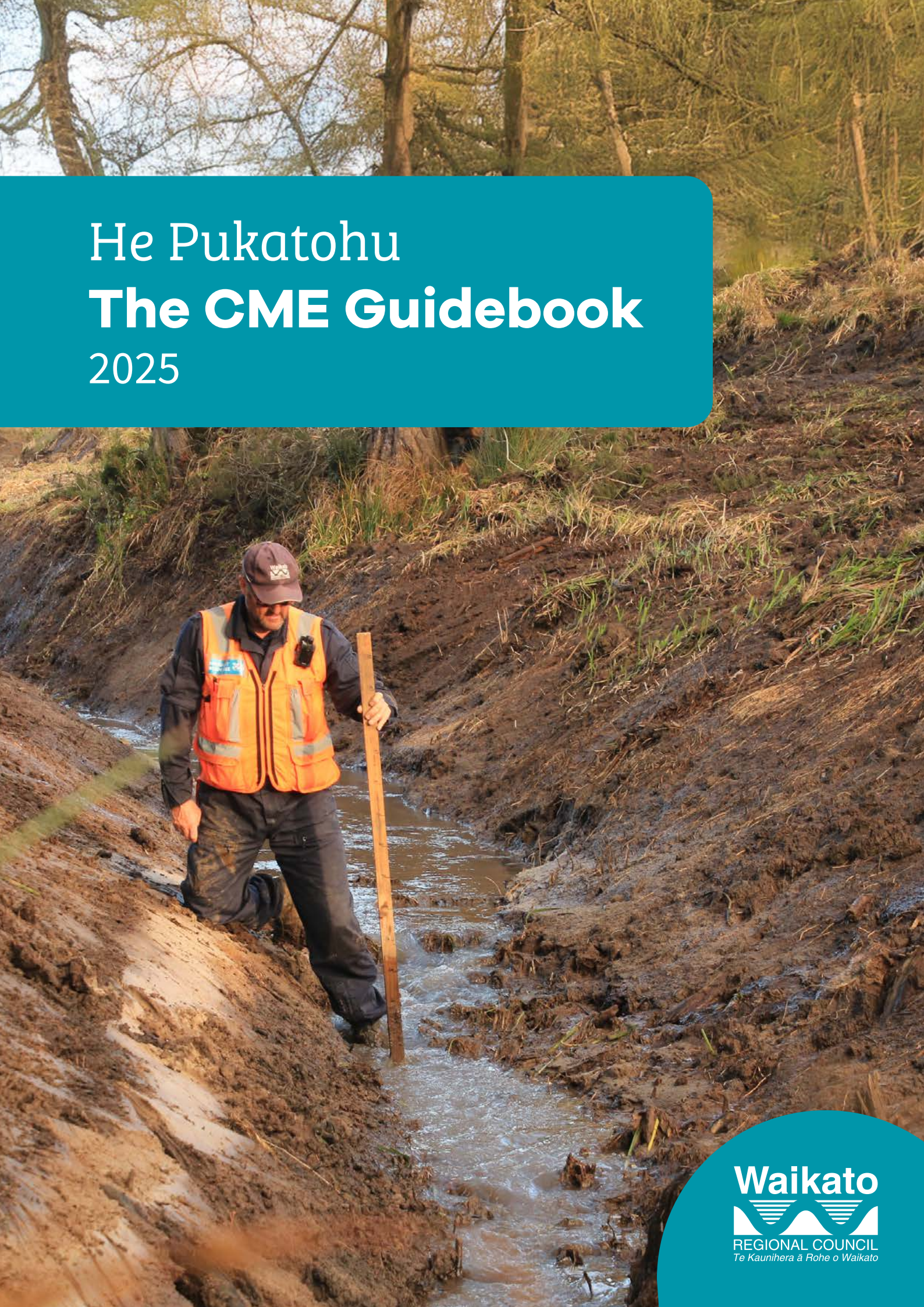

He Pukatohu
The CME Guidebook
2025

Waikato
REGIONAL COUNCIL
Te Kaunihera ā Rohe o Waikato

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He kupu whakataki

Author's foreword

It has been seven years since this manual was updated. Why so long? Well, there was much happening and plenty of impending changes to the regulatory framework with the introduction of a new Act to lead environmental regulation. With a change of government comes a change of priorities and the new Act was repealed in its entirety, with further environmental regulation pending!

Interesting times. But this also presents a real opportunity for environmental regulators to show their worth, continuing to promote sustainable management of our natural and physical resources. We have plenty of 'raw material' to work with in respect of non-compliant and unsustainable activity. We also have plenty of useful tools under the remaining legislation to bring about positive behaviour change. So, I suggest we just get on with it!

Despite the shifting political sands, the sector has made some good progress on various fronts. For example, we are now seen more as a single entity through the development of Te Uru Kahika, the collective of regional and unitary councils of Aotearoa New Zealand. This has assisted with our 'identity' and being more readily linked to our service to the community, environment, and economy.

There has also been some good progress with transparency of our CME (compliance monitoring and enforcement) functions. We are now in our sixth year of running the national CME Metrics Report. There has even been an independent analysis of reports of the first five years. You will see this analysis referenced through the manual as there is much to be learned from its findings. Particularly with regards to consistency of practice.

To assist with addressing the issue of consistency you will note a change in presentation in this manual. There is now a clear distinction between material helpful to frontline officers, and information that managers and enforcement decision makers should focus on. It is hoped that a stronger adherence and commitment to best practice will result right through council structures, not just the frontline. It is also provides broader CME guidance than the previous publication, *Basic Investigation Skills for Local Government*.

Regardless of an individual's role in a council, Te Uru Kahika has a huge part to play in the compliance, monitoring and enforcement of environmental regulation, nationally.

It is a sobering but important fact that if the individuals in each council do not fulfill their regulatory roles, no one will.

Patrick Lynch
February 2025

Rārangi kaupapa
Contents

He tīmatanga kōrero

Introducing the CME Guidebook


AF Tracking
Total
76
100%

It's all about best practice

This manual is designed to provide best practice guidance to frontline officers and their managers and executive.

A whole-of-organisation approach needs to be taken to be a competent and capable regulatory agency.

Each agency needs to have a clear understanding of what CME (compliance, monitoring and enforcement) is, and what their obligations to CME are.

Our collective regional and unitary councils have developed a single entity to be known by, Te Uru Kahika, and to represent them on common matters. The regional sector referring to themselves as a single entity should assist with the regional sector 'identity' and there can be some strength drawn from being seen as a united group.

The single entity approach obviously suggests a desire to be seen as one, but also that there should be a consistency in practice across the sector.

However, there is a persistent issue that individual agencies continue to be challenged by. We are 16 regulators embedded in organisations that have much broader roles and functions as well as their own regional priorities, histories and unique setting.

Often these other roles and functions are in direct competition for resources. And of course, the old and dated chestnut of some councils being uncomfortable with their enforcement duties still features for some, if not all, on occasion.

Ki te kāpuia e kore e whati, we succeed together.

This manual provides an opportunity to achieve consistency in best practice in the area of CME, but it will be for each council to pursue best practice within their own region.

But each council also needs to understand that they are the environmental regulator for their region. If they do not execute their compliance, monitoring and enforcement functions in their region, no one will.

The Parliamentary Commissioner for the Environment was very clear in his 2024 paper, *Environment and Economics - A marriage of (in)convenience?*, in stating that:

- the physical environment is deteriorating
- certainty is not something you can demand of governments or the environment
- environment regulation is necessary
- environmental taxes, levies or charges are unavoidable if a more environmentally sustainable economy is going to be affordable
- the risk of greenwashing is alive and well.

Aim

Our aim is to introduce regional and unitary council officers and their managers to the general concepts of compliance, monitoring and enforcement and what is required to be a competent, credible and contemporary regulator.

CME – an overview

In recent years, CME has become a common term when referring to regulation.

Iwi, interest groups, central government and the wider community all have clear expectations that regulatory agencies know what they are doing and are effective in their respective CME functions.

I note the December 2024 ruling by the High Court relating to an environmental regulator being judged[1] as 'unlawful' by not meeting certain CME obligations.

Local government is not an exception to these expectations. We should be as effective as any of the more well established and higher profile central government regulators.

But what does CME mean? For our purposes they are defined[2] as:

- **Compliance:** adherence to the RMA, including the rules established under regional and district plans and meeting resource consent conditions, regulations and national environmental standards.
- **Monitoring:** the activities carried out by councils to assess compliance with the RMA. This can be proactive (for example, resource consent or permitted activity monitoring) or reactive (for example, investigation of suspected offences).
- **Enforcement:** the actions taken by councils to respond to non-compliance with the RMA. Actions can be punitive (seek to deter or punish the offender) and/or directive (for example, direct remediation of the damage or ensure compliance with the RMA).

CME with a purpose

Each central and local government agency has their own respective obligations to uphold various statutes. And each statute will provide its own purpose and focus.

