

Report No:	REP11-07-08
File No:	
Date:	30 June 2011
<b>Decision Required</b>	

## REPORT SUMMARY

**Report to:** Environment & Planning Committee  
**Meeting Date:** 14 July 2011  
**Report Author:** Adrian Humphries, Regulatory Services Manager  
**Subject:** Tasman District Council Enforcement Policy

### EXECUTIVE SUMMARY

Tasman District Council has an Enforcement Policy in place which was adopted in 2007. Although this Policy is sound, it is restrictive in that it is very largely only geared towards enforcement of the Resource Management Act. We are responsible for enforcing many other Acts, Regulations and Bylaws and it is logical to have consistency in approach to the enforcement of these as well. For that reason the policy has been reviewed and updated to show the legislation that is enforced by TDC and the method in which this enforcement is carried out. This will achieve consistency of approach and potentially ongoing improvement of service as staff will have a set Policy to apply when carrying out all enforcement.

### RECOMMENDATION/S

It is recommended that the Committee adopt the Enforcement Policy 2011.

### DRAFT RESOLUTION

**THAT the Environment & Planning Committee receives the Tasman District Council Enforcement Policy report REP11-07-08 and approves its adoption as the Enforcement Policy for the Tasman District Council.**

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## **1. Purpose**

- 1.1 The purpose of this report is to allow adoption of a reviewed Policy which is intended to provide Tasman District Council staff tasked with enforcement responsibilities direction on the principles and procedures to be adhered to when undertaking their duties under the various Acts and Regulations Council administers.

## **2. Background**

- 2.1 The existing Policy was written in 2007 and since then has provided direction to TDC staff involved in enforcement. Although the Policy is considered to be a good document it primarily deals with enforcement of the Resource Management Act and does not adequately cover all other TDC enforcement responsibilities.

## **3. Present Situation/Matters to be Considered**

- 3.1 TDC Staff are actively involved in the enforcement of legislation. The existing Policy does not adequately cover the range of legislation enforced as it is primarily aimed at RMA enforcement. The reviewed Policy covers the additional areas whilst retaining the same method of operation that is currently employed in RMA enforcement.

## **4. Financial/Budgetary Considerations**

- 4.1 None except potential efficiency savings in training of enforcement staff.

## **5. Options**

- 5.1 Adopt the new Policy.
- 5.2 Retain the old Policy and risk inconsistent approaches to enforcement.

## **6. Pros and Cons of Options**

- 6.1 Adoption of the new Policy will improve efficiency, retention of the old Policy will not.

## **7. Evaluation of Options**

- 7.1 The adoption of the new Policy is the only beneficial option.

## **8. Significance**

- 8.1 The adoption of this Policy is significant to residents and visitors of Tasman only in so far as it will give TDC staff the ability to be consistent in enforcement. This in turn will raise public confidence in the ability of TDC to deal effectively with errant behaviour. It does not trigger the TDC significance Policy requirements.

## **9. Recommendation/s**

- 9.1 The new Policy be adopted.

## **10. Timeline/Next Steps**

- 10.1 A resolution be passed to adopt the new Policy.

## **11. Draft Resolution**

**THAT the Environment & Planning Committee receives the Tasman District Council Enforcement Policy report REP11-07-08 and approves its adoption as the Enforcement Policy for the Tasman District Council**



Adrian Humphries  
**Regulatory Services Manager**

**Appendices:** Tasman District Council Enforcement Policy 2011

TASMAN DISTRICT COUNCIL

# ENFORCEMENT POLICY 2011

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## **1. INTRODUCTION**

This procedure manual is intended to provide Tasman District Council staff tasked with enforcement responsibilities direction on the principles and procedures to be adhered to when undertaking their duties under the various Acts and Regulations Council administers.

While intended primarily for enforcement staff, this manual also provides other staff in Council and the general public with an understanding of the purpose and principles to be applied in monitoring and enforcing rules and regulations in Tasman District. It also provides insight into the range of enforcement tools available to Council and the selection processes undertaken to achieve desired outcomes.

This manual will be reviewed regularly and updated if and when required to reflect regulatory or procedural changes that may occur.

## **2. PURPOSE**

The primary purpose of this manual is to:

Provide enforcement officers at Tasman District Council with an understanding of the enforcement policies and procedures to be adhered to while exercising their duties and obligations under specific Acts.

Provide understanding on how Tasman District Council, through enforcement, gives effect to the purpose and principles of the relevant legislation, bylaws and the objectives of the Tasman Resource Management Plan (TRMP).

Provide guidance on the range of compliance promotion and enforcement tools available to enforcement staff.

Ensure a consistent and integrated approach to enforcement in Tasman District Council.

Provide Council staff and all resource users a clear understanding of Council's enforcement process and what is expected when contraventions occur.

