, the council can undertake enforcement action if compliance with conditions is not met.

What is an 'enforceable' consent condition or rule?

A test of the efficacy of any resource consent condition or plan rule is the ability of a consent authority to assess compliance and enforce it. An enforceable condition or a plan rule must:

- be simple, with clear and certain requirements that can be easily interpreted by lay people and doesn't rely on value judgements
- be measurable and easily monitored, allowing for monitoring that can be undertaken on a practical level, within the power and resource limitations of the council to clearly assess whether it is being complied with or not
- be fair and reasonable
- allow councils to apply enforcement actions when they identify non-compliance (ie, through monitoring), and will stand up to legal challenge.

Writing plan provisions to allow for compliance, monitoring and enforcement

Council staff should apply the same best practice principles and considerations as those for writing consent conditions when drafting or reviewing plan provisions.

This is particularly important when drafting permitted and controlled activities, which set out requirements, conditions and permissions which must be complied with to undertake the activity (without resource consent in the case of a permitted activity).

Council staff should test proposed rules to see how clear they are, whether they have the desired effect, or have unintended side effects, or loopholes. Staff developing and drafting rules should think about how the rule would work from the point of view of:

- a layperson reading plan provisions to decide whether they meet the requirements or conditions of the rule, or whether they will require consent
- the person processing a consent for a plan provision (in terms of clearly understanding what is intended and required)
- a council officer monitoring or enforcing the rule.

Under sections 76(2) and 68(2) of the RMA, rules in plans have the force and effect of a regulation but, if the rule is inconsistent with a regulation, the regulation will prevail. Failure to conform could see the rule challenged through appeals against enforcement proceedings (see Part 8 – Enforcement tools).

Feedback loops – drafting plan provisions

It is good practice for compliance, monitoring and enforcement (CME) staff to help planners draft and test plan provisions during development. CME staff should identify gaps, overlaps with other rules, or other implementation or interpretation problems – such as how a permitted activity rule may be monitored to check compliance, and whether it will be enforceable. In addition, planners and policy staff should obtain a legal review of the rules once they have been drafted.

In situations where an existing plan is in place, there is still an opportunity for effective feedback (from a range of sources) to inform future plan reviews or changes.

CASE STUDY 13: FEEDBACK LOOPS BETWEEN POLICY AND IMPLEMENTATION TEAMS AT TARANAKI REGIONAL COUNCIL

While planners put considerable effort into developing plans in consultation with those that implement them (ie, consents, compliance and enforcement staff), mistakes can be made and plans tested by unforseen circumstances. Taranaki Regional Council record any objective, policy or rule that fits into these categories in a spreadsheet, and the matter is reconsidered when the plan is reviewed. Amendments are often suggested in the spreadsheet to address any issues. Each plan has its own spreadsheet. This process captures the learnings from each plan as staff can change over the life of a plan and ensures any issues are captured and addressed.

CASE STUDY 14: EXAMPLE OF A POOR PLAN RULE

Permitted Activity Rule – Discharge of Farm Animal Effluent onto Land

The discharge of contaminants onto land outside the Lake Taupo Catchment from the application of farm animal effluent, (excluding pig farm effluent), and the subsequent discharge of contaminants into air or water, is a permitted activity subject to the following conditions:

> *…. c) All effluent treatment or storage facilities (eg, sumps or ponds) shall be sealed so as to restrict seepage of effluent. The permeability of the sealing layer shall not exceed 1x10-9 metres per second.*

This rule is difficult to prove beyond reasonable doubt because all treatment and storage facilities contain liquid, making it difficult to prove the permeability of the sealing layer.

To establish that the pond has been appropriately sealed requires permeability testing to be carried out, which can be expensive and time consuming. This rule does not place an onus on the farmer to prove the sealing standards.

Due to the difficult nature of being able to prove the permeability standard this condition of the rule is often not able to be enforced by way of infringement notice or prosecution.

Writing consent conditions to allow for compliance, monitoring and enforcement

When drafting resource consent conditions, councils should consider compliance monitoring and enforcement issues such as:

- the practicality of compliance monitoring
- certainty for all parties involved
- enforcement issues.

The council and any layperson reading the consent should be clear about what the conditions require, and the consent holder's obligations. Councils must draft conditions in plain English, so they can be easily understood by the council officers monitoring the consents and subsequent consent holders, to avoid uncertainty or potential for litigation throughout the life of the consent.