The regional sector, Te Uru Kahika, has a particular obligation under the Resource Management Act 1991 (RMA, the Act). The RMA is the focus of this manual, though the 80/20 rule applies. 80 per cent of what you read herein is generally applicable to any regulatory setting; 20 per cent is specific to the nuances of the RMA.

A significant plus for operating under the RMA is the simplicity and clarity of its purpose[3], that being to promote the sustainable management of natural and physical resources.

'Sustainable management' is also helpfully defined in the Act as the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing, and for their health and safety, while:

a. sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
b. safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
c. avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Management stuff

It is really helpful to the regional sector to have such a clear and simple purpose for their work as RMA regulators. It assists with our efficiency and effectiveness as all of our CME activity should have clear 'line of sight' to that purpose.

Take the opportunity to look at your own CME activities and resources. Can you link these directly back to the purpose of the Act? If not, or if it is difficult to see the corelation, it may be time to review your CME functions, activities and resources.

Specifically, what this manual will assist with is:

1. How we set up compliance and monitoring programmes.
2. How, and why, we gather information once a breach is identified.
3. How we decide what we are going to do about that breach.
4. What subsequent action, if any, we should take.
5. What policies, process and resources we need to enable 1-4 to happen efficiently and effectively.

1 https://www.courtsofnz.govt.nz/assets/cases/2024/2024-NZHC-3824.pdf

2 best-practice-guidelines-cme.pdf (environment.govt.nz)

3 Section 5 Resource Management Act 1991.

Chapter 01

Te whakatū anga

Setting up CME structure

Introduction

Management stuff

This section is really for the guidance of managers and executive, though it is helpful for all CME staff to be aware of its content.

Significant investment and time are required to set up and maintain competent and effective CME programmes. There are a number of specialist roles that are required. The people in those roles need to have certain skills and experience. They need to be appropriately resourced with clear direction and guidance coming from their respective management supported by nationally consistent foundation documents such as an **enforcement** or **compliance policies**, or **best practice guidelines**.

There is clear evidence[4] that the 16 agencies in the regional sector have vastly varying approaches in this area. There is no agreement or consistency in the most fundamental aspects of CME work. For example, to carry out certain compliance functions under the RMA there is a requirement to be a warranted enforcement officer under the Act[5]. However, not a single council refers to their frontline compliance officers as 'Enforcement Officers', nor is there any consistency as to what they are called. It is easy to see how external parties working or reporting across regional boundaries see the sector as 'inconsistent'.

A further, and compelling, inconsistency is that no two councils have the same enforcement decision making model. After more than 30 years of the RMA being in place, it would be interesting to explore how this can be.

Aim

The aim of this chapter is to identify the key roles needed to implement RMA CME and the resources, policies and processes needed to support their effective function. This chapter is principally designed to give guidance to regional and unitary compliance managers and executive.

Roles – the people

It is widely accepted that the following roles, despite their varied nomenclature around the country, are required to make CME activities happen effectively.

Frontline

Quite literally, these are the men and women who are the public facing ambassadors for the CME services of the regional sector. They may be in a consent monitoring role where they happen upon non-compliance. They may be the men and women who respond to notifications from the public with regards to environmental incidents and potential breaches.

Regardless of the mode of monitoring, these are the multi-skilled and highly resilient people who will physically carry out inspections and gather relevant information to enable informed decisions to be made by the council as to what action to take. They need to be adept in the basic investigative skills outlined in this manual while also needing to demonstrate all of the character traits listed within this Guidebook.

Frontline officers are also required to be practical, safety minded people, who can navigate myriad situations that can arise out and around the region. These are highly challenging roles meaning recruitment and retention of people with 'the right stuff' is key to the success of your CME functions.

Due to the wide variety of experience and skills required to do this work well, this is an area of work that lends itself to a second 'tier' of officers, or 'seniors'.

Investigations

Invariably there will be serious or particularly complex breaches of environmental regulation that will need to be investigated in great detail. Having vicarious and strict liability attributes means Resource Management Act offending may have many potentially culpable parties, particularly if layered corporate entities are involved. Extensive interviews and highly detailed information must be gathered to make sound enforcement decisions. These decisions can face intense challenge and scrutiny.

Experience has shown that the people who are best suited to lead this process are those who have received formal investigative training and have had a depth of experience being in charge of files that have successfully navigated the criminal courts. A good investigator is one that can readily turn their skillsets to environmental matters.

The option of simply appointing an existing council officer into an investigative role is fraught. Trying to learn how to drive complex court cases, confidently and competently, depending solely on their local government background is extremely challenging. There has been a rare success or two around the country with investigators having solely a

4 Independent Analysis of Compliance Monitoring and Enforcement for the Regional Sector – Brighta Consulting Ltd (2023)

5 Section 38 Resource Management Act 1991.

council background, however, those individuals have been quite exceptional and heavily supported by experienced colleagues and managers.

A common error when setting up these roles is to have an 'investigator' who also has to complete other duties and wear 'more than one hat'. I strongly advise against this as investigative work is all consuming and a single focus is required to do the role justice, no pun intended. It also avails the investigator to support CME best practice across the wider compliance teams.

Legal representation

There have been many occasions where being able to defer to an 'independent' legal advisor has stood a council in good stead, rather than having the legal support in-house. Though best practice suggests that legal representation sits outside council, and is contracted to provide legal support, it is appropriate to refer to this role here as it is integral to the success of CME functions.

Like the investigator, the strong recommendation is to target a legal provider who is an adept prosecutor. The 'field of battle' in RMA cases is the criminal court. I suggest councils source a highly skilled criminal prosecutor, who can turn their mind to environmental matters, rather than seek an environmental lawyer who you hope can learn the nuances of the criminal court. This rarely works well.

Your legal provider is really like another team member. They will need to be 'managed' in that they will need to be provided instruction, likely from the compliance manager, and their performance (and costs) need to be constantly monitored and assessed for value.

Business support

There is a significant administration burden in CME work and in local government generally. Quality support people are invaluable. This support can be across many diverse functions, not exhaustively:

- assisting with call taking, ensuring quality, timely information from the public
- logistical support through rostering of staff, scheduling inductions and training
- scheduling maintenance of CME assets, for example, response vehicles
- tracking of enforcement processes, cost and income
- data entry at every stage of the CME process
- retrieval of data for reporting and planning purposes
- navigating bespoke council databases
- transcription
- administration of disclosure
- co-ordination of meetings, internal and external
- invoicing, billing and 'stuff'!

Experience shows that embedding the business support person in the CME team achieves the best results. The business support person learns the language and how things work, becomes motivated to achieve CME results and becomes an integral part of the team. An efficient business support person can free up countless hours of 'officer' time enabling them to spend more time in the field or focusing on the crunchier compliance issues.

Management and executive

In 2006, I was fortunate to attend an environmental compliance conference in Sydney. There was an excellent presentation by a person who had been involved in setting up regulatory agencies at both state and federal level in Australia. There was one quote from him which I have seen come true many times since, and still refer to, though it is very Australian and needs to be said with the appropriate accent.

"Until such time as the management and executive of an organisation truly support CME functions, you are just p#ssing into the wind."

Dr Grant Pink – AELERT 2006.

What this means, in reality, is a total commitment by the managers and executive in the regional sector to CME matters. Appropriate resources need to be assigned. Appropriate policies need to be in place to enable CME work to happen, in particular impartial decision making and clear management of the inevitable political interest, and attempts at influence.

The regional sector has clear regulatory responsibilities but is also laden with many other roles and functions, many of which are not regulatory and can almost be seen as being at odds with CME functions. It is for the management and executive of the 16 councils to ensure the role of the regulator is not lost or undermined or is treated as the poor cousin to other council functions. The regional sector continues to struggle with consistency and my observations that it is this tier of each council that has the most potential to influence consistency of CME best practice.

Regardless of the specific CME role that a person has, it is important they possess and demonstrate certain qualities.

Qualities of enforcement officers

A quality investigation is one that ascertains all the available relevant information so an informed decision can be made as to how to proceed.

To successfully complete such an investigation, there are certain attributes or characteristics that identify the enforcement officer. All of these factors are interrelated, and to fail in one area will impact on the rest. Conversely, high achievement in certain attributes will reflect well on others.

Management stuff

Managers responsible for the recruitment of staff with enforcement responsibilities should bear these qualities in mind during the recruitment process.

Council enforcement officers are expected to actively demonstrate the following traits.

Reasonableness/fairness

At all times officers must act reasonably and fairly. It is not enough to just apply a degree of reasonableness or fairness during the course of duties. The true test is whether the actions of officers are just, unbiased and modest when being analysed at a later date.

Thankfully the decision on these factors will generally be made by an impartial third party as opposed to a disgruntled 'client'. The courts will often base their decisions on whether what was done by the law enforcement agency was reasonable 'under the circumstances'. The application of reasonableness and fairness will impact on the perception of all other officer and agency traits.

