Regulatory Committee Agenda - 29 June 2022

Meeting will be held in the Council Chamber at Level 2, Philip Laing House
144 Rattray Street, Dunedin (Councillors and staff only)
Members of the public may view the meeting live at: Otago Regional Council YouTube Channel

Members:

Cr Gary Kelliher, Co-Chair
Cr Andrew Noone, Co-Chair
Cr Hilary Calvert
Cr Michael Deaker
Cr Alexa Forbes
Cr Carmen Hope
Cr Michael Laws
Cr Kevin Malcolm
Cr Gretchen Robertson
Cr Bryan Scott
Cr Kate Wilson

Senior Officer: Pim Borren, Interim Chief Executive

Meeting Support: Dianne Railton, Governance Support Officer

29 June 2022 10:00 AM

Agenda Topic — Page

This report provides the Committee with a summary of the ORC compliance activities and responsibilities in relation to drinking water activities in Otago.

Minutes of a meeting of the Regulatory Committee held in the Council Chamber on Thursday 10 March 2022 at 10:00am

Membership

Cr Gary Kelliher	*(Co-Chair)*
Cr Andrew Noone	*(Co-Chair)*
Cr Hilary Calvert	
Cr Michael Deaker	
Cr Alexa Forbes	
Cr Carmen Hope	
Cr Michael Laws	
Cr Kevin Malcolm	
Cr Gretchen Robertson	
Cr Bryan Scott	
Cr Kate Wilson	

Welcome

Chairperson Noone welcomed Councillors, members of the public and staff to the meeting at 11:06 am. Staff present in the Chamber included Gwyneth Elsum (GM Strategy, Policy and Science), Amanda Vercoe (GM Governance, Culture and Customer), Liz Spector (Governance Support Officer), Steve Rushbrook (Harbourmaster) and staff present electronically included Sarah Gardner (Chief Executive), Gavin Palmer (GM Operations), Nick Donnelly (GM Corporate Services) Richard Saunders (GM Regulatory and Communications), Jo Gilroy (Manager Consents), Tami Sargeant (Manager Compliance), Simon Wilson (Manager Regulatory and Data Systems), and Shayde Bain (Communications Advisor), Jennifer Bolstad (Harbourmaster Support Coordinator), and Dianne Railton (Governance Support Officer - minute-taker) .

1. APOLOGIES

Resolution: Cr Noone Moved, Cr Malcolm Seconded:

That the apology for Cr Bryan Scott be accepted, and the apology for lateness for Cr Laws be accepted. Cr Carmen Hope and Cr Gary Kelliher attended the meeting electronically.

MOTION CARRIED

2. PUBLIC FORUM

No public forum was held.

3. CONFIRMATION OF AGENDA

The agenda was confirmed as published.

4. CONFLICT OF INTEREST

Cr Kelliher and Cr Wilson advised they would sit back from the table for discussions on Deemed Permits, due to a possible conflict. Chair Noone and Cr Hope advised they would sit back from the table for discussions on Forestry due to a possible conflict of interest.

5. CONFIRMATION OF MINUTES

Resolution: Cr Noone Moved, Cr Calvert Seconded

That the minutes of the Regulatory meeting held on 9 December 2021 be received and confirmed as a true and accurate record.

MOTION CARRIED

6. ACTIONS

There were no outstanding Actions from the Regulatory Committee.

7. MATTERS FOR CONSIDERATION

7.1. Harbourmaster Summer Activity Report

The report provided an update on Harbourmaster activity and operations following the completion of the 2021/2022 summer season. Richard Saunders (GM Regulatory and Communications), Steve Rushbrook (Harbourmaster), and Shayde Bain (Communications Advisor) were available to speak to the report and respond to questions.

Steve Rushbrook advised they had a proactive and progressive year in their department. He said highlights for the year included being deemed compliant following the Port and Marine Safety Code external review that occurred earlier in the year, and also the major uplift in Harbourmaster communications and delivery of education through social media, radio and other forms, which he said is a step up from what was done previously.

Following discussion, Chair Noone on behalf of Councillors, thanked the Harbourmaster's team for a very successful season.

Resolution REG22-101: Cr Calvert Moved, Cr Hope Seconded

That the Committee:

*1) **Notes** this report on Harbourmaster activity over the 2021/2022 summer.*

MOTION CARRIED

7.2. Regulatory Group - Quarterly Activity Report

The report updated the Committee on activities of the Regulatory Group between 1 July 2021 and 31 January 2022. Richard Saunders (GM Regulatory and Communications), Jo Gilroy (Manager Consents), Tami Sargeant (Manager Compliance), Simon Wilson (Manager Regulatory and Data Systems) and Steve Rushbrook (Harbourmaster) were available to speak to the report and respond to questions.

Richard Saunders noted that there was a resolution from the Council Meeting on 23 February 2022 relating to deemed permit fees and resource consent fees, which have been included in the report to enable discussion.

Cr Malcolm commented on the process improvements section of the report and congratulated the team on the approach of ensuring staff have the appropriate tools, and that there is an ongoing process driven by staff and customer feedback.

Chair Noone and Cr Hope sat back from the table for discussions on forestry consents.

Cr Kelliher sat back from the table and Cr Wilson left the room for discussions on Deemed Permits - Plan Change 7.

Cr Calvert asked about consent fees for applicants affected by Plan Change 7. Mr Saunders said that he couldn't comment on costs for any individuals and advised that the Consents team have processed 15 consents, and the average cost of those lodged in 2021 has been just over $5,000. Following discussion, Chair Noone moved:

Resolution REG22-102: Cr Noone Moved, Cr Robertson Seconded
That the Committee:

*1) **Notes** the Quarterly Update Report from the Regulatory Group.*
MOTION CARRIED

Cr Kelliher and Cr Wilson returned to the meeting.

8. CLOSURE

There was no further business and Chairperson Noone declared the meeting closed at 11:52am.

_____ _____
Chairperson Date

7.1. Regulatory Group - Quarterly Activity Report

Prepared for:	Regulatory Committee
Report No.	GOV2228
Activity:	Regulatory: Consents and Compliance
Author:	Richard Saunders, General Manager Regulatory and Communications
Endorsed by:	Richard Saunders, General Manager Regulatory and Communications
Date:	29 June 2022

PURPOSE

[1] To update the Committee on activities of the Regulatory Group between 1 July 2021 and 31 May 2022 and to approve the Compliance Audit and Performance Monitoring Schedule for 2022-23.

EXECUTIVE SUMMARY

[2] This report summarises the activity of the Regulatory Group which includes Consents, Compliance, Harbourmaster and the Regulatory Data and Systems teams.

RECOMMENDATION

That the Regulatory Committee:

1) ***Notes** the Quarterly Update Report from the Regulatory Group.*

2) ***Approves** the Compliance Audit and Performance Monitoring Schedule for the 2022-23 year.*

DISCUSSION

[3] The following report provides a summary of the activity of each team within the Regulatory Group.

[4] Attachment 1 contains statistics on Regulatory Group activity for the period 1 July 2021 to 31 May 2022.

CONSENTS

Consent Processing

[5] Over the reporting period decisions have been made on 601 individual consents (cumulative total). For context, in the same period last year decisions were made on 363 individual consents. This represents a significant increase on the same reporting period last year. Despite the increased workload all decisions in the reporting period were made within Resource Management Act timeframes. Timeframe extensions were used in this period in most cases to enable the applicant to review the proposed conditions or to allow for data reviews to happen on deemed permits.

[6] The number of applications received per month, in the reporting period was slightly below the totals for the same month in the 2020/21 year. This is due to 2021 having some key dates relating to the lodgement of consent to replace deemed permits which led to high levels of applications being received. A peak of 65 applications received in

November 2021 and over 60 received in March and May this year. Work is generally being handled by internal staff, but consultants are still used on an as required basis. The team are looking to progress applications that have been in the system since before 2021 in order to ensure internal capacity is maintained for consents relating to intensive winter grazing and dairy farm discharges.

[7] No applications were publicly or limited notified during the reporting period.

[8] Two hearings were held in the reporting period. These were for a limited notified and a publicly notified application:

- A wastewater discharge consent from Clutha District Council for Waihola township. Consents were granted for a period of 6 years.
- Dunedin City Council's application for a new landfill at Smooth Hill, Dunedin. This hearing was held over two weeks and was well attended by members of the public. It was also available to view via live streaming. This hearing is adjourned a while the Applicant undertakes work directed by the Hearing Panel.

[9] A summary of consents statistics for the period are included in Figures 1 to 6 of Attachment 1.

Deemed Permit Replacements

[10] Since the release of the decision on Plan Change 7(PC7) on 17 November 2021 until the end of May 2022, 26 decisions relating to deemed permits have been approved. These have all been granted for a period of 6 years. Work continues with consultants, stakeholders, and applicants to progress the remaining applications. This remains a positive process and is still being undertaken in an open and constructive way. Regular updates have been provided to stakeholders and consultants who are handling applications for consent holders.

[11] Staff in the Regulatory, Data and Systems team have completed the Schedule 10A.4 data reviews for all of the deemed permit replacement applications. This is a significant achievement and assists applicants progress their application. Work is now focused on assessing any information that applicants have provided in relation to the completed data reviews.

[12] Amendments to applications to bring them in line with PC7 have been accepted. Where amendments have been received but not yet decided, we are preparing draft reports and consent documents and sending these to the applicants for comments before a decision is made.

[13] Work has been completed on updating and developing new practice notes that relate to water-based applications. The aim of these is to ensure that applicants, stakeholders, and consultants have a clear idea of ORC's approach to certain matters. The intent of this is to reduce pain points in the process and to be as open as possible. In the reporting period materials were developed and made available online relating to augmented takes, water metering and by-washes.

Appeals to consent decisions

[14] One appeal to a consent decision was received in the reporting period. This appeal relates to consents issued by Council and Central Otago District Council for the use and

expansion of a quarry. A decision on the consent was made by an independent decision maker after a consent hearing. The appeal has been lodged by neighbours to the proposal. Council has no option but to be involved in the appeal process and will incur costs as a result. These are not budgeted costs.

[15] As noted in the previous reporting period one appeal to a consent decision was received. This appeal was from submitters and related to a decision by an independent decision maker on a deemed permit. Since the last update, the appeal has been resolved.

[16] A decision was received from the High Court on the appeal made by Clutha District Council relating to an Environment Court decision on their water permit. ORC did not lodge the appeal but had to participate. The Court found in the favour of ORC and supported the original decision made by staff and the Environment Court.

[17] No objections to consent conditions were received in the reporting period. The objection received in the last reporting period related to conditions on a consent to discharge contaminants to land. The draft conditions were reviewed by the applicant and confirmed as acceptable, and the objection has been resolved.

[18] Four formal cost objections under Section 357B of the RMA have been received by ORC in the reporting period. Three of these objections relate to costs associated with deemed and water permits. The other relates to the costs for a dairy discharge and effluent pond. These cost objections are currently in the formal hearing process with a decision being made by an independent decision maker.

Public Enquiries

[19] Responding to public enquiries remains a significant part of the workload of the Consents team. In the reporting period 1,129 enquiries were received and responded to. Most months the team is handling in excess of 200 enquiries. Most enquiries are resolved within two days of being received, with the remaining generally in the three to seven days and some over seven days. Information on these enquiries can be seen in Attachment 1.

[20] The Public Enquiries team have been responding to requests for comments on applications that are seeking to use the ‘Fast Track’ process provided by the COVID-19 Recovery (Fast-Track Consenting). These relate to stage two of Dunedin Hospital - Whakatuputupu and Lakeview Taumata development project in Queenstown.

[21] To enhance the public enquiries service, in this reporting period we have been working on:

a. Preparing text for a new page on the website specific to the public enquiries service we offer. This service is well utilised, but we want to ensure as many people as possible know what the team can do for them from attending site visits, going to field days and responding to questions.
b. The consents online project. This will enable applicants to apply for consents online. The first consent form was available in May 2022 and others are in the process of being organised to go live in the second half of the calendar year.

NES-FW and Plan Change 8 work

[22] During the reporting period the decision on the rural provisions of Plan Change 8 (PC8) was released by the Environment Court and then made operative by Council.

[23] In the reporting period Consents staff have further updated all application forms, internal guidance material, consent conditions and report templates. They have also met with key stakeholders to discuss interpretation and implementation of the new provisions. These meetings will continue. Staff have attended a number of field days organised by Catchment Groups or industry groups to speak about the dairy effluent rules and intensive winter grazing. It has been great for staff to attend these, and we are hoping to be invited to more.

[24] The Consents team and wider Regulatory Group remain heavily involved in the implementation work on the NES-FW and PC8. Key work that has carried on from the last reporting period includes:

a. Continued discussions with stakeholder and industry groups about implementation and interpretation of the new regulations.
b. Participating in the internal cross-Council working group for the implementation of the NES-FW and PC 8.
c. Staff remain involved in the regional sector group providing input into the development of Freshwater Farm Plans. As farm plans will be a new tool for Otago it is important that staff remain connected to this work so they can understand the impact it may have on our business. This work includes attending design workshops and co-ordinating with other council's on how to best use resources.

[25] As a result of changes made by the Government, the regulations relating to intensive winter grazing (IWG) under the NES-FW now come into effect from 1 November 2022 and do not impact the 2022 winter season. However, they will apply to next winter. There are three pathways for compliance with the regulations:

- Permitted activity by meeting the relevant criteria;
- Applying for a consent; or
- Having a certified freshwater farm plan (this option is not yet available)

[26] When the regulations relating to IWG commence on 1 November 2022 the related rule in the Regional Plan Water introduced by Plan Change 8 will 'drop away'. This is intentional and was an approach supported by the Court. Consequently, consents will only be needed under the NES-FW and not under the Regional Plan Water as well. This is a more streamlined approach.

[27] The commencement of the regulations will mean that people who cannot meet the permitted activity criteria will need to apply for a resource consent. Staff have been leading the regional sector response with the development of application forms and other material for consents required under the NES-FW for intensive winter grazing. These have been shared with other Councils in the hope of ensuring consistency and will be provided to stakeholders for feedback and tested before going live for people to use.

[28] In terms of number of consent applications likely, staff have access to work undertaken by Manaaki Whenua that shows the extent of winter grazing in the 2021 season. This is part of a project that staff led the organisation of at the national level. The imagery may

be useful in terms of predicting potential workload and impacts on the community. Staff have been and will continue to be trained on the new provisions and there is capacity to process the consents.

[29] It is hoped that an online form will be available in September 2022, but a copy of the application from will be accessible on the website in advance of this. The form has been developed to be able to be completed by the farmer and drives towards the use of grazing management plans. All other online resources will be updated, and staff will continue to attend events to speak about grazing. The Consents Team is committed to taking a pragmatic and customer focused approach to these consents, but still needs to give effect to the legislation and the environmental risks of the activity. This is the approach that is taken to all consent applications processed by the team.

Process Improvements

[30] The key focus for staff over the reporting period has been on processing consents as efficiently as possible and making changes to continue to improve levels of customer service. This is an ongoing process, which is driven by staff and customer feedback.

[31] Process improvement work completed in the reporting period includes:

- A re-organisation of how practice notes and information is shown on Council's website.
- Continued work on the consents online project, with more forms to be uploaded.
- Development of a GIS layer to be used to map dairy effluent and domestic wastewater discharge areas.
- More information on the website and in communications about costs for consent hearings.
- Work has started with the Finance and Communications and Marketing Teams on an infographic of an invoice to support customers understanding of the invoices.
- Involved in the updates to the material on ORC's website that relates to PC8.

COMPLIANCE MONITORING AND ENFORCEMENT

Performance Monitoring

[32] In the 11 months to 31 May 2022, the Regulatory Data and Systems and Compliance teams graded 6,340 Performance Monitoring returns against an Annual Plan target of 4,950. This is up from 5,118 Performance Monitoring returns graded in the same period in the last financial year.

[33] A summary of performance monitoring data for 2021/22 is set out in Figures 11 and 12 of Attachment 1.

ORC compliance audits and inspections

[34] The ORC Long Term Plan 2021-2031 set out a new performance measure of meeting 85% or more of 'programmed inspections/audits completed each year, as per the Compliance Audit and Performance Monitoring Schedule'.

[35] In the 2021/22 year to date, 1,308 on site audits and inspections have been completed. This is an increase from 1,027 site visits completed in the same period in the 2020/21 financial year. The 2021/22 site visits relate to 988 on site consent audits, 241 dairy inspections, 36 winter grazing site visits, 35 forestry inspections and eight regionally

significant wetland audits. This is 116% of the planned compliance audits or field inspections programmed in the year to date.

[36] A summary of the compliance field visits and inspections in the 2021/22 year, compared with the 2020/21 year and Annual Plan target is set out in Figures 13 and 14 of Attachment 1.

RMA consent audits

[37] In the 2021/22 year to date, 1,308 on site consent audits have been completed. Most consent audits have been for coastal marine area use permits (318 audits). These audits are required every five years and were completed by two interns over the summer period. The coastal structures monitoring project was enabled by improved mobility platform for undertaking the audits onsite and auto-generated compliance reports.