As well as following the key legal principles of drafting conditions, council planners should do the following when drafting conditions:

- consider how consent conditions will be monitored and enforced by CME staff – will this be practically and physically possible to do?
- ensure conditions are easily interpreted, that they are written in clear and simple language that is easy to understand and monitor. Planners should have CME staff read the condition to see if they understand it.
- ensure conditions are certain and unambiguous. Will others be able to interpret them in years to come? Would they stand up in the Environment Court if enforcement action were ever necessary?
- discuss possible conditions and monitoring requirements with the applicant as the consent is being processed
- don't reinvent the wheel; if effective consent conditions have already been developed by other councils, consider adapting them for your use by tailoring them to the specific application.

See the principles of drafting consent conditions on the Quality Planning website for further detail.

CASE STUDY 15: EXAMPLE OF A POOR CONSENT CONDITION

The following is an example of a consent condition that is difficult to enforce:

…that the consent holder submits a landscaping plan to the council for consideration and approval before starting any site works.

The condition would be improved by including the purpose of landscaping, what should be included on the plan, a timeframe for completion, and details of how the landscaping should be maintained. The condition should also clarify that the landscaping *must* be carried out.

Reviewing draft conditions and feedback loops

CME staff will be able to advise whether conditions of consent are clear, reasonable and enforceable, and whether monitoring is practical (or even feasible). To obtain feedback on consent conditions, planners should consult with CME staff on draft conditions as part of the peer review process before the consent decision is finalised, and periodically review standard conditions for certain activities.

Staff should carry out periodic review of standard conditions on a scheduled (ie, annual) basis, or if a CME staff member identifies a problem with a condition (ie, they are unable to monitor it effectively, or they find to be unenforceable).

Councils can also provide feedback to consent staff, consent holders, and the public through effective annual reporting of consent compliance, which can help inform future applications.

CASE STUDY 16: ANNUAL REPORTING FOR MAJOR CONSENTS (TARANAKI REGIONAL COUNCIL)

Taranaki Regional Council has a long-established compliance monitoring regime. Each year comprehensive compliance monitoring programmes for all major consents are designed, implemented and reported to the public through the Council's Consents and Regulatory Committee. This covers about 275 resource consent holders, exercising 1100 consents. The programmes are integrated and include all the consents (discharge to air, land and water, water permits, and land use) held for a site/activity. The consent holder pays for the monitoring, and any additional monitoring if non-compliance is identified.

An important component of the programmes is the annual report that assigns a compliance rating (high, good, improvement required, or poor) and includes data and information on the environmental effects of the activity. This information is used by consent holders who are preparing applications for changes to or renewal of their consents, and by others who are preparing an application and assessment of environmental effects for similar activities. Information about the environmental effects allows decisions to be made about whether the effects are minor or less than minor, and can be helpful in determining whether an application will be notified or not under the RMA.

There is limited cost to the council as the consent holder pays for the monitoring, and there is an efficient outcome in the later consent process; in 2016/17, 96.5 per cent of consents were non-notified in the region.

Changing and cancelling consents and conditions

Sometimes, despite the best intentions, councils grant consents with conditions that once in place do not work on a practical level. This could be where conditions are:

- unclear or uncertain, and the consent holder and/or CME staff does not understand, or cannot agree on, what is required by the condition
- not fit for purpose, in that monitoring does not provide sufficient information to assess compliance or deal with adverse environmental effects
- unenforceable, and in particular where non-compliance has been identified but CME staff have found they are unable to take any effective enforcement action.

Once a consent is granted with conditions, it will remain in place until it expires, lapses or is surrendered. Where council staff identify that a consent contains conditions that don't work for the council and/or the consent holder, then CME staff may recommend a section 127 variation to a consent holder (change or cancellation of a consent condition) or section 128 review of the consent.

Change or cancellation of a condition (Section 127)

A consent holder may apply to the consent authority for a change or cancellation of a condition of consent under section 127. While the consent holder needs to be the party doing this, CME staff may recommend to the consent holders to apply for a change or cancellation of a consent condition to address any problems identified – such as where a consent holder is unable to meet the requirements of a condition due to impracticalities, or where a condition is unclear or uncertain. CME staff may seek guidance and advice from consenting staff members within their council, to ensure this is a viable course of action before recommending it to the consent holder. Further information on section 127 to change or cancel a condition can be found on the Quality Planning website.

Review conditions (Section 128)

The RMA allows for review of consent conditions by councils in some instances to address adverse effects that might arise during the exercise of the consent. Section 128(1)(a) outlines that consent conditions can be reviewed at any time or times specified for that purpose in the consent, for any of the following purposes:

- to deal with any adverse effect on the environment that may arise from the exercise of the consent, and which it is appropriate to deal with at a later stage
- to require a holder of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or 15B to adopt the best practicable option to remove or reduce any adverse effect on the environment
- for any other purpose specified in the consent.