Professionalism

Council enforcement officers must be mindful at all times that they represent an organisation that has the attention of the public and the media, some of whom are only too willing to put the spotlight on perceived shortfalls of a council. Officers, like all council representatives, must always act with professionalism and avoid situations where their professionalism can be tarnished.

Strong interpersonal skills

The ability for an officer to relate to his/her client, listen and engage with them is paramount to gaining a successful outcome. It is a skill that requires constant development and it is obtained through exposure and repetition.

Resolve

Experience is showing that investigations and subsequent enforcement action can take many months or even years before being finalised. Enforcement officers must have dogged resolve through this process and appreciate the long term commitment required.

Open minded

As discussed above, officers must remain open minded during the course of their enquiries. To close their mind to possibilities is to limit their ability to determine the truth.

Act in good faith

Officers are regularly required to react to what they are told by others. They do so in good faith that they are being told the truth. If the source of information is not credible or is at odds with other information, then the officer must act with caution. Officers must not act with malice or for some form of personal gain or with hidden agendas.

Attention to detail

An obvious attribute, but one that can be easily overlooked. During the course of the enquiry an officer should take the time to study the site, the file, the law and what people say. It is often the very small clues that will point to the truth, just as it is the very small oversights that will enable a person to 'get away with it'.

Methodical

Officers must take a systematic approach to an enquiry. This will reduce the chance of things being 'missed'. A methodical investigation will generate a volume of information and related documents. Often the investigating officer will contain a good deal of knowledge about the matter under enquiry 'between their ears'.

There is a requirement to be disciplined with recording relevant material as it comes to light and including it on the file. The file itself must be maintained in a tidy and clearly defined structure. This will not only assist in accuracy, but is also for the benefit of others who will analyse the file (such as supervisors or lawyers).

Credibility

The credibility of the officer can affect the credibility of their colleagues and the whole organisation. To be exposed taking shortcuts or falling short in any of the areas listed above will have a major impact on reputation. Good reputations are easily lost and hard, if not impossible, to regain.

Skill development

As well as these attributes, an enforcement officer must also be able to develop certain skills.

- A sound knowledge of the law and processes.
- The ability to effectively collate information and maintain an enquiry file.
- The ability to attend sites and incidents with sound legal and procedural practice.
- Correctly manage exhibits to an evidential standard.
- An ability to interview people thoroughly and within evidential guidelines.
- Build rapport with people you are dealing with while gathering information.
- The ability to recommend the most appropriate enforcement action to an incident.
- An objective point of view of events and facts.
- The ability to distinguish between irrelevant and relevant facts.

Resources

Financial

Yes, there are costs that come with CME activity. Financial is the obvious one where salaries, legal expenses, laboratory sampling and reporting, expert opinions and other associated costs need to be budgeted for. Clearly this is a challenge in a Local Government environment where money principally comes from the public purse. However, there is clearly a cost to justice and the silent majority of New Zealanders want competent and effective environmental regulators. When there is environmental offending, it is simply not acceptable for a council not to appropriately address the matter because they 'can't afford it'.

It will be for each council to determine what level of resource, and associated capacity, confidence and competence, they will have as the environmental regulator for their region.

In our experience, there can be a significant offset to the burden on the ratepayer by the allocation of fines imposed for RMA prosecutions to be paid back to council. This is legally, and helpfully, enabled through Section 342 of the RMA.

Enforcement related policy

Clear guidance, by way of appropriate internal policy, is required so that all involved have very clear expectations of how CME 'works'. Policy covering such things as conflicts of interest, investigative process and enforcement decision making are vital. Why? Well, no two non-compliance situations are the same. There are always so many factors and circumstances that have contributed to a breach of environmental regulation. What should we consider? What should we definitely not take into consideration? How do we best achieve consistency in our decision making? Where should the delegation sit to make enforcement decisions.

Having clearly mapped out, appropriate and principled policy will guide you through the labyrinth that can be environmental CME. A current example of an Enforcement Policy is one of the **appendices** to this manual.

CME training

He ahi i te kimonga kanohi, when people know what to do, the task is easily accomplished.

Initial and ongoing training for CME team members is essential. This is not a 'set and forget'. In saying that, sourcing appropriate training can be challenging, and expensive!

Though you hope to recruit talented and experienced CME officers it is important that they are exposed to your own agencies way of approaching CME work. I advocate for an intensive initial training within six months of starting at council. Ideally not in their first week, as having a few months exposure to the actual work (in the company of experienced team members) will give better context for the training.

It is accepted that there are few credible training providers for this area of work in New Zealand currently. Some councils have developed their own training packages which is fantastic but doesn't satisfy national demands.

Following initial training I encourage regular workshops, on-point seminars and conferences, in-house case studies and even officer exchanges to keep the learning fresh and evolving.

Networks

Another way of staying fresh and current with CME best practice is through networks, as well as getting a full ration of acronyms. CESIG, IBPN, AELERT and INECE to name a few. Or maybe its attendance at the annual ECC? If you don't know what these are, I encourage you to do some digging and see if there is one, or more, that best suits you.

There can be real strength taken from knowing that you are not alone in the regional sector CME arena. Others around the country, indeed internationally, are facing similar challenges. Much support can be garnered and given through active participation in these networks.

Summary

Certain roles need to be established and resourced appropriately to competently and confidently complete CME work. This is a council executive and management responsibility.

Chapter

02

Ngā taunakitanga

Evidence

Introduction

As a regulator you need to have a sound knowledge of what constitutes 'evidence'. What information can be relied upon to make sound compliance decisions? How is the information captured so it can be relied upon? Equally, there must be a sound knowledge of what information should not be considered and what should not be relied upon.

There is a common misconception in Local Government that evidence is only important or relevant when talking about prosecutions. This is simply not the case. Regardless of what action is being considered, or indeed a decision to take no enforcement action, it must be made on good information, appropriately gathered.

In lawyer 'speak' the law of evidence is a set of rules and principles affecting judicial investigation into questions of fact. In other words, the law of evidence determines:

- what facts may, and may not, be proved in particular cases
- what sort of evidence must be given so that a fact may be proved
- by whom and in what manner the evidence must be produced so that a fact may be proved.

You will be exposed to a number of legal terms and requirements during the course of:

- dealing with breaches / non-compliance / offending (different words meaning the same things)
- subsequent investigations (information gathering)
- enforcement decisions
- enforcement actions ((punitive)warning, infringement, prosecution and (directive) abatement and enforcement order)

Some terms you will already be familiar with. Some you may have heard of but are not quite sure as to their true meaning or application. As a competent regulator it is extremely important to have a sound knowledge of these terms and requirements to:

- maintain the integrity of your council as a regulatory authority
- maintain your own integrity and credibility as an enforcement officer
- ensure you have the best chance of success with any subsequent enforcement action or withstand the challenges that can arise from not being seen to take enforcement action.

Aim

The aim of this chapter is to provide you with a basic working knowledge of the law of evidence and its application to the role of council enforcement officers and enforcement decision makers within your agency.

Management stuff

A compliance manager should have a very detailed knowledge, understanding and depth of experience covering all of the components of this chapter. A manager of compliance officers is the CME quality controller on behalf of their respective agency. 'Nuff said.

Natural justice

You may have heard the term 'natural justice'. It is often bandied about in legal circles. Basically natural justice refers to three key principles relating to justice and procedural fairness. They are not drafted in any statute but are part of 'common law'. They are the hearing rule, the bias rule, and the evidence rule.

The hearing rule

This rule requires that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision maker.

When conducting an investigation in relation to a complaint it is important that the person being complained against is advised of the allegations in as much detail as possible and given the opportunity to reply to the allegations.

The bias rule

This second rule states that no one ought to be judge in his or her case. This is the requirement that the deciding authority must be unbiased when presiding over the hearing or making the decision.

Additionally, investigators and decision makers must act without bias in all procedures connected with the making of a decision.

A decision maker must be impartial and must make a decision based on a balanced and considered assessment of the information and evidence before him or her without favouring one party over another. Even where no actual bias exists, investigators and decision makers should be careful to avoid the appearance of bias.

Investigators should ensure that there is no conflict of interest which would make it inappropriate for them to conduct the investigation.

The evidence rule

The third rule is that an administrative decision must be based upon logical proof or evidential material. Investigators and decision makers should not base their decisions on mere speculation or suspicion. Rather, an investigator or decision maker should be able to clearly point to the evidence on which the inference or determination is based.

Terms and definitions

This chapter has identified a number of legal terms and requirements relevant to the law of evidence. Many of the terms listed have hundreds of years of precedent and whole volumes dedicated to their application and interpretation.

The legal industry continues to dedicate huge resources to researching and defining the law of evidence. This is often done through challenging points of law in individual cases, often our cases!

This chapter has reduced relevant material to brief definitions and examples where appropriate.