[38] Compliance with consent conditions can be considered high with most consents being considered either fully compliant (53%), or low risk non-compliance (24%), and 6% graded as significantly non-compliant.

[39] All consent audits graded with moderate non-compliances (140 consents) and significant non-compliances (60 consents) have been followed up by staff and either appropriate action has been taken in line with the RMA compliance and enforcement policy, or investigations are continuing. This includes six infringement notices, 10 abatement notices and four warnings issued in relation to consent non-compliance.

[40] A summary of RMA consent audit data in the 2021/22 year is set out in Figures 15, 16 and 17 of Attachment 1.

Dairy programme

[41] The 2021/22 Dairy Inspection Compliance Project commenced in October 2021, and year to date compliance staff had completed 241 dairy inspections. The high-risk farms are being prioritised for inspection early in the season. Overall compliance is good with most farms being graded either fully compliant or low risk non-compliant. Five farms were graded significant non-compliant, and twelve farms were graded moderately non-compliant. These matters are being followed up by staff and either appropriate action has been taken, or investigations are continuing.

[42] The 2020/21 dairy project had a particular focus on the storage of effluent pond solids and stone trap clearings, the distances that these have been kept away from waterways and monitoring their potential to discharge to the environment through ponding and overland flow. Monitoring of silage leachate ponding was undertaken as well as farm landfills and recording of the location of offal pits. There has also been a continued focus on providing awareness and engaging with farmers on the new requirements with the NES for Freshwater, Stock Exclusion Regulations, Water Measuring Regulations and Plan Change 8.

[43] The ORC Compliance team initiated a collaborative project with Environment Canterbury and Environment Southland staff to review compliance procedures, rules and monitoring for dairy effluent. The project involved completing audits in the three

respective regions followed by a debrief and learnings session. This was a great opportunity for us to get a better understanding of how neighbouring regional council's monitor dairy farms and boost nationwide dairy compliance consistency.

[44] A summary of 2021/22 dairy inspection data is set out in Figure 18 of Attachment 1.

Forestry

[45] In the 2021/22 year to date, ORC has received 71 forestry notifications and 50 management plans and has completed 35 on site forestry inspections. Overall compliance is high with 32 forestry sites graded fully compliant, two forestry sites graded low-risk non-compliance and one forestry site graded significant non-compliance. Staff followed up on this and the issue has been remediated and rectified.

[46] A summary of 2021/22 forestry notifications and inspections data is set out in Figures 19 and 20 of Attachment 1.

Intensive winter grazing

[47] Monitoring compliance with permitted activity intensive winter grazing (IWG) under Plan Change 8 regulations will be undertaken throughout the winter season.

[48] A key component of the IWG compliance project are flyovers. The Compliance team will complete three sets of three flights this year across the Otago region:

- North Otago – From Dunedin, north to the Waitaki River and inland to include the Maniototo.
- South Otago – From Dunedin, south to the Catlins and inland to include Southwest Otago.
- Central Otago – To cover Beaumont through to Queenstown, and north to the Lakes, including Makarora and down through the Ida Valley.

[49] The first set of flyovers was undertaken in late May / early June 2022, and compliance was considered good with appropriate measures in place. Staff have followed up 'on the ground' with education visits where high-risk sites were identified. This mainly concerned the management of critical source areas and proximity of grazing crops to waterways. No formal enforcement action has been taken undertaken at this stage.

[50] There has been a significant focus on education and engaging with the primary industry sector and the farming community ahead of the 2022 winter. Regulatory staff have been providing advice and information and speaking at events when invited. This advice and information included speaking at catchment group sessions, workshops on IWG and field days; meetings with industry groups, stakeholders and other Regional Councils; responding to phone calls and email questions and providing as much information on our website as possible. Work across ORC continues through the Council wide NES-FW and Plan Change 8 staff working group that discuss interpretation issues and resource needs.

Investigations and enforcement

[51] In the 2021/22 year to date, 1,329 service requests were received on the pollution response hotline. This is slightly down from 1,479 service requests in the same period of the 2020/21 year. The most common reasons for requests were water pollution (301), outdoor burning (266) and domestic chimney (146).

[52] Further details on service requests in the 2021/22 year, including comparison with the 2020/21 year can be found in Figures 21 and 22 of Attachment 1.

[53] In the 2021/22 year to date, ORC has taken 104 formal enforcement actions, including 13 warnings, 48 infringement notices, and 37 abatement notices. This is a significant increase from 74 formal enforcement actions taken in the same period of the 2020/21 year. The most common causes of enforcement action related to water pollution (37) and consent non-compliance (20).

[54] For the 2021/22 year to date, ORC has authorised five legal proceedings in relation to discharge of contaminants to air, and sought one interim enforcement order in relation to a domestic wastewater discharge across a neighbouring property.

[55] All formal enforcement action is taken in accordance with the RMA Compliance and Enforcement Policy.

[56] The increase in formal enforcement action should not be seen to reflect more offending occurring in Otago. Improvements in CME activities across the compliance monitoring and investigations teams have been a significant contributor to the increase in enforcement action. These improvements include:

- Streamlining of the enforcement decision-making process to ensure timely and consistent enforcement decisions are made
- Increased consents monitored, leading to more non-compliance identified and enforcement action considered
- Additional staff resources to enable timely attendance to pollution complaints and gathering of information
- Dedicated staff member overseeing all enforcement notices and ensuring consistent procedures are followed

[57] Further details on enforcement action in the 2021/22 year, including comparison with the 2020/21 year can be found in Figures 23 and 24 of Attachment 1.

Compliance engagement and education activities

[58] To support and enable compliance, ORC Compliance staff work proactively with landowners, consent holders and the community to engage with on them compliance matters and educate on good practices.

[59] Some of the engagement and education activities that have been undertaken in this calendar year include:

- Engaging with Forestry Companies on good management practices and rules for afforestation activities and encouraging planting of native buffer zones onsite.

- Media campaign around 'moving day' encouraging farmers and stock truck companies to use best practices to safeguard water quality and transport safety when moving stock.
- Encouraging property developers with residential earthworks consents to check sediment controls are in place ahead of adverse weather conditions, and spot-checking compliance.
- Ongoing engagement with primary industry groups and farmers on NES-FW and good management practices and planning for winter grazing in 2022, including presenting at several field days and farm workshops across the Otago region.
- Sending out educational letters to alleged offenders in relation to domestic chimney and outdoor burning complaints.
- Radio interview with Otago Access Radio on stormwater pollution and reminding people to only let rain go down the stormwater drains to protect our waterways.
- Media releases seeking information on potential cause of fish kill in Horne Creek and promoting the Pollution Hotline.

RMA INVESTIGATIONS AND ENFORCEMENT REPORT

[60] The Compliance and Enforcement Special Interest Group (CESIG) is a regional sector group with a focus on promoting best practice in compliance monitoring and enforcement (CME).

[61] A CESIG working group prepared an "RMA Investigations and Enforcement Report in response to a request from Regional Chief Executives (RCEO) to identify challenges with current CME enforcement tools and investigation requirements under the RMA. The CESIG working group was led by the ORC Manager Compliance and a final report was submitted to RCEO in April 2022 (the full report is provided at Attachment 3).

[62] The report draws upon various information sources already available, including the annual CME Metrics Report and the 2020 report "New Directions for Resource Management". A targeted survey of regional and unitary councils was undertaken to identify challenges with current enforcement and investigation, and several councils contributed case studies to provide context (including the *ORC v Northlake Investment Limited* case). In addition, Chief Environment Court Judge Kirkpatrick was interviewed on his views on enforcement and investigation challenges from a judiciary perspective.

[63] The report identified several opportunities to improve future CME outcomes, including:

- Improving the timeliness of court proceedings to support deterrence for environmental offending:
  i. Introducing limitations on option for 'trial by jury' for environmental offending.
  ii. Increasing support for Environment / District Court Judges, and/or additional dual warranted judges
- Increasing the financial penalties imposed for RMA offences to support deterrence for environmental offending:
  iii. Adopting the amended Infringement Offences Regulations to increase infringement fees.
  iv. Developing guidance for prosecutors and judiciary on aspirations of community, iwi and Government in driving positive behaviour change through deterrence from breaches of environmental legislation.

v. Aligning the Natural and Built Environments Act penalties with other legislation maximum penalties.
vi. Prohibiting insurance for fines and infringement fees under the Natural and Built Environments Act

- Broadening the resourcing options for councils undertaking RMA enforcement action:
  vii. Establish central funding for the sector in undertaking court proceedings for matters of national significance or legal precedents in environmental offending.
  viii. Enabling regulators to recover costs associated with permitted activity and unauthorised activity monitoring.
- Improving the enforceability of resource consents, Plan rules, RMA, National Environment Standards:
  ix. Imbedding CME considerations and input at all stages of the policy, regulation, and consent condition cycle.
- Boosting CME workforce and investigations capacity/capability and recognising CME as a practice/profession:
  x. Resourcing plan for the promotion and support of CME capacity and capability.

[64] The RCEO provided the report to the Minister for Environment, and it is understood that the report has been considered by Ministry for Environment in the RM reform and drafting of the Natural and Built Environment Bill.

[65] CESIG is also considering options for developing solutions to some of the challenges identified in the report that are within the control of the Regional Sector and proactively working with Ministry for Environment.

HARBOURMASTER

[66] Port and Harbour Marine safety code annual self-assessment has been completed, signed off by CEO at ORC and CEO at Port Otago and submitted to the code secretariat. Our next external review for this will be in 2024 with an internal review in 2023.

Search and rescue exercise

[67] NZ Police are tasked with Marine, and Land based Search and Rescue (SAR) throughout New Zealand, where Rescue Coordination Centre NZ (RCCNZ) are not involved. From time to time they call upon other agencies such as ORC Harbourmaster and private vessel owners to participate in SAR operations when required. As part of this function, we are asked to participate in exercises as we are familiar with protocols and procedures used during SAR operations.

[68] Such an event was held in Dunedin over a weekend in May 2022 involving all agencies to see if there were any shortfalls in operational procedures, and if so, what needs to be address in case of a real emergency. While SAR is not a part of our day-to-day business, we value being part of SAR exercises as a reliable back-up for Police operations.

[69] The objective of the SAR exercise was to utilise assets within the Otago area and incorporate various agencies. The operation was sectioned into two parts, first part was outside Warrington area, then second part outside Karitane area.

[70] Having participated fully in this exercise the Harbourmaster team thanked all parties involved for the invite and expressed our appreciation of being involved. We were thanked for our involvement.

[71] The Harbourmaster team has also been actively engaged with Customs NZ. This has provided a great opportunity for some inter agency understanding and co-operation.

[72] Hydrographic survey of the eastern channel in Otago harbour has been completed, it is our intention to make this data available for users in the near future. This piece of work will also inform navigational safety improvements on the Peninsula side of the harbour between Grassy Point and Portobello. We have engaged local users to seek thoughts and ideas. This work will see a number of buoys placed to improve safe navigation for users throughout this area.

[73] Harbourmaster has examined one Pilotage exemption certificate and one grade one pilot this period. Both candidates passed both theory and practical exams successfully.

OPTIONS

[74] As this is a report for noting there are no options.

CONSIDERATIONS

Policy Considerations

[75] There are no policy considerations.

Financial Considerations

[76] There are no financial considerations.

Significance and Engagement

[77] As this is a report for noting consideration of the Significance and Engagement Policy is not required.

Legislative Considerations

[78] A number of legislative requirements govern the activities of the Regulatory Group.

Risk Considerations

[79] There are a number of legal and reputational risks associated with the delivery of ORC's regulatory functions.

Climate Change Considerations

[80] There are no climate change considerations associated with this report.

Communications Considerations

[81] Communication with the Otago community occurs on a regular basis to educate and inform people on regulatory matters. This includes a quarterly regulatory newsletter which is aimed at informing RMA professionals on technical matters and relevant updates.

NEXT STEPS

[82] Regulatory activity will continue and will be reported to the Regulatory Committee on a quarterly basis.

ATTACHMENTS

1. July 2021 to May 2022 Regulatory Data [**7.1.1** - 12 pages]
2. Operational Compliance Audit and Performance Monitoring Schedule 2022-23 [**7.1.2** - 1 page]
3. RMA Investigations and Enforcement Report [**7.1.3** - 22 pages]

Attachment 1: REGULATORY REPORTING FOR THE PERIOD 1 JULY 2021 TO 31 May 2022

Consents

Figure 1: Resource Consent Applications Received

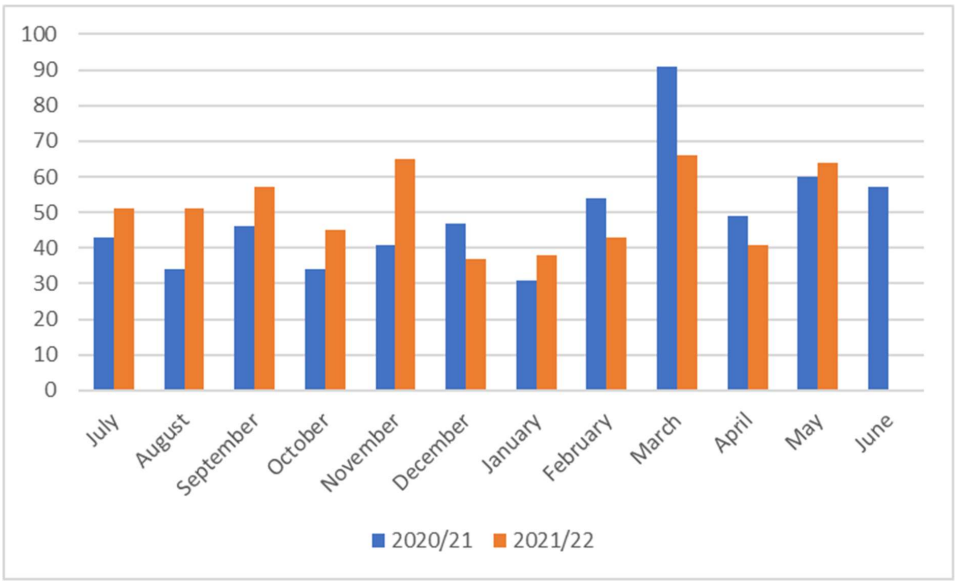
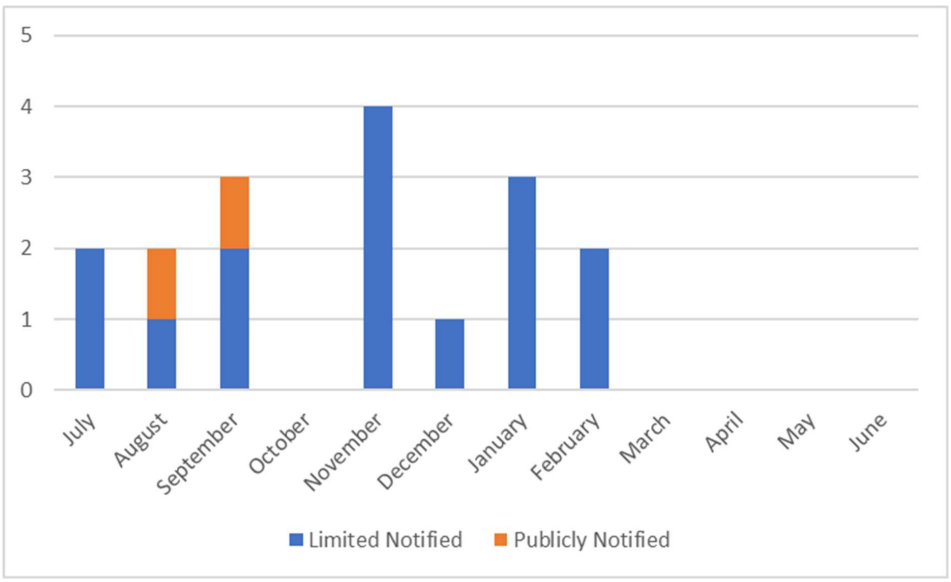


Figure 2: Notified Applications



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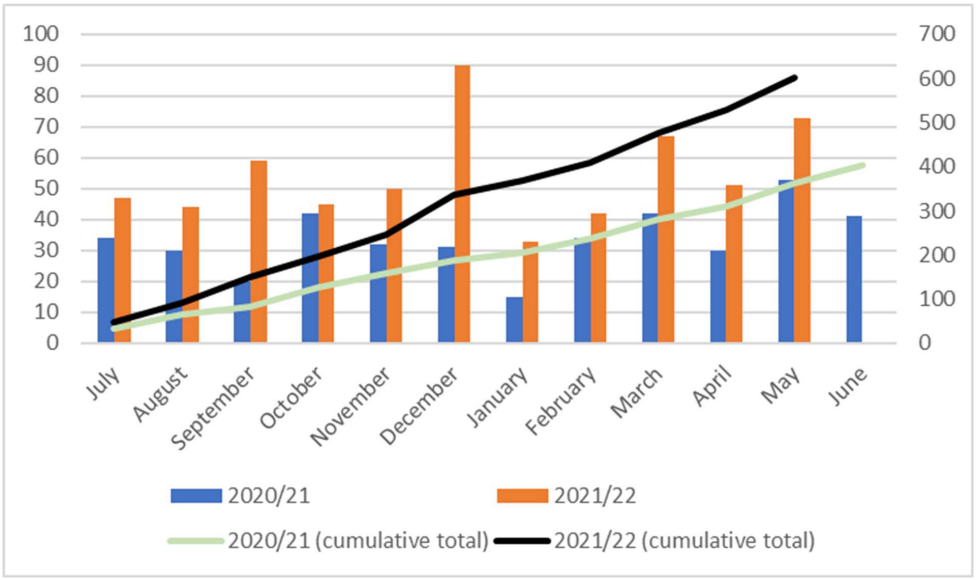