Further information on including a review condition and process for proceeding with a review, can be found on the Quality Planning website.

Lapsing and cancelling consents that have not been given effect to (Section 125 and 126)

CME staff play a lead role in gathering evidence and decision-making on lapsing or cancelling a consent that has not been given effect to within the specified timeframe.

Section 125 requires that a consent that has not been given effect to will lapse five years after being granted, unless another time was specified when the consent was granted. Consent holders can apply for an extension to the lapse date. However, this must be applied for before the lapse date and can only be granted by the council after considering the criteria in section 125.

Section 126 allows a council to serve notice to cancel a consent that may have been used in the past but has not been used for five years unless the consent specifically provides otherwise, or the consent holder responds to the notice within three months of being served asking for it to be revoked. Before revoking the notice, or providing for an extension the council must carry out the process set out in section 126.

Part 10 – Reporting and record keeping

Why keep records?

Record keeping and reporting is important for:

- transparency and accountability
- enabling councils to carry out compliance, monitoring and enforcement (CME) activities efficiently and effectively
- supporting review and evaluation of the compliance strategy
- informing continuous improvement of practices (eg, by providing information about levels of compliance, and key compliance trends)
- identifying compliance trends (eg, compliance levels over time, or compliance levels by activity type)
- providing confidence to the public that the CME role is being carried out effectively and efficiently
- use as evidence – comprehensive and accurate records are needed to support any enforcement action taken
- fulfilling mandatory reporting and record keeping requirements, such as the National Monitoring System reporting and internal reporting (eg, reporting to councillors).

Resource Management Act (RMA) requirements for reporting and record keeping

The RMA requires councils to:

- make information on the monitoring of the "efficiency and effectiveness" of policies, rules or other methods in their policy statement or its plan (of which CME activities is a part) publicly available at "intervals of not more than five years" (Section 35(2A))
- keep "a summary of all written complaints received by it during the preceding five years concerning alleged breaches of the Act or a plan, and information on how it dealt with each such complaint"(section 35(5)(i))
- "keep reasonably available at [their] principal office" information relevant to the administration of policy statements and plans, the monitoring of resource consents, and current issues relating to the environment of the area to enable the public to be informed of their duties and the council's functions, powers and duties, and to participate effectively in the Act (section 35(3)).

Councils should ensure their records are in good order and reasonably accessible, in case any records are requested by a member of the public.

Reporting to the Ministry for the Environment – National Monitoring System

The National Monitoring System requires councils to provide detailed data each year on the functions, tools, and processes they are responsible for under the RMA. The National Monitoring System currently includes questions about CME, including:

- numbers/types of enforcement actions councils are taking for RMA breaches
- levels of monitoring of resource consents, and non-compliance with resource consents
- numbers of incident notifications councils have received
- numbers of frontline CME staff.

We are currently reviewing the data we collects on the National Monitoring System. The information requirements below indicate the type of data we may collect from councils through future requests. See the Ministry for the Environment website to find out more about the National Monitoring System data requirements.

What information should be collected?

Minimum information requirements

Councils should collect and record the following information for all types of monitoring (ie, resource consent monitoring, incident notification response, and permitted activity monitoring):

- the activity that the monitoring relates to, for example forestry, agricultural effluent, landfills/cleanfills, earthworks (see case study 17)
- the form of monitoring, for example site inspection, desktop monitoring, drone monitoring
- level of non-compliance (see Compliance grades)
- type of breach, for example breach of consent condition, or breach of section 15(1)(a) (this information is required by the National Monitoring System)
- council's response to any non-compliance, for example abatement notice or formal warning issued
- the effectiveness of the council's response to non-compliance.

This information should be recorded in a central database, for easy access and data analysis.

Resource consent monitoring

In addition, councils should collect and record the following information about resource consent monitoring:

- a list of all resource consents, and the frequency of monitoring of resource consents (see Part 5 – Compliance monitoring); this will help with responding to the National Monitoring System question on numbers of resource consents requiring monitoring
- numbers of resource consents actually monitored (as required by the National Monitoring System).

Council staff should record this information in a central database, for easy access and data analysis.

Incident response

Councils should also collect and record the following information about responses to incident notifications (which includes complaints):

- how the incident was detected by the council (eg, by written/verbal notification, reported by another council staff member)
- the subject/content of the incident notification and how it was dealt with (to help councils keep a "summary of all written complaints" for section 35(5)(i))
- numbers of incident notifications received (this will assist in responding to the National Monitoring System).

