

Otago Regional Council

RMA Compliance and Enforcement Policy



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1 Introduction

The Otago Regional Council (ORC) is responsible for regulating activities affecting water, air, land and coastal environments to promote the sustainable management of our environment. Compliance monitoring and enforcement is a significant tool in achieving the overarching sustainable management purpose of the Resource Management Act 1991 (RMA)¹.

This policy sets out the approach and principles by which the ORC promotes and enforces compliance with the RMA and provides an outline of how RMA compliance and enforcement is managed. This policy is intended to ensure a consistent and integrated approach to compliance and enforcement by ORC.

2 Approach to non-compliance

The ORC has a 'spectrum' approach to encouraging positive behaviour change and ensuring the highest levels of compliance possible.

The ORC's approach to ensuring compliance with the RMA is based on '4Es model'² of Engage, Educate, Enable and Enforce:

- **Engage** – consult with regulated parties, stakeholders and community on matters that may affect them. This will require maintaining relationships and communication until final outcomes have been reached. This will facilitate greater understanding of challenges and constraints, engender support and identify opportunities to work with others.
- **Educate** – alert regulated parties to what is required to be compliant and where the onus lies to be compliant. Education should also be utilised to inform community and stakeholders about what regulations are in place around them, so that they will better understand what is compliant and what is not.
- **Enable** – provide opportunities for regulated parties to be exposed to industry best practice and regulatory requirements. Link regulated parties with appropriate industry advisors. Promote examples of best practice.

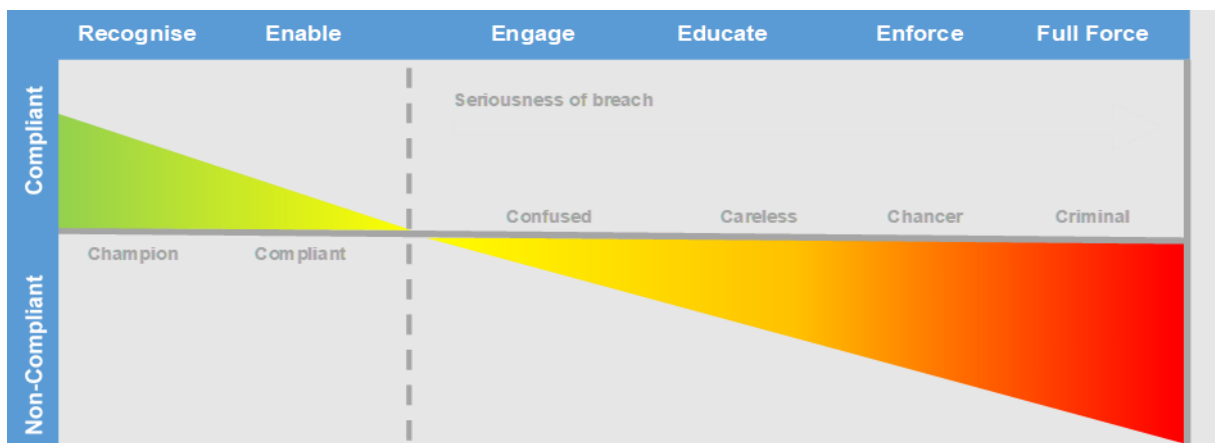
¹ Section 5 of the Resource Management Act 1991

² The 4Es model is drawn from the CESIG Regional Sector Strategic Compliance Framework 2019-2024

- **Enforce** – when breaches of regulation, or non-compliance, are identified then an array of enforcement tools and actions are available to bring about positive behaviour change. Enforcement outcomes should be proportional to individual circumstances of the breach and culpability of the party.

Non-compliance with the RMA is taken seriously by the ORC. Except in exceptional circumstances some form of action will be taken in response to non-compliance.

ORC’s approach and use of enforcement tools and actions depends on the issue, context and seriousness of the breach as illustrated below³:



3 Principles of enforcement

Underlying the ORC’s approach to compliance and enforcement action are the following principles⁴.

Transparency - We will provide clear information and explanations to the community, and those being regulated, about the standards and requirements for compliance. We will ensure that the community has access to information about the change to environmental impacts of industry as well as actions taken by us to address environmental issues and non-compliance.

Consistency of process– Our actions will be consistent with the legislation and within our powers. Compliance and enforcement outcomes will be consistent and predictable for similar circumstances. We will ensure that our staff have the necessary skills and are appropriately trained, and that there are effective systems and policies in place to support them.

Fair, reasonable and proportional approach – We will apply regulatory interventions and actions appropriate for the situation. We will use our discretion justifiably and ensure our decisions are appropriate to the circumstances, and that our interventions

³ Influencing behaviour change is based on the CESIG Regional Sector Strategic Compliance Framework

⁴ These principles are drawn from the CESIG Regional Sector Strategic Compliance Framework 2019-2024

and actions will be proportionate to the seriousness of the non-compliance and the risks posed to people and the environment.