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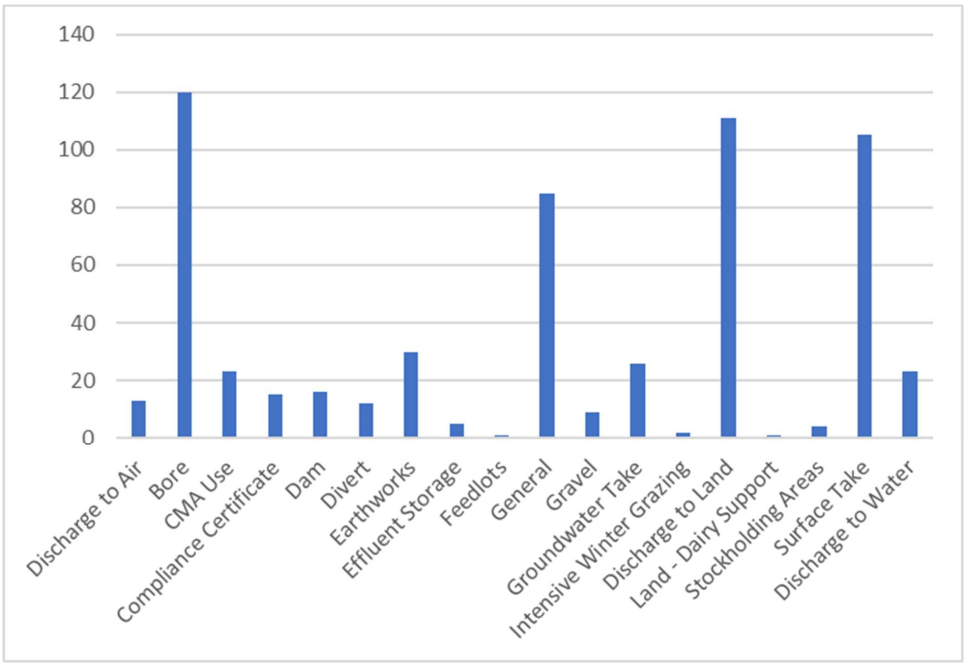

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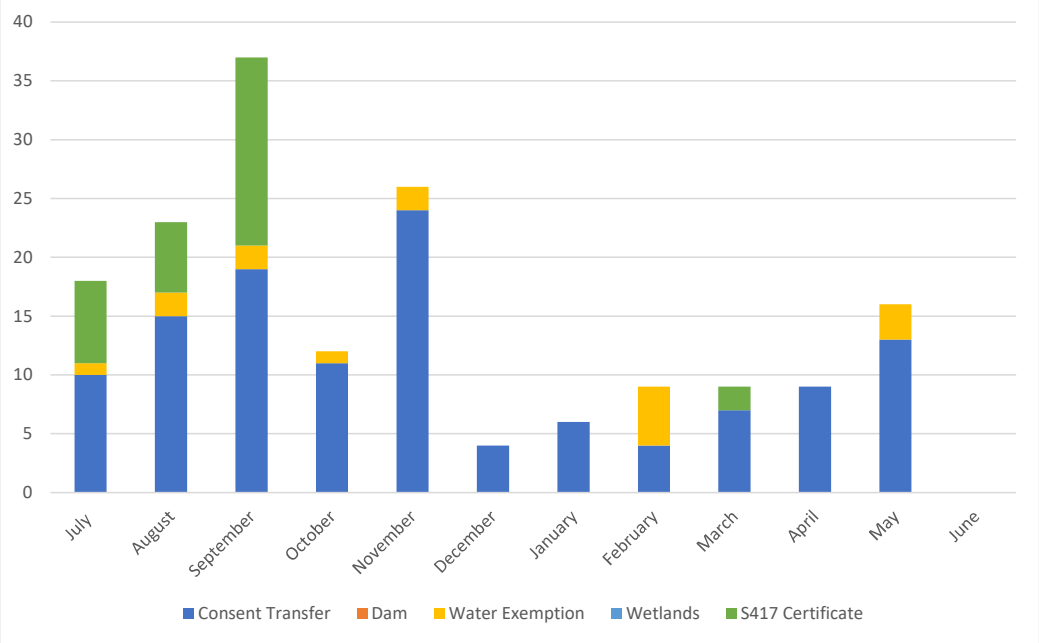

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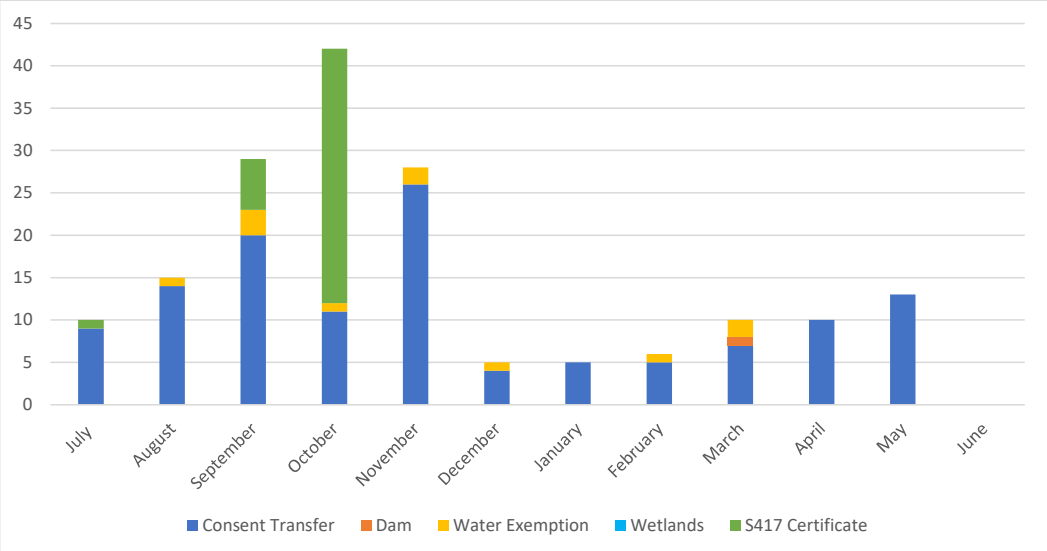

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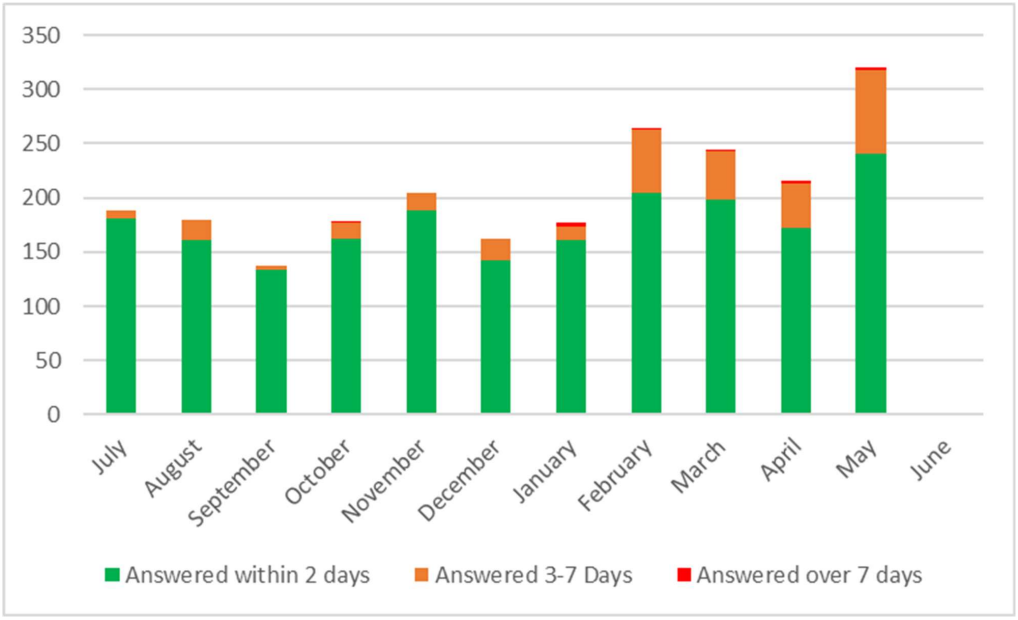

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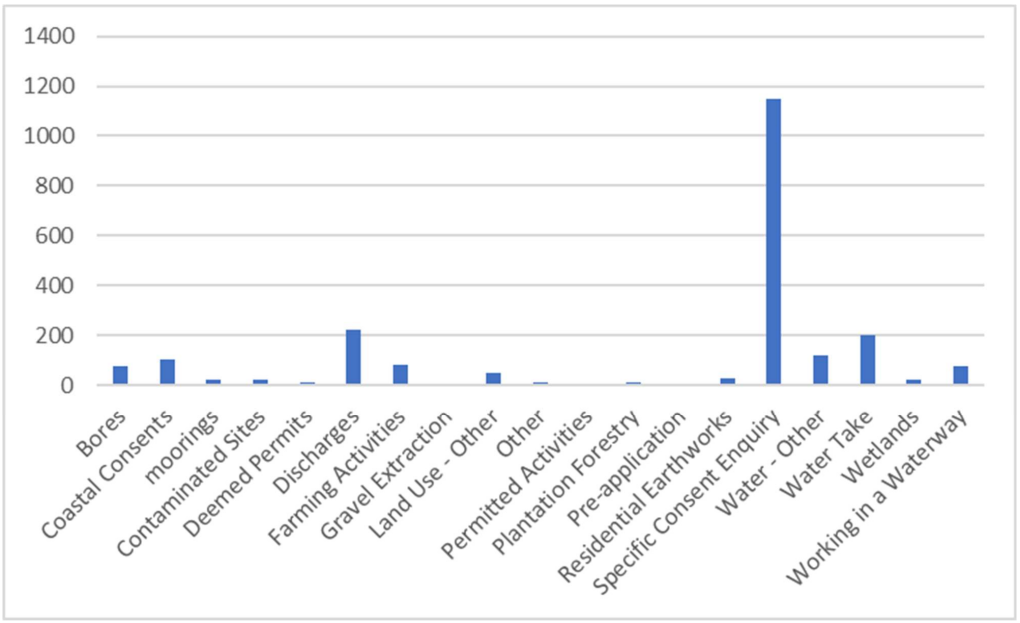

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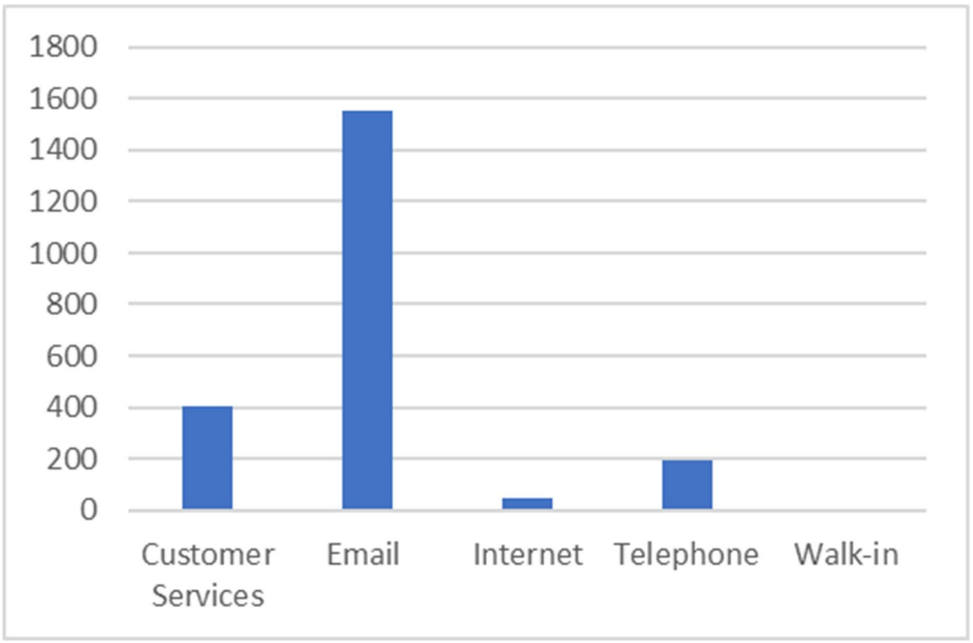

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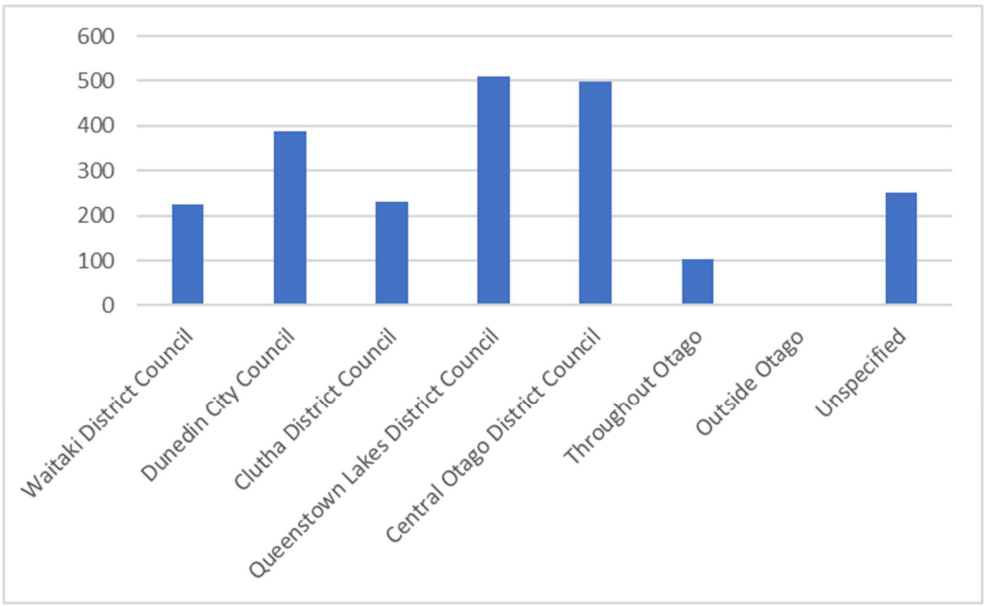

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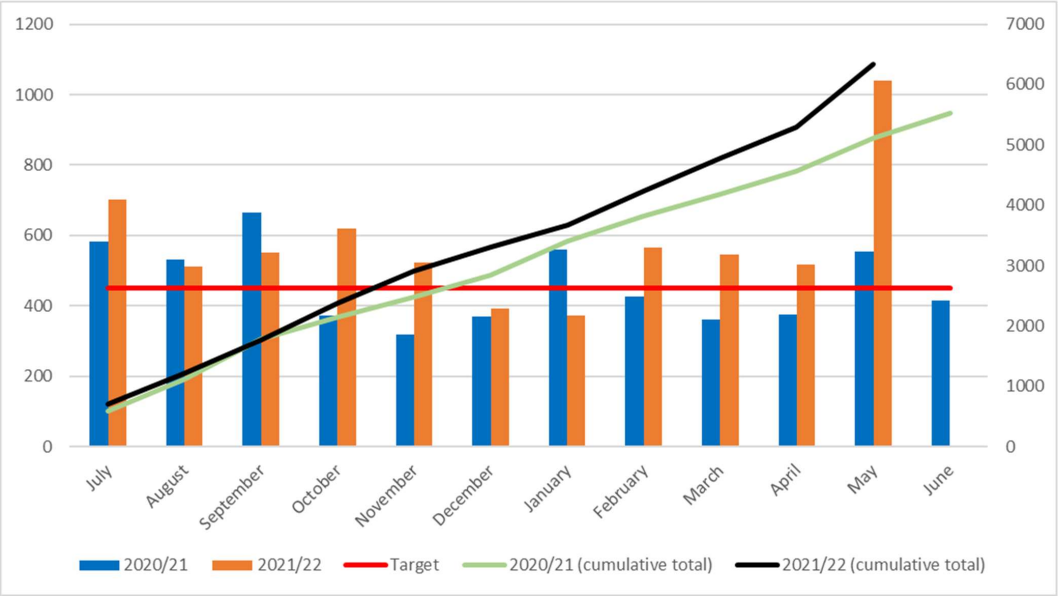

