

# Enforcement Policy

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# Introduction

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.

Environment Canterbury (the Canterbury Regional Council) has a key role in facilitating sustainable management in the Canterbury region while meeting a number of legislative obligations relating to the implementation of a number of Acts and Regulations relevant to this facilitation. The majority of Environment Canterbury enforcement work relates to the Resource Management Act (RMA) and this is the primary focus of this Policy. Notwithstanding this, the principles underpinning this Policy may be applied to other areas of enforcement, e.g. the Biosecurity Act 1993 and the navigational safety provisions of the Maritime Transport Act 1994.

Environment Canterbury meets this role by managing resource use through plans, resource consents and a range of other statutory instruments and regulations.

Complying with these regulations and requirements is everyone's responsibility.

Environment Canterbury's approach to compliance is to work with individuals, industry and the community to achieve voluntary compliance wherever possible and to take enforcement action when voluntary compliance is not achieved.

In Canterbury the delivery of RMA enforcement activities is undertaken within a wider strategic context set out through the Long-Term Plan and regional strategies such as the Canterbury Water Management Strategy and Zone Implementation Programmes.

This Enforcement Policy sets out how Environment Canterbury will investigate non-compliance and, where appropriate, take enforcement action under the relevant regulations.



# Purpose

The purpose of this policy document is to:

- Outline Environment Canterbury's approach to enforcement activities within the wider Canterbury strategic approach;
- Inform the general community as to the Council's approach to dealing with non-compliance;
- Provide guidelines for Environment Canterbury staff on the delivery of enforcement functions; and
- Ensure a consistent and integrated approach to enforcement in Canterbury.

# Conflicts of interest

Environment Canterbury will carry out its enforcement functions in accordance with the Conflict of Interest Policy.

This policy provides guidance for staff as to where a Conflict of Interest may arise and a mechanism for ensuring that any actual or potential Conflict of Interest is disclosed and managed appropriately.

# Response to non-compliance

Achieving environmental and community outcomes is a shared responsibility between Government, resource users, industry and community. Our approach to non-compliance is to work with individuals, landowners and industry towards voluntary compliance and where needed, apply escalating interventions to address non-compliance, achieve behaviour change or provide deterrence.

Environment Canterbury operates across the full regulatory spectrum which has the key components of engagement, education, enabling and enforcement.

## Engagement

This includes consulting with resource users, stakeholders and community on matters that may affect them. This will promote greater understanding of the challenges and constraints, engender support and identify opportunities to work with others. Key to this are relationships and communication until final outcomes have been reached.

## Education

For those who are unaware of the rules and regulations or need reminding of their obligations. Education is also used to inform community and stakeholders about

what the expectations are for regulations so that there is a good understanding about what is compliant and how this links to achieving outcomes.

## Enabling

Providing opportunities for resource users to be informed regarding industry best practice and the help and assistance that is available to them. This includes linking people with industry advisors who can provide such assistance.

## Enforcement

When breaches of regulation or non-compliance are identified, various enforcement tools are used to bring about positive behaviour change, obtain necessary action or provide deterrence through appropriate penalties. Enforcement outcomes should be proportional to the seriousness of the adverse environmental effect, the individual circumstances of the breach, culpability of the party and the significance to the community.

These are not exclusive of each other but operate together and may be provided by diverse parts of the organisation. This policy covers the Council's enforcement activities.

# Principles

Environment Canterbury will undertake its enforcement responsibilities in a manner that is consistent with the following principles:

## Transparent

We will provide clear information and explanation to the community on the standards and requirements for compliance. We will ensure that the community has access to information about the impacts of poor performance and the actions taken by us to address issues and non-compliance.

## Risk based and prioritised

We will focus on the most important issues and problems to achieve the best outcomes. We will target our regulatory interventions at poor performers and illegal activities that pose the greatest risk to the environment and the communities impacted by poor performance.

## Consistency of process

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

## Fair, reasonable and proportional approach

We will apply a range of regulatory interventions and actions appropriate to the situation. This could range from educating users, promoting and encouraging compliance, using enforcement tools to obtain

necessary action or providing deterrence through appropriate penalties.

## Evidence-based, informed

We will use an evidence-based approach to our decision-making.

