



Bay of Plenty Regional Council

Enforcement Policy

Contents

Introduction	3
Enforcement Principles	5
Enforcement Tools	6
Enforcement Decision Making	7
Media	10
Prosecution Policy	10



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Introduction

The Bay of Plenty Regional Council (the Council) is required to regulate activities in the environment under the Resource Management Act 1991 (the Act). We do this through the rules and policies set out in Regional Plans, and by ensuring that activities requiring a resource consent are provided with appropriate conditions to avoid, remedy or mitigate any adverse effects on the environment.

In order to achieve the environmental protections set out in the Act, there must be compliance with the regulatory requirements i.e. to pass a law and not have it enforced is to authorise the very thing you wish to prohibit. Council has a range of tools to ensure that people and organisations carry out activities in accordance with regional rules and resource consent conditions.

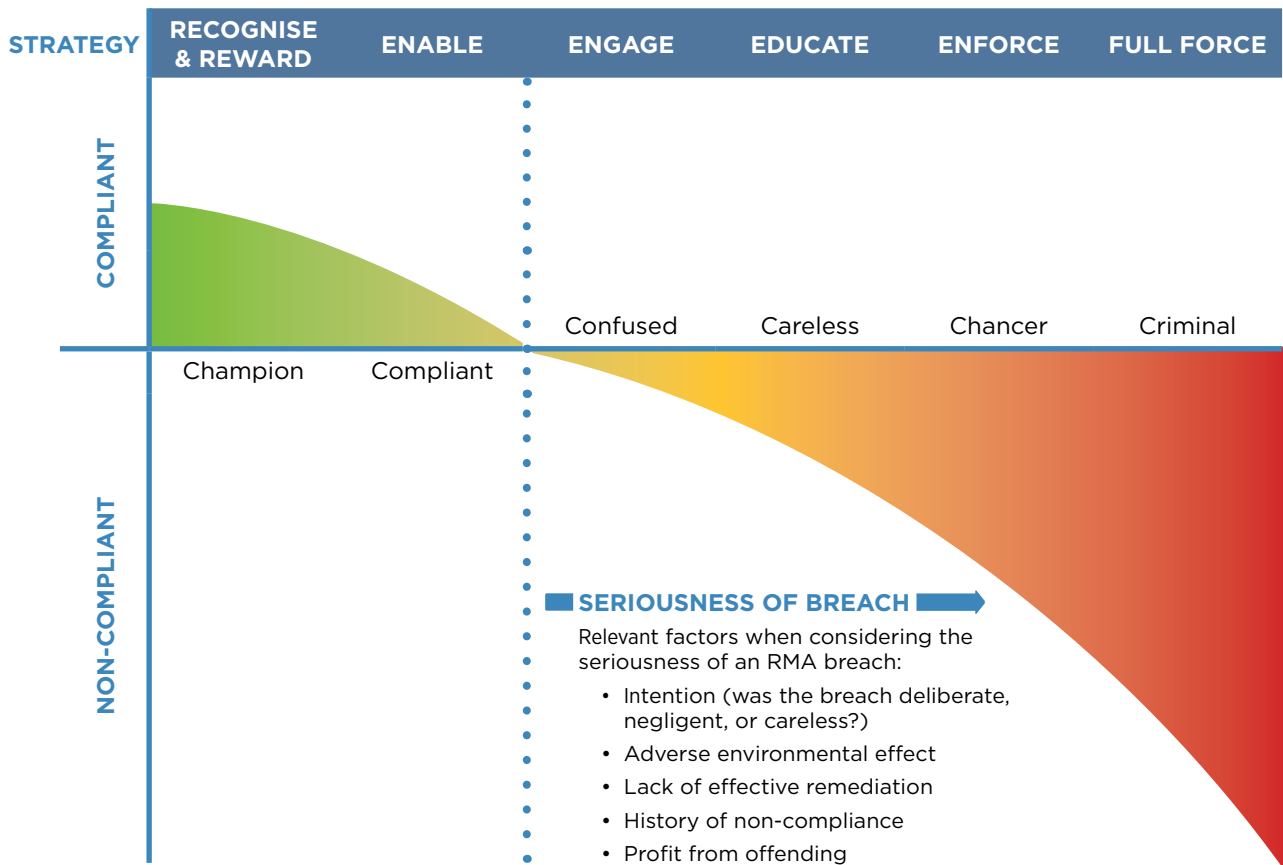
These tools include enforcement action in response to non-compliance. We undertake our compliance and enforcement work on behalf of all residents of the Bay of Plenty Region, including future generations, to achieve the best environmental and community outcomes.