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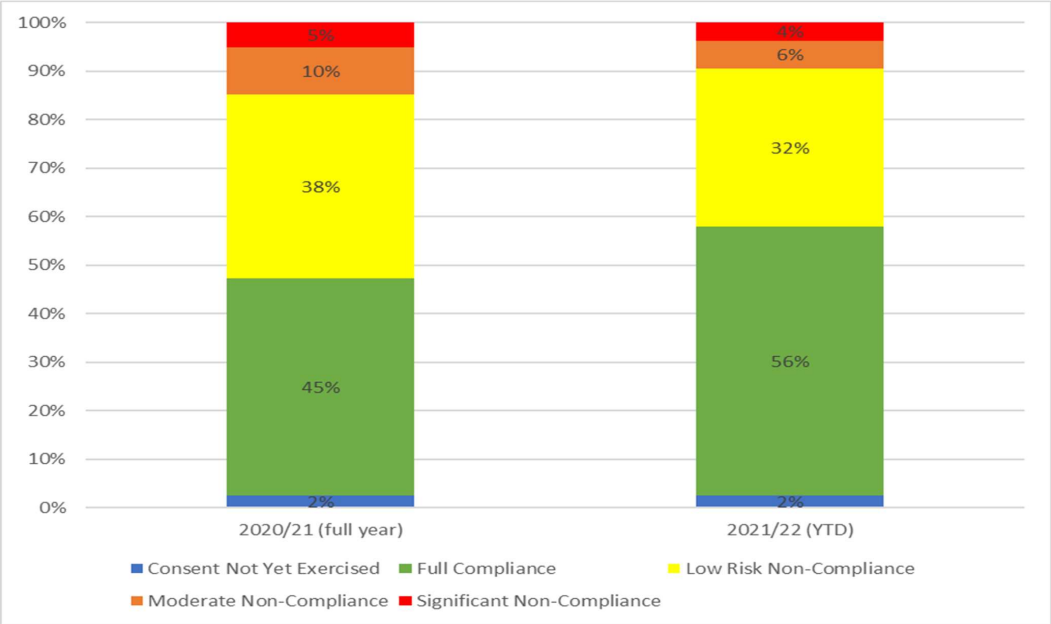

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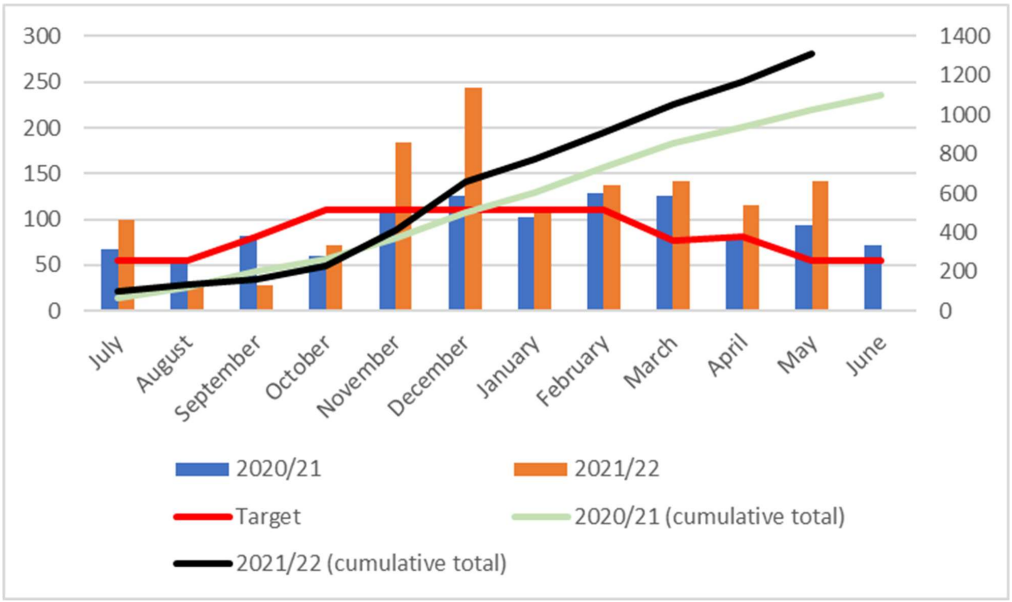

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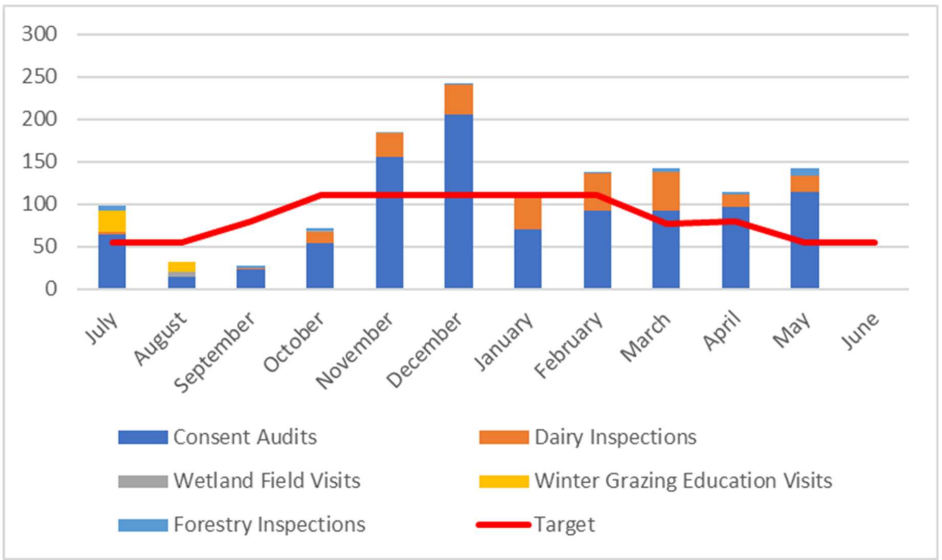

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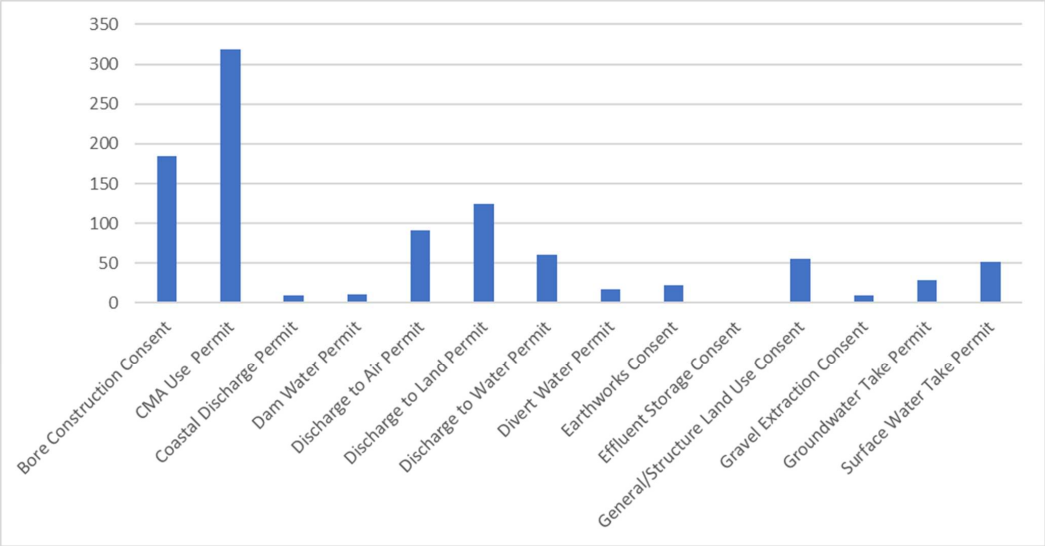

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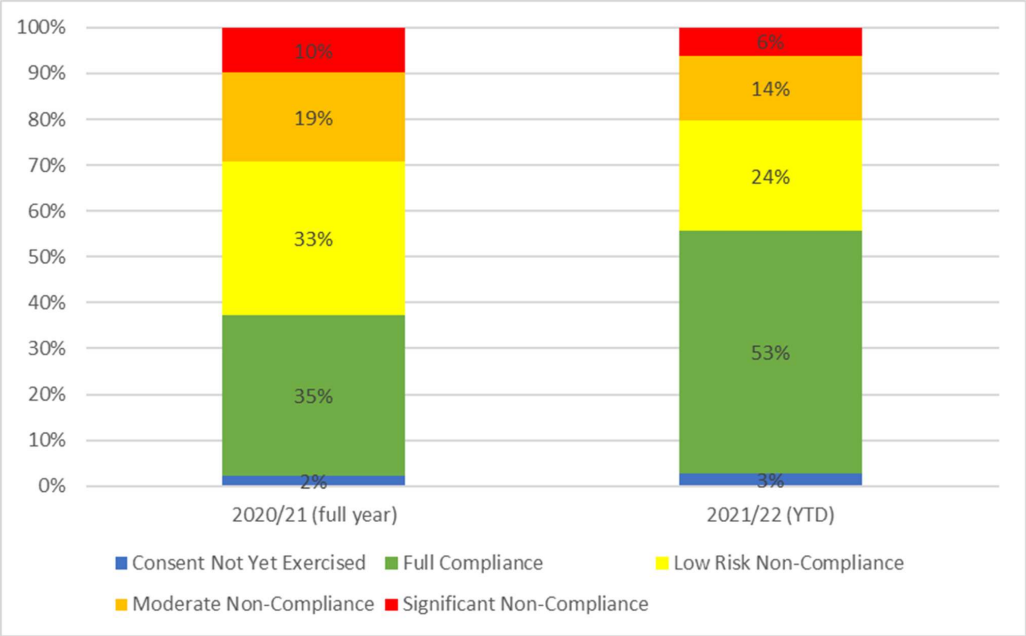

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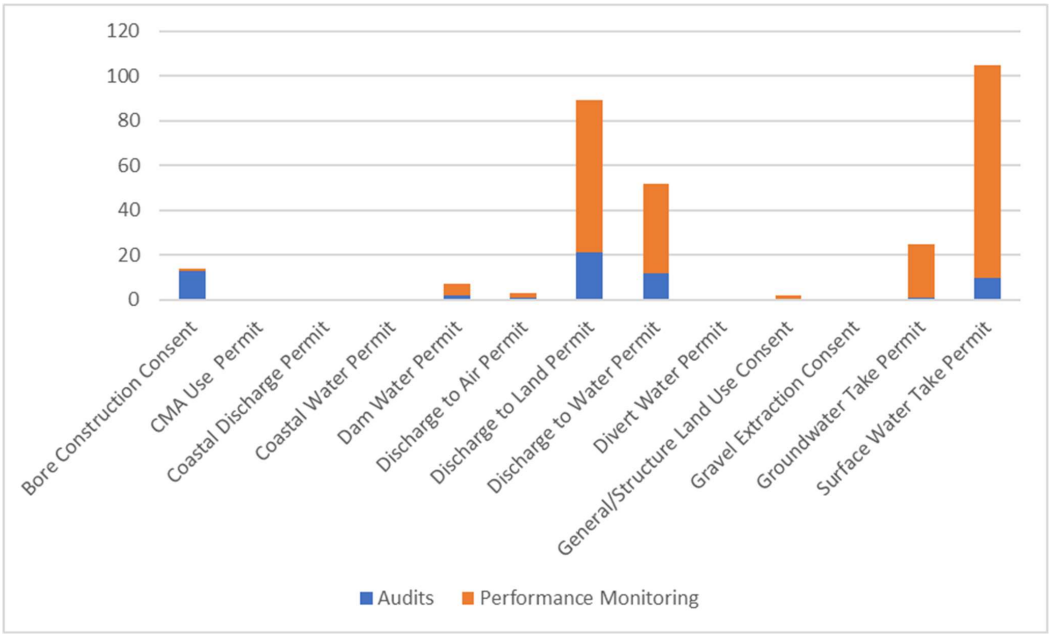

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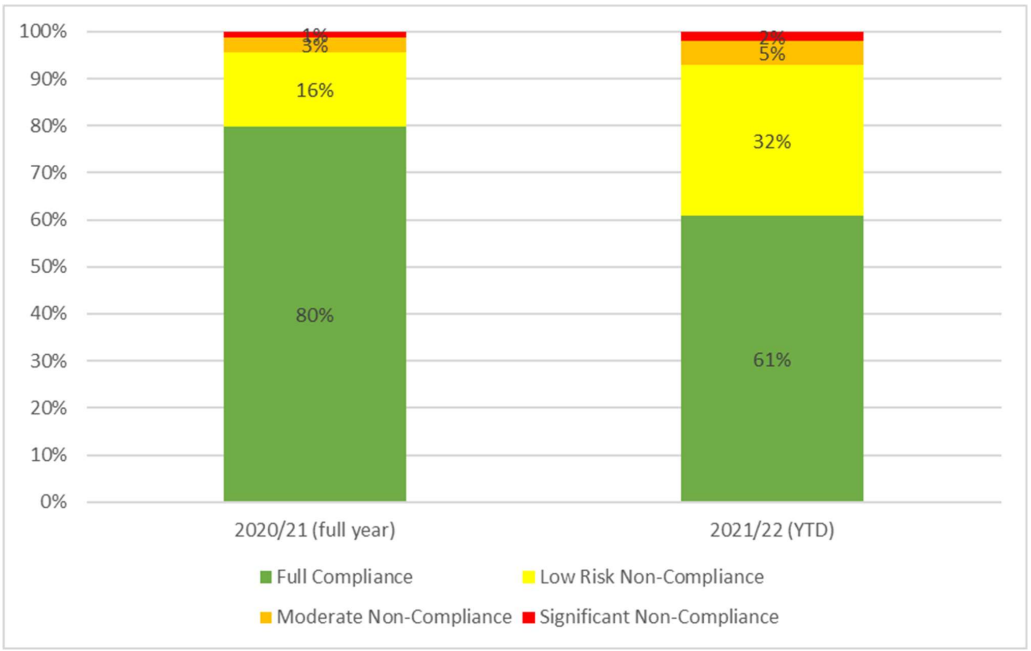

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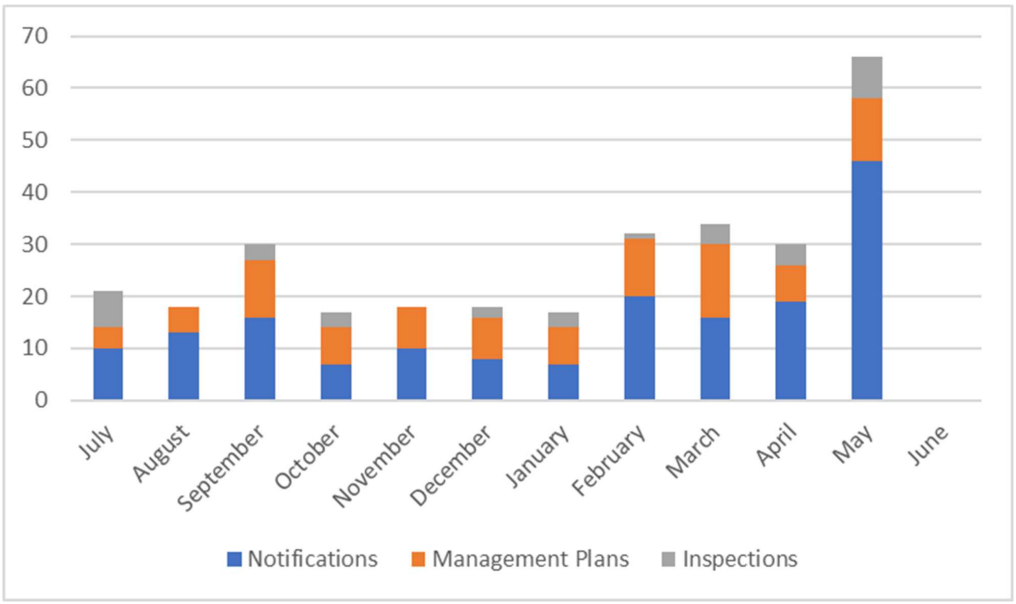