Councils should maintain a central database to record this data, for easy access and data analysis.

CASE STUDY 17: REPORTING BY ACTIVITY TYPE (BAY OF PLENTY REGIONAL COUNCIL)[95]

The Bay of Plenty Regional Council groups activities in the following five subgroups for reporting purposes:

1. land: contaminated sites, earthworks, waste, quarry, forestry, dairy and domestic wastewater discharges
2. coastal: coastal discharges, CMA works, dredging, mangrove management, coastal structures
3. fresh water: ag/hort irrigation, discharges to water, stormwater, geothermal (Rotorua), geothermal (Western Bay), industrial water takes, drinking water (community), dams and diversions, structures, lake structures (within this), riverbed works, bore installations, pest management
4. infrastructure*: Port of Tauranga, roads, three waters (municipal water, wastewater, stormwater)
5. industry*: industrial discharges to air, land and water, industrial water takes, timber treatment plants, hydroelectricity generation, and industrial geothermal use.

* In the case of infrastructure and industry, a number of these activities are also represented in the other subgroups.

95 Bay of Plenty Regional Council. 2017. *2015/2016 Pollution Prevention report.* Tauranga: Bay of Plenty Regional Council. Retrieved from www.boprc.govt.nz/our-region-and-environment/pollution-prevention-and-compliance/consent-compliance-and-monitoring/compliance-reporting/.

Additional information

Councils should also keep much more detailed records about:

- site visits (see Notebooks)
- enforcement decisions; that is, how the enforcement decision was reached.

These records will be important when staff determine the appropriate response to any non-compliance. They may be used as evidence in Court, if a prosecution or enforcement order is taken, or if an enforcement decision is judicially reviewed.

These records will need to be readily accessible to staff when needed (eg, to help make an enforcement decision). While it is good practice for councils to store these records in a central database, it is not necessary to do so.

Compliance grades

Councils are encouraged to use the following compliance grades to report on levels of compliance (adapted from the Bay of Plenty Regional Council grading system[96]).

This will help staff identify compliance trends and evaluate the effectiveness of CME activities, and help with reporting. Staff should not rely on compliance grades for assessing enforcement options, however, as the tool does not capture the complexity of the analysis that is needed to support enforcement decisions.

Table 4: Recommended compliance rating system

	Compliance grade
	FULL COMPLIANCE with all relevant consent conditions, plan rules, regulations and national environmental standards.
	LOW RISK NON-COMPLIANCE. Compliance with most of the relevant consent conditions, plan rules, regulations and national environmental standards. Non-compliance carries a low risk of adverse environmental effects or is technical in nature (eg, failure to submit a monitoring report).
	MODERATE NON-COMPLIANCE. Non-compliance with some of the relevant consent conditions, plan rules, regulations and national environmental standards, where there are some environmental consequences and/or there is a moderate risk of adverse environmental effects.
	SIGNIFICANT NON-COMPLIANCE. Non-compliance with many of the relevant consent conditions, plan rules, regulations and national environmental standards, where there are significant environmental consequences and/or a high risk of adverse environmental effects.

Internal council reporting

It is important that councils have internal reporting systems set up for reporting on CME to ensure:

- other council staff (eg, planning and consenting staff) are given feedback on the effectiveness of plan rules and resource consent condition)

[96] Bay of Plenty Regional Council. 2017. 2015/2016 Pollution Prevention report. Tauranga: Bay of Plenty Regional Council. Retrieved from https://www.boprc.govt.nz/our-region-and-environment/pollution-prevention-and-compliance/consent-compliance-and-monitoring/compliance-reporting/.

- executive staff have sufficient context about CME to inform decisions, for example on resourcing CME, development and review of their compliance strategy or programme, and enforcement actions
- councillors have sufficient context about CME to inform decisions on resourcing CME, and to communicate key messages to their constituents.

The methods of internal reporting will vary from council to council. Frontline CME staff may choose to report internally through:

- regular verbal and/or written updates at meetings with councillors
- regular verbal and/or written updates at meetings with executive staff
- their intranet
- internal council newsletters
- verbal updates at staff meetings
- direct feedback to plan-making or resource consent processing staff.

External (public) reporting

It is good practice for councils to provide regular (eg, annual) reports to the public on CME activities. Council public reporting on CME gives assurance to the public that rules/policies are being enforced, and educates the public on how the council responds to non-compliance. Given CME activities are largely funded by rates, it is also important that the public knows how their money is being spent. It can also provide further opportunity for compliance promotion and education.

