

Taranaki Regional Council

Resource Management Act
Enforcement Policy 2017

Taranaki Regional Council
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Preface

In July 1993, the Taranaki Regional Council produced its first version of enforcement provisions, procedures and policies under the Resource Management Act 1991.

When carrying out its statutory responsibilities for managing the use, development and protection of land, air or water resources in the Taranaki region, the Taranaki Regional Council is required to make use of the enforcement provisions contained within Part 12 of the Resource Management Act.

The enforcement powers of the Resource Management Act are appropriately delegated to staff with the policy direction set by the Council. This document sets out the Council's policy within the context of the broad framework of measures (e.g. education) the Council employs to maintain and enhance environmental quality in the region.

A separate supporting document introduces the Council's enforcement provisions and procedures to implement the policy.

The Council has a well tested and accepted integrated consent, monitoring and enforcement regime in place to achieve the environmental objectives and policies set by the community through the planning process. Other Council documents address the other components of the regime.

At the end of the day, effective and efficient resource management is a responsibility we (the Council and the wider community) all share. We look forward to the community's continued co-operation and commitment to achieve high levels of compliance and further improvements to environmental quality in the region.

David MacLeod
Chairperson
Taranaki Regional Council

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1. Introduction

Local Government in New Zealand is responsible for implementing and ensuring compliance with, a variety of laws and regulations that are aimed at achieving positive community and environmental outcomes.

For the Taranaki Regional Council there are a number of obligations relating to implementation of the Resource Management Act (RMA). The purpose of the RMA is to 'promote the sustainable management of our natural and physical resources'.

The Taranaki Regional Council (TRC) needs to meet its obligations under the RMA and to the community while working within the organisations values. It also needs to work towards the mission of the organisation.

Mission Statement

Our mission is to work for a thriving and prosperous Taranaki by:

- Promoting the sustainable use, development and protection of Taranaki's natural and physical resources;
- Safeguarding Taranaki's people and resources from natural and other hazards;
- Promoting and providing for Taranaki's regionally significant services, amenities and infrastructure; and
- Representing Taranaki's interests and contributions to the regional, national and international community.

We will do this by leading with responsibility, working co-operatively, encouraging community participation, and taking into account the Treaty of Waitangi.

These various obligations are met by a regulatory team comprising Compliance Staff (CS) who are bound by principles and guidelines particular to that role and undertake consent processing, compliance monitoring and enforcement activities. These staff are mainly located in the Inspectorate Section but are also spread throughout other sections at the Council.

Regulation is carried out under the RMA and within the scope of the Council's strategic planning documents (Long Term and Annual Plans). This framework is shown in Figure 1 and includes policy, implementation, review and reporting components. The framework provides public transparency and accountability for the Council.

