



STAFF REPORT

TO: Environment & Planning Subcommittee

FROM: Carl Cheeseman, Co-ordinator Compliance - Monitoring

REFERENCE: F104

SUBJECT: **PROPOSED CHARGES FOR COUNCIL INVESTIGATIONS INTO ENVIRONMENTAL INCIDENTS AND COMPLAINTS – REPORT EP06/05/19 - Report Prepared for 30 May 2006 Meeting**

1. PURPOSE

To introduce a system allowing effective cost recovery for actual and reasonable costs incurred by Council responding to and investigating complaints and incidents found to be in breach of the rules.

2. THE CURRENT POLICY AND PROBLEMS

Each year Council Compliance Monitoring staff investigate or respond to a large number of complaints or incidents occurring in the district. Of these a significant proportion are found to be a result of an activity undertaken in contravention of the Tasman Resource Management Plan or some other act administered by Council as part of its duties e.g. Litter Act.

Traditionally Council has borne the cost of much of the work without the ability to effectively recover some or all of the costs incurred. This is compounded further through the loss of more productive time spent in consent monitoring. The only exception has been when Council has issued an infringement fine for an offence where the fine has technically off-set part of the cost. However as infringement fines are intended to provide a means of punishment and deterrence for offences committed they are a fairly blunt instrument and are clearly not designed as a means of cost recovery for debt incurred as part of carrying out a Council function. Council's current reliance on the use of infringement fines as its only mechanism to off set cost incurred in investigation is problematic on several fronts including:

- The Infringement Fine Regulations strictly control the infringement fee payable for each particular offence. This may vary from \$300 to \$1000 depending on the section of the act breached. This fee is fixed and the penalty available can be either woefully short of actual cost incurred during investigation or is excessive where the breach is of a minor nature.
- Council has generally only issued infringement fines for offences considered being at the upper end of the scale and the great majority of detected breaches are typically dealt with through written warnings or abatement notices.

- Infringement fines are perceived as a blunt instrument. As council is committed to working with the public in a constructive manner reliance on fines does not foster good relations.

Other charging provisions of the RMA such as section 36 charges relate only to resource consent monitoring and provide no mechanism for cost recovery outside the consent monitoring framework. Complaint and incident investigations found in breach are often related to unconsented activities.

3. THE PROPOSED CHARGING POLICY

The Resource Management Act requires Council to undertake its duty to enforce the rules in its plan. In particular Section 84 of the act clearly states that 'every regional or territorial authority shall observe and to the extent of its authority enforce the observance of the policy statement or plan'. This responsibility is undertaken principally through Councils Compliance-Monitoring section. Problems exist when Council exercises its duties as the act then provides no mechanism in which Council can recover costs incurred as a result of fulfilling these duties other than through a cost on the general rate.

Under the Local Government Act 2002 Section 150 provides Council the ability to prescribe fees or charges for inspections undertaken under any other enactment if that enactment provides no authorisation for the local authority to charge a fee.

Section 150 states that provided the charging policy is prescribed in a bylaw or through the special consultative process, inspection fees may be charged for all actual and reasonable costs incurred during inspection.

Several regional councils have now adopted this provision through their charging policies as a means of recouping those costs incurred while investigating matters under the Resource Management Act.

4. WHAT RMA MATTERS CAN THE CHARGE BE APPLIED TO

With the introduction of a charge it is envisaged that council staff involved in investigating breaches against the following sections of the Resource Management Act will be able to recoup costs where it is found that a breach has occurred as a result of that activity.

- Section 9 – Restrictions on use of land
- Section 12 – Restrictions on use of coastal marine area
- Section 13 – Restrictions on certain uses of beds of lakes and rivers
- Section 14 – Restrictions relating to water
- Section 15 – Discharge of contaminants into environment
- Section 327 – Excessive noise direction
- Section 329 – Water shortage direction

All the above sections control the use or effects on the districts various resources unless the activity is expressly allowed by a rule in a plan or resource consent or regulations.