CME reports

It is good practice for councils to publish regular CME reports that give an overview of, for example, approaches to monitoring, how many enforcement actions have been taken, and common non-compliant activities. Many councils publicly release reports on CME.

CASE STUDY 18: ANNUAL COMPLIANCE MONITORING REPORTS (ENVIRONMENT SOUTHLAND)

Environment Southland publishes an annual compliance monitoring report. Since 2015, these reports have also been produced on a catchment basis. Despite being a significant undertaking to produce, the report is regarded as an important 'report card' for local industries, some of whom submit the results in the compliance monitoring to their boards.

A traffic light system is used for industry results that indicate how the industry has performed over the past year. Although the traffic light system is a rudimentary way of reporting on complex and sometimes complicated consent conditions, it is a quick reference for readers of the report. It has also started robust discussions between rural consent holders and the territorial authorities.

Other consents, such as dairy effluent discharges and whitebait stands, can be combined and reported on; this provides a snapshot of the entire industry located in Southland.

A secondary benefit is that information is easily available for anyone considering a request for information (ie, through Local Government Official Information and Meetings Act requests). Information in the report can be easily accessed and provides people with the most requested information, such as number of infringements, abatement notices, and people or companies prosecuted. The report is always keenly awaited, and of interest to the elected council, who have considerable interest in the results and can ask informed questions of the compliance division having read the report. The key purpose of the report, however, is to demonstrate to ratepayers where council's compliance resource has been focused, and the kinds of outcomes those efforts have yielded.

Examples of Environment Southland's compliance monitoring reports can be found on their website.

CASE STUDY 19: MONTHLY REPORTING ON CME (HUTT CITY COUNCIL)

Hutt City Council undertakes month-by-month recording of CME activities and reports on these regularly to elected representatives. It publishes an annual account of CME efforts for the general public, in the annual report.

The reporting is carried out against pre-determined indicators, with performance measures. For example, in 2015/16 the Council had a goal to monitor all resource consents within five days of being granted, and it achieved this goal.[97]

The reporting also includes data on the number of incident notifications received by Council, the number of site visits, and the number and type of notices issued. Much of this information overlaps with that sourced by the Ministry for the Environment for the national level reporting.

Councils that regularly and systematically track their efforts will find external reporting much easier and less resource-intensive.

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97 Hutt City Council. 2016. *Annual Report 2015-2016; Making Our Place*. Lower Hutt: Hutt City Council. Retrieved from http://iportal.huttcity.govt.nz/Record/ReadOnly?Tab=3&Uri=4279902. See page 38.

Activity-specific CME reports

Some councils publicly release activity-specific CME reports, on significant (and/or high risk) activities in their region/district in which there is a high degree of public interest.

CASE STUDY 20: MUNICIPAL WASTEWATER ANNUAL REPORTING (BAY OF PLENTY REGIONAL COUNCIL (BOPRC))

BOPRC produces compliance 'snapshot reports' on a two-yearly basis, covering the 16 Municipal Wastewater Treatment Plants (WWTP) in the region, which are operated under 31 different consents. They are all run by a district council, except one that is operated by a local village trust. Major WWTPs are inspected six-monthly, and minor WWTPs are inspected annually.

Compliance ratings reflect the risks associated with any non-compliance, and are assigned at the completion of each compliance inspection. Council staff also regularly monitor compliance by reviewing performance monitoring returns submitted by consent holders (eg, monitoring reports, sampling results).

To meet individual council reporting requirements, BOPRC reports on WWTPs on a per-council basis on request.

CASE STUDY 21: QUARRY COMPLIANCE REPORTING (DUNEDIN CITY COUNCIL)

Few territorial authorities report on compliance of specific activities. Where this is done, it is often because councils have developed bespoke compliance strategies to address issues in a particular sector. An example of this is the recent efforts by Dunedin City Council to address non-compliance issues in some quarries operating within city limits. All quarries operating under resource consent are visited in March each year, and have been since 2016. In 2017, 17 consented quarries were operating in the city, with consents dating from 1986 through to 2014. The results are reported to council and accessible to the public.

The quarry operators have been very cooperative, and most seem to welcome the monitoring inspections. Knowing they are all inspected at the same time is seen positively from an equity perspective. A focused programme has enabled the Council and consent holders to work together to identify problems earlier, and encourages compliance with the conditions.

The process has also allowed the Council to learn lessons on matters such as how to improve resource consent processing and, importantly, the nature and quality of consent conditions.