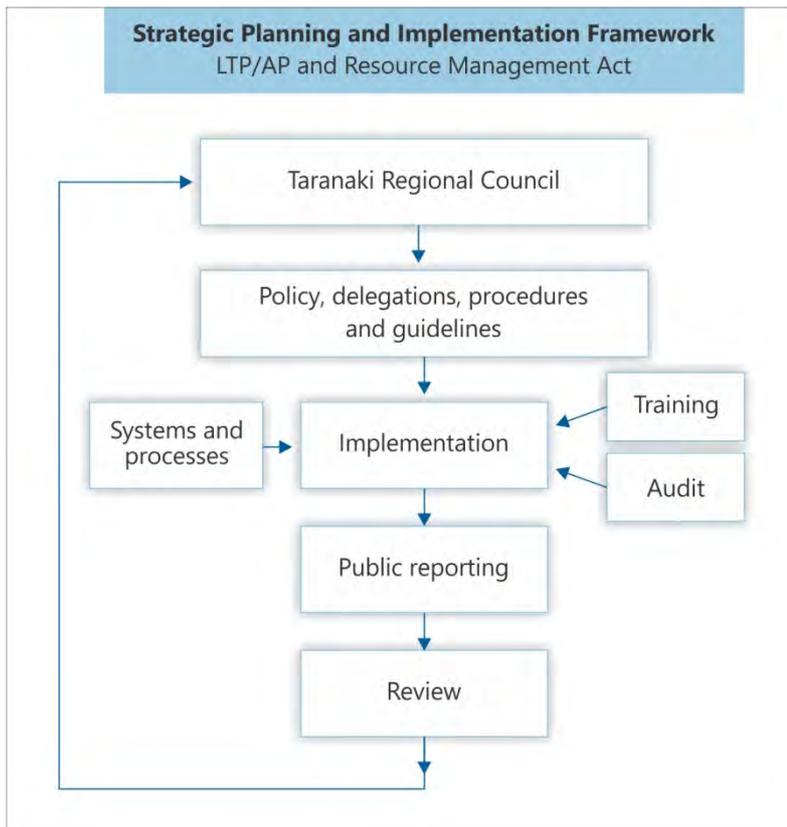


Figure 1 A summary of the Council's strategic framework for environmental regulation

Much of the regulatory 'business' for CS arises from the receipt and processing of resource consent applications by the Consents Section from those in the community seeking to use, or impact on, natural and physical resources. When consents are issued there are then obligations on the Council to monitor compliance with the respective consent conditions and take appropriate action if there is non-compliance.

A key role in ensuring compliance is carrying out compliance monitoring, and responding to notifications (incidents) of potential breaches of the RMA, policies, plans or consent conditions. This role triggers a range of associated interventions to ensure that individuals and organisations adhere to these rules and regulations for the 'public good'.

Many activities in Taranaki are 'permitted' by regional plans. As with consented activities there are also obligations to monitor compliance with permitted activity rules. The Compliance Section also manages an environmental incident response service whereby members of the public can contact the council if they believe there has been or is about to be a breach of environmental regulations.

On occasion when a breach has been confirmed there is a requirement to take enforcement action against liable parties using tools available under the RMA. This role can be highly contentious and the subject of much public and judicial scrutiny. Therefore it has to be undertaken correctly and professionally with a high expectation of success.

The purpose of this policy is to provide clear guidance to the Taranaki Regional Council and community as to how our RMA enforcement obligations are carried out.

The policy is also an important component in delivering the regional council sector's strategic compliance framework (RSSCF, 2016) which was developed by the Compliance and Enforcement Special Interest Group (CESIG) to assist in the development of a consistent approach to compliance monitoring and enforcement in New Zealand. This has been slightly modified to reflect this Council's approach to compliance monitoring and enforcement but remains consistent with the approach and principles in the framework.

This policy is underpinned by an Enforcement Provisions and Procedures document (TRC ,2017) that serves as a guide and includes system and process information.

2. Objectives and policy

The Council's framework for the enforcement policy is summarised in Figure 2 over the page.

The Resource Management Act provides clear instructions as to the procedures to be followed by regional councils and the community when using the enforcement provisions of the Act. However, there is considerable scope as to how, when and where various enforcement 'tools' may be used. Through the preparation of this policy, the Council has taken this opportunity to provide greater certainty to resource users and the community by stating, as a matter of record, the objective, policy and particular methods of implementation it will adopt in democratically implementing the provisions of the Act.

The Council is of the view that regulation based policies, associated regional plans and consent processing will remain a core part of its responsibilities. Compliance monitoring and enforcement follow as being essential cornerstone activities designed to reinforce the integrity and value of the policies.

Objective

To achieve an optimal level of compliance with the Resource Management Act and with policies, plans and resource consents prepared or granted under the Act.

Policy

The Taranaki Regional Council will ensure that the duties and restrictions contained in Part III (duties and restrictions) of the Resource Management Act and the provisions of plans and resource consents are adhered to. Where non-compliance is noted, the Council will:

- (a) Identify and advise the person responsible of the non-compliance and any remedial action required; and
- (b) Follow up the initial visit to confirm what remedial action has been taken or identify outstanding requirements; and/or
- (c) In circumstances where an act or omission has resulted in an actual or likely adverse environmental effect or in circumstances of continued non-compliance, the Council may use the enforcement provisions of the Act.

