



Gisborne District Council

Kaupapa Here Whakauruhi Enforcement Policy

How we undertake compliance and enforcement of
the Resource Management Act in Tairāwhiti



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Background

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

Gisborne District Council (Council) has a number of obligations relating to the implementation and enforcement of the Resource Management Act (RMA) 1991.

In carrying out our duties under the RMA Council needs to:

- meet our statutory obligations under the RMA
- meet the expectations of our community
- work in a way that reflects our corporate values; and,
- further the vision and mission of Council.

Our RMA obligations are met by a dedicated Compliance Monitoring and Enforcement (CME) team. The CME team monitor a range of activities regulated by the RMA, including compliance with National Environmental Standards, Tairāwhiti Resource Management Plan (TRMP) rules, and the conditions of resource consents. Their role also includes taking enforcement action against an individual or company when a breach has been confirmed. Council has a requirement to take appropriate enforcement action against liable parties using the enforcement tools available under the RMA.

With increasing pressure on resource use, Council's regulatory functions are subject to greater interest from resource users and the wider community. The Enforcement Policy provides a clear understanding of Council's management of compliance and enforcement of the RMA. It is intended that the policy will encourage a regional culture of proactive compliance, accountability, consultation and co-operation in governing resource use in Gisborne.

Purpose

This policy:

- sets the purpose and principles by which we promote and enforce compliance with the RMA; and,
- ensures a consistent and integrated approach to compliance and enforcement of the RMA by Council.

Scope

This policy covers the Council's RMA compliance, monitoring and enforcement activities. This policy is general in nature and does not limit Council's discretion in considering appropriate compliance and/or enforcement.

Our guiding regulation framework

Council has a "spectrum" approach to encouraging positive behaviour change and ensuring the highest levels of compliance possible through the compliance, monitoring, and enforcement of the RMA. The CME team also apply the 4 Es approach (Engage, Educate, Enable and Enforce) in their compliance programmes.





Council's approach to ensuring compliance with the RMA includes:

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

Principles

The following principles are to be used to guide the development of strategic compliance programmes:

Transparent

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

Consistency of process

Actions are consistent with legislation and within our powers. As a sector, and as individual authorities, we will strive for consistency of compliance and enforcement outcomes for similar circumstances. We will ensure our team members have the necessary skills and are appropriately trained, and that there are effective systems and policies in place to support them.

Fair, reasonable and proportional approach

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

Evidence-based and informed

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

Collaborative

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



Lawful, ethical and accountable

Conducting 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.

Targeted

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

Responsive and effective

Considering allegations of non-compliance 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.





Conflict of Interest

Council will carry out all of its RMA compliance, monitoring and enforcement functions in accordance with the Council's conflict of interest policy.

The purpose of this policy is to:

- Create a framework around 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, political 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 conflict of interest may arise (and therefore how to avoid a conflict of interest) and a mechanism for ensuring that any actual or potential conflict of interest is disclosed and managed appropriately. All staff are expected to be vigilant about how any conflicts of interests (real or perceived) may impact their ability to carry out their responsibilities and identify this as soon as the conflict is identified.

Media

Public scrutiny is beneficial to the administration of justice and the community has a right to accurate information. However, it is of primary importance that public statements do not prejudice an individual's right to a fair trial. This is explicitly provided for under section 6(a) of the Local Government Official Information and Meetings Act 1987.

Until an enforcement outcome is reached, such as a notice issued or prosecution commenced, any publicity about enforcement matters will generally be restricted to the simple fact that Council is investigating an alleged breach. Similarly, where a matter is before the Court, Council will not provide any statements to members of the public or the media. Council will generally publicise the outcome of a prosecution at the conclusion of the Court proceedings where appropriate (unless publicity is not in the public interest or not allowed by law) for the following purposes:

- Education and deterrence
- Encouraging and reinforcing compliant behaviours
- Maintaining the community's perception of the integrity of our regulatory work

Staff are expected to respond to media requests in accordance with Council's policy and procedures.