## **3. WHY ENFORCE?**

Enforcement is an integral part of the implementation and administration of the law. As an agency having territorial authority responsibilities it has broad ranging environmental, planning, and development control responsibilities, including the statutory obligation to enforce its legal duties and responsibilities under the wide range of Acts it administers.

The reasons Council is required to enforce the law are essentially related to matters of health, safety and environmental protection. These are matters that Parliament has deemed to be of sufficient public interest to merit Government intervention. Council enforces the law to meet those undertakings through rules and resource consents.

The statutes under which the Council has duties and responsibilities for the enforcement of laws include the:

- Resource Management Act 1991
- Local Government Act 2002
- Local Government Act 1974
- Building Act 2004
- Fencing of Swimming Pools Act 1987
- Sale of Liquor Act 1989
- Dog Control Act 1996
- Impounding Act 1955
- Health Act 1956
- Transport Act 1962
- Hazardous Substances & New Organisms Act 1996
- Gambling Act 2003
- Prostitution Law Reform Act 2003
- Litter Act 1979
- Food Act 1981
- Biosecurity Act 1993
- And various Regulations, Council plans and bylaws

The need to enforce compliance may arise following routine monitoring or investigation following receipt of a complaint:

Structured monitoring programmes allow Council to assess the degree to which people are complying with the terms of their resource consent or the rules allowing them to undertake specific activities and respond accordingly.

Likewise, complaints investigation is a crucial function of Council in providing appropriate response to alleged breaches.

In both instances, the need to take enforcement action will arise because a breach of the legislation or a breach of a statutory consent has arisen.

We can broadly categorise enforcement mechanisms as being concerned with three interrelated outcomes, these are:

- Avoidance, mitigation or remedying of adverse effects;
- Compliance; and
- Deterrents and restitution.

Typically, the process of undertaking enforcement is a staged one of promoting awareness and providing assistance, warnings, issuing of enforcement notices and in serious cases, prosecution, although this may vary from time to time.

The scope of the following sections is to discuss the broad outline of enforcement investigations and standard procedures required for successful enforcement action. The standardisation of forms and reporting is also designed to assist compliance officers in generating a consistent approach to all enforcement investigations.



## **4. ENFORCEMENT PRINCIPLES**

### **4.1 Principles**

The requirement to enforce compliance with the law is a mandatory obligation of most of the Acts Council administers. These Acts provide the specific legislative framework for Council to enforce the rules and regulations. While these Acts provide the enforcement tools, how Council chooses to enforce remains at its discretion. This is necessarily so when considering that compliance and enforcement is complex in law and usually complicated by many factors, all having a bearing one way or another on an appropriate response.

Although enforcement officers are given discretion regarding the enforcement option to take, the response must always be commensurate with the level of offending and provide consistency in approach. Because of its discretionary nature there will be occasions where, on the facts of a particular case, no action is taken. While every effort should be made to treat like cases alike, there will be situations where differences may occur. Any accusation of inconsistency can be minimised provided every decision is backed up by sound and defensible judgements,

To assist enforcement staff in selecting an appropriate response, regard must always be given to the underlying set of principles guiding the use of enforcement. These principles must be adhered to when carrying out monitoring, enforcement or compliance promotion.

#### **Effect of Non-compliance**

Council cannot authorise the continuation of an offence however any action taken will depend on the severity of the offence and the consequences on the environment, people or property. The enforcement response should always be commensurate with the effects.

#### **Administrative Efficiency**

The Council will undertake its duties in a timely and professional manner, ensuring that at all times compliance and enforcement is done in as cost-efficient manner as possible.

#### **Objectivity**

Council will ensure that all complaints or alleged breaches are investigated in an impartial and objective manner and free of interference or coercion.

#### **Fairness**

Council will administer its enforcement responsibilities without fear or favour. There will be no bias in favour of consent holders, resource users, or complainants and any advocacy or enforcement will be applied consistently, impartially and fairly across all sectors regardless.

## **Certainty**

The Council will provide certainty and clarity about what is not acceptable behaviour and what is, and in instances of non-compliance the likely consequence. Decisions on enforcement action will be taken in a timely manner and without undue delay or interference.

## **Simplicity**

It is not appropriate to put in place a system that is unduly bureaucratic. Any approach to enforcement of legal obligations, while remaining legally defensible, should be simple to administer and understood by all staff, resource users and the public in general.

## **5. GENERAL PROVISIONS**

### **5.1 Enforcement Officers**

The CEO has the authority to appoint enforcement officers under various Acts, including the Local Government Act 2002, Health Act 1956, Resource Management Act 1991, Litter Act 1979 and Hazardous Substances & New Organisms Act 1996. Duly appointed enforcement officers have authority to undertake all statutory enforcement functions and responsibilities provided for by those Acts.

### **5.2 Warrant of Appointment**

Every Enforcement Officer in Tasman District Council is to be issued a Warrant of Appointment. The warrant serves as the officer's written authorisation and evidence of identification. This warrant should be carried by the officer at all times and be produced upon initial entry to any property whether asked or not, and upon any reasonable later request.