The Taranaki Regional Council has a responsibility to enforce the principal sections of the Resource Management Act. With regards to its functions the Council has particular responsibilities to enforce sections 9, 12, 13, 14 and 15 of the Act.

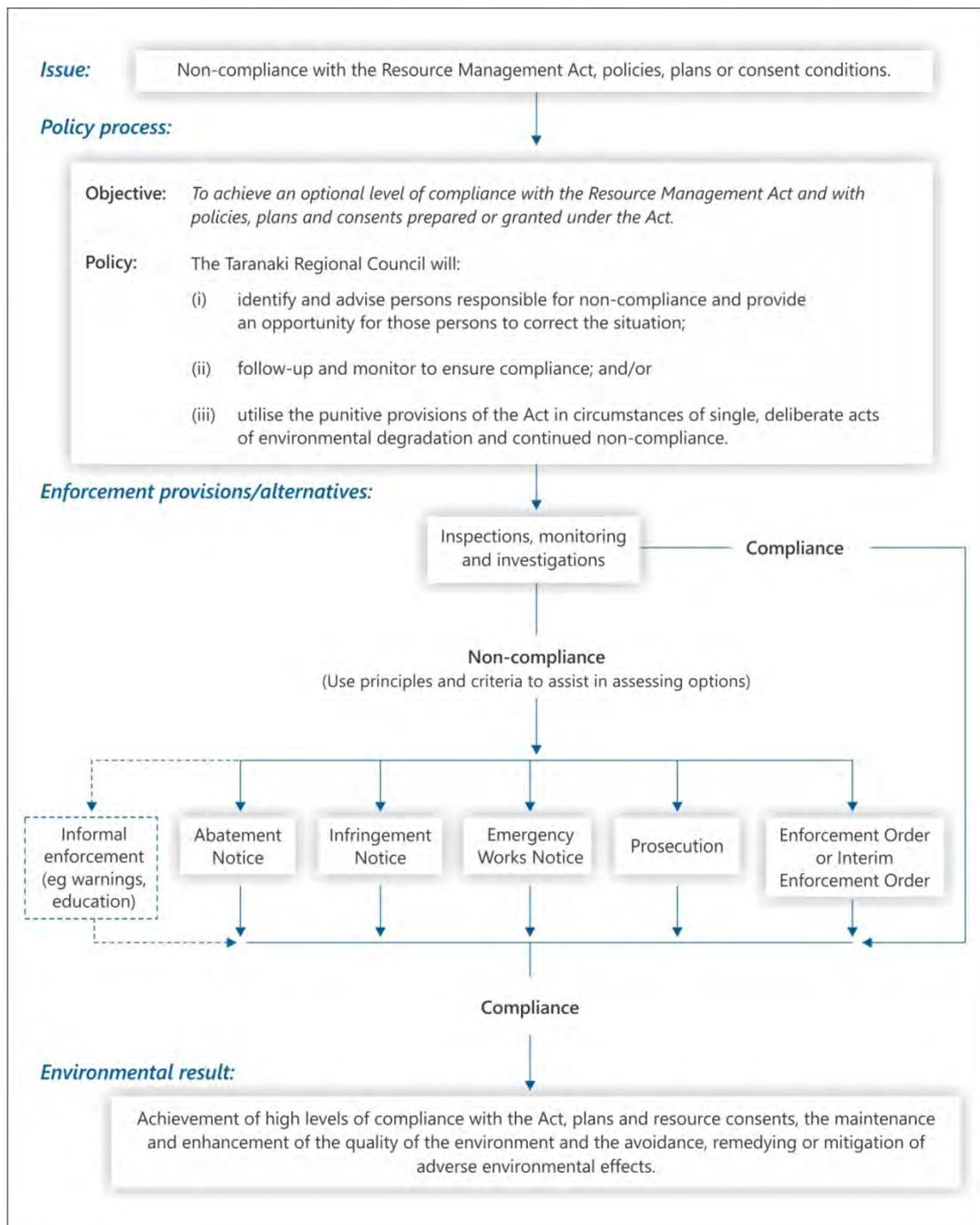


Figure 2 The Taranaki's Regional Council's enforcement policy

An objective is a statement describing what the Council is trying to do and the end to be achieved. The above objective refers to achieving an 'optimal' level of compliance, which means the best achievable result. In theory the 'ideal' level of compliance would be a level whereby there is full compliance, all of the time, by resource users. While this is a very worthwhile goal, it is nevertheless recognised that this ideal state will very rarely be achieved. The optimal level is therefore a more realistic target.

Enforcement is a necessary but last resort in the administration and implementation of the law. The intent and effect of the objective and policy is to ensure, firstly that the Council is clear about the issue, process and outcome being sought. It is implicitly recognised in the policy that other means in addition to, or in place of, the use of the Act's enforcement provisions need to be considered and these 'tools' are addressed below.

A policy is a statement of a course of action to achieve an objective. A policy provides guidance and direction for specific methods of implementation in addressing issues of non-compliance. Policy does not specify the precise actions to be taken, but indicates the commitment to a general course of action. With regards to the policy, the general course of action to be undertaken by the Council depends very much upon the 'circumstances' resulting in non-compliance.

Where non-compliance occurs, a three-staged approach to enforcement is available. Council officers will, in normal circumstances, provide the opportunity for an offending party to correct the situation. In many cases, resource users may not be aware that they have breached the Council's, and indeed the Act's requirements, therefore provision is made for these persons to rectify the situation, prior to formal enforcement action being taken. On occasion however, implementation of policy (a) and (b) may not suffice, and further enforcement action is required. In circumstances where a negligent or deliberate act has resulted in an adverse environmental effect, or in circumstances where there is continued non-compliance, the Chief Executive, acting under delegation from the Council, may decide to use the prosecution provisions of the Act.