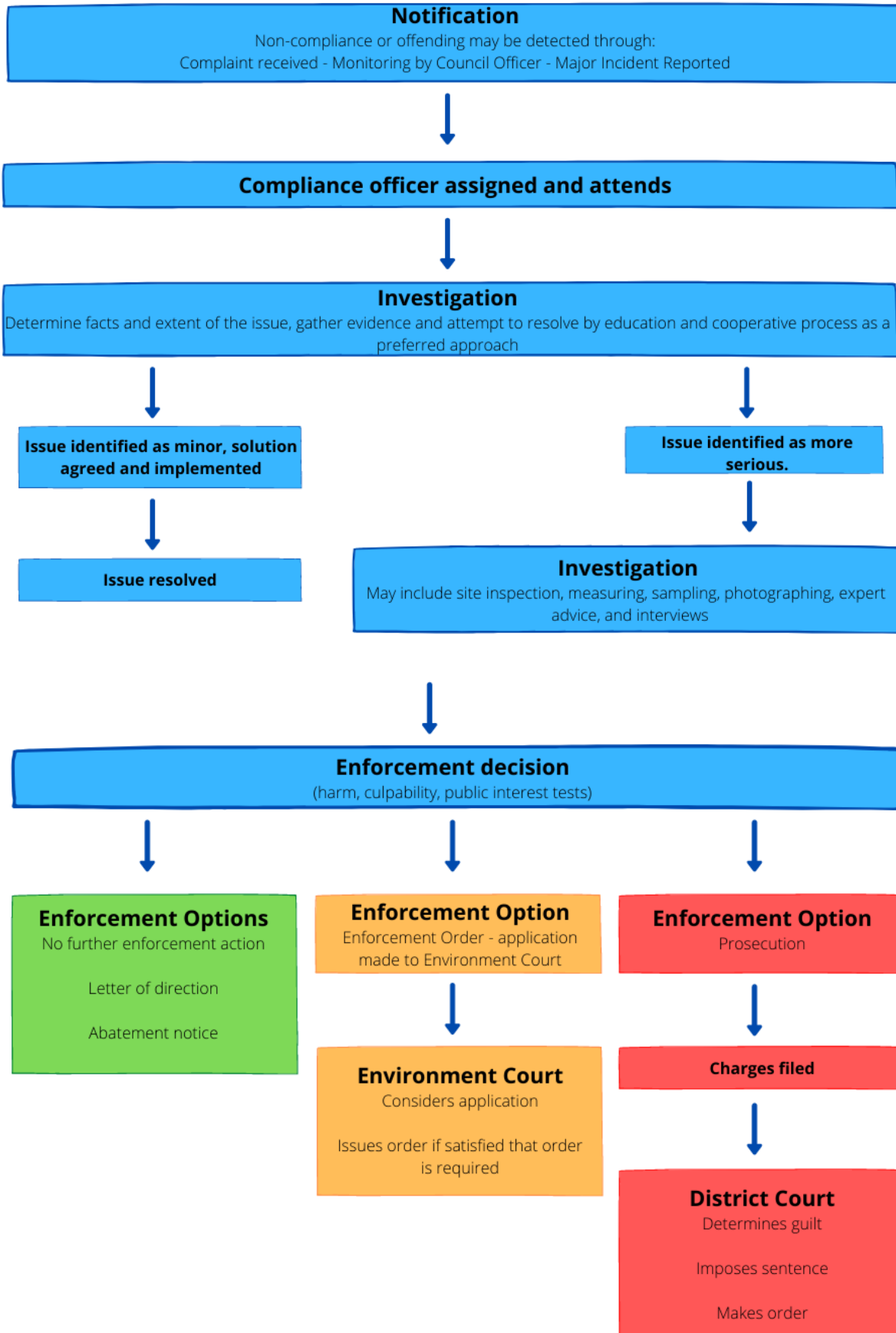
Use of prosecution fines

When an award in favour of Council is made by the Court as a result of a prosecution taken by Council, that award is used to pay for the costs of taking the prosecution. The costs involved in taking a prosecution vary depending on the scale and complexity of the breach and any defence mounted by the party being prosecuted. Should any part of the award remain after deducting the costs of the investigation the money will be used to offset rates in relation to the cost of compliance and monitoring.