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

Collaborative – We will work with and, where possible, share information with other regulators and stakeholders to ensure the best compliance outcomes for our region. We will engage with the community, those we regulate and government to explain and promote environmental requirements and achieve better community and environmental outcomes.

Lawful, ethical and accountable – We will conduct ourselves lawfully and impartially and in accordance with these principles and relevant policies and guidance. We will document and take responsibility for our regulatory decisions and actions. We will measure and report on our regulatory performance.

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

Responsive and effective – We will consider all alleged non-compliances to determine the necessary interventions and action to minimise impacts on the environment and the community and maximise deterrence. We will respond in an effective and timely manner in accordance with legislative and organisational obligations.

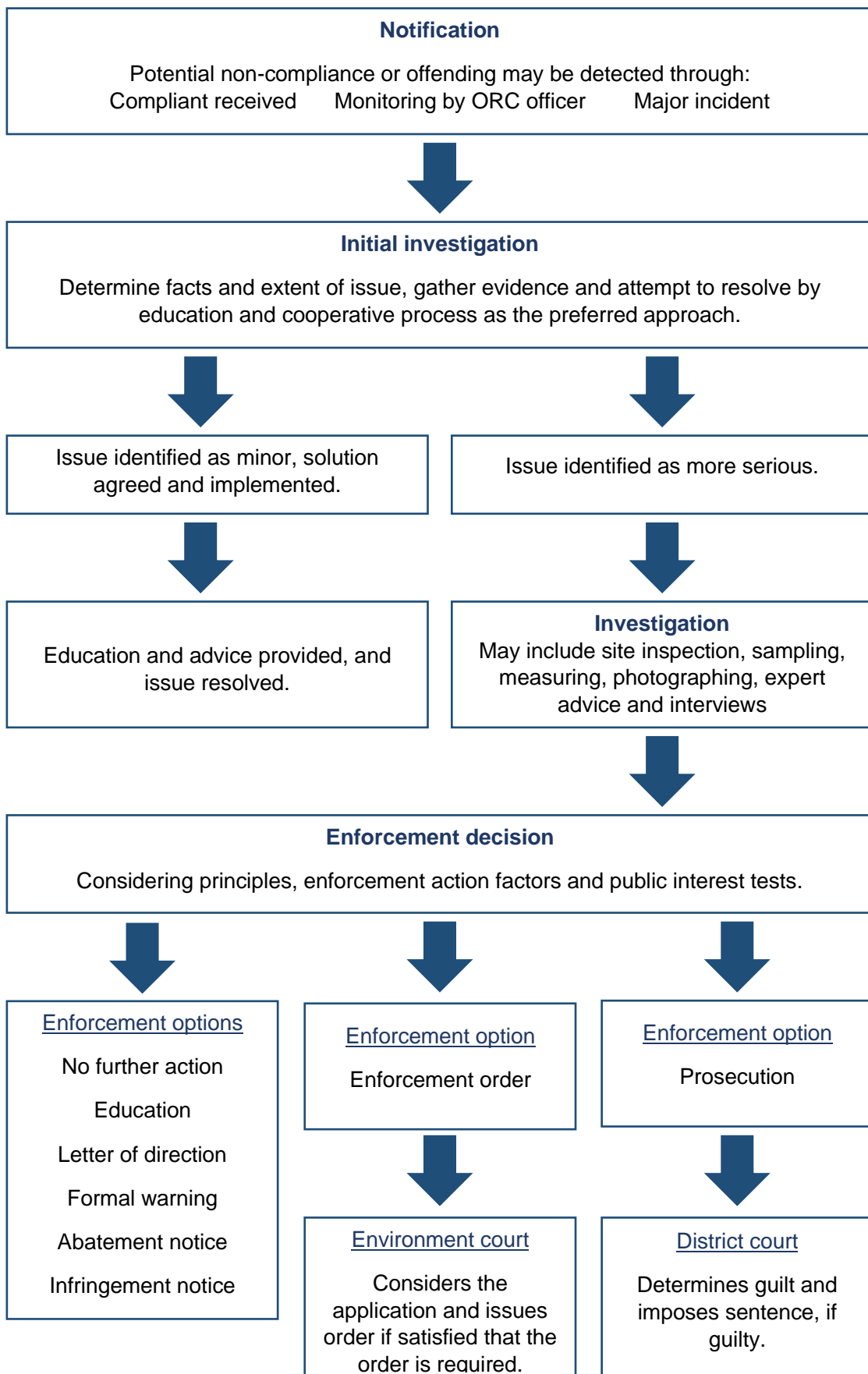
4 Conflict of interest

From time to time, ORC may be in a position where an actual or perceived conflict of interest associated with compliance activity exists. In these situations, it may be appropriate to request the support of an independent party which may include providing advice; undertaking any investigation; making recommendations on potential enforcement action; or reviewing an investigation. This ensures any action is consistent with the principles of enforcement set out in section 3 of the Policy. In particular, that compliance and enforcement action is lawful, ethical and accountable.