The Resource Management Act allows the Council discretion over how, when, and where to use the enforcement provisions of the Act. To assist in any assessment, some guiding principles have been developed by the Regional Council CESIG in 2016. Taranaki Regional Council has slightly expanded these principles and will apply and adhere to these principles when carrying out enforcement activities. These principles are set out below with a brief explanation:

a) Transparency

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

b) 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 that our staff have the necessary skills and are appropriately trained, and that there are effective systems and policies in place to support them.

c) Fair Reasonable and Proportional approach

We will apply regulatory interventions and actions appropriate for the situation 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. 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.

d) Evidence Based, informed

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

e) Collaborative

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

f) Lawful, ethical, and accountable

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

g) Targeted

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.

h) Responsive, effective and efficient

We will consider all alleged non-compliances to determine the necessary interventions and action 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 whilst keeping the costs to the ratepayer to the most practical minimum through providing a system that is unduly bureaucratic or that is unduly costly to administer.

Summarised in Figure 2 is the policy framework including the enforcement provisions available to the Council to address issues of non-compliance and to:

- Implement the objective and policy; and
- To achieve the environmental result anticipated.

Environmental results anticipated from implementation of this policy:

- Achievement of behaviour change towards high levels of compliance with the Act, regional plans and resource consents.
- The maintenance and enhancement of the quality of the environment.
- The avoidance, remedying or mitigation of adverse environmental effects.

3. Scope and enforcement process

3.1 Scope

Taranaki Regional Council's motto is to *Work with people and care for Taranaki*. This involves empathetic engagement (responsive, listening and even-handedness) which has been recognised, following a review of regulatory systems, as a key element of a successful regulatory approach (Coglianese 2017).

The approach adopted involves a 'spectrum' type approach to encouraging positive behaviour change and ensuring the highest levels of compliance possible.