## Lawful, ethical and accountable

We will conduct ourselves lawfully and impartially and in accordance with these principles and relevant policies and guidance.

## Collaborative

We will work with all relevant parties to ensure the best compliance outcome for our region.

## Responsive and effective

We will use a range of statutory and non-statutory interventions and action to achieve outcomes.

## Integrated work programmes

We will integrate national, regional and zone priorities to deliver on agreed zone and community-wide outcomes.

## Communication

We will communicate with all relevant parties to ensure that there is full understanding of Environment Canterbury's responsibilities and potential responses; and to assist all parties to understand their responsibilities and what constitutes a non-compliance or a breach.



# The enforcement pathway

This section of the policy outlines the enforcement pathway expected to be undertaken from the discovery of a breach through to the decision to take enforcement action. This section details the specific steps involved for breaches of the RMA. However, the principles below will also be considered for other areas of Environment Canterbury regulatory enforcement.

## 1. Gathering information (Investigation)

If a breach or a potential breach of the RMA or other Act occurs, then information and evidence must be gathered to establish the truth of what has occurred and to enable informed decisions to be made. The depth and scope of the investigation will be dependent on the seriousness of the incident.

An investigation may entail:

- entry onto private property to gather information and evidence such as; samples, photographs and ecological or geological surveys.
- speaking to witnesses and the liable parties, and
- the recording, either in written form or electronically, of detailed witness statements, and the interview of liable parties under a formal caution.

When entering private property Council officers must ensure that they respect the rights of liable parties and lawful occupiers and that their entry onto private property is lawful.<sup>1</sup>

Undertaking a comprehensive investigation ensures that we have the right information to be able to make an appropriate decision about how the Council should best respond to non-compliance.

## 2. Enforcement decision making

The RMA provides potentially large penalties for those who breach the Act but 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 regional sector that these are the appropriate factors to consider in enforcement decision making and Environment Canterbury has adopted them as a standard.

Factors considered by Environment Canterbury when contemplating 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 the 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 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 purpose and principles of the RMA?

Not every factor will be relevant on every occasion and one single factor may be sufficiently aggravating or mitigating such that it may influence the ultimate decision.

Each case is unique, and the individual circumstances need to be considered on each occasion to achieve a fair and reasonable outcome. Notwithstanding this, Environment Canterbury may proceed directly to enforcement action, including prosecution, where the circumstances support this.

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<sup>1</sup> Under Section 38 of the RMA Environment Canterbury officers may issue warrants to their officers which gives them legal authority to assess compliance with environmental regulations. However, these entry powers have some limitations. In some circumstances the Council might need to obtain a search warrant to gather evidence from private property.

The decision as to the appropriate level of enforcement is arrived at by consultation between enforcement officers and their managers, with recommendations for action that might include an infringement or prosecution being referred to an Enforcement Decision Panel (EDP) comprising three Environment Canterbury managers drawn from the compliance sector.

Recommendations for this level of enforcement action are presented to this panel by Environment Canterbury investigators, Incident Response officers and Resource Management officers.

Recommendations for enforcement action other than prosecution are decided by the EDP. Recommendations for prosecution are initially considered by the EDP. If the EDP finds that prosecution is warranted, the matter is forwarded for a legal review.

### 3. Legal review

Once the EDP has determined that prosecution is the most appropriate enforcement response, the matter is referred for a legal review. The legal review applies two tests, being the evidential test and the public interest test respectively, as outlined in the Solicitor General's Guidelines. (Appendix 1). The legal review may be undertaken by Environment Canterbury in-house legal counsel, the Crown Solicitor or an independent law firm.

### 4. Chief Executive Officer sign-off

The Chief Executive Officer of Environment Canterbury has the delegated authority to make the decisions for the Council to prosecute. The Chief Executive Officer will consider this policy, the recommendations of the EDP and the findings of the independent legal review in making their decision.

### 5. Enforcement options

Enforcement can be categorised into two main types; directive and punitive.

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.

### Punitive actions include:

**FORMAL WARNING:** A formal warning is a written warning to a person or company that has committed an offence. No further action will be taken in respect of the breach, but it will form part of the history of non-compliance. Normally a formal warning will be given where an administrative, minor or technical breach has occurred; where the environmental effect is minor or trivial in nature; the subject does not have a history of non-compliance; the matter is one which can be quickly and simply put right, or where a written warning would be appropriate in the circumstances.