The decision to request independent support for an investigation is made by the General Manager Regulatory and Communications following a recommendation from the Manager Compliance.

Where ORC may be involved in potential significant non-compliance, independent support will be sought.

5 The investigation and enforcement process at a glance



6 Gathering information

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

Investigation activities may include:

- Visiting private property to collect information or potential evidence such as samples, photographs, measurements, or ecological assessments.
- Talking to people about what they know about the incident. People interviewed may be witnesses to an incident or potentially liable parties. These conversations will be recorded in writing or by electronic means.
- For serious matters interviews of potentially liable parties are conducted under caution to ensure their rights are understood.

When visiting private property it is vital to respect the rights of the lawful owner or occupier. ORC staff must ensure that all entry to private property is done so lawfully.

The Chief Executive Officer of the ORC has the authority to issue staff with warrants of authority. A warranted enforcement officer has the ability to enter private property (excluding dwelling houses) for the purpose of assessing compliance with environmental regulation. This can be completed without providing prior notice to the occupier or landowner.

However, there are times when access to property has to be conducted with informed consent or search warrant. Staff must attend specific training⁵ and be familiar with all of their statutory obligations before carrying out any enforcement functions.

7 Enforcement decision

The ORC takes a rational and principled approach to regulation. In general, the ORC advocates a policy of education-first and co-operation towards compliance. However, the Council recognises that there are times when the use of punitive measures is necessary.

Enforcement of the RMA can be complex. The Sentencing Act 2002 and the courts have provided helpful guidelines⁶ as to what factors are appropriate to consider in RMA cases to determine the seriousness of a breach. It is widely accepted across the regional sector that these are the appropriate factors to consider in enforcement decision making.

⁵ Warranted ORC staff gather information in keeping with best practice detailed in *Basic Investigative Skills for Local Government*

⁶ *Machinery Movers Limited v Auckland* [1994] 1 NZLR 492 & *Selwyn Mews Ltd v Auckland City Council* HC Auckland CRI-2003-404-159

Factors to consider when considering enforcement action:

- What were, or are, the actual adverse effects on the environment?
- What were, or are, the potential adverse effects on the environment?
- What is the value or sensitivity of the receiving environment or area affected?
- What is the toxicity of discharge?
- Was the breach as a result of deliberate, negligent or careless action?
- What degree of due care was taken and how foreseeable was the incident?
- What efforts have been made to remedy or mitigate the adverse effects?
- What has been the effectiveness of those efforts?
- Was there any profit or benefit gained by alleged offender(s)?
- Is this a repeat non-compliance or has there been previous enforcement action taken against the alleged offender(s)?
- Was there a failure to act on prior instructions, advice or notice?
- Is there a degree of specific deterrence required in relation to the alleged offender(s)?
- Is there a need for a wider general deterrence required in respect of this activity or industry?

Not every factor will be relevant every time. On occasion one single factor may be sufficiently aggravating, or mitigating, that it may influence the ultimate decision. It is inappropriate to take a matrix or numerical approach to weighing and balancing these factors. Each case is unique and the individual circumstances need to be considered on each occasion to achieve a fair and reasonable outcome.

The discretion to take enforcement action, or not, sits solely with those delegated to make decisions in the regulatory agency⁷, including:

- The appropriate defendant to pursue;
- The appropriate enforcement tools to use in the circumstances; and
- Withdrawal of an enforcement action that has been commenced.

⁷ New Zealand Law Commission 'Prosecution decisions and the discretion to prosecute'
<http://www.nzlii.org/nz/other/nzlc/report/R66/R66-5 .html>

The prosecution test:

The Solicitor-General's Prosecution Guidelines provides direction on what factors should be considered before a decision to prosecute is made. There are two parts of the test to be met. The first part of the test is the **evidential test** and requires a legal assessment of whether:

- A specific person being responsible for the offending (whether natural or legal).
- The evidence is credible.
- The ORC can produce the evidence before the court, and it is likely it will be admitted by the court.
- The evidence can reasonably be expected to satisfy a court beyond a reasonable doubt, that the person has committed a criminal offence.
- Whether the defendant can successfully make out a statutory defence based on the information available to the ORC, which will include any information supplied by the likely defendant as well as other persons.
- There is any other evidence the ORC should seek out which may support or detract from the case.

Once it has been established that there is sufficient evidence to provide a reasonable prospect of conviction, the test for prosecution requires a consideration of whether the **public interest**. The Solicitor-General's Prosecution Guidelines states that broadly the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. A case-by-case assessment is necessary to displace that presumption.