### **5.3 Surrender of Warrant**

Every Enforcement Officer is to surrender his/her warrant upon termination of employment in Council

### **5.4 Powers of Entry for Inspection**

The power granting an Enforcement Officer entry onto private land may differ with respect to obligations and duties required to be met, depending on the Act under which the power is exercised.

Power of entry to private property exists under the Building Act 2004 (Section 222), Resource Management Act (Section 332), the Local Government Act 2002 (Section 171), Hazardous Substances & New Organisms Act 1996 (Section 103), Health Act 1956 (Section 128) and the Dog Control Act 1996 (Section 14). It is the Enforcement Officer's responsibility to fully understand the obligations and duties contained in these Acts prior to exercising any entry onto private land.

**Note: All enforcement officers in Tasman District Council will hold warrants issued pursuant to these Acts stating that the Enforcement Officer is authorised the power of entry under these sections**

When exercising authority to enter private land, the following must be undertaken:

**In all cases** the Enforcement Officer must upon entering the property make every attempt to find the owner or occupier.

**In all cases** the officer is to show his/her warrant of appointment to the owner/occupier of the property to confirm identity and if the owner/occupier later asks to see the warrant again, the warrant should be shown.

**In all cases** (when the owner is not available) following an inspection, a Notice of Inspection shall be written out with all relevant details and the officer's business card should accompany the notice at all times.

**Note: It is a statutory requirement for Council to advise the occupant(s) that their property has been subject to an inspection under Section 332(4) of the Resource Management Act 1991 and Section 15(4) of the Dog Control Act.**

Officers can also use any assistance as is reasonably necessary to carry out this function. In the event that the owner or occupier refuses entry, the Enforcement Officer will contact the Regulatory Manager or the Environmental Information Manager and inform them of the situation. The Council may then apply to the District Court to issue a **"Warrant of Entry"** if the Enforcement Officer(s) is/are convinced that there will be evidence of an offence. A Constable is required to accompany the Enforcement Officer onto the site for the purpose of execution of the warrant.

## 5.5 Interviews

It is standard practice when conducting investigations to seek an explanation from any offending person and all relevant witnesses. A written record of the conversation should always be made at the time, or immediately after the conversation. A signed statement should be sought on serious matters. Whenever possible, it is useful to have another Enforcement Officer present when investigating an incident.

The fact that this is the only information a person is required to give should not stop the Enforcement Officer from seeking an explanation to an offence and every opportunity to do so should be given.

**Note: Section 178 of the Local Government Act, Section 22 of the Resource Management Act and Section 19(1) of the Dog Control Act specifically provide an enforcement officer the power to require a person suspected of committing an offence to provide certain information. Enforcement officers need to familiarise themselves with these provisions.**

## 5.6 Documentary Evidence

Photographs, written statements, diaries and file notes (including field records) are essential for the following reasons:

- They record what the Enforcement Officer observed and any actions taken.

- They can form the basis for the brief of evidence that will be prepared in the event that the matter is taken through to a hearing.

They can be referred to when the witness gives evidence to refresh his/her memory (prosecution only). Notes can only be referred to if the note was taken at the time of the incident, or as soon as possible after the incident. If notes cannot be taken at the scene of the incident, they should be recorded when the officer returns to the car. This will ensure the notes can be referred to in Court if necessary.

In prosecutions it is not unusual for charges to be laid between five and six months after an incident because Council requires this much time to thoroughly investigate a matter. Once charges are laid, it may take a further 6 to 12 months to obtain a hearing date. Therefore, staff may have to give evidence 12 to 18 months (and sometimes longer) after the incident. This is why clear and comprehensive file notes must be kept at the investigation phase. Officers may produce a transcript of notes and interviews provided that the original handwritten notes are preserved intact for future scrutiny. Note the storage of any digital media should not include any compression or alteration of the captured image or transcript.

Generally, file notes should cover:

- The time of entry to inspect the property, the reasons for doing so and the duration of the inspection.
- Confirmation that the warrants were shown to the person(s) spoken to, or written notice of the inspection was left in a prominent place if the owner/occupier was not present.
- The full names and addresses of all persons spoken to and a contact telephone number for each of them.
- Questions put to the interviewee, and the interviewee's response.
- Any explanation or reasons given by the person(s) spoken to.
- The officer's observations.
- The weather on the day of the investigation, including whether it had been raining previously, etc (this is important when dealing with discharges into or onto land that have found their way into a watercourse).
- Reference to samples, sample labels and photographs.

Enforcement officers should type a record when they return to the office after investigating a complaint. This should give a general overview of the investigation and expand or clarify any "shorthand" in handwritten notes.