The investigation and enforcement process

The process at a glance





Receiving complaints about a potential breach

Complaints can be made to Council via a number of methods, including phone and email. It helps to provide as many details as possible. These include the identity and address of the complainant, the address at which the alleged breach has taken place, a description of the unauthorised activity, and the harm that is considered to be caused. Complainants may also be encouraged to send in dated photographs of the alleged breach.

Council will ensure that:

- All valid complaints are properly recorded and investigated.
- The personal details of the complainant are held in the strictest confidence.
- In cases involving a serious and/or irreversible harm, the complaint is investigated as a matter of priority, usually within 24 hours of receipt.
- The complainant is updated on any subsequent action that may result as soon as reasonably practicable.

Council does not take sides in a dispute. It will, however, judge what action is appropriate according to the evidence, particular circumstances, impact on the built or natural environment, relevant policies, and legislation.

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 such as 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 Gisborne District Council's Chief Executive has the authority to issue staff with warrants of authority. A warranted enforcement officer has the ability to enter private property (excluding a dwelling) for the purpose of assessing compliance with environmental regulation. This can be completed without prior notice to the occupier or landowner. 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 has given very clear direction as to when an officer can rely upon their warrant of authority and when they need to have informed consent or a search warrant.



Staff must attend specific training and be familiar with all of their statutory obligations before carrying out any enforcement functions.

Cost recovery

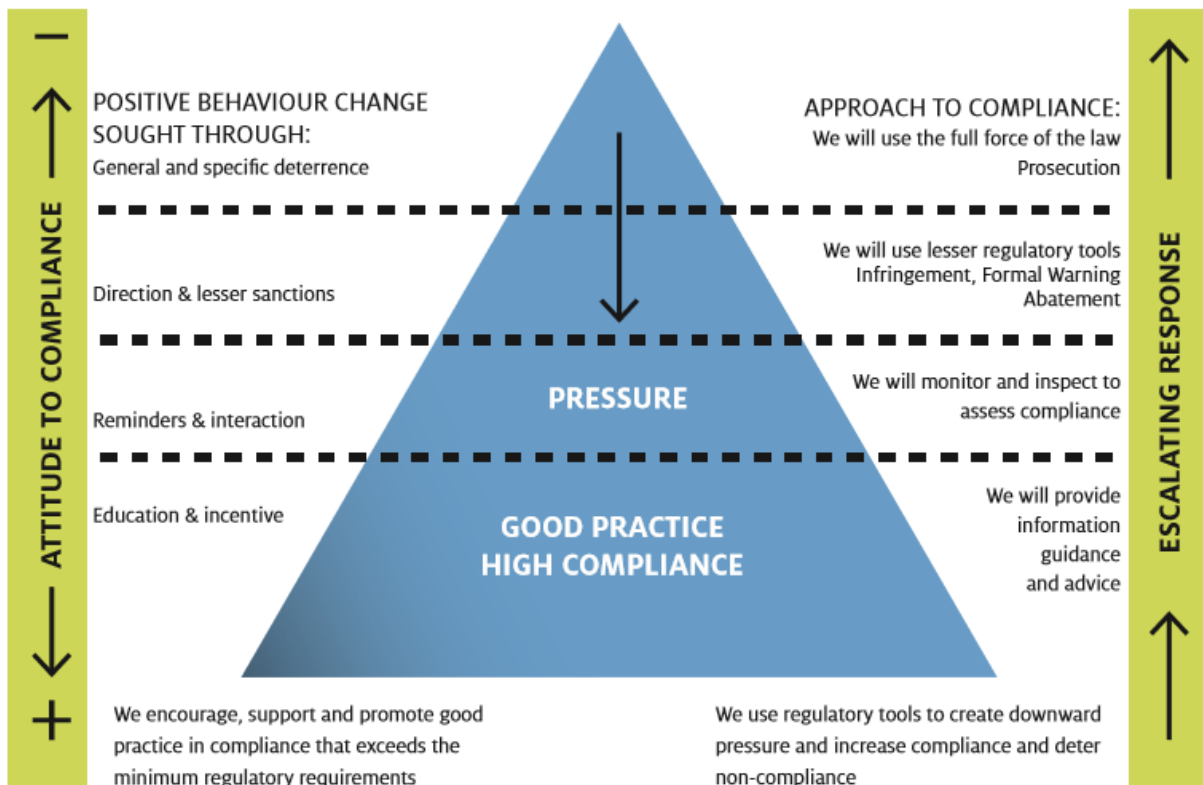
Council endeavours to make all reasonable efforts to ensure that the cost of compliance is met by the person or company responsible for the non-compliance and not by the Gisborne's ratepayers.