**INFRINGEMENT NOTICE:** An infringement notice can be issued to an individual or company that has committed an RMA offence. The infringement fine varies from \$300 to \$1000 depending on the offence and if not paid in certain timeframes will be sent to the Ministry of Justice for fine collection (where further fees are likely to be added). Payment of the fine does not lead to a criminal conviction.

Infringements can be appealed. Information on how to make an appeal is found on the back of each infringement notice and can be explained by staff.

**PROSECUTION:** A prosecution is a process for taking a breach through the criminal Courts. The ultimate decision to prosecute is made by the Chief Executive Officer of Environment Canterbury based on the recommendations and advice of investigative and legal staff.

The matter is presided over by a District Court judge who specialises in Environment Court matters. The hearing is held in the District Court.

All criminal evidential rules and standards must be met in an RMA prosecution.

People or companies who face prosecution will be served with a summons, which will provide information regarding dates and location of the court hearing.

Most RMA offences carry a penalty of up to two years imprisonment or a fine not exceeding \$300,000 for an individual, and a fine not exceeding \$600,000 for a company.

Some prosecutions may qualify for consideration for Alternative Environmental Justice; a scheme administered by Environment Canterbury whereby restorative environmental outcomes are negotiated at a Conference attended by the offending party, Council staff and the community under the guidance of an independent facilitator. Refer to the Environment Canterbury Guidelines for implementing Alternative Environmental Justice.

# Appendix 1

## Solicitor-General's Prosecution Guidelines (2013)

The Council will adhere to the standards of good criminal prosecution practice expressed in the Solicitor-General's prosecution Guidelines (2103). The Solicitor-General's Prosecution Guidelines and the Media Protocol for Prosecutors (Crown Law 2013), while not binding on local authorities, represent best practice.

The Solicitor-General's Prosecution Guidelines is a comprehensive 31-page document providing a detailed guide to evidential and public interest considerations, and the list below is illustrative only and not a comprehensive list of the matters to be considered. Matters will vary in each case according to the particular facts.

Under the Solicitor-General's Prosecution Guidelines a prosecution is more likely if:

- A conviction is likely to result in a significant sentence;
  - The offence caused significant harm or created a risk of significant harm;
  - The offence was committed against a person serving the public e.g. a police officer or a Council officer;
  - The individual was in a position of authority or trust;
  - The evidence shows that the individual was a ringleader or an organiser of the offence;
  - There is evidence that the offence was premeditated;
  - There is evidence that the offence was carried out by a group;
  - The victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
  - The offence was committed in the presence of, or in close proximity to, a child;
  - There is an element of corruption;
  - The individual's previous convictions or cautions are relevant to the present offence;
  - There are grounds for believing that the offence is likely to be continued or repeated for example by a history of recurring conduct;
  - The offence, although not serious in itself, is widespread in the area where it was committed;
  - A prosecution would have a significant positive impact on maintaining community confidence;
  - The individual is alleged to have committed the offence while subject to an order of the court;
  - A confiscation or some other order is required, and a conviction is a pre-requisite.
- Under the Solicitor-General's Prosecution Guidelines a prosecution is less likely if:
- The court is likely to impose a nominal penalty;
  - The individual has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order;
  - The offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
  - The loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement;
  - There has been a long delay between the offence taking place and the date of the trial, unless: the offence is serious, the delay has been caused in part by the individual, the offence has only recently come to light, or the complexity of the offence has meant that there has been a long investigation;
  - A prosecution is likely to have a bad effect on the physical or mental health of a victim or witness, always bearing in mind the seriousness of the offence;
  - The individual is elderly or very young or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence was serious or there is real possibility that it may be repeated;
  - The individual has put right the loss or harm that was caused (but individuals must not avoid prosecution or diversion solely because they pay compensation);
  - Where other proper alternatives to prosecution are available (including disciplinary or other proceedings).

These considerations are not intended to be comprehensive or exhaustive. The public interest considerations that may properly be taken into account when deciding whether the public interest requires prosecution will vary from case to case.

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