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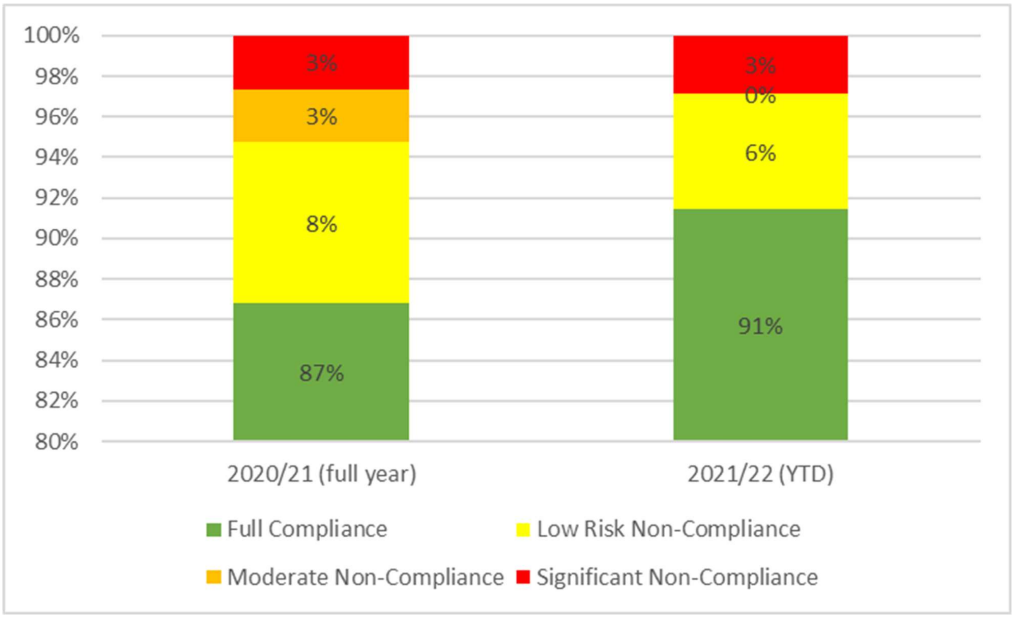

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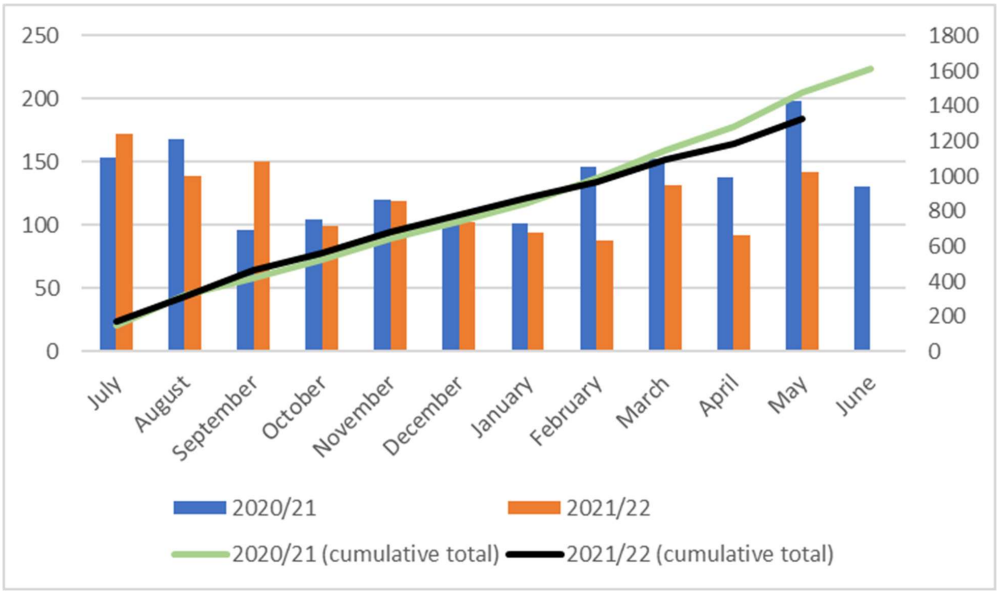

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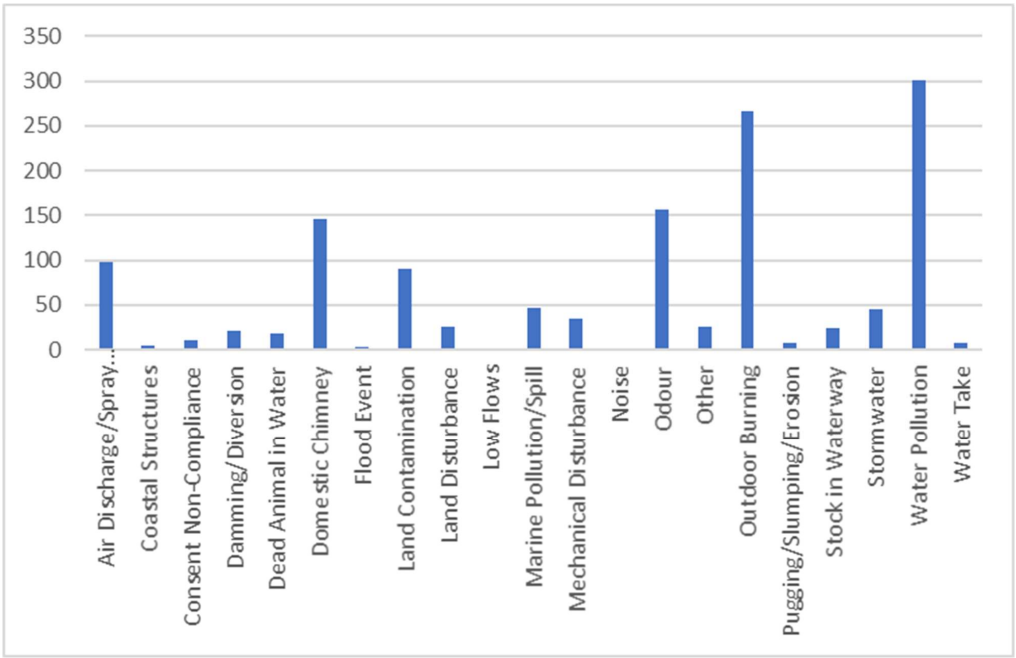

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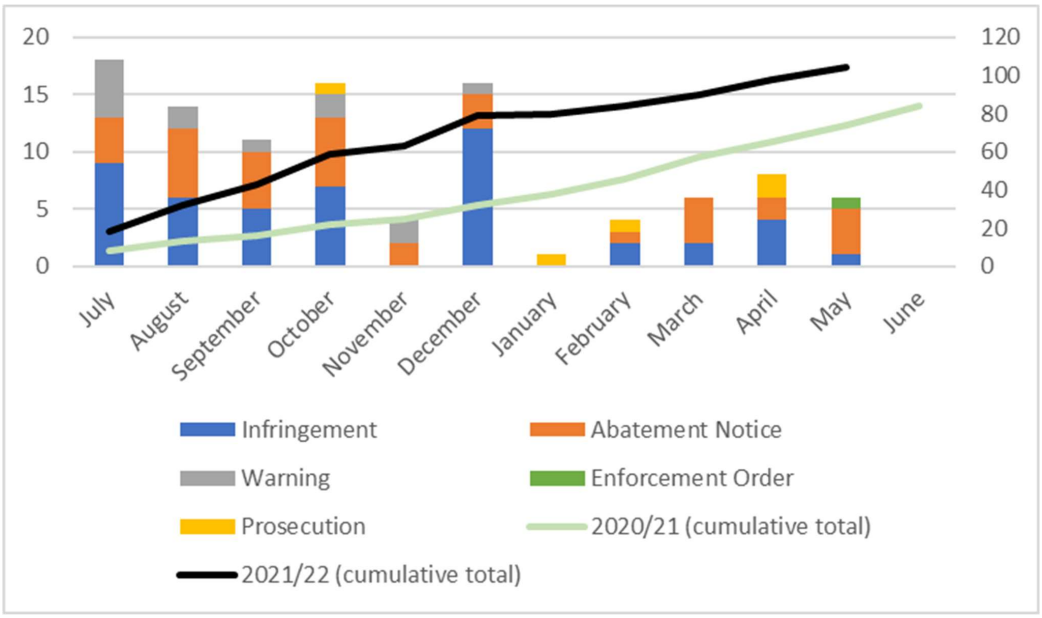

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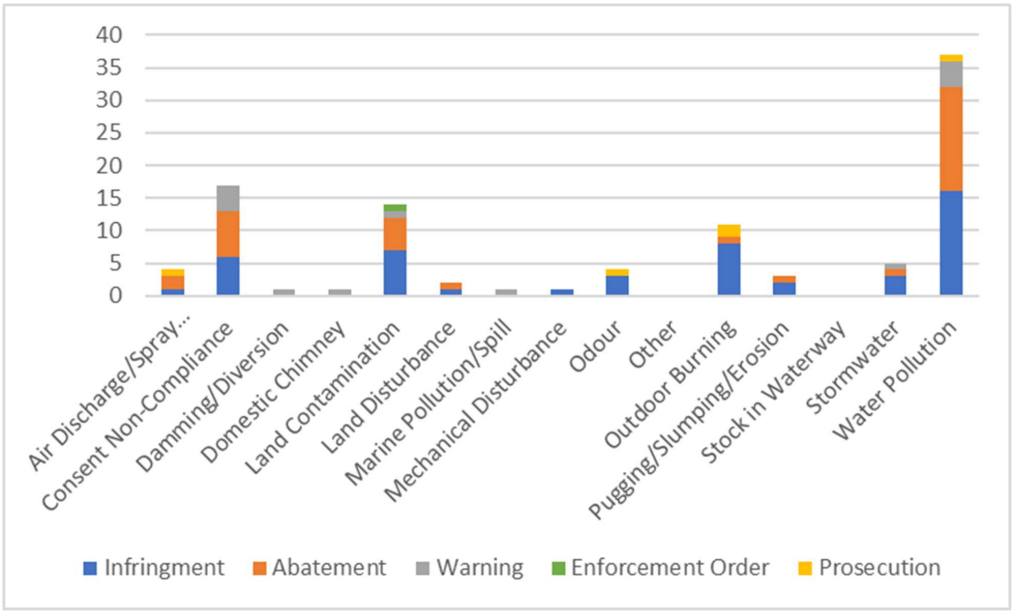

Compliance Audit and Performance Monitoring Schedule 2022-23

	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Total
Planned performance monitoring grades	**500**	**500**	**500**	**500**	**500**	**500**	**500**	**500**	**500**	**500**	**500**	**500**	**6,000**
Audits/inspections	**78**	**77**	**88**	**87**	**85**	**85**	**85**	**85**	**88**	**87**	**78**	**77**	**1,000**
Type of audits/inspections by priority as identified in the Compliance Plan 2020-22													
Priority 1: Permitted activity dairy programme and forestry, discharges to water, earthworks, winter grazing	20	20	35	35	35	35	35	35	35	35	20	20	**360**
Priority 2: District council consents, landfills, power generation and other large-scale activities	40	40	40	40	40	40	40	40	40	40	40	40	**480**
Priority 3: Water take consents and water flows during dry periods	10	10	10	10	10	10	10	10	10	10	10	10	**120**
Priority 4: Monitoring regionally significant wetlands and dams/other structures	3	2	3	2					3	2	3	2	**20**
Priority 5: Monitoring industrial air discharges	5	5									5	5	**20**
Priority 6: Monitoring coastal structures													**0**

*Total consents planned for monitoring (including grading of information, audits and inspections) in 2022-23 is 2,500.

Te Uru Kahika
Regional and Unitary Councils Aotearoa

REPORT FOR RCEO GROUP

RMA Investigations and Enforcement Report

CESIG WORKING GROUP
COMPLIANCE AND ENFORCEMENT SPECIAL INTEREST GROUP
APRIL 2022

Contents

Executive Summary

This report has been prepared in response to a request from Regional Chief Executives (RCEO). It contains information gathered from regional and unitary Councils across Aotearoa New Zealand to canvas the experiences and current challenges working within the investigations and enforcement regime under the Resource Management Act 1991 (RMA). The information and data gathered on compliance, investigation and enforcement highlighted the effective delivery and significant scale of compliance, monitoring and enforcement (CME) undertaken by the sector. This has however not been expanded on in this report as its purpose is to identify challenges within the existing regulatory regime to inform future reform and provide for improved outcomes.

This report identifies several opportunities to improve future CME outcomes, including:

- **Improving the timeliness of court proceedings to support deterrence for environmental offending:**
  - Introducing limitations on option for 'trial by jury' for environmental offending.
  - Increasing support for Environment / District Court Judges, and/or additional dual warranted judges.

- **Increasing the financial penalties imposed for RMA offences to support deterrence for environmental offending**
  - Adopting the amended Infringement Offences Regulations to increase infringement fees.
  - Developing guidance for prosecutors and judiciary on aspirations of community, iwi and Government in driving positive behaviour change through deterrence from breaches of environmental legislation.
  - Aligning the Natural and Built Environments Act penalties with other legislation maximum penalties.
  - Prohibiting insurance for fines and infringement fees under the Natural and Built Environments Act.

- **Broadening the resourcing options for councils undertaking RMA enforcement action**
  - Establish central funding for the sector in undertaking court proceedings for matters of national significance or legal precedents in environmental offending.
  - Enabling regulators to recover costs associated with permitted activity and unauthorised activity monitoring.

- **Improving the enforceability of resource consents, Plan rules, RMA, National Environment Standards**
  - Imbedding compliance monitoring and enforcement (CME) considerations and input at all stages of the policy, regulation, and consent condition cycle.

- **Boosting CME workforce and investigations capacity/capability and recognising CME as a practice/profession.**
  - Resourcing plan for the promotion and support of CME capacity and capability.

It is acknowledged that many of these opportunities would require legislative change and are currently being considered in the drafting of the Natural and Built Environment Act. As this is developed, it is important that the Regional, Unitary and Territorial CME sector is involved in its development to support future CME delivery outcomes.

Introduction

Regional and unitary councils are responsible for compliance monitoring and enforcement (CME) under the Resource Management Act 1991 (RMA). The RMA provides punitive and directive tools that can be utilised by the regulator when dealing with non-compliance and environmental offending. Tools range from relatively low-level administrative tools, such as the issuing of a warning, through to criminal prosecution, generally resulting in criminal convictions and fines, and on the rare occasion, a term of imprisonment.

To provide for natural justice, enforcement action requires provision for challenge or appeal processes. Through these processes, the robustness of investigation and evidence is tested, including interpretation of the RMA, regulations and planning instruments.

The regional sector is comprised of 16 separate agencies who have had autonomy over the last 30 years in implementing the CME aspects of the RMA. As a sector, the desire for increased consistency, transparency and best practice has driven initiatives, such as "The Regional Sector Compliance Monitoring Strategy", the annual "Sector CME report", peer CME reviews and assisted the Ministry for the Environment's development of "Best practice guidelines for compliance, monitoring and enforcement under the Resource Management Act 1991".

The RMA is currently under review and will be replaced with new legislation. This creates an opportunity for the sector to provide factually based information in respect of the challenges of working under the current regime. This is done in the hope that the new regime can strengthen CME delivery outcomes by the sector through the reduction or elimination of existing challenges.

"Environmental offending needs to be a lot more efficient court process"

- Judge Kirkpatrick

This report has been prepared by a working group of the Compliance Enforcement Special Interest Group (CESIG). The report draws upon various information sources already available, including the annual CME Metrics Report[1] and the 2020 report "New Directions for Resource Management[2]" (the Randerson Report). A targeted survey of regional and unitary councils was undertaken to identify challenges with current enforcement and investigation, in addition to survey responses several councils contributed case studies to provide context. In addition, Chief Environment Court Judge Kirkpatrick was interviewed on his views on enforcement and investigation challenges from a judiciary perspective, which have been referenced within this report.

It's important to note that Territorial Local Authorities were not included in the preparation of this report; although the feedback provided by unitary authorities can provide some insight into the challenges faced when enforcing matters relating to district and/or city council functions under the RMA, and it is expected that many will be like those documented in this report.

[1] www.lgnz.co.nz/assets/Regional/CME-Metrics-2020-Report.pdf
[2] environment.govt.nz/assets/Publications/Files/rm-panel-review-report-web.pdf

Prosecutions

Conducting investigations and initiating criminal proceedings is the most complex area of CME work for the regional sector. The sector recognises that many of the challenges faced in taking RMA prosecutions are common for any regulatory or enforcement agency involved in criminal prosecutions.

Prosecution is considered an effective tool in providing both specific and general deterrence for environmental offending.

In the interests of natural justice, it is important that prosecutions are initiated and undertaken confidently, competently, and with relative consistency.

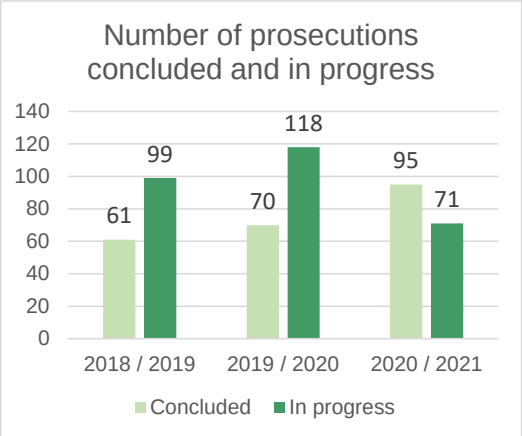

Figure 1 shows the number of prosecutions completed and in progress for the sector over the 2018-2021 period[3].

There are common themes that emerge in respect of the complexities and challenges with prosecutions for the sector, which are detailed below.