## **5.7 Technical Instruments**

Enforcement officers are likely to use a variety of technical instruments in collecting samples and in carrying out field measurements. The admissibility of data generated by mechanical or computerised instruments is subject to the law of evidence. To be able to admit evidence collected by the use of an instrument, it is necessary to show the following:

The instrument was used by someone qualified to use it.  
There was correct operation of the instrument, and it was in good condition for accurate work.

**Note: It may be necessary to produce the manufacturer's specifications for the instrument and give evidence that the instrument was regularly maintained and/or calibrated in accordance with the manufacturer's specifications, or standard analytical methods or procedures.**

If the instrument is complex and not frequently in use, evidence must be given showing that the instrument was constructed and/or programmed on scientific principles, and is accepted as dependable for its purpose by the profession concerned in that branch of science. This sort of evidence can only be given by an expert. Advice should be sought from experts in Council if available, or externally if necessary, prior to the use of such instruments.

If there are any handwritten notes made recording results, these must be retained, even if later typed up. Any original computer-generated printout should be retained.

## **5.8 Visual Observations, Photographs, Sketches and Measurements**

Detailed visual observation is very important in prosecutions. Photographs should always be taken and every Enforcement Officer should carry the camera at all times. In certain cases, consideration should be given to aerial photographs, as this is often very useful for illustrating an overview of the situation. It is important to ensure that the date and time is recorded on all photographs. A sketch will be helpful (e.g., identifying dumping points, waterways and the source of the discharge or the extent of an excavation). Global positioning system (GPS) units and 100 metre tape measures should be available to all enforcement staff.

## **5.9 Samples**

Section 332(2) of the Resource Management Act provides that the Enforcement Officer may take samples of water, air, soil or organic matter, and under Section 332(2A) may also take a sample of any substance that the Enforcement Officer has reasonable cause to suspect is a contaminant of any water, air, soil or organic matter. Whenever possible, collect samples of the contaminant discharged and analyse the samples so that evidence can be given of the effect of the contaminant on the environment. Remember that visual observation on its own may not be sufficient to prove the substance is a contaminant as defined in the Resource Management Act.

The purpose of sampling is to identify the contaminant discharged and its likely effect on air, soil or water quality. Hence, the receiving environment should also be sampled above and below the point of discharge. Make sure to establish the extent of any discharge as accurately as possible, including directions of flow and speed. If there are other possible sources of contamination (e.g., two drainpipes discharging into the same stream), samples should also be collected from these other sources to establish their effect on the receiving environment.

It is important that the investigating officer adheres closely to the sampling procedures outlined in Tasman District Council Sample Collection Procedures manual.

Food Act 1981 Section 20 and 21 has similar provisions relating to food samples.

## 5.10 Chain of Custody

The “chain of custody” refers to the passage of an exhibit, from where it was located until the time it is produced in Court as evidence (physical evidence such as samples, documents or photographs are referred to as “exhibits”). The chain of custody proves that an exhibit is, in fact, what it is alleged to be (i.e., what is produced in Court is precisely what was originally found at the scene).

## 5.11 Service of Documents

It is important that the correct procedures are observed in relation to the service of documents under the specific Acts Council administers. The mode of service of documents under the Resource Management Act is clearly detailed in Section 352. In general service of a document may be achieved through the following means:

When the recipient is present, delivery personally to that person

Hand delivering any document to the usual or last known residence or place of business of the person (the letter box is acceptable). In some cases, delivery can be by facsimile; or

Send it to the actual or last known place of residence or business of the person; or

Send it by any other manner that the Court may, on application to it, direct.

Pursuant to Section 352(5) of the Resource Management Act, Section 66(2) of the Dog Control Act and Section 14(2) of the Litter Act where a notice or document is sent by post to a person, it shall be deemed, in the absence of proof to the contrary (e.g., registered post) to be received by the person at the time the letter would have been delivered in the ordinary course of the post.

Service on a body (whether incorporated or not) can be carried out by service on an officer on the board of that body, or on the registered office of the body.

## 5.12 Cost Recovery

Council may recover what is considered actual and reasonable costs incurred as a result of investigating breaches of an Act. By “actual and reasonable”, it is intended to mean those costs directly associated with the non-complying activity and that caused Council to respond as it did. 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.

These costs are incurred after a second or subsequent visit detects continuing non-compliance, or new offending.

Enforcement officers should endeavour to recover all fair and reasonable costs associated with an investigation. Once a decision to take enforcement action is made however, Council is then limited in recovering costs under this Policy, as it excludes any activity not deemed to be an inspection, such as enforcement proceedings. In essence, Council cannot charge for time spent preparing infringement or abatement notices, or preparation of other enforcement proceedings. In these instances, Council must rely on costs awarded by the Courts at any later hearing.

### **5.13 Receipt or Handling of Monies**

No Enforcement Officer in Tasman District Council shall accept or handle any fees or monies associated with their duties, including fines payments.