As well as the base legislation that we work under (for example, the Resource Management Act), there are numerous other generic statutes that we are required to work within. They include, but are not limited to, the New Zealand Bill of Rights, the Criminal Procedure Act, the Criminal Disclosure Act and the Evidence Act.

There are regular and frequent changes to these various laws that may affect currency of material in this guide.

As we are not a central government agency with a national head office providing us with up-to-date information about relevant legislative changes, and case law, it is for each local government agency in the regional sector to ensure they remain current. This can be challenging.

We urge you to always seek appropriate professional guidance in this area. It is wise to seek guidance from someone who is current in their knowledge as well as truly qualified and experienced in this area. This does not necessarily mean the lawyer that your agency has used forever, nor is it necessarily the one with the highest hourly rate. Not all lawyers are created equal.

We also suggest that each agency in the regional sector has an active role in national networks such as the Compliance Enforcement Special Interest Group (CESIG) and Investigative Best Practice Network (IBPN) to stay connected with national development.

It is important to remember that RMA prosecutions are heard by District Court Judges, who also hold an Environment Court Warrant. But the prosecutions themselves take place in the District Court. Not the Environment Court. Meaning that the criminal rules of evidence apply rather than the more relaxed approach, and lower evidential standards, of civil courts, such as the Environment Court.

Experience shows that some parties being investigated, and often their lawyers, do not grasp this concept at all. On occasion, regional councils teams do not realise this either – subsequently they approach a criminal prosecution like a matter to be heard in a civil jurisdiction. This often results in inappropriate or inadequate advice being given to subjects and unnecessary protraction of the prosecution process.

Only a consistent approach by councils and their staff, over a long period of time, will educate the regulated community in this area.

Helpful case

Auckland Regional Council v URS New Zealand Limited

CRI-2008-004-013603 Auckland District Court

This is now a dated case, but the guidance provided is just as valid in the mid-2020s. This was a case where the defendant argued there were insufficient particulars contained on the (then) information or charging document to fairly inform the defendant of what it was that they were alleged to have done.

One of their arguments was they did not have sufficient details to establish whether they had a statutory defence available to them. Beware! Defendants regularly try to attack the wording of charges to disassemble a council case.

District Court Judge FWM McElrea determined there was insufficient detail contained in the information or charging document and went on to offer guidance as to the particulars required of RMA charges.

He wrote this guidance for us:

It might be helpful to bring together some of the considerations dealt with above and offer some guidance on the question of particulars of RMA charges. I do this in eight propositions:

1. *While following the words of the statute will often suffice to satisfy the requirements of s17 of the (then) Summary Proceedings Act ("such particulars as will fairly inform the defendant of the substance of the offences"), that will not always be so. A common-sense approach and* ***an appreciation of the importance of fairness to defendants*** *will usually indicate how much detail is necessary.*

2. *The RMA is not simple legislation and the offences created by the RMA can be complex and depend upon district or regional plans for their expression. Further, most charges are indictable, in the sense that they carry the right to elect trial by jury. Accordingly,* ***informations (charging documents) will commonly need more particulars than for traffic offences or other summary charges.***

3. ***Where the offence is contravening a rule in a plan the exact rule should be stated along with the respect(s) in which it is said to have been contravened.***

4. *While an information which fails to allege an offence known to law could be struck out as nullity, a simple failure to give sufficient particulars will not lead to that result, in view of s 204 of the Summary Proceedings Act.*

5. *An information might comply with s17 (by fairly informing the defendant of the substance of the charge) but still give rise to an order for further particulars where prejudice arises in a particular case.*

6. *Therefore, whenever a defendant is embarrassed in its defence further particulars should be sought. These might be given informally, for example, by letter, but a copy of the letter should be provided to the Court at the commencement of the hearing so that the Court proceeds on the same basis.*

7. *If an informant refuses to supply further particulars informally, or where there is a dispute as to their adequacy, a written application should be made to the Court for an order for further particulars. This should be done well before the hearing and will be dealt with by the Court using its inherent powers to control its own process.*

8. *Where an informant wishes to amend particulars originally given in an information, or further particulars later supplied, the Court has the power to allow such amendments according to well established principles generally relating to fairness, the importance of dealing with the real issue(s), and the absence of prejudice.*

It is important to remember that the same effort must be given to drafting an allegation in an infringement notice or a formal warning as in a charging document. All are allegations that the law has been broken!

Basic legal terms

This table explains some basic legal terms and provides an introduction to the elements and ingredients of offences.

Term	Definition
Statute	A statute is an act of Parliament, such as the Resource Management Act 1991.
Crime and offence	Up until 2013 there was a statutory definition that explained exactly what technically constituted a crime. This definition no longer exists. However various 'categories' of offences have been defined under the Criminal Procedure Act. **Category 1.** Matters that can only have a fine imposed. **Category 2.** The matter carries a maximum term of imprisonment of less than two years or has no imprisonment but can have a community-based sentence imposed. **Category 3.** Carries a maximum period of imprisonment of two years or more or is listed in Schedule 1 of the Act. **Category 4.** An offence listed in Schedule 1 of the Act. Each category carries its own process and obligations. Most RMA offences will fall into Category 3, so it is important your agency meets its obligations if pursuing such an offence through the criminal courts.
Case law	Case law is a system of law based on judicial precedents rather than statutory laws. Where there are legal arguments over what statutory law (sections, words, phrases, even concepts) applies in court, the presiding judge(s) may make a decision on their interpretation of the correct meaning. This decision is then binding on lower courts and is referred to as case law. This is how the law evolves and is clarified. Case law from other countries may be referred to in New Zealand, particularly Commonwealth countries such as England and Canada which are perceived to have similar legal system. Cases are quoted throughout this manual. It is important to note that only cases from a higher court actually *provide* precedent and are truly case law. Decisions from equal courts give guidance only and are not binding. Their influence should be considered on a case-by-case basis. The ultimate example of case law is a 2012 RMA case that went to the Supreme Court, the highest court in New Zealand, for the final interpretation of 'grey' statutory law. (SC 48/2011 [2012] NZSC 21 Carol Margaret Down v the Queen)
Defendant	The defendant is the 'person' who has been charged in the District Court and is seen by the prosecuting agency as having criminal liability for the charges being faced. This person may be "the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate". (Section 2 RMA) The RMA provides distinction between a "natural person" and a "person other than a natural person" for the purpose of penalty. (Section 339(1) RMA) As an example, in a case of unlawful dairy effluent discharge the defendants may be the farm worker (a natural person), the farm manager (a natural person) and even the corporate group (a person other than natural person) that owns the farm.
Charging document	A charging document is the physical document used to commence proceedings in the District Court. There can be a LOT of fishhooks when formulating charging documents. Though the charging document is filed by the prosecuting agency (i.e. us!) it is strongly advised to have appropriately qualified and experienced legal counsel review these before filing. Getting a charging document wrong can be fatal to the case. For example, a charging document may be ruled invalid if it does not disclose all the elements of an offence. An example of a completed charging document is shown at the rear of this manual in the Appendices. You will see that the form contains all of the information the court would require to initiate proceedings, including the actual wording of the charge that the informant alleges. From one incident it is possible that more than one offence has been committed and that more than one individual may be liable, resulting in multiple charging documents for one case.

Term	Definition
Statute of limitations	The statute of limitations is a law that restricts the time within which legal proceedings may be brought. Subsection (4) of section 338 of the RMA provides that the limitation period 'ends on the date that is 12 months after the date on which the contravention giving rise to the charge first became known, or should have become known, to the local authority or consent authority.' Where the offence charged is a continuing offence, the period commences from each and every day the offence continues. **Please note:** Twelve months is not a target! Though, by law, we can wait (nearly) a year to file charges that does little to reflect the seriousness of the offending and the timeliness of the deterrence. This restriction is an absolute, with no flexibility. A number of council cases have failed as they have attempted to commence proceedings out of time.
Prosecutor	The prosecutor is the person conducting the proceedings against the defendant. Previously this role was known as 'the informant'. In a council situation, it is appropriate for both the council and their lawyer to be referred to as the prosecutor.
Elements	Elements of offences are described as the underlying factors which are common or rudimentary to any offence. For example, it is generally accepted that criminal law contains two elements. 1. A physical element, called 'the act', referred to as actus reus. 2. A mental element or state of mind, called 'the intent', referred to as mens rea.
Actus reus (physical act)	This is the physical act or effort required to commit the offence. Each offence must contain some physical, outward, external behavioural component or manifestation in order to satisfy this element, such as the physical act of discharging a contaminant.
Mens rea (mental intent)	This is the intent of the offender – what was in the mind, or often referred to as guilty knowledge. It was originally expressed in the ancient Roman maxim 'actus non facit reum, nisi mens rea sit' (an act is not guilty without a guilty mind). Fortunately, the Roman Senate did not draft the RMA. RMA offences are 'strict liability' (see definition below) so this is not an element that must be proven. Though there needs to be evidence leading back to the defendant, this need only establish, for example, sloppy or negligent management as opposed to a deliberate intention to breach. However, it is always good practice to conduct your enquiries, interviews and investigations as if you had to prove intent.
Strict liability	As mentioned above, RMA offences have been created as 'strict liability' offences. This means that the element of the 'intent' (mens rea) is ***not required to establish RMA offences though it is relevant as to the seriousness of the breach***. i.e. if it was done deliberately, that is aggravating and seen as more serious. Although the prosecution is not required to prove intent, the defendant does have potential defences to any strict liability offences under sections 340 and 341 of the RMA It is extremely important that enforcement officers consider these statutory defences during the course of their work. (This will be covered in more depth in later chapters.)