Timeliness of court processes

From the filing of charges until conclusion of sentencing, even in a relatively straightforward case with early guilty pleas, a prosecution generally takes over a year to sentencing.
Delays can lead to the deterrence message not being proximate to the offending for the impacted community and negate the application of enforcement orders as part of sentencing, requiring parallel enforcement order proceedings to mitigate or cease the environmental offending in the intervening period.

Significant delays in court proceedings presents challenges to officers and defendants in accurately recalling evidence and to Councils where officer turnover impacts case management continuity and requires summoning previous employees to attend proceedings.
Data received from Regional Councils validates this, as the average time taken for cases to be resolved is 468 days from the date which charges are filed, with 58% of cases taking over a year to go through the judicial process (refer to Table 1 below).

[3] Data sought from the CME Metrics Report www.lgnz.co.nz/assets/Regional/CME-Metrics-2020-Report.pdf

Table 1: Breakdown of timeliness and cost based on hearing type

Hearing type	Days (Average/case)	Legal fees (Average/ case)
No trial - early guilty plea	388	$36933
Judge only trial	504	$45647
Trial by Jury	773	No data

As is to be expected, these timeliness issues are exacerbated where a matter is defended, with judge alone trials taking significantly longer than cases with a guilty plea. The data shows that cases where the defendant elects for a jury trial take almost twice as long as those where a guilty plea is entered. However, even when the defendant enters an early guilty plea, the average time for a case to be resolved is still over one year.

CASE STUDY – GWRC V CPB HEB JOINT VENTURE

In November 2019 charges were laid in relation to earthworks and sediment discharges in Belmont Regional Park, Greater Wellington Region. The works were outside the road alignment footprint of the Transmission Gully Project and related to enabling mitigation planting to take place. There were no consents in place for this work and efforts to mitigate and remedy the issues identified were slow, even when raised by the council. As a result, tributaries of two creeks were directly impacted, with further potential effects downstream.

After two years of legal arguments, a guilty plea was entered and a sentence of $70,000 was imposed. This level of fine was inconsequential to such a large project. For a relatively simple case, the resources and expense involved were significant to the council involved. The delay considerably reduced the impact of the prosecution value for individual and general deterrence.

Court delays can be attributed to a range of factors; in particular, cases can be heavily delayed through repeated adjournments being sought and granted, pre-trial litigation, and resolving points to reach agreement in plea negotiations.

It is recognised that delays are not unique to prosecutions initiated by the regional sector and is likely to be a common challenge faced by all agencies involved in criminal prosecutions in New Zealand. We also accept that delays have been exacerbated by the various COVID lockdowns and restrictions in 2020 and 2021.

Our collective experience is that most judgements for RMA cases are 'reserved', to provide the opportunity to consider all the materials provided and draft comprehensive sentencing notes.

There is a relatively limited pool of judges who hold the dual warrants required to enable them to hear RMA matters, with 6 Environment Court judges currently appointed out of the maximum 10 appointments provided for under the RMA. Time delays for the availability of judges is particularly noted in smaller towns with already limited Court time.

"It is important to note that there is often a lot of material and often is provided for the Judge to review shortly before the final court date/sentencing is set"

- Judge Kirkpatrick

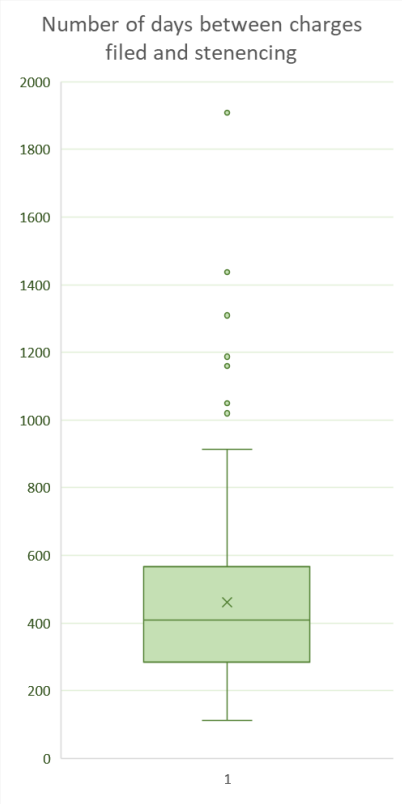

Figure 2: Range of lengths for court cases to be resolved (days between charges filed and sentancing decision issued)

Trial by Jury

Defendants have the option to elect a 'trial by jury' process as opposed to having the matter heard solely by a judge. This election is available as environmental offending is a Category 3 offence under the Criminal Procedure Act 2011, due to the two-year imprisonment period available upon conviction under the RMA.

Although most cases are resolved through early guilty pleas or judge alone trials, there is an increasing number of RMA cases where defendants plead 'not guilty' and elects trial by jury. It is rare for these cases to ultimately proceed to a jury trial (i.e., with defendants entering a late guilty plea or judge alone trial). However, the initial decision to elect trial by jury sets in place several steps resulting in procedural delays and costs for preparation.

One such step is electing trial by jury requires a change in prosecutor to the Crown. The Crown Prosecutor takes over the case which requires additional time to review the file, charges and proceedings afresh. While costs of the crown prosecutor are there forth covered by the crown, this does limit the Regional sectors ability to manage the direction of regionally significant cases and appeal rights which fall to the Crown.

As RMA cases 'stand in line' with other criminal prosecutions it can mean a wait of at times, several years before the matter is heard and decided; this is further compounded by the fact that RMA cases are (rightly) prioritized lower than other Category 3 criminal offences, such as violent crime. There are current examples of cases taking over five years to complete, in part due to the election of trial by jury. This limits the message of deterrence sought as part of the prosecution process.

The Randerson report identified that jury trials were not generally appropriate for RMA cases, and the CESIG endorses this position.

Further consideration should be undertaken on limiting the option for 'trial by jury' for environmental offending:

- It may be more appropriate for environmental matters to be considered by a District Court Judge who also holds an environment court warrant and is well versed in the technicalities of environmental offending[4] than a jury of laypersons.
- CESIG notes the Randerson recommendation of "adjusting *the maximum imprisonment term so most prosecutions may be heard as judge-alone trials"*[5] however reducing the maximum imprisonment for environmental offending may send the wrong message to the community, particularly at a time when harsher penalties are called for.
- Judge Kirkpatrick considered that there may be an 'aggravated tier' for offending for RMA offences like Building Act offences.

> *"Consider aggravated tier for offending… only the most serious might have the full penalty currently available and/or be able to elect trial by jury"*
> *- Judge Kirkpatrick*

CESIG would welcome additional support for RMA/DC Judges, and increased numbers of dual warranted judges to hear RMA matters.

[4] This matter was also identified in the Randerson Report, which considered that jury trials were not generally appropriate for RMA cases
[5] Recommendation 3(iii) of the Randerson Report, p.419

Resourcing for Enforcement

Undertaking prosecution and court proceedings involves significant costs and resourcing for councils. It is important to recognise that undertaking court proceedings and the fines issued is not a cost-recovery exercise for councils in undertaking their powers of enforcement under the RMA.

The costs associated with undertaking court proceedings can be significant and can place significant pressure on councils with unpredictable work programme demands.

Prosecutions take on average, approximately 289 hours per case (approx. 0.15FTE for each case) for the Officer in Charge (OC). It should be noted that in many cases, prosecutions will draw on staff outside of the OC, which means there is likely an opportunity cost in terms of diversion from other work programmes. Staff from other teams such as compliance monitoring and science programmes are often called upon to support prosecution work. This can be intensified within smaller councils or smaller CME teams, which do not have designated investigators and compliance staff are taken off their 'compliance monitoring' duties to investigate and prepare matters for court.

Although legal costs are often the easiest to capture, information from councils (Waikato, Horizons and Southland) indicates that legal fees only account for a small portion of the total cost to the community, with 60% of the total cost being attributed to staff time. Based on the same figures, the average cost of a prosecution is $47,191 per case; however, there is significant variation in this figure.

CASE STUDY – GDC V ARATU FORESTS LIMITED, GDC V PF OLSEN, GDC V DNS AND GDC V JUKEN NEW ZEALAND

In June 2018 a major storm event occurred on the East Coast. The rain event resulted in severe flooding and the mobilisation of a large volume of sediment and woody debris from plantation forests in the Tolaga Bay area. A second major storm event occurred on 11 and 12 June 2018.

It is estimated 47,000m3 of woody debris was deposited on the beach at Tolaga Bay and at least 400,000m3 of woody debris deposited throughout other catchments. The flow of debris damaged farms, houses, blocked bridges, and roads to the Tolaga Bay area. One family had to be rescued by helicopter from the roof of their house due to the wall of debris surrounding their house.

Due to the large scale and complexity of the event, it was identified that Gisborne District Council did not have sufficient resourcing to investigate all the plantation forests in the affected area. Council reached out to other Regional and Unitary Councils for assistance. Gisborne District Council had nine staff working on the investigation. Council was provided support of an additional six staff from other Councils around New Zealand. This worked well as staff had the relevant technical experience and understood the processes around Council investigations.

In respect of the resulting prosecutions, four forestry companies entered guilty pleas. Another case is still before the courts as the defendants elected a jury trial. The four companies that entered guilty pleas were fined a combined total of $854,200. Two of the companies were ordered to pay reparation, combined total of $131,500.

The costs (ongoing) associated with the investigation and resulting prosecutions have been significant. Gisborne District Council has covered the costs associated with the investigation apart from the staff time of the other Regional and Unitary Councils. Bay of Plenty Regional Council provided two staff who have played a significant role in the investigation and subsequent prosecutions.

Council funding for CME activities is budgeted through the long-term plan and annual plan process, in consultation with their communities. Prosecution decision making requires robust considerations of relevant factors in line with the Solicitor-Generals Prosecution Guidelines; while cost is a relevant factor when making an overall assessment of public interest, it is important that prosecution proceedings are not prevented due to Council budget constraints. The basis of undertaking prosecution proceedings is not cost recovery or "likely return" with the purpose of the fines imposed being specific or general deterrence to offenders and their relevant industries. In the absence of central funding, the costs of these proceedings are borne by local rate payers. Legal costs associated with trial by jury cases are funded by the Crown.

CASE STUDY – ORC V NORTHLAKE INVESTMENTS LIMITED

On two occasions in August 2017, during a heavy rainfall event, a significant silt and sediment discharge occurred into the Clutha River. The discharge was traced back to a large earthworks site, which was part of a residential subdivision development. As a result of the investigation the civil contractor and developer/landowner were charged under section 15(1)(b) of the RMA.

The contractor eventually plead guilty in 2018 and was sentenced in January 2019, receiving a fine of $25,500. The developer/landowner took the matter through to a Judge alone trial and as a result of that was found guilty of the offence. They were sentenced in September 2019 getting a fine of $42,500. They appealed this conviction and sentence. In September 2020 the Court of Appeal approved an application to appeal the District Court conviction, the companies previous appeal to the High Court had been rejected. The focus of Northlake's argument concerns the liability under the RMA of a developer who contracts out construction works and relies on expert advice.

The Court of Appeal hearing took place in October 2021, and the decision was issued in April 2022. The appeal was dismissed, and the conviction was upheld, 4 years and 8 months after the offence date. This is a significant decision for environmental offending in New Zealand.

The costs to the ORC have been significant, totally $329,283, with most of those expenses for legal fees ($255,728).

Anecdotal feedback from councils noted a trend in increasing costs associated with litigation. This was due to an increase in pre-trial arguments by defendants and that in some cases defendants plead guilty late in the process, after the Council has incurred the time and expense in preparing for a defended hearing/jury trial. Frustration was raised with some cases where full preparation for a trial has taken place for a defendant to change their plea at the last minute and receive a discount at sentencing for a guilty plea.

However, the sector is also realistic about their enforcement role and accept that many of the challenges faced in taking RMA prosecutions are common for any regulatory or enforcement agency involved in criminal prosecutions. Defendants must have the right to defend themselves and the right to natural justice.

"EPA should be considering helping smaller councils – they should utilise the Central Government budget and resource to help smaller councils with prosecutions"
- Judge Kirkpatrick

CESIG recommends that further consideration should be given to funding options for councils undertaking court proceedings:

- Establish central funding for the sector in undertaking court proceedings for matters of national significance or legal precedents in environmental offending.

Permitted Activity Monitoring

Many offences occur from activities which do not relate to a resource consent, and/or are a breach of a permitted rule within a regional/district plan. Due to resource constraints for CME work, councils apply a risk lens to CME work programmes.

One key challenge facing the sector is the inability to recover costs associated with the monitoring of permitted activities in regional/district plans or investigations due to the current scope of section 36 of the RMA except for National Environmental Standards which provide for permitted activity charging. The impact being many permitted activity monitoring programmes need to be funded by ratepayers. Often this results in proactive monitoring of permitted activities not being prioritised, the identification of permitted activity breaches therefore being reactive, and relying heavily on intelligence from the community.

Proactive permitted activity monitoring needs be supported by system design and resourcing that allows this to be undertaken efficiently for councils and their communities. CESIG has reservations about the reliance on permitted activities that the RM reform programme is signalling. If this shift to 'wider scope' permitted activities is rolled out, this will place additional pressure on CME resources unless supported by a suitable funding mechanism. In general, permitted activity monitoring charges are resisted by industry and communities.

CESIG agrees that monitoring of permitted activities is critical to achieve environmental outcomes and inform future policy but emphasises the inability to cost recover is a current barrier. Accordingly, CESIG supports the recommendation in the Randerson Report, *enabling regulators to recover costs associated with permitted activity and unauthorised activity monitoring*"[6].
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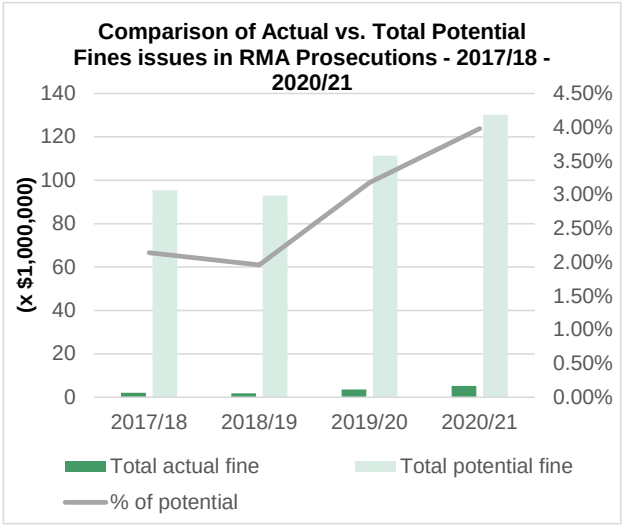
[6] Recommendation 4(i) of the Randerson Report, p.419

Sentencing and Fines

The maximum penalties available under the RMA are low compared with similar statutes in other countries and other regulatory regimes in New Zealand[7].

Figure 3 illustrates the total potential fines issued by courts in RMA prosecutions across the regional sector over the last four years compared with the actual fines. Although it is encouraging to see a trend of rising fines, relative to the maximum available, it is concerning that only 4% of the total maximum fines has been issued.



The RMA has been in place since 1991, and over that period there has been some significant environmental offending. However, the fines imposed by the court have not been close to the maximums available. For example, in 2012 Daina Shipping Co., the registered owner of the wrecked cargo ship *Rena*, was fined $300,000, half of the maximum available. The *Rena's* grounding on the Astrolabe Reef, off the coast of Tauranga, is one of the country's most significant incidents of environmental pollution. In 2013, Ruapehu Alpine Lifts Limited was responsible for a 19,000L diesel spill that resulted in the water supply for the town of Raetihi being shut off for several weeks. A $300,000 fine was imposed.

Relatively low financial penalties for environmental offending resulting from inadequate investment to prevent adverse effects can contribute to a "cost of business" attitude to enforcement penalties for offenders.

It is possible for councils to appeal sentences that are imposed on the grounds that the penalty was 'manifestly inadequate'.

To date councils have been reluctant to appeal sentences for several reasons:

- Appeals are time consuming and incur additional expensive whether successful or otherwise placing additional burden on rate payers.
- It can be difficult to establish that a penalty is manifestly inadequate when there is no precedent.
- Managing existing work programmes and levels of service; appeals contribute to an additional burden to resource demands. Councils are facing increasing demand to deliver national directions.
- Weighting of risk from an unsuccessful appeal, if endorsed by the higher court, and setting precedent.

[7] see pages 404 and 405 of the Randerson Report.

CESIG recommends further consideration is required to increase penalties for environmental offending to deter offending:

- Increasing the fines being imposed in environmental cases is lead from the judiciary, CESIG supports a variation of the Randerson recommendations of "*increasing the maximum financial penalties*[8]" in supporting the judiciary in increasing fines imposed within the bounds of current legislation. An option for assisting the judiciary with 'banding offending' is discussed below.

- CESIG notes the Randerson recommendation of *"deterring offending by extending the circumstances in which commercial gain may be taken into account in sentencing; and prohibiting insurance for fines and infringement fees under the Natural and Built Environments Act*"[9].

- Aligning RMA penalties with other legislation maximum penalties.