Working with people, caring for Taranaki

Taranaki Regional Council's approach to ensuring compliance with the Act includes the following:

- **Recognition and reward** for those who lead best practice and are seen as exemplar, going above and beyond mere regulation through environmental awards and other mechanisms.
- **Education** for those people who are unaware of rules or need reminding of their obligations, and the reasons for those obligations.
- **Supporting industries** to develop best practise and be engaged to encourage compliance, or better, within their peers and own industry.
- **Enforcement** for those people who breach regulation. The Act provides a number of enforcement tools that can be applied to people who have committed breaches. One of those enforcement tools is prosecution.

3.2 Enforcement process

The investigation and enforcement process is summarised in Figure 3 below.



Figure 3 A summary of the Council's investigation and enforcement process

Conflicts of Interest

Taranaki Regional Council will carry out all of its enforcement functions in accordance with its organisation values and a conflict of interest (COI) policy

- The purpose of this policy is to:
create a framework for decision making that avoids actual or perceived conflict of interest
- minimise the risks where a conflict of interest exists
- ensure staff are free from any personal, commercial, financial or other pressures that might affect their actual or perceived ability to make independent decisions.

This policy provides guidance for staff as to where a COI may arise (and therefore how to avoid a COI) and a mechanism for ensuring that any actual or potential COI is disclosed and managed appropriately.

3.2.1 Phase 1: Gathering the information (Investigation)

If a breach, or potential breach, of the RMA occurs then information must be gathered about how and why the breach occurred. This information gathering, or investigation, should be welcomed by all parties as its purpose is to establish the truth of what has occurred and enable informed decisions to be made. The depth and scope of the investigation will be dependent on the seriousness of the incident.

Investigation activities may include:

- Visiting private property to collect information or potential evidence like samples, photographs, measurements, or ecological assessments.
- Talking to people about what they know about the incident. People interviewed may be witnesses to an incident or potentially liable parties. These conversations will be recorded in writing or by electronic means .
- For serious matters interviews of potentially liable parties are conducted under caution to ensure their rights are understood.

When visiting private property it is vital to respect the rights of the lawful owner or occupier. Council staff must ensure that all entry to private property is done so lawfully.

The Chief Executive Officer of the Taranaki Regional Council has the authority to issue staff with warrants of authority. A warranted enforcement officer has the ability to enter private property for the purpose of assessing compliance with environmental regulation. However, if the officer has reasonable grounds to believe that a breach of the RMA has been carried out on the property then that warrant is no longer a valid legal access. The High Court ([2003] NZRMA 481 (HC)) has given very clear direction as to when an officer can rely upon their warrant of authority. Staff must attend specific training and be familiar with all of their statutory obligations before carrying out any enforcement functions.

3.2.2 Phase 2: Enforcement Decision Making

Enforcement of the Resource Management Act can be complex. The Act provides potentially large penalties for those who breach the Act, however does not offer any guidance as to determining what is serious and what is less so. For example, a single section of the Act can prohibit activities as diverse as emitting objectionable odour or dust, damaging a coastal reef, discharging contaminants to a stream or burying waste in land. Clearly these have vastly different environmental and community effects. The courts have provided helpful guidelines (*Machinery Movers Ltd v Auckland* (1994)) as to what factors are appropriate to consider in RMA cases to determine the seriousness of a breach. It is widely accepted across the regional sector that these are the appropriate factors to consider in enforcement decision making.

Factors to consider when considering enforcement action

- 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 breach as a result of deliberate, negligent or careless action?
- What degree of due care was taken and how foreseeable was the incident?
- What efforts have been made to remedy or mitigate the adverse effects?
- What has been the effectiveness of those efforts?
- Was there any profit or benefit gained by alleged offender(s)?
- 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?
- Is there a degree of specific deterrence required in relation to the alleged offender(s)?
- Is there a need for a wider general deterrence required in respect of this activity or industry?
- Was the receiving environment of particular significance to iwi?
- How does the unlawful activity align with the purposes and principles of the RMA?
- If being considered for prosecution, how does the intended prosecution align with Solicitor-General's Prosecution Guidelines? (these guidelines are attached at Appendix A).