### **5.14 Disclosure of Information**

If Council prosecutes, all file notes and other documents (other than correspondence and other communications between the local authority and its lawyer relating to the prosecution) are subject to disclosure under the Criminal Disclosure Act 2008.

For any action not subject to the Criminal Disclosure Act 2008, if the party against whom the action is taken makes a request under the Local Government Official Information & Meetings Act 1987, copies of documents on the local authority file are required to be provided unless there are reasons for withholding the information under Sections 6 and 7 of the Local Government Official Information & Meetings Act.

As a general rule, the exception will be disclosure of the names of complainants. The Council will not normally disclose the names of complainants under the provisions of Section 27(1)(c) of the Privacy Act 1993, which authorises the right to withhold certain information.

All requests for disclosure of information are to be referred to the Environmental Information Manager or Regulatory Manager in the first instance.

### **5.15 Media Release**

Only the Environment & Planning Manager or the CEO has the authority to release information to the media unless he/she has delegated the authority. Under no circumstances are enforcement officers to discuss enforcement issues with the media unless first consulting with the Environment & Planning Manager.

In prosecutions before the Courts the rule of sub judice applies. "Sub judice" means that while a matter is under judicial consideration public comment on the case is prohibited, as the matter has yet to be decided by the Court.

As the media often report about matters prior to the Court making a decision, any press releases about enforcement matters should be restricted to the simple fact that Council is undertaking enforcement action in respect of an alleged breach. Under no circumstance can any information be given that can lead to the identification of the names of the defendants, or other parties to proceedings.

## **6. THE ENFORCEMENT PATHWAY**

The following section outlines the enforcement pathway expected to be undertaken from discovery of an offence through to the decision to take enforcement action.

### **6.1 Response on Discovery of Offence**

The response upon discovery of an offence will be largely dependent on several factors, including the need to deal with any ongoing adverse environmental effects, risk of continuing offending and the seriousness of the offence. It is expected that the response will take the following staged approach:

#### **1. Response to Effects**

Upon discovery, the initial response will be to assess the actual or potential effects, if any, resulting from the contravention. Significant adverse effects will require an immediate response prior to any other action in order to address those effects. This may include:

- A full pollution prevention response (for RMA), defaulting directly to abatement notice, enforcement or interim enforcement order, in order to prevent further serious environmental damage from starting or continuing.
- An immediate closure in the case of a serious food hygiene risk.
- Seizure or destruction of an offending animal in the case of a dog attack.

#### **2. Response to Offence**

Following any urgent intervention to deal with effects, the next stage is to conduct investigations, including gathering evidence and explanations from offenders. It is recommended, particularly with serious offences, that explanations and/or admissions be obtained by way of formal interviews conducted by the investigating officer.

In less serious matters, it will usually be sufficient to write to the offending party or parties requiring written explanation as to why the offence occurred and the circumstances behind it. The purpose of a formal letter is threefold:

- To advise that non-compliance has been detected and Council believes the recipient is responsible.
- To allow the recipient opportunity to consider the matter and propose remedies.
- To provide an explanation that will assist Council in determining an appropriate response to the offence.

Regardless of the level of offending, a response should always be sought from an offender. The exception to this would be matters of a very minor nature with nil environmental or other detrimental effects, or the person has responded such that the effects are remedied and it will not happen again.

Upon receipt of any explanation, the next and final stage is one of deciding on a response to the offence by determining the appropriate enforcement action (if any) through a sound decision-making process.



**Note: Notwithstanding the above, Tasman District Council reserves the right to proceed directly to enforcement action, including prosecution, against parties where the circumstances support this.**

### **3. Deciding the Enforcement Response**

Making the correct enforcement response, often in the absence of complete information, requires considerable skill. It also requires a good knowledge or understanding of:

- The requirements, duties and transitional provisions of the various Acts and Regulations;
- The rules and objectives of Council's plans and policy statements;
- Ability to interrogate the Property and Rating database;
- Common sense in knowing when to apply the principle de minimis;
- An ability to be decisive; and
- Diplomacy and tact (particularly when informing someone that the Council will be taking further enforcement action).

It is recognised that many of the attributes listed above can only be gained through experience in an enforcement role however it is expected that enforcement officers will endeavour to familiarise themselves with the rules, regulations and databases operated by Council and avail themselves fully of training courses and other opportunities to up skill when available.

Aside from these attributes, deciding on the correct enforcement response also requires a clear understanding of the enforcement options that are available to officers and working through them to select the most appropriate for the offence given the circumstances. The following section outlines these various options.

## **7. ENFORCEMENT OPTIONS**

Tasman District Council enforcement officers have a broad range of enforcement options available to them to resolve matters of non-compliance. Selecting the appropriate enforcement response will depend on such factors as the seriousness of the offence, the significance of adverse effect on people and/or the environment and the level of remorse shown by the offender. The following range of enforcement options is available to staff in response to detected offending.