- Developing guidance for prosecutors and judiciary on aspirations of community, iwi and Government in driving positive behaviour change through deterrence from breaches of environmental legislation.

Insurance for RMA Offending

CESIG acknowledges the Randerson recommendations of "*prohibiting insurance for fines and infringement fees under the Natural and Built Environments Act*"[10]. CESIG agrees that deterrence is diminished through insurance cover for environmental offending, but also recognises that prohibiting insurance may result in increased numbers of fines and fees being unpaid or companies liquidated to avoid payment. This would result in additional burden on Councils and ratepayers. Generally, if the offender is insured, the fine gets paid promptly and in full.

Insurance for remediation works is strongly supported, to ensure adverse effects are mitigated. CESIG recognises that the conviction itself at times is sufficient deterrence and there are additional financial impacts on the defendant (e.g., increased premiums).

Banding Penalties

The report has highlighted concerns that the level of fines being imposed by the Courts are very low when compared to the statutory maximums available. Given that RMA reform is underway, the sector believes there may be an opportunity for an alternative approach to establishing appropriate fines, which may assist in addressing this issue.

The sector supports the introduction of a band or tiered system of offending may assist in increasing fines to support deterrence, whilst at the same time addressing factors such as guilty pleas and ability to pay fines.

The concept of banding offending is not new in an RMA context. In the Chick[11] case, Judge Whiting undertook an analysis of farm dairy effluent cases and identified three bands, namely Level 1 (Least Serious), Level 2 (Moderately Serious) and Level 3 (More than Moderately Serious), with sentencing ranges identified for each band.

Determination of where offending sat within each band was done after consideration of several key sentencing factors including the nature of the environment affected, the extent of the damage afflicted,

[8] Recommendations 3(i) of the Randerson Report, p.419
[9] Recommendations 3(ii) and 3(iv) of the Randerson Report, p.419
[10] Recommendation 3(iv) and of the Randerson Report, p.419
[11] See Waikato Regional Council v GA and BG Chick, CRN0707950094, CRN0707950096 and CRN0707950097

the deliberateness of the offence and the attitude of the defendant. Whilst the fine levels associated with the Chick bands are no longer considered appropriate the concept of banding certain offending to assist the court in determining an appropriate sentence has continued[12].

The sector supports as part of RMA reform further investigation into the appropriateness of a banding system for environmental offending penalties.

Enforcement Orders

Enforcement orders are mostly sought as part of the sentencing process. The majority of councils who responded to the survey stated that they were obtained as part of a prosecution process at sentencing. There are additional costs with enforcement order proceedings taken in isolation through application to the Environment Court.

Enforcement orders generally work well when sought through a sentencing process as it is more cost effective and there is less adversity to the content of the order, which can be agreed beforehand, making the issuing of the order somewhat of a formality for the Judge. However, when significant delays occur during a prosecution, this process loses its effectiveness and enforcement orders may need to be sought outside of the prosecution in order to accelerate remedial actions that will mitigate or avoid on-going environmental effects associated with the offending. Experience has shown that seeking an enforcement order through the Environment Court can be as lengthy as obtaining one through a criminal prosecution.

"Enforcement Orders are often complicated, draft conditions can be complex, Counsel even if prior agreement on the content – will often take the time to argue points when before the judge, which elongates the proceedings"

- Judge Kirkpatrick

Enforcement orders are useful for site remediation following offending and carry more weight than abatement notices, however they can be very time consuming to monitor for compliance and require further prosecution to enforce.

[12] See Southland Regional Council v John Douglas Dodds CRI 2020-017-302 for a recent example.

CASE STUDY - HORIZONS V FUGLE

In 2011, Horizons Regional Council applied for and was granted an interim ex parte enforcement order against a Mr Fugle in relation to a sub-division development in Palmerston North. The order was sought and awarded on the basis the environmental effects associated with the failure to comply with a resource consent were serious and ongoing.

What followed was a long and litigious process over several years, with the Environment Court noting in February 2016 "*These proceedings have a long and tangled history. … At a casual count some 26 sets of proceedings have been filed in this court arising out of development of the site. Proceedings before the Environment Court have included (inter alia) abatement notice appeals, interim and full enforcement order applications, applications for declaration and cost applications."*

The proceedings saw various changes to the enforcement orders as Mr Fugle changed the ownership of the site several times. This culminated in a final order being made against the company Farm Holdings (4) Limited (FH(4)L) in 2016.

Due to the lengthy and contentious nature of the enforcement order process, Council incurred costs in the order of $200,000. Whilst Council did obtain reasonably significant costs awards in relation to this matter (around $116,000) FH(4)L was put into voluntary liquidation in May 2016 with the liquidation being finalised in September 2017. The reasons for putting the company into liquidation is detailed in the Final Liquidators report that states:
"*The company own parcels of land which, at the time of purchasing, in late 2011, were already embroiled in dispute with local Council. The dispute involved sediment run-off from the site works that has been undertaken by the previous property owner. Council has elected to pursue enforcement action against the company as successor in title. The company perceived the cost of implementing the work required by Council would have outweighed the project return. The Directors decided the best course of action was to place the company in liquidation*."

As part of the liquidation process the liquidator invoked the provisions of section 269 of the Companies Act 1993, which saw the land revert to the Crown, who then on-sold the property to a new owner. As a result of this process the provisions of section 314(5) were severed, making the order unenforceable on the new owner of the property.

A high number of abatement notices are issued by the regional sector, with 5,225 notices issued in the 2020/21 year[13], an average of 100 notices each week. Abatement notices are effective, simple, cheap and widely used. They are generally successful at achieving behavioural change of the recipient and obtaining the desired environmental outcomes.

Appeals for abatement notices that require a hearing are few and far between. Resolution of issues or disputes regarding abatement notices are commonly resolved outside of the court process as it is an administratively simple process to change a notice or to cancel and issue a new notice. It is a significant advantage that abatement notices do not have a limitation period for issuing. When

[13] CME metrics report

abatement notices are appealed the first step is generally to engage in mediation. This process can have merit in that it enables the parties to discuss and potentially resolve issues relating to the notice. However, if the appeal continues, there may be more value in abandoning the notice and pursuing an alternate form of enforcement action, such as an enforcement order due to the costs associated with preparing for an appeal being like that associated with obtaining an enforcement order.

CESIG recommends that the 'breach of abatement notice' infringement fee should be increased from $750 to be a more effective deterrent for offenders.

CESIG supports the Randerson recommendations of "*enabling abatement notices for the contravention of a consent notice, or any covenant imposed by condition of consent*"[14].

CASE STUDY: DISCHARGES OF WASTEWATER FROM TINY HOMES IN MARLBOROUGH

In September 2020 MDC received a complaint about two 'tiny homes' that had been placed on Māori land reserved as a Urupā. A site visit was conducted, and it was found that one of the buildings was on Department of Conservation land and one was on the Māori land block – two different zones within the operative plan. The owner of the buildings is part of the Iwi that the Māori land block is held in Trust, and informed MDC that the buildings are used as a Whare Kai and Whare Karakia, for cultural and spiritual activities. The operative plan doesn't provide permitted activities that cover the buildings and the uses. The Iwi which holds the Māori land in trust oppose the location of the buildings and the use of the buildings and other activities as the land is for Urupā only.

MDC had concerns about the discharge of grey water and black water from the buildings and the amenity value of the coastal foreshore area. After trying to achieve compliance by working with the owner of the buildings, MDC issued an Abatement Notice on 8 June 2021 requiring the cessation of the occupation of the land and removal of the two buildings. On 28 June 2021 an appeal and stay application were lodged with the Environment Court.

On 30 July 2021 the appeal and stay were granted with conditions (requested by MDC – to limit the use of the buildings for storage only and prevent any occupation of the buildings), the matter was referred to mediation by the Court.

To date mediation has not resolved the matter, this is unlikely to be resolved quickly as the defendant is also waiting on a decision in relation to renaming the trustees of the Māori block of land (Urupā) and then seeking permission to use the land for the Whare Kai/Whare Karakia (which is unlikely to be granted by the Trust/Iwi). This matter is yet to be heard by the court as of April 2022.

[14] Recommendations 4(iv) of the Randerson Report, p.419

Infringement Notices

Infringement notices are issued frequently and are an effective mechanism for dealing with minor offences. 2,150 infringement notices were issued in the 2020/21 year, an average of six infringement notices per day.

It is extremely rare for infringement notices to be formally challenged via the District Court hearing process. Only two infringement notice hearings were reported to have occurred in the last four years. Disputes can often be resolved informally without a court process.

A suggested alternative to the full defended hearing process for infringements could be that these appeals are treated like objections under the RMA, which can be determined on papers by an environment court commissioner or judge.

The value of infringement fees that can be imposed under the RMA is set in the Resource Management (Infringement Offences) Regulations 1999. Schedule 1 needs to be amended to reflect the principal Act amendment of 1 September 2020, which signalled those fines would be increased, including being doubled for corporate offenders, to remain an effective deterrent.

For example, the infringement fee for outdoor burning is $300, compared to the disposal costs for green waste which are far greater, particularly for commercial operators with large volumes or in industries such as horticulture.

“Agrees that the infringement fees should be higher, or alternatively also place an aggravation scale”

- Judge Kirkpatrick

A fee escalation for continued breaches would be useful, as well as different levels of fees for commercial or corporate entities vs individuals to increase the deterrent.

CESIG recommends that the infringement fees are increased through the amendment of the *Resource Management (Infringement Offences) Regulations 1999* to be a more effective deterrent for offenders.

Technical, Expert & Planning Challenges

It is important in when commencing a prosecution and in following the Solicitor-Generals Prosecution Guidelines, that regional councils have sufficient evidence and information that an environmental offence has occurred. There are significant challenges for staff in CME in achieving evidential sufficiency for RMA offences, due to the technical nature of environmental offending.

Technical science advice is often required to prove a breach has occurred under the RMA (e.g., determining a river), National Environment Standards (e.g., determining a wetland in the NES-F), and consent conditions (e.g., reasonable mixing, anaerobic soil conditions).

The technical nature of elements of RMA offending and the drafting of Plan rules and National Environmental Standards present significant challenges and resourcing for regulators to achieve the necessary burden of proof of a breach of the Act. This issue is highlighted in the discussion below in relation to Regulation 26 of the National Environmental Standard for Plantation Forestry.

Regulation 26 of the Resource Management (National Environmental Standards for Plantation Forestry) Regulation 2017 states:

> *Sediment originating from earthworks must be managed to ensure that after reasonable mixing it does not give rise to any of the following effects on receiving waters:*
>
> *(a) any conspicuous change in colour or visual clarity:*
>
> *(b) the rendering of fresh water unsuitable for consumption by farm animals:*
>
> *(c) any significant adverse effect on aquatic life.*

It is a well-established principle that conditions must meet certain criteria including being fair, reasonable and practical; have certainty, clarity, simplicity and conciseness; avoid unintentional vagueness and ambiguity; and be enforceable[15].

It is the sector's view that the condition of the above regulation fails to meet these key criteria around condition making and is simply not appropriate for a permitted activity regime for the following reasons:

- They are not clear and provide no certainty. The conditions are open to interpretation in that a Council and operator can have different views on what is considered a conspicuous change in colour, whether the water was rendered unsuitable for farm animals and whether there was a significant adverse effect on aquatic life in relation to a particular discharge.

- They are not simple or concise and introduce ambiguity and vagueness, in that they require significant work on behalf of the regulator to prove whether an offence has occurred in the first place (or the operator to prove they are complying). Typically, to assess compliance requires the engagement of an expert(s) to undertake a site-specific assessment and analysis[16]

- Given the inherent uncertainty and lack of clarity the condition is simply not enforceable.

[15] Making Good Decisions. A resource for RMA decision makers, 3rd Edition.

[16] These standards are based on section 107 of the RMA, which is assessed when considering consent applications for discharges to water. Typically to assess whether an application does not have these effects requires an assessment from appropriately qualified and experienced experts who undertake a site-specific assessment of the effects as they relate to the actual activity. Additionally, if these effects were a possibility the application would be notified under the provisions of section 95, which in turn places the proposed application under greater public scrutiny.

Determining whether an activity meets the permitted activity criteria should be clear, easy and cost effective for both the regulator and operator.

Whilst not in a CME context, these standards are considered in a resource consent process where discharges to water are being assessed due to the provisions of section 107 of the RMA[17]. In these circumstances applications are generally supported by substantive assessments of effects prepared by experts where site specific assessments are made to demonstrate whether the proposed activity will not have the effects detailed in section 107. It is the sector's view that is simply not reasonable or practical to place such a high information burden on both Councils and operators to demonstrate whether compliance is being achieved with a permitted activity standard.

It is the sector's view that early engagement on the enforceability and practical implementation of conditions/standards would reduce the risk of problematic conditions/standards being imposed and improve the overall implementation of national regulations.

CESIG recommends that system links are formalised with CME, consents teams, planners and Central Government staff to enable involvement and input from CME staff at all stages of the condition/regulation/policy drafting cycle.

CASE STUDY: WATER ABSTRACTION IN THE BAY OF PLENTY

Within the Bay of Plenty Region, there is a well-established horticultural industry based around kiwifruit orchards, which is continuing to grow. There is currently an increasing trend in the Bay of Plenty for large scale land conversions to kiwifruit orchards. Many landowners are undertaking their conversions without securing their water rights in advance, including in over-allocated catchments where water permits will be difficult to obtain.

Under the BOPRC Natural Resources Plan, the permitted activity rules for water takes allow 35m^3 per day of groundwater and 15m^3 per day of surface water to be taken per property, yet they do not require meters to be installed or any records to be kept. BOPRC had previously developed and notified a proposed plan change, which would include more stringent requirements for metering; however, this was withdrawn in early 2020 due to the pending release of the National Policy Statement for Freshwater Management.

Regional Plan changes can take a significant amount of time to progress. During this time, without water use data available, and because the burden of proof lies with the Regulator, it can be difficult for Council to understand the level of compliance with these rules or obtain sufficient evidence where these limits are being exceeded. For rules such as this, a legislated reversal of the burden of proof for the defendant/resource-user to prove that they are compliant would function to both deter non-compliance and enable enforcement action.

[17] Regulation 26 effectively mirrors the relevant parts of section 107 of the RMA, which prohibits a Council from granting consent for an activity that has these effects, unless the provision of section 107(2) are met.

CASE STUDY – MDC V PETER YEALANDS

In July 2019 compliance officers observed extensive excavation and the construction of a culvert in the bed of a river on a property. The property owner stated he had previously been given permission by Council to 'clean out his drains' and that was all he had done. He referred to a plan rule which allowed 'maintenance of existing farm drains' as a permitted activity in the operative plan. There was no provision for the activity in the proposed plan.

MDC sought legal opinion which advised there was sufficient evidence to establish contravention of s13(1)(a) and s13(1)(b) RMA 1991 – however, there was potential legal arguments around whether the plan rule allowing maintenance of a farm drain was a district or regional rule, and whether the work was maintenance. MDC weighed up using in house experts (science team) vs engaging an external expert – using in house resource to reduce costs as it was determined they could provide the necessary evidence in relation to a river.

The enforcement process was followed, and two infringement notices were issued to Mr Yealands for breaches of sections 13(1)(b) and s13(1)(a).

Infringement notices were issued in November 2019. Mr Yealands requested a hearing in relation to both the infringement notices issued. A two-day hearing took place in January 2021 (part heard). At the end of the prosecution evidence the defence made an application under s147 to have the infringement offences dismissed.

In September 2021, Judge Dickey issued a reserved decision. The infringement relating to the culvert s13(1)(a) was dismissed, however, the infringement relating to the works in a river remained and Judge Dickey found the river was in fact a river.

The defendant informed the prosecutor that they would be appealing all the way – either by judicial review or if found guilty, appeal through the High Court.

After conducting a further public interest analysis MDC decided to withdraw the remaining infringement notice and it was agreed costs would lie where they fall.

The process from when the contravention was first observed by Council (July 2019) to when Council withdrew the remaining infringement notice was just over two years. Council has not received invoices for the legal fees however estimates the costs to be significant.

The defendant engaged a QC and a solicitor for the proceedings and his costs would have been substantial. The process was lengthy, required extensive work (investigation, obtaining statements, expert evidence) and preparing and serving disclosure.

Workforce Capacity and Capability

While capacity and capability may not be matters resolved through legislative reform, it is critical when considering implementation and in achieving policy outcomes for existing and any new regulatory regime.

Pivotal to all CME activities, from compliance monitoring, incident response, investigations and enforcement are the enforcement officers who are ‘on the ground’, undertaking the work. CME activity is multidiscipline, requiring investigation, legal and environmental science knowledge and skills. Without appropriately trained staff, evidence is not gathered, an incident is not investigated, and appropriate enforcement action cannot be taken.

Strong skillset and investigation experience is required and there is a requirement for 'specialist' skills in investigation and technical matters which go beyond what could be expected of a generalist role. Specialist training and qualifications are required for compliance, monitoring and enforcement roles. Within the sector there has been a 13% increase in CME staff levels in the two-year period to 2021. In part this has been driven by an increased priority of CME activity by the sector, along with additional demand from the increasing numbers of National Environmental Standards. There are finite staff with existing qualifications or experience to fill current and future vacancies.