Term	Definition
Vicarious liability	Vicarious liability is a term that relates to a person having liability through the actions or omissions of another person. The RMA (Section 340) states that where an offence is committed by any person acting as an agent (this includes as an employee or contractor) for another person, that the other person is as liable as if he or she had personally committed the offence. This can have significant implications when dealing with companies as the company directors and management may be liable for the actions of their employees, or even contractors. For example, as part of his daily duties a garage worker discharges sump oil into a stormwater drain. Not only is the garage worker liable, but potentially also his manager and the garage owner. A helpful tool for considering vicarious liability is the 'Culpability Pie'.
Offence section	Section 338 of the RMA actually creates the offence by detailing how other sections within the Act may be contravened. It is important to note that this section also creates an offence by 'permitting' a contravention. This is commonly used in situations of vicarious liability.
Penalty section	This is the section of an Act that details the penalty relevant to each offence created under the offence section. In the RMA this is located at Section 339.
Ingredients	Ingredients of offences are described as the details or components which are unique to a specified offence. Where there is a selection of ingredients available under one section, it is up to you to identify which is the most appropriate ingredient to pursue (i.e. it is very important to determine whether it is an 'and' or an 'or'). An example of identifying offence ingredients: You have identified that a dairy farmer has unlawfully discharged dairy effluent directly from his irrigator into a stream. The separate ingredients of this offence are found in Section 338(1)(a) and 15(1)(a) of the RMA. Ingredients: • a person (identify the offender) • on or between a particular date(s) • at a particular location • contravened Section 15(1)(a) of the RMA by permitting • the discharge • of a contaminant (namely farm animal effluent) • into • water (namely the 'example' stream) when the discharge was not expressly allowed for by a national environmental standard or other regulations, a rule in a regional plan, or a resource consent. Each and every one of these ingredients have to be individually considered, established and able to be proven beyond reasonable doubt, if challenged, if an alleged offender is to be found guilty of committing this offence. The terms 'elements' and 'ingredients' are sometimes confused and used interchangeably. In practice, the difference is academic. What is important is that you understand how to identify and define the components of an offence that you must prove.

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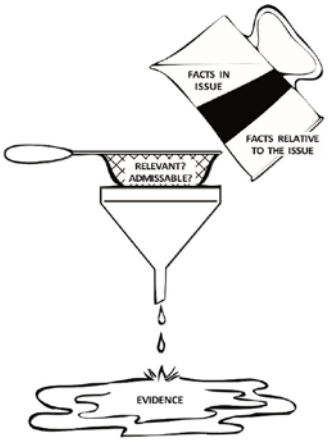
Evidence

Now that you are able to identify the ingredients and elements of an offence, it is important to correctly identify and capture the evidence needed to prove this offence to the required standard.

It is important to be able to discern between information that is available to you and what part of that information constitutes evidence.

Term	Definition
Evidence	Evidence is information given personally or drawn from a document or exhibit which tends to prove or disprove a fact.
Facts	The dictionary defines a fact as 'an occurrence of an event: a thing certainly known to have occurred or be true: the realities of a situation, a thing assumed as basis for inference'.
Facts in issue	As mentioned above, RMA offences have been created as 'strict liability' offences. This means that the element of the 'intent' (mens rea) is not required to establish RMA offences though it is relevant as to the seriousness of the breach. i.e. if it was done deliberately that is aggravating and seen as more serious. Although the prosecution is not required to prove intent, the defendant does have potential defences to any strict liability offences under sections 340 and 341 of the RMA It is extremely important that enforcement officers consider these statutory defences during the course of their work. (This will be covered in more depth in later chapters.)
Admissible	'Admissibility' is a term referring to whether the court will allow certain evidence to be given or not to be given. If the court allows evidence to be given, it is admissible. If the court refuses to hear the evidence, it is not admissible. The question whether evidence tendered is admissible may involve a sequence of questions. Are the facts sought to be proved admissible: • as being facts in issue, or • facts relevant to the issue, or • relevant on any other ground, if so, • are they outside any rule of exclusion of facts, and • in any event, is the appropriate means of proof adopted? * Admissibility is a technical area and guidance from experienced or qualified senior staff for lawyers should be sought if in doubt.
Relevant facts	To be admissible, evidence must also be relevant. For evidence to be relevant there must be a connection between a fact given as evidence and the facts in issue. It is the judge who will decide whether the connection is close enough to be relevant. To be admissible, evidence must always be relevant. However, relevant evidence can be inadmissible. For example, a soil sample showing that contaminants exist that was unlawfully collected would be relevant, but because it was collected unlawfully it may not be admissible.

To be received in evidence, facts must be both relevant and admissible. This diagram summarises the preceding notes dealing with facts and shows how they interlock to form evidence.



Burden of proof

The burden of proof simply means the responsibility or onus of establishing the case concerned. In an RMA prosecution, the burden of proof is upon the council as the prosecuting agency. The general rule is that "who asserts must prove".

It must be remembered that a defendant is presumed innocent until proven guilty. There is no legal obligation on a defendant to prove his or her innocence. The defence is entitled to put the prosecution to the test of proving the case beyond reasonable doubt. These points are highlighted in the following case. The age of the case reflects what a foundation principle the burden of proof is.

Case law

"While the prosecution must prove the guilt of the accused, there is no such burden laid on the accused to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence."

Woolmington v D. P. P. (1935) A. C. 462

Although this case was one of murder, and some 90 years old, the Woolmington principle is of universal application throughout the entire field of criminal law including RMA prosecutions taken by your council.

Viscount Sankey, L C. stated the law as follows: "Throughout the web of English criminal law, one golden thread is always to be seen: that it is the duty of the prosecution to prove the prisoner's guilt, subject to the defence of insanity and subject to any statutory exception. If at the end of and on the whole of the case, there is reasonable doubt created by the evidence given either by the prosecution or the prisoner, the prosecution has not made out the case, and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

We should not be left in any doubt about this principle being applied in RMA cases taken by the Regional Sector!

Standard of proof

There are two different standards of proof.

Beyond reasonable doubt

You will all have heard the expression, 'beyond reasonable doubt'. It has been the subject of much case law as well as Hollywood drama. This term describes the standard of proof that the prosecution must meet in every ingredient of the offence to prove their case.

For local government enforcement officers 'beyond reasonable doubt' describes the standard of proof that must be met for both prosecution and infringement notices, if challenged.

'Beyond reasonable doubt' means the court must be satisfied, or sure, that a defendant committed the offence. It is not a calculation of probability. A court must acquit a defendant if it is not satisfied or sure that the defendant committed the offence.

If a doubt exists but it is vague or 'fanciful' then that doubt can be discounted from the Courts decision making. Beyond a reasonable doubt is not beyond all possible doubt.

Local government staff when involved in compliance work should follow the mantra 'best practice to avoid unnecessary legal argument'. That being if the best practice detailed in this guidance document is followed at all times then all enforcement options will be available and any reasonable challenge will be able to be met."

On the balance of probabilities

There is a lesser standard of proof for an:

- application for enforcement order
- appeal against an abatement notice (not to be confused with defending a charge, or infringement, for breach of an abatement notice).

The standard here is 'on the balance of probabilities'. This means that once both sides have presented their evidence, the judge will find for the party who, on the whole, has a stronger case.

Helpful case

The following scenario was one that Judge J Treadwell (1998) experienced and gives a good example of beyond reasonable doubt in an RMA application. Again, an older case, but still completely relevant.

"I now wish to cover the question of the exclusion of other possible sources of contamination. This situation came before me in a prosecution in Napier. A food processor with a history of complaints from neighbours was finally prosecuted by the council. The plant was located in an area where there were other potential sources of contamination, namely a composting plant, a council sewer vent, a fertiliser works and a wool scour, to name but four.

Of those one used raw material for its processing similar to that used by the defendant. A council officer responded to a complaint and met with the manager of the defendant and the complainant. She did not enter the site but all parties positioned themselves at a point where the smell was discernible. The manager of the defendant company said he would go and see what was happening and would see if the smell was coming from his plant. He did this, found nothing amiss within the plant, and took no further steps. The council officer maintained that she could identify the smell as the sort of smell which came from that plant. The council officer (who had passed tests indicating that she was fairly sensitive to smell and could identify various smells) stated that in her opinion the smell emanated from the plant. Because the manager did not return the officer went back, reported to the council, and a prosecution followed.