Reporting back to consent holders

Many councils provide 'compliance reports' to consent holders, at the completion of a monitoring event or cycle (ie, after carrying out an inspection, or when they have reviewed records submitted as part of a consent conditions). These reports may be one-off or provided by councils on an ongoing basis (ie, annually, or as frequently as the council carries out monitoring for that consent). These reports are an opportunity for the council to give feedback to the consent holder on how they are tracking with meeting compliance, and often include an overall compliance rating.

Where compliance officers have observed non-compliance with a condition, or where the consent-holder is required to take future action, the council can provide advice on what the consent holder needs to do to comply. Councils can use compliance reports in conjunction with other enforcement tools (see Part 8 – Enforcement tools), but they can also use them as a stand-alone non-statutory tool to effectively deal with 'low-risk non-compliance', or where there is a potential for non-compliance by the consent holder in the future.

Councils can use these reports as a 'reward' system, and encourage ongoing or future compliance from the consent holder, as they can provide positive feedback to consent holders that are fully compliant. In some cases, consent holders may request these reports, to provide assurance that they are meeting the requirements of their consent, and these may help them meet industry or environmental standards, or as a performance indicator.

Other forms of public reporting by councils

Councils are encouraged to publish their CME strategies and guidelines on their websites. Compliance strategies provide information to the community about how councils approach CME activities, including:

- when a council may investigate a site
- what circumstances justify an enforcement action
- when a prosecution may be taken.

Such a document gives greater certainty to the public on how a council is likely to respond to non-compliance. It may also help the public to better understand what they can do to comply.

Councils may wish to have a summarised version of their strategy available for the public, as the operational parts of the strategy (eg, site visits or collecting evidence) may be unnecessary detail for the public. In considering what parts of the compliance strategy to publish, councils should consider what aspects affect public rights and interests, and whether publishing this information would contribute to improving achievement of the objectives of the strategy.

Evaluating and reporting on the effectiveness of council's CME activities

Councils should also report on the effectiveness of their CME activities, both internally and externally. Evaluation questions about this are included in Part 2 – Strategic approach to achieving compliance.

Part 11 – Training, networking and support

Skills and qualities of compliance, monitoring, and enforcement staff

Compliance, monitoring and enforcement (CME) staff will need to employ a range of skills and knowledge at different times in fulfilling their roles. During investigations their role is similar to that of a police officer, and during site visits the role may be closer to that of a scientist or an educator. They may also require training in specific sets of skills (such as expertise in erosion and sediment control).

Figure 7 sets out the qualities an enforcement officer should have. Not all the skills and capabilities required of CME staff can be taught; this could include responding well in difficult or high stress environments, and confrontational situations. Certain personalities are better suited to the CME role than others[98] – executive council staff and management should bear this in mind when recruiting CME staff.

Qualities of a CME officer[99]

A quality investigation is one that ascertains all the available relevant information so an informed decision can be made as to how to proceed. To successfully complete such an investigation, there are certain attributes or characteristics that identify the enforcement officer. All of these factors are interrelated, and to fail in one area will impact on the rest. Conversely, high achievement in certain attributes will reflect well on others.

Figure 7: Qualities of enforcement officers

98 Environmental Defence Society. 2017. *Last Line of Defence: compliance, monitoring and enforcement of New Zealand's environmental law*. Auckland: Environmental Defence Society.

99 Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

Reasonableness/fairness

At all times officers must act reasonably and fairly. It is not enough to just apply a degree of reasonableness or fairness during the course of duties. The true test is whether the actions of officers are just and unbiased when being analysed at a later date.

Thankfully the decision on these factors will generally be made by an impartial third party as opposed to a disgruntled 'client'. The Courts will often base their decisions on whether what was done by the law enforcement agency was reasonable 'under the circumstances'. The application of reasonableness and fairness will impact on the perception of all other officer and agency traits.

Professionalism

Council enforcement officers must be mindful at all times that they represent an organisation that has the attention of the public and the media, some of whom are only too willing to put the spotlight on perceived shortfalls of a council. Officers, like all council representatives, must always act with professionalism and avoid situations where their professionalism can be tarnished or questioned.

Strong interpersonal skills

The ability for an officer to relate to his/her client, listen and engage with them is paramount to gaining a successful outcome. It is a skill that requires constant development and it is obtained through exposure and repetition.

Resolve

Experience is showing that investigations and subsequent enforcement action can take many months or even years before being finalised. Enforcement officers must have dogged resolve through this process and appreciate the long-term commitment required.