### **7.1 Informal Options**

These are options usually available as a response to minor offences with no or minor adverse effects, where further non-compliance is unlikely and formal enforcement action is not deemed appropriate (or any more effective) in achieving a desired outcome over an informal approach.

#### **Information/Advice**

This type of response is appropriate for incidents of very minor non-compliance, the purpose being to notify that non-compliance exists and request the need for compliance to be observed. Correspondence should be in writing and copies placed on file to provide a record for future reference. The correspondence need not seek a written explanation from the offender but may include educational material.

## **Education**

Education is a valid and useful tool for use in minor matters where the non-compliance was unintentional and educating the offender will achieve a desired outcome without the need for other enforcement action.

Education may extend to advising of the rules relating to the activity, or providing understanding of the environmental effects resulting from their actions.

Council has a number of in-house resources and useful publications that may be used for this purpose such as environmental health information sheets.

## **Warning Letter**

A warning letter is formal notification that an offence has been committed. A warning letter is issued when the level of offending is such that other informal options are not appropriate, yet formal enforcement action is not warranted after:

- Working through the enforcement decision process and;
- Considering any written response to a request for explanation.

Copies of warning letters must be attached to any relevant files.

## **7.2 Formal Enforcement Options**

When the offence is such that there is a real need to take action to avoid, remedy or mitigate adverse effects, ensure compliance, or provide deterrence and/or penalty, one or more formal enforcement responses is/are required.

### **Infringement Notice**

An infringement notice is written notice that an offence is alleged to have occurred against an Act. The notice requires the payment of an instant fine (set fee), as provided for by an Act to which the breach is alleged to be against. Fines are issued in accordance with the Summary Proceedings Act, which determines the process. The Summary Proceedings Act provides that a person subject to an infringement notice may elect to pay the fee, or have the matter heard in the Courts.

### **Abatement Notice**

An abatement notice is a formal notice prescribed under the Resource Management Act that compels a recipient to act in some way as determined by the notice. The notice is issued when there is a requirement for someone to:

- Cease an activity.
- Do something necessary to avoid, remedy or mitigate an actual or potential adverse effect on the environment.
- Comply with a resource consent, rule in a plan or regulation in order to avoid an adverse effect.

### **Enforcement Orders**

An enforcement order is an order from the Environment Court directing a person to:  
Cease an unlawful or objectionable activity that is likely to have an adverse effect;  
Take action to ensure compliance, or avoid, remedy or mitigate any adverse effects;  
Change or cancel a resource consent under certain circumstances.

An enforcement order may require the restoration of any natural and physical resource to the state it was before the adverse effect occurred. A person against whom an enforcement order is made shall comply and pay all the actual and reasonable costs and expenses of complying with the order unless the order directs otherwise (the application must include an application for Council costs). If a person fails to comply with an enforcement order, Council can carry out the required work and charge that person (failure to comply with an enforcement order is also an offence under Section 338 of the Resource Management Act).

The Council under Section 317 of the Resource Management Act must give a "Notice of Application" form to every person directly affected by the application within five (5) working days of applying for the enforcement order. The Judge before deciding will hear the applicant and anyone else who wishes to be heard. The Courts will then either:

- Make an appropriate order; or
- Refuse the application.

The Court cannot make an enforcement order against a person who is acting in accordance with a rule in a plan or a resource consent if the adverse effects for which the order is sought were recognised at the time of approval, unless it was considered necessary to do so.

### **Interim Enforcement Order**

The Council may also apply to the Environment Court Judge or a District Court Judge to make an interim enforcement order under Section 320 of the Resource Management Act if it considers other mechanisms to be too slow or an emergency works notice inappropriate. The Council's legal advisers will make the application on behalf of the Council. The Judge, if he/she so wishes, will issue an interim enforcement order without holding a hearing and without the necessity to serve a notice in accordance with Section 317 of the Resource Management Act.

The Judge shall instruct the Council to serve a copy of the interim enforcement order on the person against whom the order is made. A person against whom the order has been made, and who has not been heard by the Judge before the order was made, may apply as soon as practicable, after the service of the order, to the Judge to change or cancel the order. The Judge may confirm, change or cancel the interim enforcement order at any time.

The interim enforcement order is a quicker method of obtaining an enforcement order. It is time-saving in that the Judge should be readily available to hear such an application and make a decision without having to hear the other side. It is a form of an injunction that takes effect once it has been served. An interim enforcement order stays in force until an application for a full enforcement order is determined, or until cancelled by the Judge under Section 320(5) of the Resource Management Act.

### **Prosecution**

Prosecution is an enforcement tool which, if a conviction is secured, would normally result in a penalty/sentence being imposed on the alleged offender.

A prosecution can be seen to have a punishment, as well as a deterrent, dimension. Invariably, prosecution happens after an offence has taken place and is not therefore a method of fixing or mitigating the effects of an alleged offence. This is important,

as it may be many months before a case is heard, by which time the effects of any breach or non-compliance may be irreversible.