I had evidence from the plant manager that having been alerted to the complaint he went back checked his plant and found no smell. I have evidence from an expert who stated the guidelines had been issued by health authorities which recommended that in order to successfully mount a prosecution an officer should take a 360 degree sweep around the suspected source in order to exclude any possible alternate sources. This merely reflected general 'reasonable doubt' considerations. I had evidence that the type of material associated with this smell was sometimes contained in decomposing material: that smell could vent from the sewer; and that there were two other potential sources of smell albeit slightly different. Despite evidence of wind direction there were concessions made concerning eddies of wind around the large buildings which were close together in this zone. I could not therefore hold that the company had been positively identified beyond reasonable doubt as the source of the smell."

Divisions of evidence

Evidence can be broken down into a number of different types or 'divisions'. For our purposes, we will look at only four.

Division	Explanation
Direct evidence	This is the testimony of a witness, an actual person. Perhaps about something they saw, did, heard or said. The strength or weakness of direct evidence depends entirely upon the truthfulness and accuracy of the observational powers of that witness. This is why prompt and fulsome interviews and statements are so important. But more on that later.
Documentary evidence	Sometimes valuable and admissible information is in a document. For example, a photograph or contract invoice. Remember, any such document will always need to be 'produced' by an actual person evidentially linked to the document. Perhaps the person who took the photograph or a party to the contract.
Real evidence	'Real' evidence is a material object directly presented for inspection. Example: the container from which a toxin had been discharged into the stream. But, like documents, objects will always need to be 'produced' by an actual person. Perhaps the person who found the container. **The Chain of Custody for both documents and objects is crucial. More on this soon.**
Circumstantial evidence	Facts, other than the facts in issue, from which the facts in issue may be inferred. Example: seeing a vehicle leaving a site raises the inference that the vehicle owner/user may have been at the site.

Regardless of what type of evidence is gathered, the enforcement officer should always strive to obtain the 'best evidence' available. For example, this would mean obtaining original documents as opposed to copies.

There are admissibility rules that are described in the Evidence Act 2006 that relate to such things as hearsay, opinion, veracity and propensity. Experienced criminal investigators or your legal advisor will have knowledge of these rules as they apply to producing evidence in court.

These rules do not apply to the information gathering phase of your enquiry. If you are interviewing a witness and they are able to tell you matters that may amount to hearsay, or they express an opinion, it is important to capture that information from the witness.

Not only is it important for you as the investigator of the offence to know everything that the witness can tell you, but their information may lead on to other avenues of enquiry that provide information of the required evidential standard.

Credibility of evidence

Credibility is simply the extent to which evidence will be regarded as true. When evidence is admitted, the judge or jury may attach what weight to it they please. They can believe all the evidence, none of it or just part of it.

It has nothing to do with its relevancy or admissibility, although, of course, the evidence must be relevant and admissible before the question of credibility can arise.

The credibility of a witness depends upon his or her:

- knowledge of the facts
- intelligence
- impartiality and freedom from bias
- integrity
- veracity (truthfulness).

For practical purposes, the word credibility means 'how well a person can be believed'. This is something you must consider when investigating an incident, interviewing a witness, and considering enforcement action.

Summary

- **The law of evidence gives clear guidelines on what facts may or may not be proven.**
- **A working knowledge of legal terms and definitions is required for enforcement officers when gathering information.**
- **A council officer MUST know the ingredients of the breaches they are looking into. Consideration must be given to:**
  - **strict liability**
  - **vicarious liability**
  - **admissibility**
  - **relevance**
  - **beyond reasonable doubt**
  - **best evidence**
  - **credibility**

Chapter

03

Te hopu raraunga

Record keeping

The Big Six

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Introduction

We are fortunate in the regional sector to have many compliance officers who carry out their field work to a very high standard, consistently meeting best practice standards. It is vital that the subsequent record keeping reflects that best practice. By keeping a high standard of record, an officer is placing their agency in the best possible position to carry out any subsequent action and face any challenges that may arise.

We strongly advocate that each officer maintains their own records through the use of a simple notebook. Whether that notebook is paper or digital. Essentially, the same rules and processes apply in using and maintaining a notebook, regardless of its type. A well-kept notebook will go a very long way to enabling an officer, and their council, to navigate the minefield that can follow CME fieldwork.

Notes taken by the officer will transfer to file notes. These notes will form the basis of an investigation or enquiry file. This chapter will identify the need and purpose for different kinds of files. A well-ordered and thorough file will provide the foundation that any subsequent action will be built on.

Experience shows that one person must be clearly identified as a file holder and responsible for all aspects of that file.

Aim

The aim of this chapter is to provide you with the skills and knowledge required to:

- **maintain a notebook to an evidential standard**
- **identify the need for enquiry or investigation files**
- **complete file notes effectively**
- **realise the need for file 'ownership'.**

The notebook – an essential tool

Few enforcement officers have the ability to recall from memory the details of conversations, observations or other information weeks or months later when it may become necessary to do so.

By the time the incident has been investigated, internal process followed, and the enforcement action initiated, several months may have passed. If the matter is defended and makes its way through the usual protracted court process, it may be 12-18 months later that a staff member may have to recall the incident in detail when giving evidence.

Experience shows that in RMA cases, officers may be required to give evidence of what they have done or observed up to four years after the incident in question!

No one could possibly be expected to remember details of an incident that long ago. However, a well-kept notebook will assist you with any processes or challenges that follow.

No one can predict which incident you attend will become a protracted case so best practice is to approach all incidents as if they might 'go the distance'. This is not as onerous as it sounds and is really about developing good habits.

When you are keeping your notebook, you should record enough detail about an event so that, anytime later, you are able to refresh your memory in relation to those facts. In addition, the mere fact you were making notes at the time of the occurrence will tend to impress the details of the incident upon your mind.

At first you should record too much detail rather than too little. You will soon learn the type and amount of key information you should record in your notes to support later processes.

Your notebook is an essential tool of your trade, and you should treat it accordingly. Always carry it with you, particularly when you are in the field. Use it to record anything you may want or need to recall later.

Be methodical, neat and accurate in your notebook. Use it consistently. Look after it and keep it safe and secure.

Why keep notes?

There are many reasons why we enter information into our notebooks.

- It provides a permanent record.
- It is the basis of file notes.
- It may be a record of interview.
- It provides a record of evidence you may be required to give.
- It records other information of value.

Your notebook can assist you in completing other records such as timesheets, billing, making 'to do' lists for your daily work, other matters to be reported and recording your activity. It may be that well-kept notes can refute possible complaints or criticisms.

What are contemporaneous notes?

Notes and records of interviews in your notebook should be made at the time or as soon as practicable afterwards. This is referred to as being 'contemporaneous'.

It may be that the situation you are in is such that it is not practical, or even safe, to complete your notebook at the time. Under these circumstances, it is totally acceptable to make your notes as soon as circumstances allow afterwards; they are likely to still be considered contemporaneous, as long as the delay was seen to be reasonable under the circumstances.

One extremely useful aspect of contemporaneous notes is if you ever are required to give evidence of a thing you did, saw, heard or said, then the court will (likely) allow you to refresh your memory from these notes.

How much do I write down?

At first you should record too much detail rather than too little. At times you may feel under pressure to deal with an incident quickly, but you only get one chance at taking good notes, so do it at your pace and do it well first time. That is a key part of your job.

You will see the benefit of taking good notes later when you prepare file notes, get involved in enforcement decision making or are challenged on any subsequent enforcement actions.

Like The Highlander, there can be only one! You should only ever have one notebook in use at any given time. When that notebook is full, move on to the next. There have been instances of officers keeping 'rough' notes in the field and then completing a 'tidier' notebook once back at the office. This is bad practice and should not be done.

E.L.B.O.W.S.

The type of notebook (paper or electronic) and the format in which the notebook is kept can be adapted to suit personal styles. However, it is important for each person to maintain their notebook consistently.

There is a well-worn mnemonic that is used internationally to guide the use of the notebooks for enforcement officers it is:

NO **E**RASURES
NO **L**EAVES TORN OUT
NO **B**LANK SPACES
NO **O**VERWRITING
NO **W**RITING BETWEEN THE LINES
STATEMENTS IN DIRECT SPEECH

It is also good practice to find the time immediately after an incident to review your notes and to record any additional recollections you have that you did not write down in the heat of the moment.

Retaining notebooks

Notebooks should be carried when working, particularly when in the field. Your notebook may be required years after you have completed it. You, or your agency, should securely store your completed notebooks.

As more agencies move towards electronic notebooks, you will need to be aware of limitations in long-term storage of notes taken electronically. There have been instances where officers have ceased employment with an agency and subsequently all their electronic notes can no longer be accessed. Work with your IT and records management people to work out a system where this can be avoided.