5. WHAT CAN BE CHARGED FOR UNDER THIS POLICY?

Investigating breaches costs Council through a number of ways including among others, staff time, travel and disbursements. The intent of this charging policy is to allow council to recover what is considered actual and reasonable costs incurred as a result of investigating these breaches. By actual and reasonable it is intended to mean those costs directly associated with the non-complying activity and which caused Council to respond as it did. It is envisaged that costs that may be fairly recovered include but may not be limited to:

- Staff time spent locating the activity and undertaking on-site inspection to identify/confirm breaches.
- Staff time spent determining culpability/responsibility for detected offences.
- Staff time spent in communicating and corresponding with persons/organisations responsible including matters involving remedial or mitigation works.
- Time spent in travel to a site where an activity is subsequently found to be non-complying.
- Costs incurred through disbursements such as costs of analysis.

It is recommended that no charge be incurred for time spent on an investigation that is less than 30 minutes including travel time.

6. STANDARD OF PROOF

Staff applying a charge under this policy will be required to apply the same standard of proof as to culpability that is applied under the provisions of the Resource Management Act prior to billing. In essence this means the same standard of proof as required for a prosecution or an infringement offence in that it is “beyond reasonable doubt. Ensuring this will minimise the risk of incorrect charging and provide a consistent benchmark.

7. WHY INCLUDE TRAVEL TIME?

Tasman district is large and many activities occur some distance from the staffed centres. When complaints are made in relation to activities Compliance staff are obliged to attend and investigate for breaches. In these instances the costs incurred by Council in travel to sites is directly attributable to that activity and are not inconsiderable. If the matter is found to be non-complying then the RMA clearly establishes the polluter pays principal and it is reasonable to expect therefore that persons or organisations responsible for breaches should pay these associated costs. This would represent a move away from the current practice of equalling out travel costs.

8. WHAT CANNOT BE CHARGED FOR UNDER THIS POLICY?

Section 150 of the Local Government Act 2002 allows Council to recover its costs for inspections conducted under another act if that act provides no mechanism. It does not however provide the authority for Council to recover its costs associated with the following:

- Non compliance with the rules if the breach is detected during routine monitoring of the resource consent or permitted activity. In these circumstances the matter should be dealt with through normal procedures under the RMA.
- Matters outside the actual investigation. Examples of this would be staff involvement in pollution clean up after an incident or dealing with the effects of an activity in order to avoid, remedy or mitigate further adverse effect. In these cases Council is required to deal with these matters through the Resource Management Act where Section 314 gives express authority through application for an enforcement order before the courts. Under this provision Council can seek to recover costs associated with clean ups through the court.
- Staff time in preparing infringement or abatement notices or initiation of enforcement proceedings including the obtaining of any legal advice.

9. THE RELATIONSHIP BETWEEN SECTION 150 AND THE INFRINGEMENT FINE REGULATIONS

Infringement fines are a tool provided for through the RMA that allows a council a means of providing punishment and deterrence for offences committed against the act. The infringement fine procedure is carefully prescribed in law including the summary right to a defence. Section 150 of the LGA however merely provides Council with the ability to recover costs incurred during inspections where an activity is found to be non-complying.

- Since the two forms of charging have different purposes there may be occasions where non-complying activities may attract both an inspection charge for the initial inspection and an infringement notice for the offence. To assist staff in the implementation of this cost recovery regime, a policy has been prepared and is attached – Attachment A.

10. ASSESSING THE POTENTIAL INCOME FROM THIS POLICY

Difficulties exist in trying to gauge with any certainty the likely income from this policy as there are too many unknown variables to give any meaningful value. That aside using this year's available complaint data provides some basis for an estimate. Using an assumption that 50% of the 595 complaints received to date are non-complying and the average officer time spent investigating is 1 hour at \$80 then the expected income would be in the order of \$23,800. Note this total excludes time involved in travel which is unquantifiable from the available data.

11. CONCLUSION

Council spends a considerable amount of time investigating all manner of incidents and offences as it is obliged to do as part of its duties and obligations under the RMA. On a great number of occasions investigations have revealed non-complying activities in contravention of the plan. At present Council has no ability under the RMA to recover costs it has incurred as a result of its investigations despite the polluter pays principals inherent in the RMA. As a result costs have generally fallen to the general rate

The Local Government Act 2002 provides a mechanism in section 150 for council to charge for inspections where no mechanism exists in the act being exercised, provided a policy is implemented through bylaw or a publicly notified resolution. This allows council to recover actual and reasonable costs incurred as a result of direct breaches of the plan from activities.