There is also a financial implication to prosecution. While the Council may have costs awarded in its favour or receive a proportion of any penalties, the costs of invoking prosecution proceedings by Council will be considerable and the process will be a time-consuming method of enforcement. For this reason, prosecution should only be considered for the most serious of cases.

### **Water Shortage Direction**

Council may issue a water shortage direction when it is considered that a serious temporary shortage of water exists in the District. A direction, once issued, will restrict or forbid the taking of water by users. Water shortage directions can only be issued for a period of 14 days but can be revoked, renewed or amended by a subsequent direction from Council. The process of public notification is well prescribed and any subsequent deliberate contravention is a prosecutable offence.

### **Excessive Noise Directions**

Under the Resource Management Act an Enforcement Officer or Constable on request may issue an excessive noise direction, either orally or in writing, that requires a person to immediately reduce the excessive noise to a reasonable level. This direction is additional to any power under Sections 322 – 325 of the Act to issue an abatement notice for excessive noise.

The issue of a notice binds a person to cease or reduce the noise for a period of up to 72 hours. Contravention of the direction can result in seizure or incapacitation of the device causing the noise. Abatement Notices can also be issued under Section 338 of the RMA for repeat offenders.

## **8. SELECTING AN ENFORCEMENT RESPONSE**

Deciding on the appropriate enforcement response is often complicated by a range of factors. In order to make a sound and justifiable decision, it is essential that all relevant issues surrounding the matter are carefully considered prior to actual enforcement action being taken.

### **8.1 Factors Requiring Consideration**

Along with the principles contained in Chapter 5, the following are all matters that need careful consideration prior to selecting a correct enforcement response. It must be remembered however, that this is not an exhaustive list and other factors may exist in certain cases:

#### **1. Circumstances**

*The significance of the actual or potential adverse effect on persons or the environment from the non-compliance.*

Consider the sensitivity of persons and/or the receiving environment; magnitude of distress, environmental damage and whether the effects are temporary or ongoing, irreversible, or able to be mitigated. Question whether the activity, while providing a breach, is of such a minor nature or effect as to be de minimis and warrant no enforcement response.

*Conduct of offender.*

Assess the deliberateness of the offender's action. Was the act as a result of deliberateness or carelessness, was the person ignorant of the law, or ought to have known? Ascertain if they were under instruction from other parties or employers, or acting alone. Consider closely if the incident was avoidable and what, if any, action was taken to mitigate when the offender became aware of the issue.

*Previous history.*

Establish if there is a previous history of non-compliance, or pattern of similar offending. Ascertain if there has been a failure to act on previous warnings by Council, or a record of previous enforcement action undertaken.

*Action taken and degree of remorse shown by offender.*

Is the offence still continuing, or was action taken to mitigate or remedy any effects, or have steps been put in place to avoid future breaches? Was Council notified at the time of incident, or the offender becoming aware? Does the offender accept responsibility or deny, show remorse, or have a cavalier or apathetic approach?

*Potential or likelihood of recurrence.*

Assess if the incident is a one-off, or whether there is potential for it to recur. If so, have steps been put in place to avoid any future recurrence, or is the risk still clearly present?

## **2. Legal Issues**

*Establish a breach exists.*

Determine that a clear breach of an Act, rule in a plan, consent or a Regulation has occurred in the first place.

*Ingredients of offence.*

Establish that all the ingredients of the offence are present and clearly able to be established. Assess what standard of proof is required – on balance of probabilities, or beyond reasonable doubt?

*Statute of limitations.*

Determine when Council first become aware of the offence. Remember that Section 338(4) of the Resource Management Act and most other Acts limit the laying of information in the Courts to no longer than six months from when the date at which the offence became known or ought to have become known to the Council. For filing of infringement notices the limitation is six months from the date of offence pursuant to the Relevant Acts and the Summary Proceedings Act.

*Statutory defences.*

Determine if they have a defence. In the Resource Management Act, statutory defences are provided for under Sections 340 and 341 for offences against the Act, Litter Act and Food Act have similar provisions. Consider fully the availability and likely success of these as a defence in any enforcement proceedings.

*Enforceability.*

Determine the enforceability of the condition or rule. It is not policy to proceed against anyone for a breach if the legality or certainty of meaning of the rule or condition is in any question.

### **3. Desired Outcomes**

*Outcomes.*

Determine if there is a desired outcome and whether the intended enforcement action provides the right tool to achieve the desired outcome.

*Punitive or deterrent effect.*

Establish whether there is a need to provide an appropriate punitive or deterrent response for the level of offending.

*Cost-effectiveness.*

Determine if the proposed enforcement response is the most cost-effective approach for the particular level of offending and the desired outcomes sought.

## **8.2 Standard of Proof**

There are two different standards of proof that require consideration in any enforcement decision process.