How do notes become file notes?

Your notebook entries are ***your*** record. File notes are ***your agency's*** record of what you have done.

Your notes form the basis for file notes, which will be key components of an incident file and will need to be integrated into the document management system that your council uses. Ideally, there should not be anything of substance appearing in your file notes that has not featured in your contemporaneous notes.

However, if you do recall something important later that you didn't record fully in your notebook at the time, by all means add it to your file note. It is better to record the information late than not at all.

It is important to remember that due to the delay in completing file notes it is unlikely they would be regarded as contemporaneous.

Example of a notebook page

14·3·24	Monday - Fine
0800	Start work - Admin
0830	. Attend meeting - Te Waahi Totara Room
	re Smith & Brown Ltd. (61 88 92)
0900	Uplift files for earthworks attended yesterday
0930	Arrive at H & P Timber Yard
	18 Carrigan Street, Hamilton East 3495
	Re: REQ 118065
	Reports that treated timber being burn't
	Wind - SW - gusting to 8kph - moderate
0935	Speak to: BAXTER / James / Bryan (known as Jim)
	18 Brown Street
	Hamilton
	DOB: 18·4·67
	OCC: Site Manager - H & P. Timber
	Ph: (07) 849 1212
	Mob: (021) 756 810
	Email: jim@handp.co.nz
	Introductions - warrant shown - explanation for visit
	Ask to view area where fire has occurred. Jim
	acknowledges the fire but denies any treated timber
	would have been burn't.
0937	With Jim, go to the SE corner of the yard - embers of
	the fire - approx. 2m diameter - being burn't on open ground
	Photograph the scene - 5x photos taken
	Uplift 1x piece 4" x 2" timber - approx. 10cm long
	Has 'HS' stapled to the end of it.
0945	Also take 2x samples embers - place in glass container
	- taken from seat of fire - secure in truck.
	Leave site
1005	Drop above samples to Hills Labs - Ref # 150 6308
	Chain of custody form completed.

Investigation files

This is probably an opportune point to draw the distinction between the types of files you will be involved with as a local government enforcement officer. On a day-to-day basis, you may have responsibility for site or customer files that relate to consent applications or ongoing site monitoring. This part of the chapter focuses on investigation files or files that arise as a result of non-compliance and may be the subject of enforcement action.

During the course of your daily work, you will detect noncompliance. At the time of detection, it would be unwise to try and predict what enforcement action may result. You simply do not have all the information required to make that decision or recommendation. So, you should treat this matter as an investigation, and treat the file accordingly.

One of the most important responsibilities for an enforcement officer is to ensure that the file is documented correctly. This is vital to ensure that all of the officer's good field work can be followed up with appropriately.

Much of this responsibility lies in the completion of file notes.

File notes

Definition

Some organisations also refer to file notes as job sheets. A file note (as it relates to an investigation file) is an official record, chronologically listed, of action taken, information gathered (such as the taking of photographs, video or samples) and people spoken to.

As previously mentioned, while notebook entries are the officer's personal record of what has been done, a file note transfers this information to the collective knowledge of the council or agency.

Use

- Establish all the actions completed by an officer at a location at a given time and also subsequent follow-ups.
- Enable the methodical planning of the investigation of an offence.
- Establish what has been done and assist to identify what still needs to be done.
- Provide the basis for the preparation of a subsequent 'brief of evidence'.

Procedure

File notes should:

- be completed in a timely manner so all facts, actions and observations are promptly available to others
- be well-constructed so any future reader is as fully informed as the author of the file note
- have paragraphs for each new subject so that the information is clear and easily located
- each action should have clearly indicated date and time of each action or observation
- be signed and dated by the author.

The date should be the date the file note was completed and signed. This is important to show the amount of time elapsed between the incident being attended and the date the information was committed to your file note.

Once you have completed a file note, including adding your signature, make it a permanent record ensuring it is profiled to the investigation file. If you have further information, start a new file note. Do not try to revisit and edit the first file note because this may lead to duplications and inconsistent documents on the file.

Content

Avoid the tendency to be too brief in compiling file notes. Make sure the information is detailed but concise and relevant. The main purpose of a file note is to be able to reconstruct exactly what was seen and done for someone who was not present at the time.

The kind of information that should be recorded in a file note are:

- the exact location of the event, incident or inspection
- the time of each action, such as entry to inspect the property, the reasons for doing so and the duration of the inspection
- confirmation that warrants of authority were produced upon initial entry, or that a written notice of the inspection was left in a prominent place if the owner/occupier was not present
- all health and safety precautions taken, including use of PPE (personal protective equipment) and asking occupants of any known risks on site
- the full names and addresses of all persons spoken to, and a contact telephone number and email for each of them
- questions put to anyone and their response
- any explanation or reasons given by the person(s) spoken to
- the officer's observations
- a sketch plan – a picture is worth a thousand words
- weather at the time, particularly if it is relevant to the matter under enquiry
- reference to samples, videos, drone use and photos. Where were they taken? What do they indicate? How were they labelled?

Evidential value

File notes are an important part of an investigation file. Though you may be cross-examined over their content by a defence lawyer, you will generally not have access to them when giving evidence to refresh your memory. Your notebook would generally be used for this purpose, but this is not to say you cannot study your file notes at length prior to the hearing.

File notes must be disclosed to the defendant or their lawyer. Any comments made in the file note should not be flippant, derogatory or offensive unless they are a direct quote from someone.

By the correct completion of your notebook and file notes you have laid a solid foundation for any enforcement action that may follow.

An example of a file note based on the earlier example of a notebook entry

File Note

File No:	56 01 10
Date file note created:	19 July 2024
Date(s) content of file note refers to:	16 July 2024
Author:	Billy Evington
Subject:	**Unlawful discharge - H & P Timber Yard**

16/07/2024 **Introduction**
Respond to call that has come via REQ118065
Report of large open fire at timber yard, confidential informant believed treated timber was being burnt.

0930 hrs Attend H & P Timber Yard.
18 Carrigan St, Hamilton East.
Fine day, cold, moderate SW breeze.
Park in customer parking and go directly to site office.

Speak to:
BAXTER/James/Bryan (known as Jim)
18 Brown Street
Hamilton
DOB: 18/04/67
Occ: Site Manager
Ph: 07 849 1212
Mob: 021 756 810
Email: jimb@handp.co.nz

Introduce myself and produce warrant of authority.
I explain purpose of visit to Mr BAXTER. I ask to view area where fire has occurred. Mr BAXTER is very co-operative. He acknowledges fire stating they had had a bit of a clean up around the yard over the weekend and were burning a few off cuts and sawdust. He states this was done by 3 yard staff at his direction. He denies any treated timber would have been burnt as they are 'very particular' with treated timber off cuts.

0937 hrs In the company of Mr BAXTER go to S.E. corner of yard.
There are only wisps of smoke from the embers of fire approx 2 metres across. One piece of solid wood left at edge of, and partly in fire. Timber is 4 by 2 (100mmx 50mm) about 10 cm long, burnt at one end however clean-cut end has small piece of white paper stapled to it. The marking "H5" in clear black writing on white paper tag. I take 5 photos of bed of fire and off cut.

0945 hrs I take 2 samples from centre of embers. These are contained in wide mouth glass sample containers. I label them 01 and 02. Burnt timber also seized and place in plastic container labelled 03.

Thank Mr BAXTER and tell him I will be in touch with him in due course. Depart site.

1005hrs Drive directly to RJ Hill lab in Clyde Street and deliver samples to Garry Oldham. Chain of custody form completed.

1015 hrs Return to office. Complete PRS for timber and secure exhibit.

Doc # 29665429

Signature: _____
File note completed by Billy Evington

Waikato REGIONAL COUNCIL
Te Kaunihera ā Rohe o Waikato

Date file note completed: 19 July 2024

File ownership and presentation

Further important concepts to grasp are:

- file ownership
- file presentation.

As you detect non-compliance and begin to investigate and document the matter, you should be aware that it is, in fact, your file. You are responsible for it and all of its related requirements until such time as the file is clearly handed over to someone else or all possible matters have been attended to.

It is vital that, at any given time, the ownership of the file and the responsibility for the investigation lies with one person and that person's role as officer in charge is known to all parties.

File presentation may affect outcome

An investigation file is the basis for initiating enforcement action. Judges, defence counsel and the defendant, as well as your own prosecutor, will see all or parts of that file. Files should be submitted in a professional manner, meaning tidy, in a logical sequence, indexed and complete.

The standard of content and presentation can actually impact on the plea entered and ultimately on the penalty imposed. Experience shows that a competent defence lawyer will often work quickly towards a guilty plea once in receipt of a compelling, well-structured file.

The prosecutor presents the case as it has been prepared. No matter how skillful the prosecutor may be, if the basic groundwork has not been properly done, the ingredients not proved or relevant points not highlighted, the prosecution may not succeed.