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.

The 'compliance pyramid' is a widely used model for achieving positive behaviour change. 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.



The most severe response is reserved for the most serious breach

Adapted from Ian Ayres & John Braithwaite (1992), *Responsive Regulation: Transcending the deregulation debate*, Oxford University Press, New York

Enforcement decision-making

Enforcement of the RMA can be complex. The Act provides potentially large penalties for those who breach. However, it does not offer any guidance as to determining what is serious and what is less so. The courts have provided helpful guidelines as to what factors are appropriate to consider in RMA cases to determine the seriousness of a breach. It is widely accepted across the CME 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 the Solicitor-General's Prosecution Guidelines?

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 agency.

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.



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.

A warranted officer does not make an enforcement decision in isolation.

If a matter is either complex, has a high public profile, requires specific guidance or simply there is no precedent, then an Enforcement Decision Group (EDG) can be formed to consider the matter and authorise an action. The EDG is comprised of delegated managers within the Environmental Services and Protection Hub.

However, if the matter is being considered for prosecution then it must be recommended by the EDG. This panel recommendation must then be authorised by the Director Environmental Services and Protection or Chief Executive. Even then, the authority is conditional on the matter being subjected to 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.



Enforcement options

Gisborne District Council enforcement officers have a broad range of enforcement options available to them to address matters of non-compliance. Enforcement tools can be categorised into three main types:



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- Informal actions are focused on providing education and incentive-based responses to allow the person to become better informed and develop their own means to improved compliance.
 - Directive actions are about looking forward and giving direction and righting the wrong.
 - Punitive actions are about looking back and holding people accountable for what they have done.



Informal actions

Action	Description of action	Potential impacts on the liable party	When might this action be appropriate?
Education and enforcement	To prevent further breaches or to remedy or mitigate the effects of non-compliance, Council can provide information or guidance around rules and regulations or provide assistance to enable parties to achieve compliance.	This is a non-formal process and as such has no legal implication.	Education and other incentive based interactions are reserved for dealing with cooperative parties, who are motivated to do the right thing but lack the knowledge or skills necessary to achieve and maintain compliance.

Directive actions

Action	Description of action	Potential impacts on the liable party	When might this action be appropriate?
Letter of direction	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.	Letters of direction should be reserved for dealing with cooperative 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 an 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, where a breach has been established, that Council may also elect to take punitive action.

Punitive 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.	A formal warning may be given when: <ul style="list-style-type: none"> • An administrative, minor or technical breach has occurred; • And the 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 \$1,000.	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.	An infringement notice may be issued when: <ul style="list-style-type: none"> • There is prima facie (on the face of it) evidence of a legislative breach; • And a one-off or isolated legislative breach had 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	A prosecution is a process taken through the criminal courts to establish guilt or innocence and, if appropriate, the Court will impose sanctions. RMA matters are heard by a District Court Judge with an Environmental Court warrant. All criminal evidential rules and standards must be met in an RMA prosecution.	A successful prosecution will generally result in a conviction, a penalty imposed and consideration to costs of the investigation. A prosecution forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance.	A prosecution may be considered appropriate when the factors (listed in the enforcement decision-making section) indicate that the matter is sufficiently serious to warrant the intervention of the criminal law.



Independent Legal Review

An independent legal review may be sought when assessing which enforcement option is the most appropriate for a breach. The independent legal review considers the matter in its entirety. The review applies two tests: the evidential test and public interest test as described in the enforcement decision making section of this policy. These tests are separately considered and must both be satisfied before a prosecution is initiated.

Who should conduct this review?

As a local authority, Council is free to choose its legal representatives in enforcement matters.