“...where a regulated entity deliberately or persistently fails to comply, it is vital that the agency take swift and firm enforcement action. Failing to do this will:

- **Unfairly advantage those who are non-compliant, as against those who comply voluntarily**
- **Undermine incentives for voluntary compliance**
- **Damage the agency’s credibility with the regulatory sector and the wider public, who will perceive that the agency allows deliberate offenders to ‘get away with it’**
- **Undermine the agency’s own internal morale”**

CCCP – Achieving Compliance; A Guide for Compliance Agencies in New Zealand June 2011; page 181

The Council’s approach to ensuring compliance with the Act is via the model outlined in the Regional Sector Strategic Compliance Framework (2019-2024), as shown below.



When non-compliant activities are identified there needs to be a response that is proportionate to the overall circumstances of the offending. This Policy provides a guide as to how to assess what that response should be.

The purpose of this Enforcement Policy is to:

- Outline the enforcement tools available to the Council;
- Communicate our approach to enforcement of the Act;
- Guide and assist Council officers in the performance of our enforcement duties;
- Ensure consistent, robust and appropriate decision making in relation to enforcement matters.

This Enforcement Policy is intended as a high-level guidance document and does not confine, restrain or limit the discretion of Council to take, or not take, any action.

Relevant supporting documents include the Solicitor-General’s Prosecution Guidelines (2013)¹, the Regional Sector Strategic Compliance Framework 2019-2024 and the Council’s Formal Enforcement under the Resource Management Act Procedures Manual and Guidelines: Issue No. 1 (2018).

¹ <https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/ProsecutionGuidelines2013.pdf>

Enforcement Principles

This Enforcement Policy is underpinned by the Council's vision and integrates our core values of trust, integrity, courage, manaakitanga, kotahitanga and whanaungatanga into our regulatory functions. It is a key part of how we deliver our values to the community.

The principles² behind our enforcement action are:

Transparent	We will provide clear information and explanation to the community about the standards and requirements for compliance. We will ensure that the community has access to information about industry environmental performance as well as actions taken by us to address environmental issues and non-compliance.
Consistent	Our actions will be consistent with the legislation and within our powers. 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	We will apply regulatory interventions and actions appropriate for the situation. We will use our discretion justifiably and ensure our decisions are appropriate to the circumstances and that our interventions and actions will be proportionate to the risks posed to people and the environment and the seriousness of the non-compliance.
Evidence based	We will use 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	We will work with and, where possible, share information with other regulators and stakeholders to ensure the best compliance outcomes for our regions. 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	We will conduct ourselves lawfully and impartially and in accordance with these principles and relevant policies and guidance. We will document and take responsibility for our regulatory decisions and actions. We will measure and report on our regulatory performance.
Targeted	We will focus on the most important issues and problems to achieve the best environmental or community outcomes. We will target our regulatory intervention at poor performers and illegal activities that pose the greatest risk to the environment. We will apply the right tool for the right problem at the right time.
Responsive and effective	We will consider all alleged 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.







Council will also carry out its enforcement functions in accordance with its Conflict of Interest Policy.

² From Regional Sector Strategic Compliance Framework 2019-2024 authored by the Regional Council Compliance and Enforcement Special Interest Group.

Enforcement Tools

There is a range of enforcement tools available to address non-compliance. Enforcement tools can be categorised into two main functions. Directive actions are about looking forward and giving direction to right the wrong. Punitive actions are about looking back and holding people accountable for what they have done.