8 Enforcement options

Part XII of the RMA includes "formal" enforcement tools that are available to deal with breaches of the RMA. Informal enforcement tools are also used by the ORC as part of its enforcement options. It is important to ensure these tools (both formal and informal) are applied consistently across the myriad of activities and resource use across the region.

Enforcement tools can be categorised into three general areas.

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

	Description of action	Potential impacts for the liable party	When this action may be appropriate
Informal actions	<p>Education and engagement</p> <p>To prevent further breaches, or to remedy or mitigate the effects of non-compliance, ORC can provide information or guidance around rules and regulations to enable parties to achieve compliance.</p>	<p>This is a non-formal process and as such has no legal implication.</p>	<p>Education and other incentive-based interactions are reserved for low level offending and when dealing with cooperative parties, who are motivated to do the right thing but lack the knowledge or skills necessary to achieve and maintain compliance.</p>
Directive actions	<p>Letter of direction</p> <p>To prevent further breaches, or to remedy or mitigate the effects of non-compliance, ORC can give a written direction for a party to take or cease a particular action.</p>	<p>Such a direction is not legally enforceable.</p>	<p>Letters of direction should be reserved for dealing with cooperative parties, who are motivated to follow the direction, and where the breach is of a minor nature, consistent with a breach that would perhaps also receive a formal warning.</p>
	<p>Abatement notice</p> <p>An abatement notice is a formal, written directive. It is drafted and served by ORC instructing an individual or company to cease an activity, prohibit them from commencing an activity or requiring them to do something. The form, content and scope of an abatement notice are prescribed in statute.</p>	<p>A direction given through an abatement notice is legally enforceable. To breach an abatement notice is to commit an offence against the RMA and make liable parties open to punitive actions.</p>	<p>An abatement notice may be appropriate any time that there is a risk of further breaches of environmental regulation or when remediation or mitigation is required as a result of non-compliance.</p> <p>Other considerations are where no action has been taken to rectify a situation when less formal processes have been used, and/or where non-compliance is ongoing.</p>

	Description of action	Potential impacts for the liable party	When this action may be appropriate
Directive actions	<p>Enforcement order</p> <p>Like an abatement notice, an enforcement order can direct a party to take particular action. However, an application for an enforcement order must be made to the Environment Court but can also be made during the course of an RMA prosecution or sentencing.</p>	<p>A direction given through an enforcement order is legally enforceable.</p> <p>To breach an enforcement order is to commit an offence against the RMA and make liable parties open to punitive actions.</p>	<p>An application for an enforcement order may be appropriate any time there is a risk of continuing breaches of environmental regulation, or remediation or mitigation is required due to non-compliance.</p> <p>Other considerations are for a repeat offence where effects are significant and where no progress has been made when using other enforcement tools.</p>
Punitive actions	<p>Formal warning</p> <p>A formal warning is documented by way of a letter to a culpable party informing them that an offence against the RMA has been committed, and that they are liable.</p>	<p>No further action will be taken in respect of that breach.</p> <p>However, the warning forms part of a history of non-compliance and will be considered if there are future incidents of non-compliance.</p>	<p>A formal warning may be given when an administrative, minor or technical breach has occurred and is issued in lieu of an infringement; and the environmental effect or potential effect, is minor or trivial in nature; and the subject does not have a history of non-compliance; and the matter is one which can be quickly and simply put right; and a written warning would be appropriate in the circumstances.</p>

	Description of action	Potential impacts for the liable party	When this action may be appropriate
Punitive actions	<p>Infringement notice</p> <p>An infringement notice is a written notice which requires the payment of a fee. The amount of the fee is set in law. Depending on the breach the fine will be between \$300 and \$1000.</p>	<p>No further action will be taken in respect of that breach. However, the infringement notice forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance.</p>	<p>An infringement notice may be issued when:</p> <p>There is prima facie (on the face of it) evidence of a legislative breach; and a one-off or isolated legislative breach has occurred which is of minor impact, and which can be remedied easily; and where an infringement notice is considered to be a sufficient deterrent.</p>
	<p>Prosecution</p> <p>A prosecution is a process taken through the criminal courts to establish guilt or innocence and, if appropriate, the court will impose sanctions.</p> <p>RMA matters are heard by a District Court Judge with an Environment Court warrant.</p> <p>All criminal evidential rules and standards must be met in a RMA prosecution.</p>	<p>A successful prosecution will generally result in a conviction, a penalty imposed and consideration to costs of the Investigation.</p> <p>A prosecution forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance.</p>	<p>A prosecution may be considered appropriate when the factors listed in section 6 indicate that the matter is sufficiently serious to warrant the intervention of the criminal law.</p>