Open minded

As discussed above, officers must remain open minded during the course of their enquiries. To close their mind to possibilities is to limit their ability to determine the truth.

Act in good faith

Officers are regularly required to react to what they are told by others. They do so in good faith that they are being told the truth. If the source of information is not credible or is at odds with other information, then the officer must act with caution. Officers must not act with malice, or for some form of personal gain or with hidden agendas.

Attention to detail

Attention to details is an obvious attribute, but one that can be easily overlooked. During the course of an investigation an officer should take the time to study the site, the file, the law, and what people say. It is often the very small clues that will point to the truth, just as it is the very small oversights that will enable a person to 'get away with it'.

Methodical

Officers must take a systematic approach to an enquiry. This will reduce the chance of things being 'missed'. A methodical investigation will generate a volume of information and related documents. Often the investigating officer will contain a good deal of knowledge about the matter under enquiry 'between their ears'.

There is a requirement to be disciplined with recording relevant material as it comes to light and including it on the file. The file itself must be maintained in a tidy and clearly defined

structure. This will not only help in accuracy, but is also for the benefit of others who will analyse the file (such as supervisors or lawyers).

Credibility

The credibility of the officer can affect the credibility of their colleagues and the whole organisation. To be exposed taking shortcuts or falling short in any of the areas listed above will have a major impact on reputation. Good reputations are easily lost and hard, if not impossible, to regain.

Training and upskilling

All councils are charged with the CME role set out in the Resource Management Act (RMA). This common role means training needs across these agencies are relatively similar. It is important CME staff receive some formal training on how to carry out their role.

The types of skills an enforcement officer should have include:[100]

- a sound knowledge of the law and processes
- an objective point of view of events and facts
- the ability to:
  - effectively collate information and maintain an enquiry file
  - attend sites and incidents and follow sound legal and procedural practice
  - correctly manage exhibits to an evidential standard
  - interview people thoroughly and within evidential guidelines
  - build rapport with people while gathering information from them
  - recommend the most appropriate enforcement action to an incident
  - distinguish between irrelevant and relevant facts.

While there are some national-level training opportunities (such as the Government Regulatory Best Practice Initiative and the Basic Investigative Skills course, explained below), existing training opportunities are limited, and often rely on voluntary coordination by councils.

Government Regulatory Best Practice initiative

The Government Regulatory Best Practice initiative (known as 'G-Reg') is progressively introducing a series of online learning modules to the New Zealand Qualifications Authority framework. Regulatory compliance standards can now be taken at levels 3, 4 and 5, and level 6 qualifications are under development.

Although the standards are not tailored to RMA compliance specifically, they provide a helpful overview of fundamentals of regulatory compliance. The Skills website has more information on the G-Reg qualifications.

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100 Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act.* Waikato: Waikato Regional Council.

Councils may wish to share skills and resources for the purposes of training and upskilling. The advantage of sharing resource training materials and programmes is that the limited resource provided to compliance, monitoring and enforcement can be used to better effect, and training can be more consistent between agencies.

CASE STUDY 22: BASIC INVESTIGATIVE SKILLS COURSE AND MANUAL (WAIKATO REGIONAL COUNCIL)

A notable example of sharing of training resources is the Basic Investigative Skills manual and the accompanying course developed and delivered by the Waikato Regional Council.

The course is delivered on a cost-recoverable basis and has been attended by more than 500 officers over the past 11 years, and the manual is available on the internet.[101]

The manual is also a valuable support tool for the emerging national qualifications framework that is striving to improve the training available for compliance and enforcement officers across many agencies.

'On the job' training

Council staff should also receive 'on the job' training and support in their roles. For junior or new staff this training might cover:

- introduction to and the use of policies, procedural manuals, and standard operating procedures specific to the council, such as incident response manuals, sampling standard operating procedures (eg, in evidence collection), compliance strategies, and prosecution policies
- key timeframes and deadlines, such as statutory timeframes for investigations of non-compliance and key performance indicators
- record keeping and use of databases and file management systems
- opportunities for new or junior staff to 'buddy' with experienced or more senior staff members during site inspections and investigations; additionally there should be opportunities for officers of all experience levels to accompany other officers on inspections where there may be more complex issues, or to an activity/industry not well known to that staff member (continual upskilling for learning and development)
- ongoing 'best practice' skills sessions, providing opportunities for staff to continually upskill and learn off one another from recent experiences/lessons learned
- peer review processes for review of compliance reports and enforcement documents and decision-making processes
- specialist in-house training courses; staff from other council sections may run courses on specific topic areas; for example, freshwater ecologists to host a course or talk on the impact of stream pollution.