The standard of proof required for a prosecution is “beyond reasonable doubt”. A “reasonable doubt” is a doubt that would prevent a reasonable and just judge or jury from coming to a conclusion. In the case of an infringement notice the standard of proof for an Enforcement Officer is “has reasonable cause to believe”. In such cases any individual issued with an infringement notice still has the right of appeal to the District Court where any evidence would be weighed by the presiding Court Officers and a decision made.

The standard of proof for an application for enforcement order or appeal against abatement notice is “on the balance of probabilities”. This means that once both sides have presented their evidence, the Judge will find for the party who on the whole has a stronger case.

Before any action is taken, the sufficient existence of these levels of proof must be established.

## **8.3 The Enforcement Option Matrix**

The following enforcement option matrix is designed to assist in selecting an appropriate enforcement option once the above steps have been assessed and weighted. The matrix provides a useful tool in conjunction with the other checks in determining the appropriate response. It should be recognised however that the table (while a useful guidance tool) is limited in its ability to determine an outcome in all cases due to the varying and complicated nature of some offences. The table should however assist in providing a pathway towards a more consistent enforcement process.

Actual or possible effect of Offence	First Offence (Unlikely to happen again)	First Offence (Potential to occur again)	Second or Subsequent Offence	Deliberate or Knowingly Negligent
No personal or environmental effects	Note on file and no further action	Warning letter and preventative action plan	Infringement fine	Infringement fine
Minor personal or environmental effects (Able to be remedied)	Warning letter	Warning letter and preventative action plan	Abatement notice requiring action and Infringement fine	Abatement notice requiring action and Infringement fine
Minor personal or environmental effects (Unable to be remedied)	Warning letter	Warning letter and preventative action plan	Preventative abatement notice and Infringement fine	Preventative abatement notice and Infringement fine
Moderate personal or environmental effects (Able to be remedied)	Abatement notice requiring action and/or Infringement fine	Abatement notice requiring action and/or Infringement fine	Abatement notice requiring action and Infringement fine	Abatement notice requiring action and Infringement fine
Moderate personal or environmental effects (Unable to be remedied)	Infringement fine	Preventative abatement notice and/or Infringement fine	Infringement fine or prosecution depending on circumstances	Infringement fine or prosecution depending on circumstances
Significant personal or environmental effects (Able to be remedied)	Abatement notice requiring action and/or Infringement fine	Abatement notice requiring action and/or Infringement fine	Enforcement order and/or prosecution	Enforcement order and/or prosecution
Significant personal or environmental effects (Unable to be remedied)	Infringement fine or prosecution depending on circumstances	Infringement fine or prosecution depending on circumstances	Prosecution	Prosecution

#### 8.4 Deciding the Response

Once an interim decision has been made, it should be rechecked for consistency against the principles and policies outlined in this document. If at this stage the Enforcement Officer is satisfied that the response selected is appropriate, it is necessary to seek final approval from the Regulatory Manager to initiating any action. Once approval is gained, the matter should proceed as directed.

## 8.5 Appeals

In order to comply with the rules of natural justice an appeals process must be available to those who have had action taken against them. The response to such an appeal will be dependent on the original action by the Council. The table below indicates the level of response that would normally be considered appropriate; however this is only for guidance and should not prevent an officer adjusting their response to a specific case:

### Appeals

Original Action Taken	Response(s)	Remarks
Warning letter	Discuss with alleged offender and explain the purpose of the letter. Note their appeal on file.	No elevation of response required
Infringement fine	<p>Alleged offenders have their summary of rights printed on the infringement notice. These rights allow them to contact the council and deny liability and/or explain the reason for the offence. The issuing officer should consider the appeal and decide on the most appropriate response, this could be:</p> <ol style="list-style-type: none"> <li>1. Reject the appeal and offer the alleged offender the opportunity for a Court hearing. If the alleged offender takes the option of a Hearing this must be arranged by council through the District Court and a Notice of Hearing issued to the alleged offender.</li> <li>2. Consider forming a hearing panel of Councillors to hear the appeal who would then decide the best course of action.</li> <li>3. Accept the appeal and cancel the Notice.</li> </ol>	<p>Ideally any appeals should be dealt with at this level as a Court Hearing incurs additional costs for the Appellant and the Council.</p> <p>See Summary Proceedings Act 1957.</p>
Abatement Notice	Any person on whom an abatement notice is served may appeal to the Environment Court.	See s325 RMA
Enforcement Order	Any person who is affected by an enforcement order may apply to the Environment Court for it to be changed or removed.	See s321 RMA
Prosecution	If a prosecution is being taken an appeal should be dealt with by the Court. This does not prohibit council from taking into account any information provided by an offender which could have an effect on any outcome in Court.	



## 8.6 Evaluating Effectiveness

In order to develop an effective enforcement process in Council, all enforcement action undertaken by officers should be evaluated 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, 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.