It is difficult to recruit suitably qualified and experienced staff with compliance/regulatory or enforcement background. There is high competition, with limited availability making it difficult to compete with Central Government departments (e.g., Kainga Ora, MFE, NZTA/Waka Kotahi, EPA, Taumata Arowai) and the private sector. Generally, remuneration for CME staff within councils is paid less than equivalent resource management positions in other parts of the council (i.e., science, planning, policy) resulting in a loss of staff to competing parts of the regulatory cycle.

While these challenges are not unique to CME and are also evident in other Council environmental areas including Policy, Planning and Science, it is important that the sector and central government recognises and supports building capacity and capability including recognition of CME as a professional discipline.

In mitigating frontline CME capacity and capability, the sector recognises the importance of the management, executive, and political tiers of the regional sector and central government to collectively support CME resources.

CESIG is of the view that CME needs to be duly recognised as a practice and profession, and that ongoing workforce capacity building is undertaken including the ongoing development and provision of training for CME disciplines.

With increasing demand and expectation for CME activity by communities, iwi, central government, and with the introduction of new National Environmental Standards (NES), resource development requires a long-term Resourcing Plan promoting and supporting CME as a profession in order to achieve policy and environmental outcomes

Te Uru Kahika Regional and Unitary Councils Aotearoa

7.2. ORC Compliance - Drinking Water Update Report

Prepared for:	Regulatory Committee
Report No.	REG2203
Activity:	Regulatory: Consents and Compliance
Author:	Tami Sargeant, Manager Compliance
Endorsed by:	Richard Saunders, General Manager Regulatory and Communications
Date:	29 June 2022

PURPOSE

[1] The purpose of this report is to provides the Committee with a summary of the ORC compliance activities and responsibilities in relation to drinking water activities in Otago.

EXECUTIVE SUMMARY

[2] ORC, as a Regional Council, has a responsibility to monitor the compliance of drinking water activities in relation to their potential effects on the environment.

[3] This report provides a summary of the results of compliance audits undertaken related to drinking water over the last two years across, and other activities compliance staff undertake to support compliance.

RECOMMENDATION

That the Regulatory Committee:

1) ***Notes** this report.*

2) ***Notes** that the Annual Compliance Report will include information on the compliance of consented activities that relate to drinking water in the Otago region.*

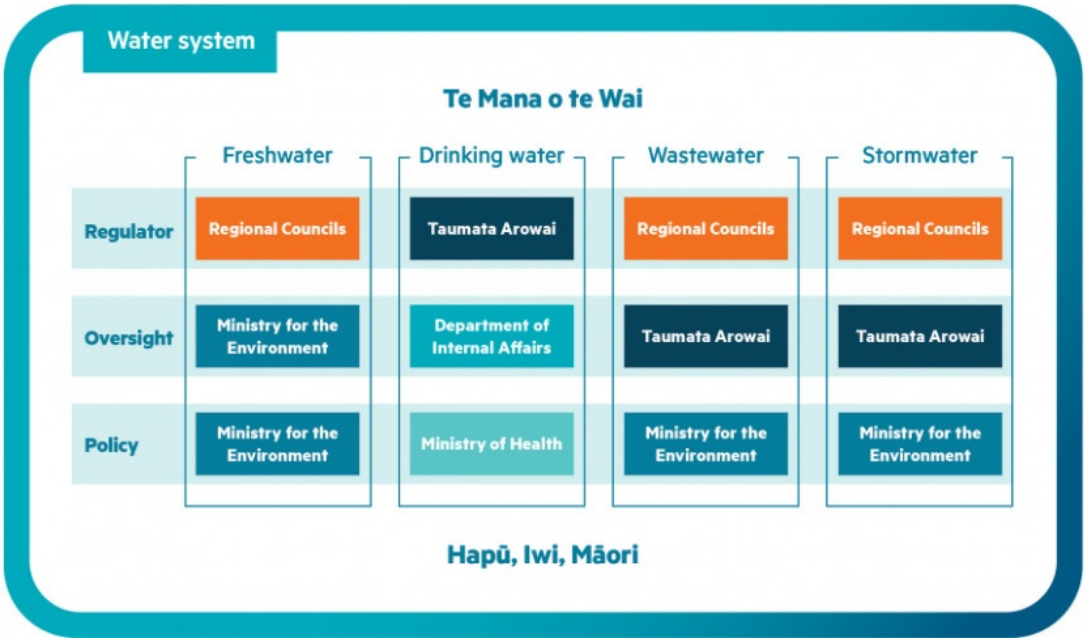
BACKGROUND

[4] ORC, as a Regional Council, has a range of functions and duties in relation to drinking water. ORC's role relates to managing takes, land uses and discharges with a focus on maintaining and enhancing the quality of source (or raw) water. Drinking water suppliers are then responsible for treating source water to the appropriate standard and protecting it from contamination from the water treatment plant to the tap and consumers.

[5] Once water is taken, its treatment, reticulation, and quality at the point of supply to the end user is not an RMA responsibility of Regional Councils. Those specific responsibilities rest with drinking water suppliers, who are regulated under the Water Services Act 2021 (WSA) that came into effect in November 2021.

[6] Taumata Arowai is the new drinking water regulator and works with Crown entities (such as the Ministry for the Environment, Ministry of Health and Department of Internal Affairs), public health units along with regional, city and district councils to regulate drinking water suppliers to help improve outcomes for public health (access to

safe drinking water), the environment and for the three waters (drinking water, wastewater and stormwater).



[7] Under the RMA, Regional Councils are responsible for monitoring activities within their region and consider taking enforcement action using the tools available under the RMA where there is any non-compliance. There are three components to Council's regulatory compliance role:

a. Monitoring of resource consents and some permitted activities;
b. Responding to environmental incidents (pollution hotline); and
c. Enforcing compliance with the RMA, Regional Plans with National Environment Standards, and regulations.

[8] The ORC Compliance Plan 2020-22 applies a risk-based approach to prioritising compliance monitoring and enforcement activities across the Otago region. The purpose of the Compliance Plan is to improve environmental outcomes associated with the activities ORC regulates; to identify and prioritise the CME activities; and to inform communities and consent holders in Otago about the compliance activities ORC undertakes and raise environmental awareness. This approach is consistent with the Water Services Act requirements for Taumata Arowai to develop its own graduated and targeted response to enforcement.

[9] The Compliance Plan identifies actions, outputs and outcomes in relation to drinking water as follows:

Action	Compliance team outputs	Outcome
Water takes **Issue:** Taking more water than is consented is unlawful and can adversely affect mauri, freshwater habitats and other water users.		
Monitor water	• Undertake desktop, aerial or on-site	• Improved

takes in Otago.	monitoring of water permits based on catchment risk, and policy development requirements under the NPSFM. • Focus on Upper Taieri, Manuherikia, Cardrona, Pisa, Gibbston and Central Otago catchments. Work proactively with water users to reduce incidents of non-compliance. • Appropriate action where breaches of consent conditions, plan rules or water measuring regulations are identified.	compliance with rules and consents conditions. • Impacts on freshwater and habitats are reduced. • Improve the reliability of data records provided by consent holders.
Deemed permits As deemed permits expire in 2021, the compliance team have a key role to support the replacement process.		
Monitor deemed permits and work proactively with permit holders to replace deemed permits.	• Undertake desktop, aerial or on-site monitoring of deemed permits where monitoring data is required to support the assessment of renewal applications. • Work proactively alongside the irrigation companies to support with the transfer of deemed permits to resource consents. • Focus on Upper Taieri, Manuherikia, Cardrona, Pisa, Gibbston and Central Otago catchments.	• Deemed permits are replaced by resource consents. • Impacts on freshwater and habitats from non-compliance are reduced. • Improve the reliability of data records provided by consent holders.
Water flows and levels during dry periods **Issue:** During dry weather, water takes during low flows have greater impacts on freshwater.		
Ensure minimum flows are maintained during dry weather periods.	• Establish dry weather task force prior to dry weather conditions affecting flows. • Monitor low flow conditions and work proactively with permit holders to ensure minimum flows are maintained during low flow periods. • Issue water shortage directions where required. • Monitor residual flows on permits and prioritise this based on the level of risk. • Appropriate action where breaches	• Compliance with minimum and residual flows is improved. • During low flows impacts from water takes on freshwater and habitats are reduced.

of consent conditions or plan rules are identified.

[10] Monitoring compliance with drinking water schemes consent's also falls within priorities one and two and three of the ORC Compliance Plan 2020-22 to "reduce non-compliant discharges to improve freshwater quality"; and taking a "proactive and integrated approach to monitoring largescale activities".

DISCUSSION

Consent monitoring

[11] ORC monitors compliance with resource consents related to drinking water schemes in the Otago region. The age, expiry dates and consent conditions related to the drinking water schemes varies across the region. In general, drinking water schemes can include the following types of consents:

a. Water takes
b. Discharge to water or land (treatment plant backwash water)
c. Bore construction
d. Water take structures
e. Damming of water
f. Working in rivers

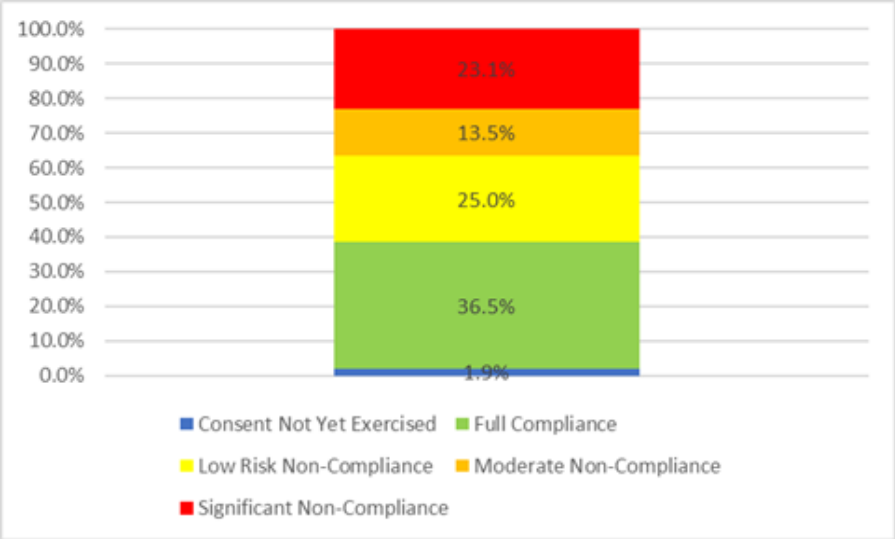
[12] When assessing a consent there are two types of non-compliance that can occur. The first are process related where the consent holder is not complying with the requirements to submit reports or report on specific activities, such as water meter verifications. The second type are physical non-compliances where the activity is not operating in accordance with the consent conditions. This can range from quality or quantity discharges exceeding the set limits, to fish screens not being installed.

Territorial local authorities

[13] Territorial Local Authorities (TLAs) are the largest drinking water suppliers in the Otago region. The table below provides a summary of the number of drinking water schemes operated by TLAs that hold ORC consent and the total number of consents held.

Territorial local authority	Drinking water schemes	Consents held
Central Otago District Council (CODC)	8	24
Clutha District Council (CDC)	14	14
Dunedin City Council (DCC)	10	31
Queenstown Lakes District Council (QLDC)	17	20
Waitaki District Council (WDC)	5	5
Total	54	94

[14] The resource consents associated with the CODC, CDC and DCC drinking water schemes have been audited over the last two years. The QLDC and WDC drinking water schemes will be audited over the next two months. The following chart provides information on the overall compliance grades of TLA drinking water related consents audited within the last two years (37 drinking water schemes).



[15] The reasons for significant non-compliance relate to:

a. Breaching consent limits for quality and quantity of discharge and take
b. Lack of consistent monitoring of discharges and takes
c. Insufficient fish screening of takes
d. Not providing data to determine environmental effects
e. Significant diversions / misuse or unaccounted water

[16] Each audit report is provided to the consent holder at the end of the audit process will have a range of corrective actions requiring attention. The timeframes to complete these actions will vary from immediate (if it relates to human health) to several months depending on the potential environmental impacts of the issues and the time required to complete remedial works. Formal enforcement action is taken in accordance with the ORC Compliance and Enforcement Policy.

[17] In October 2021, the Government confirmed that four publicly owned water entities will be established to ensure every New Zealander has access to affordable, long-lasting drinking, waste and storm water infrastructure. Consents held by the TLAs will be transferred to the new water entity, and ongoing compliance with consent conditions would be required. ORC has had early engagement with the national transition unit involved in establishing the water entities, including providing information on the consents held by TLAs and the current compliance status.

Bore construction monitoring project

[18] ORC compliance has undertaken a project to prioritise the auditing of land use (bore construction) resource consents. This was in response to two instances of naturally occurring arsenic above Drinking Water Standard health related levels detected in drinking water supplies.

[19] In the 2021/22 year to date, ORC has audited 185 consents. Overall compliance is good with most bores being considered either fully compliant or low risk non-compliance. 13 bores were graded significant non-compliant, and 59 bores were graded moderately non-compliant. The rest of the bores were either fully compliant or low risk non-compliant. The reasons for non-compliance relate to:

a. Issues with the casing or sealing of the bore
b. Water ingress / flooded bore chambers

[20] If there is a potential health risk identified through the audit inspections, staff follow this up immediately with the consent holder to ensure appropriate action and remediation is taken, and in some instances will follow up with Taumata Arowai (previously this would have been Public Health South)

Permitted activity monitoring

[21] Many activities, including water takes (source water for drinking water supplies) and discharges (potential source of contamination such as septic tanks) may be operating under a permitted activity rule within the Regional Plan: Water. The permitted activity standards for discharges recognise individual activities on their own will not cause issues. However, where they are concentrated, poorly designed or maintained, or co-located with self-suppliers of ground water takes are likely to result in conditions that will require new approaches in some areas.

[22] Controlling domestic or stock water takes is complex, as section 14(3) of the RMA expressly allows the take of water for "reasonable domestic purposes" (including drinking water) and for animal drinking water. In practice this means in Otago these takes are not regulated or managed, or even known. Council may not know where these activities are located and therefore may not know if a risk to a user exists from a water source. When permitted activity takes are identified during other monitoring activities, they are discussed with the land owner and noted (so we are beginning to get a record of where some are). These records and discussions are particularly important if it is a groundwater take and the bore head is not secure.

Good practice communication and collaboration activities

[23] Educational material is now available on ORC's website and is proactively supplied to known bore owners when councils monitoring identifies quality issues in aquifers, and through general reminders such as press releases, social media and other channels.

[24] A Cross Agency Drinking Water Working Group was established after arsenic was detected above drinking water standards detected in the bore water supply in the Ladies Mile area of the Wakatipu basin in November 2020. The Working Group has members from Public Health South (PHS), QLDC and ORC, and the membership has been extended to include Taumata Arowai and Central Otago District Council representatives although a meeting with the extended group has yet to be convened.

[25] ORC Compliance, Science and Communications teams released an 'ORC Bore Specifications - A Guide for Drillers and Service Providers' brochure in March 2021 to encourage best practice with the installation of bores and headworks. This has been well used by the industry and has also been referenced by other councils. A copy of this brochure can be found online at www.orc.govt.nz/media/10518/orc-bore-specifications-a-guide-for-drillers-service-providers.pdf.

[26] Joint agency '*Private Water Supplies: Community information sessions*' in Queenstown and Wānaka. These were held in March 2021. The community information sessions were to help clarify the responsibilities of private water suppliers and provide guidance

around the roles of the respective agencies in the oversight of the supply of water. This was a joint ORC, PHS and QLDC initiative.

OPTIONS

[27] As this is a noting report there are no options.

CONSIDERATIONS

Strategic Framework and Policy Considerations

[28] There are no strategic framework or policy considerations.

Financial Considerations

[29] There are no financial considerations.

Significance and Engagement Considerations

[30] ORC compliance staff continue to work with consent holders to support compliance with consents related to drinking water supply.

Legislative and Risk Considerations

[31] Compliance monitoring and enforcement is a mandatory function under the Resource Management Act.

[32] There are environmental, legal, social and reputational risks associated with compliance monitoring activities. Regular monitoring to confirm compliance occurs.

Climate Change Considerations

[33] There are no climate change considerations.

Communications Considerations

[34] There are no communications considerations.

NEXT STEPS

[35] ORC staff will continue to monitor compliance and work with consent holders to ensure compliance with conditions of the resource consents is achieved. Each non-compliance identified will be assessed to determine the appropriate enforcement response in accordance with the RMA Compliance and Enforcement Policy.

[36] ORC still will also continue to collaborate with other agencies involved in regulating or providing drinking water services, including Taumata Arowai and the establishment of the new Water Entity D.

[37] ORC awaits the outcome of the MfE review of the National Environmental Standards for source of human drinking water.

ATTACHMENTS

Nil