In conjunction with the other tools provided for in the RMA this policy should encourage a general improvement in compliance with the Councils policies and plan. More importantly it will reduce the level of unfairness seen through the continuing burden on the general rate by focussing on the polluter pays principal.

A proposed charging policy for incident inspections is set out in attachment A. This attachment is based on a policy implemented by Greater Wellington Regional Council in 2000 which was incorporated into their Resource Management Charging Policy. Their assistance in providing this policy document is greatly appreciated.

12. RECOMMENDATIONS

It is recommended that the committee:

- Receive this report.
- Agrees to the implementation of a charging policy on incident inspections as set out in Attachment A and resolves to notify this policy using the special committee procedures under Section 83 of the Local Government Act 2002.

Carl Cheeseman
Co-ordinator Compliance - Monitoring

Charges for Incident Inspections

1. SUMMARY

The Council may charge people or organisations whose activities contravene the Tasman Resource Management Plan or Resource Management Act 1991 for costs it incurs in inspecting those activities and where those costs can not be reasonably met by other means.

1.1 Circumstances in Which a Charge May Apply and Charges Applicable

Where a person (or persons) or organisation carries out an activity in a manner that contravenes the provisions of Section 9, 12, 13, 14, 15, 327, or 329 of the Resource Management Act 1991, the Council may charge that person (or persons) or organisation for the cost of any inspection it undertakes in relation to that activity. This cost may include:

1. time spent by Council officers identifying and confirming that the activity is taking or has taken place;
2. time spent by Council officers identifying and confirming the person(s) or organisation responsible for causing or allowing the activity to take place or have taken place;
3. time spent by Council officers alerting and informing the person(s) or organisation responsible of their responsibilities in relation to the activity, including any suggestions or advice relating to how any adverse effects might be avoided, remedied, or mitigated;
4. travel time from the Council's nearest relevant office;
5. Costs by way of disbursements (such as laboratory analysis costs).

The Council will only charge for time spent which exceeds 30 minutes. Travel time will be included in the calculation of this time.

Any charge will only be such as to allow the Council to recover its actual and reasonable costs, and will only be made to the extent that the Council's actions are occasioned by the actions of the person (or persons) or organisation responsible for the activity to which the charge relates.

1.2 Charges not Applicable to Consented Activities

Section 1.1 of this Policy does not apply to any activity to which a resource consent issued by the Council relates. Charges for inspections for resource consents are provided for in the Council's schedule of charges.

1.3 Authority to Charge

These charges are made under section 150 of the Local Government Act 2002.

1.4 Charge-Out Rate

The rate at which staff time shall be charged shall be the same as the hourly rate applicable at the time in the Council's Schedule of Charges. As at 1 July 2006, this is \$80 per hour (inclusive of GST).

1.5 Goods and Services Tax

Goods and Services tax will be added to any charge made under these provisions.

1.6 Remission of Charges

The Council may remit any charge made under Section 1.1 above, in part or in full, on a case by case basis, and at its discretion.

1.7 When Due

Charges are due for payment within 28 days.

1.8 Relationship of Charges to Infringement Offences

Where an infringement notice under the Resource Management (Infringement Offences) Regulations 1999 is issued by the Council in relation to the activity, or for a related activity, the provisions of those Regulations to do with payment, further action, non-payment of fees, defences, and queries and correspondence will be relevant to the timing and payment of any charge made under Section 1.1 above.

For example, if one of the defences listed in the Regulations is accepted, then no charge will be made for Council inspections under Section 1.1.

1.9 Relationship of Charges to Enforcement Orders Under s.314 of the Resource Management Act 1991.

The Council may also seek reimbursement for any actual and reasonable costs it incurs in avoiding, remedying, or mitigating any adverse effect on the environment, by way of an enforcement order under s.314 of the Resource Management Act 1991.

2. RELATIONSHIP OF CHARGES TO THE MARITIME TRANSPORT ACT 1994

These charges do not apply to marine oil pollution incidents. These are provided for under the Maritime Transport Act 1994.

2.1 Date Charges become Operative

These charges will apply from 1 August 2006 and will continue in effect until amended or replaced under s. 150 of the Local Government Act 2002.