Not every factor will be relevant every time. On occasion one single factor may be sufficiently aggravating, or mitigating, that it may influence the ultimate decision. It is inappropriate to take a matrix or numerical approach to weighing and balancing these factors. Each case is unique and the individual circumstances need to be considered on each occasion to achieve a fair and reasonable outcome. The discretion to take enforcement action, or not, sits solely with those delegated to make decisions in the regulatory agency¹.

a) Who can make the decision

Taking any kind of enforcement action can have a profound impact on the subject of the action and cannot be taken lightly. Decisions on enforcement action must be based on reliable and correctly obtained information. Acting under delegation for low level breaches, compliance staff can issue abatement notices and the Compliance Manager and Director- Resource Management can authorise the issuing of infringement notices.

If the matter is being considered for prosecution then it must be assessed by the Compliance Manager and Director- Resource Management for a determination of the Chief Executive. These individuals are able to openly discuss the incident and a final decision is made by the Chief Executive. The recommendation to prosecute is conditional on the matter being subjected to

¹ NZ Law Commission : http://www.nzlii.org.nz/other/nzic/report/R66/R66-5_.html

independent legal review. Taking into account the very unique circumstances that can be present in individual cases, and regardless of who makes the decision, it is vital to strive for consistency in decision making. Independence of the decision maker(s) is paramount.

b) Independent legal advice

The independent legal review considers the matter in its entirety. The review applies two tests: the evidential test and public interest test. These tests are separately considered and must both be satisfied before a prosecution is initiated. The Council has access to very experienced RMA enforcement lawyers. In rare instances two independent legal opinions may be requested.

The Evidential Test

The first part of the test is the evidential test for prosecution and requires a legal assessment of whether:

- The evidence relates to an identifiable person (whether natural or legal).
- The evidence is credible.
- The Council can produce the evidence before the court and it is likely it will be admitted by the court.
- The evidence can reasonably be expected to satisfy an impartial jury (or Judge), beyond a reasonable doubt, that the individual has committed a criminal offence; the individual has given any explanations and, if so, whether the court is likely to find the explanations credible in the light of the evidence as a whole.
- There is any other evidence the council should seek out which may support or detract from the case.

Once it has been established that there is sufficient evidence to provide a reasonable prospect of conviction, the test for prosecution requires a consideration of whether the public interest requires a criminal prosecution.

The public interest test

The second part of the test for prosecution is the public interest test, which is important for ensuring that the discretion to prosecute is exercised in accordance with the rule of law and any relevant statutory requirements.

3.2.3 Phase 3: Enforcement options

The Council has developed a 'compliance pyramid' for achieving positive behaviour change (Figure 4). At the bottom of the pyramid are those who are willing to comply – at the top are those who resist compliance. The pyramid is designed to create downward pressure – that is, to move non-compliant individuals or organisations down the pyramid to full compliance and to where lower-level and less costly interventions can be utilised. A compliance spectrum from sanctions to education exists.