Enforcement tools include:

DIRECTIVE	PUNITIVE
 <p>Advice letter</p> <p>Advice letters are a key educational tool to help people understand what the rules are and how to comply. A follow-up inspection may also take place to ensure any minor problems have been rectified or preventive action taken.</p>	 <p>Formal warning</p> <p>A formal warning is documented by way of a letter informing the recipient that an offence has been committed and they are liable, but that no further action will be taken in respect of that offending. It also notes that the warning forms part of the person's compliance history and will be taken into consideration should further offending occur.</p>
 <p>Abatement Notice</p> <p>An abatement notice is a formal notice served on a person believed to be responsible for a breach, or an anticipated breach, of the Act. An abatement notice can require a person to cease an activity or require someone to do something in order to comply with the Act.</p>	 <p>Infringement Notice</p> <p>An infringement notice is a written notice alleging that a person has committed an offence and requiring the payment of a fee (maximum \$1,000 depending on the nature of the offence). Payment of the fee does not result in a criminal conviction and the infringement regime provides a quick method for dealing with less serious instances of non-compliance. Infringement notices must be issued within four months of the date of offence.</p>
 <p>Enforcement Order</p> <p>These are similar to abatement notices but they are issued by the Environment Court on application of the Council, therefore carry more weight.</p>	 <p>Prosecution</p> <p>A prosecution is initiated by laying a charging document in the criminal jurisdiction of the District Court and must be commenced within six months of the date that Council first knew, or should have known, of the offence. The charges must be proved beyond a reasonable doubt. The maximum penalties are \$300,000 or two years' imprisonment for an individual, and \$600,000 for a company. A prosecution is appropriate when the non-compliance is sufficiently serious to warrant the intervention of the criminal law.</p>

See Part 12 of the Act for more information regarding the formal enforcement tools it mandates.

Enforcement Decision Making

How we make fair and appropriate decisions

Enforcement of the Act can be complex. It provides potentially large penalties for those who breach, however no guidance is provided as to how to determine the seriousness of an offence or when it might be appropriate to exercise each different enforcement tool.

The courts have provided helpful guidance as to what factors are appropriate for us to consider 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.

Relevant factors include, but are not limited to:

- **Environmental effect:** Consider both actual adverse effects and potential or likely adverse effects. Was it short-lived and able to be remedied or permanent and irreversible? How widespread were the effects? What was the toxicity of the discharge?
- **Receiving environment:** Was the receiving environment particularly vulnerable or sensitive or protected for a certain purpose? Was the receiving environment of particular significance to iwi? How did the incident affect people or the community?
- **Conduct of the offender:** Was it a first offence? Was it likely to be a one-off incident? What is their compliance history? What advice have they previously been given? Was the incident an accident or due to careless, reckless or deliberate behaviour? How foreseeable was the incident? Did the person notify Council of the incident? Did they attempt to avoid, stop, remedy or mitigate the effects? What steps have they taken to avoid this happening again?
- **Attitude of the offender:** Was the person willing and able to comply? Was the reason they were not able to comply within their control? Are they reluctant or unwilling to comply? Did they deliberately decide not to comply? Did they rely on instructions or advice from a third party? Did the person profit or otherwise benefit from the activity/action?
- **Deterrence factor:** Is there a degree of specific deterrence required in relation to that person? Is there a need for a wider, general deterrence in respect of the activity or industry?

Legal considerations

- How does the activity or incident align with the purposes and principles of the Act (sections 5, 6 and 7)?
- If being considered for prosecution, how does that outcome align with the Solicitor-General's Prosecution Guidelines in relation to the evidential test and the public interest test? (NB: Further explanation of these tests is detailed in the 'Independent Legal Review' section on page 9).

Actual and likely adverse effects		Conduct and attitude of offender			Deterrence factor	
Severity of environmental effect	Value or sensitivity of receiving environment	Deliberateness	Lack of effort to remedy or mitigate	Profit or benefit to offender	Degree of deterrence required	
↑ — ↓	↑ — ↓	↑ — ↓	↑ — ↓	↑ — ↓	↑ — ↓	Prosecution
						Infringement
						Warning

While it is a balancing act, it is important to note that not every factor will be relevant in every case, and occasionally, one single factor may be sufficiently aggravating, or mitigating, that it may influence the ultimate decision.