[101] Waikato Regional Council. 2018. *Basic Investigative Skills for Local Government, with Particular Emphasis on Enforcement of the Resource Management Act*. Waikato: Waikato Regional Council.

It is important that training opportunities are also provided for more experienced staff, for example in improving their specialist investigative skills. Involvement in the networks below, such as the Investigative Best Practice Network, may be helpful for this purpose.

Networking and upskilling

Skills and knowledge sharing within and between agencies is important for upskilling in CME, and building relationships so agencies can support each other.

National forums and groups

A number of nationwide forums/groups exist for this purpose, including:

- The **Environmental Compliance Conference** is an annual two or three day conference, currently organised by the New Zealand Planning Institute and a committee of committed CME professionals. At the conference, CME staff and related professionals from around New Zealand meet to "hear the views of experienced peers, exchange ideas, review best practice, learn from case studies and catch up with their colleagues". It is also a useful networking forum to create ongoing connections; CME staff may be able to draw on connections made at the conference to help with future issues.
- The **Compliance and Enforcement Special Interest Group (CESIG)**, made up of compliance managers from regional councils and unitary authorities, provides a forum for information sharing and discussion of common issues. CESIG is working to improve consistency in approaches to CME. The group has developed the Regional Sector Strategic Compliance Framework 2016–18 for this purpose, and is carrying out informal 'peer-reviews' of their CME approaches, to identify where practice improvements can be made.
- The **Society of Local Government Managers' List Serve** is a well-used discussion forum through which staff groups across the local government sector request support and information by email, and is used by some councils when questions around CME arise.
- The **Departmental Prosecutors Forum** is a network of central and local government staff who come together to discuss and consider issues relating to prosecution work on behalf of government departments and other public bodies.
- **Government Regulatory Best Practice initiative (G-Reg**) is a network of central and local government regulatory agencies established to lead and contribute to regulatory practice initiatives. G-Reg has led the development of regulatory compliance qualifications, as described in Government Regulatory Best Practice initiative.
- **The Public Prosecutions Unit (Crown Law**) – Although the Solicitor-General is not directly responsible for council prosecutions (due to councils not falling under the 'public prosecution' definition in the Criminal Procedure Act 2011), the Public Prosecution Unit can help councils develop prosecution policies. The Waikato Regional Council's Enforcement Policy, for example, was reviewed by the Public Prosecution Unit.
- **The Investigative Best Practice Network (IBPN)** is a national network to help regional council staff developand maintain consistent best practice in RMA investigation and enforcement action. The IBPN aims to ensure best practice and standards of professionalism nationally, and provides an opportunity for council staff to collaborate and share expertise on RMA enforcement.

Regional networks

A number of councils have also formed regional networks. For example, CME staff from councils throughout the Wellington region meet quarterly at the Regional Environmental Protection Officers Forum. The forum helps staff to build connections, discuss common or emerging issues, and identify areas to support each other in their roles.

As regional and unitary councils normally have greater CME resources and expertise, a number of regional councils offer support to district and city councils in their CME functions. For example, Waikato Regional Council provides technical and process advice at an informal level to Thames-Coromandel District Council on aspects of CME work, for example through reviewing their enforcement policies, or helping to assemble or review a case file for enforcement.

Inter-agency support and cooperation

CME may from time-to-time require cooperation between a number of councils and other agencies. For example, where pollution occurs in one region but impacts on another region downstream, or where an incident results in breaches to both regional and district plan rules and resource consents, or a breach of another Act or piece of legislation.

Councils should agree on the approach before such incidents arise, to allow for an efficient and effective response. Some councils have memoranda of understanding with other councils or agencies, which set out how they will support each other to respond to such incidents. Some councils have agreements with iwi to assist in responding to major incidents (see Part 3 – Working with iwi).

Smaller councils with limited resources may ask for specialist investigation assistance from a larger council to undertake a site inspection and investigation. Councils may also help each other with incidents in remote locations – such as where a ‘regional’ incident may have occurred, but a regional council CME officer may be physically a long distance away. In this case the officer may request help from a nearby council CME officer to help with first response investigations.

Some councils rely on informal relationships between staff for getting additional support with CME. Formal arrangements (such as a memorandum of understanding) are preferable as this reduces the risk of a dispute over responsibilities/costs between councils, and the arrangement will continue despite staff turnover. One option is for councils to formally transfer their functions, power or duties to another council by using section 33(2)(a) of the RMA.