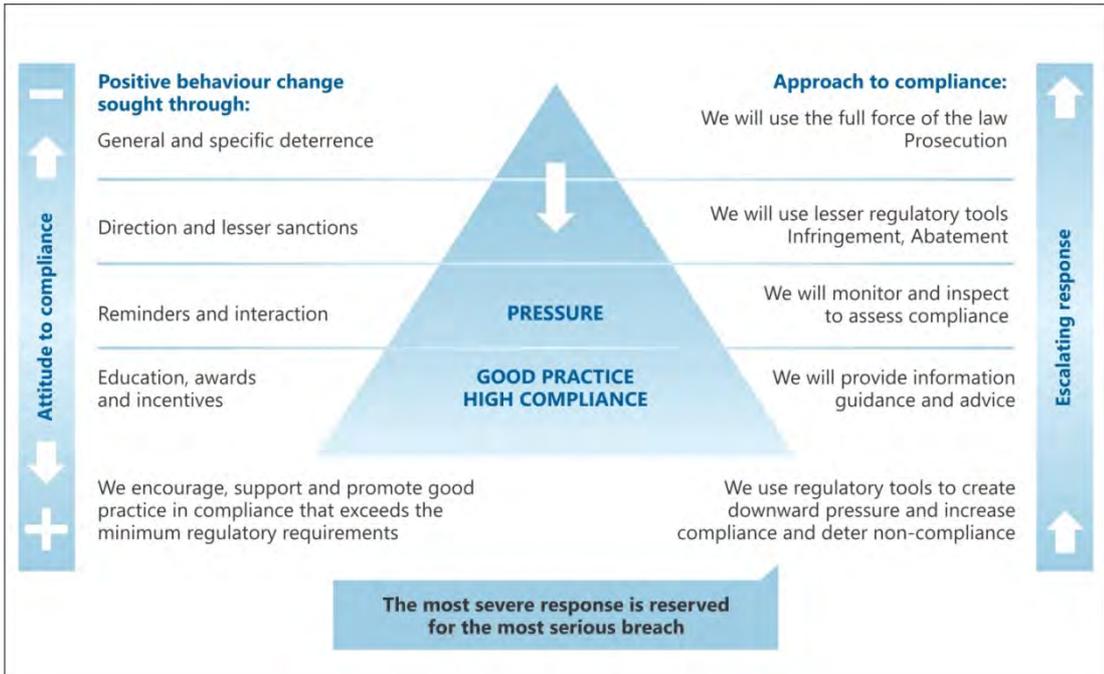


Figure 4 The Council's compliance pyramid for achieving positive behaviour change².

At the root of the compliance spectrum lies the spectrum-like nature of the motivations or reasons for non-compliance and the resulting tailored responses (Figure 5) (Environmental Defence Society, 2017).



Figure 5 Compliance spectrum

The Act and case law provide the formal enforcement tools that are available to deal with breaches. It is important to ensure these tools are applied consistently across the myriad of activities and

² Adapted from Waikato Regional Council (2016) and Ian Ayres & John Braithwaite (1992): Responsive Regulation. Transcending the deregulation debate, Oxford University Press, New York.

resource use across the region. Enforcement tools can be categorised into two main functions. Directive actions are about looking forward and giving direction to right the wrong. Punitive actions are about looking back and holding people accountable for what they have done. These actions are described in more detail in Tables 1 and 2 below.

Table 1 Directive enforcement actions

Action	Description Of Action	Potential Impacts On The Liable Party	When Might This Action Be Appropriate?
Letter of direction/warning	To prevent further breaches, or to remedy or mitigate the effects of non-compliance, council can give a written direction for a party to take or cease a particular action.	Such a direction is not legally enforceable.	Direction/warning letters are rarely used with the preference being to issue an abatement notice. The letters are for dealing with co-operative parties, who are motivated to follow the direction, and where the breach is of a minor nature, consistent with a breach that would perhaps also receive a formal warning.
Abatement Notice	An abatement notice is a formal, written directive. It is drafted and served by council instructing an individual or company to cease an activity, prohibit them from commencing an activity or requiring them to do something. The form, content and scope of an abatement notice are prescribed in statute.	A direction given through an abatement notice is legally enforceable. To breach an abatement notice is to commit an offence against the RMA and make liable parties open to punitive actions.	An abatement notice may be appropriate any time that there is a risk of further breaches of environmental regulation or remediation or mitigation is required as a result of non-compliance.
Enforcement Order	Like an abatement notice an enforcement order can direct a party to take particular action. However, an application for an enforcement order must be made to the Environment Court but can also be made during the course of a RMA prosecution.	A direction given through an enforcement order is legally enforceable. To breach an enforcement order is to commit an offence against the RMA and make liable parties open to punitive actions.	An application for an enforcement order may be appropriate any time there is a risk of further breaches of environmental regulation, or remediation or mitigation is required as a result of non-compliance.