The individual circumstances of each case vary so widely that it is not possible nor appropriate to ascribe weights to these factors or to take a matrix or numerical approach to balancing them. The judgement about what weight each factor carries is more nuanced and very case-dependent. Each case is unique and needs to be considered on its own merits to achieve a fair and reasonable outcome. The discretion to take enforcement action, or not, sits solely with the delegated officers of the Council.

The enforcement decision making process is confidential. Enforcement recommendation and decision documents are not subject to release as per section 6(a) of the Local Government Official Information and Meetings Act 1987 (LGOIMA).

Who makes the enforcement decisions

Officers

Where a non-compliance comes to our attention via compliance monitoring work or incident response, an initial investigation will be carried out by the relevant Regulatory Compliance Officer. For more significant non-compliances, the investigation may be referred to a dedicated investigator.

Officers do not have discretion as to what is or isn't non-compliant – the discretion is exercised in the enforcement decision that is made.

Council's Regulatory Compliance Officers are warranted to issue abatement notices and infringement notices; however all formal warning letters, abatement notices and recommendations for infringement notices are peer reviewed by an investigator and checked for evidential sufficiency. Recommendations for infringement notices must be approved by a team leader or manager.

Enforcement Decision Group

An Enforcement Decision Group (EDG) meeting is held when the decision to take enforcement action may include prosecution, applying for an enforcement order, issuing multiple infringement notices, or considering other complex enforcement related matters. Additionally, the EDG may consider what action is appropriate for a group of similar non-compliances, such as those found during the annual dairy effluent discharge compliance audits.

The EDG must have a quorum of at least four staff including at least two members from the Regulatory Compliance Leadership Team (Managers and Team Leaders) and designated Senior Regulatory Compliance Officer Investigators.

The outcome of an EDG meeting will be a decision or recommendation for enforcement required, if any. The recommendation will be made according to the consensus view of the EDG ³. In the case of prosecution being recommended, the recommendations will be subject to legal advice, after which it will be presented to the Regulatory Services General Manager for final approval.

Independence of the decision maker is paramount.

*“In practice in New Zealand the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise”
– Solicitor-General’s Prosecution Guidelines (2013)*

Independent Legal Review

The purpose of the legal review is to ensure that the tests for prosecution as set out in the Solicitor-General’s Prosecution Guidelines (2013) – the evidential test and the public interest test – are met and to provide another layer of independent judgement.

The evidential test requires a legal assessment of whether:

- The evidence relates to an identifiable ‘person’ (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 which may support or detract from the case.

The public interest test requires a consideration of whether a criminal prosecution is in the public interest. This is important for ensuring that the discretion to prosecute is exercised in accordance with the rule of law and any relevant statutory requirements.

Prosecutorial discretion in relation to the public interest test is a continuing discretion – even after charges are laid we are able to reconsider our position in light of further information coming to hand.

Regulatory Services General Manager

The delegation to give final approval to commence a prosecution is held by the Regulatory Services General Manager, who will consider the EDG’s recommendation and the independent legal review in making that decision.

³ Further detail around EDG process, reaching consensus and alternative procedure is contained in the Council’s Formal Enforcement under the Resource Management Act Procedures Manual and Guidelines: Issue No. 1 (2018).

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; and
- Maintaining the community's perception of the integrity of our regulatory work.

Prosecution Policy

This Enforcement Policy is intended to serve as Council's Prosecution Policy, however its coverage is broadened to include all enforcement tools.

This Enforcement Policy sets out the principles Council staff will follow when deciding whether or not to initiate criminal proceedings for environmental offences against section 338 of the Act in the Bay of Plenty Region.



**ENVIRONMENTAL
COMPLIANCE
OFFICER**





**For more information visit our website
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or email info@boprc.govt.nz**