It is important to note that for every directive action there should be a corresponding punitive action.

Table 2 Punitive enforcement actions

Action	Description Of Action	Potential Impacts On The Liable Party	When Might This Action Be Appropriate?
Formal warning	A formal warning is documented by way of a letter to a culpable party informing them that an offence against the RMA has been committed, and that they are liable.	No further action will be taken in respect of that breach. However, the warning forms part of a history of non-compliance and will be considered if there are future incidents of non-compliance.	<p>A formal warning may be given when:</p> <ul style="list-style-type: none"> An administrative, minor or technical breach has occurred; and The environmental effect, or potential effect, is minor or trivial in nature; and The subject does not have a history of non-compliance; and The matter is one which can be quickly and simply put right; and A written warning would be appropriate in the circumstances.
Infringement notice	An infringement notice is a written notice which requires the payment of a fine. The amount of the fine is set in law. Depending on the breach the fine will be between \$300 and \$1000.	No further action will be taken in respect of that breach. However, the infringement notice forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance.	<p>An infringement notice may be issued when:</p> <ul style="list-style-type: none"> There is a prima facie (on the face of it) evidence of a legislative breach; and A one-off isolated legislative breach has occurred which is of minor impact and which can be remedied easily; and Where an infringement notice is considered to be a sufficient deterrent.
Prosecution	<p>A prosecution is a process taken through the criminal courts to establish guilt or innocence and, if appropriate, the court will impose sanctions.</p> <p>RMA matters are heard by a District Court Judge who is also an Environment Judge.</p> <p>All criminal evidential rules and standards must be met in a RMA prosecution.</p>	<p>A successful prosecution will generally result in a conviction, a penalty impose and consideration to costs of the investigation.</p> <p>A prosecution forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance.</p>	A prosecution may be considered appropriate when the factors listed above indicate that the matter is sufficiently serious to warrant the intervention of the criminal law.

4. Review

It is recognised that the way in which Council officers conduct compliance monitoring and enforcement will change over time. This could be due to changing legislative requirements, case law and/or the desire to improve upon existing systems and processes. To ensure the continued relevance and usefulness of this policy it is proposed that this document continues to be reviewed should circumstances necessitate change.

References

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Appendix A

Solicitor-General's Prosecution Guidelines (2013)

Appendix A

Solicitor-General's Prosecution Guidelines (2013)

The Council will adhere to the standards of good criminal prosecution practice expressed in the *Solicitor-General's Prosecution Guidelines (2013)*. The Council's criminal prosecutions are conducted by external lawyers, on the Council's behalf, and the *Solicitor-General's Prosecution Guidelines* and the *Media Protocol for Prosecutors (Crown Law, 2013)* while not binding on local authorities, represent best practice. Also the Solicitor-General's Guidance (CLO311/379) is helpful in guidance to local government as to who offers the best legal service in prosecution matters. The list, based on the *Solicitor-General's Prosecution Guidelines*, is illustrative only and not a comprehensive list of the matters to be considered as the matters will vary in each case according to the particular facts. Under the *Solicitor-General's Prosecution Guidelines* a prosecution is more likely if:

- A conviction is likely to result in a significant sentence;
- The offence caused significant harm or created a risk of significant harm;
- The offence was committed against a person serving the public for example, a police officer or Council officer;
- The individual was in a position of authority or trust;
- The evidence shows that the individual was a ringleader or an organiser of the offence;
- There is evidence that the offence was premeditated;
- There is evidence that the offence was carried out by a group;
- The victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
- The offence was committed in the presence of, or in close proximity to, a child;
- There is an element of corruption;
- The individual's previous convictions or cautions are relevant to the present offence;
- There are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct;
- The offence, although not serious in itself, is widespread in the area where it was committed;
- A prosecution would have a significant positive impact on maintaining community confidence;
- The individual is alleged to have committed the offence while subject to an order of the court;
- A confiscation or some other order is required and a conviction is a pre-requisite.