Be aware that damages could be awarded against the council under certain circumstances for unsuccessful prosecutions. This is something to be aware of, not afraid of. If competent prosecutions are taken in good faith, costs against council are unlikely. However, we refer you to Waikato Regional Council v Wallace Corporation Ltd and others [2012]NZHC 1420.

File content

Your investigation file should contain all of the information relevant to the matter under enquiry.

The items listed below will be required depending on the stage of the investigation or subsequent enforcement action and will be dealt with in more depth in other chapters. Please note some of these may not be applicable to every file.

- The document that alerted you to the incident (for example, an email from your council call taker).
- Notebook entries (where legible, a photocopy of notebook, otherwise a photocopy of notebook and typed transcript).
- All other notes made in respect of the incident (such as file notes).
- Photographs and video. All images taken need to be retained, even if they are repetitive or of poor quality. Though only a few may be referred to or used, they must all be available for disclosure.
- List of physical exhibits.
- Property record sheets.
- Analysis results.
- Transcripts of interviews and statements (which must be checked against the original audio, visual or handwritten record).
- Maps.
- All background material (including planning and investigation information).
- Company searches.
- Search warrant and application.
- Emails or correspondence, particularly if directly with an offender.
- Briefs of evidence for each witness (if a defended or disputed hearing is indicated).
- Media releases and subsequent articles.
- Title searches proving land ownership.

Summary

- **A notebook is an essential tool for any enforcement officer.**
- **Information gathered in the field must be transferred to file notes.**
- **File notes provide the basis of an investigation file.**
- **Ownership and responsibility for a file must be established.**
- **Files must be maintained and submitted in a professional manner.**

Chapter

04

Ngā pūkenga mahi tūwaenga

Practical field skills

Introduction

A crucial part of your role as a compliance officer is to get 'out in the field' and take an active part in CME, some of which may arise from attending environmental incidents. A breach of regulation or an environmental incident may be relatively minor or potentially disastrous. It may be as a result of a deliberate act, some degree of negligence or a genuine accident.

An incident or breach may be discovered through:

- emergency response
- complaint response
- compliance monitoring.

You may be the first on the scene and have limited resources to deal with what you are facing. You may need to take steps immediately to ensure damage is limited and mitigation is initiated. This may be as simple as liaising with another agency such as FENZ (Fire Emergency New Zealand) or a local authority. In certain circumstances, it may mean giving direction to a resource user to act.

Local government staff will have vastly differing experience in dealing with incidents. The training that staff have been exposed to will also vary greatly. These variances can develop inconsistencies in practice.

Though the emphasis in this manual is on an officer's CME role, this is an excellent opportunity to briefly focus on the practical side of attending an environmental incident. This chapter will encourage consistency by council staff in the way they approach this role.

Management stuff

Individual councils will develop their own specific policies and procedures for incident response and staff safety. We encourage local government managers to including the practical points outlined in this chapter into such policies and procedures. Certainly the resources referred to in this chapter are the responsibility of the employer to provide.

Aim

The aim of this chapter is to provide practical guidelines for CME field work including attending environmental incidents.

The Big Six

1. Knowing your offence or breach
2. Record keeping
3. **Scene attendance**
4.
5.
6.

Health, safety and wellbeing

We have put this first in this section of the manual. Why? Because staff health, safety and wellbeing should always be the first consideration when preparing for, or attending, any incident.

Every council should have clear health and safety policies and procedures that staff are familiar with and must adhere to. These policies and procedures should be regularly referred to ensuring familiarity and best practice.

The following points are not designed to replace health and safety policies but are considered to be the type of practical procedures that staff should consider, along with health and safety considerations, when completing field work.

Everyone has a role to play in workplace safety. For example, though an employer must provide fit for purpose safety clothing and equipment for an employee, an enforcement officer must also actively take responsibility for its carriage and use. This is their responsibility and not only contributes to their own safety but towards their professionalism as an enforcement officer.

Environment or enforcement?

In dealing with the immediate environmental effects of an incident, you may easily lose focus on the fact that someone may have a degree of criminal liability relating to this incident. Your actions may inadvertently destroy evidence, either partially or in whole. So, what comes first? Environment or enforcement? Though more than 30 years old, this RMA case gives helpful guidance.

In Auckland Regional Council v Horticultural Processors Ltd et al, the council prosecuted a company and individuals for the discharge of approximately 560 tonnes of kiwifruit pulp/waste. The defendants pleaded not guilty.

The charges against one of the defendants were proven, another defendant was discharged without conviction, and the charges against the remaining three defendants were dismissed. One of the defendants, Smith, applied for costs. Auckland Regional Council was ordered to pay costs of $4000 to Smith.

Judge Kenderdine expressed concern that the council had deliberately allowed the discharge to continue for at least five days after it was brought to its attention to allow the council to collect evidence against Horticultural Processors Ltd. Judge Kenderdine took this factor into account when assessing the costs to be awarded against the council.

At page 10 of the costs decision, Judge Kenderdine stated:

"I have grave concern that he [Mr Smith] is now bearing the costs of a criminal prosecution from a council concerned about the toxic effects of the discharge ***which they deliberately allowed to continue for at least five days after it was brought to their attention*** *– merely in order to press home the charges to HPL. If the slurry was so dangerous it does not seem reasonable that the council allowed it to be dumped for so long and then proceed to charge Mr Smith with an offence of strict liability."*

23/11/93, Judge Kenderdine, DC Henderson CRN 2090016530.

So, not only should we consider the environment first, but the court believes we should, too.

Preparation

Before an officer deploys into the field, they must be prepared for anything they might reasonably encounter. Again, personal responsibility for preparation sits with each officer, and resourced by their employer.

Training

No officer should be deployed into the field without prerequisite training for anything they might reasonably encounter or be accompanied by an experienced officer who is. The kind of pre-deployment training that should be available to field staff includes, but is not limited to:

- This course!
- Dealing with aggressive people
- Swift water training
- 4WD driver training
- Environmental sampling

The employer is obligated to supply the training required for field officers to do their work safely, competently and confidently.

Field kit

It is strongly recommended that all staff develop and maintain a field kit that is readily available to them. This is beyond their (always carried) notebook and warrant of authority.

Your field kit should include:

- clothing and personal protective equipment (PPE) appropriate to all possible conditions and situations
- cellphone
- camera, with video capability (cellphone can be utilised for this purpose in most instances)
- Global Positioning System device (GPS)
- spare batteries or power source for all equipment
- sampling gear (usually carried in vehicles) including:
  - chilly bin
  - a range of sampling bottles
  - a range of plastic and paper sealable bags
  - sampling stick
  - disposable gloves
  - hand sanitiser
  - spare pens/pencil for writing in wet
- protective document folder containing:
  - photocopies of your warrant of authority
  - property record sheets
  - witness statement forms
  - lined foolscap paper
  - notice of inspection
  - important contact numbers, such as senior staff and emergency services.

Vehicle

Just as an officer has to be prepared for anything they might reasonably encounter, so must their vehicle. Council vehicles must be fit for purpose.

For example, we have to be able to access forestry sites to ensure compliance with the National Environmental Standard for Plantation Forestry. This would generally require a vehicle with four-wheel drive, reasonable ground clearance, suitable tyres, possibly a winch and forestry specific radio set.

However, a standard council vehicle may be totally adequate for carrying out compliance inspections that can be accessed totally by sealed, good condition roads.

Completing an appreciation

The appreciation process is used by many organisations, both here and internationally, to ensure effective attendance at a scene or inspection. We promote using the appreciation tool on every occasion so as to be completely familiar with it. Initially this may seem daunting and even onerous however over time experienced staff will complete an appreciation almost subconsciously.

This process can be applied from high profile major incidents to day-to-day occurrences. It is a matter of tailoring its application to the situation.

There are five key steps in the appreciation process.

1. Aim
2. Information
3. Factors
4. Courses open
5. Plan

Aim

The first thing to do is to establish what is the aim of an officer's attendance at this particular scene.

There may be more than one aim, but they should be prioritised and dealt with one by one or as resources permit.

Aim(s) should be clear and concise. For example, in the event of a contaminant spill, an officer may identify the following aims.

6. To stop the spill or event at source (containment).
7. To mitigate effects and clean up.
8. To collect evidence for possible enforcement action.

Each situation will differ, and it is important to note that it is not the enforcement officer's role to undertake (1) and (2) themselves, but to direct the owner or occupier to take appropriate action.

If it is established that the liable party is completely incapable of undertaking suitable action to stop a spill and/or clean up the effect, council staff may need to take a more active role. There are risks involved with this and should never happen without seeking advice from your manager first.

Information

You then need to collect all the relevant information you may require to achieve your aim.

The amount and type of information you collect will depend on the urgency and scale of the incident. It may include:

- assessing the complaint
- site information
- maps
- weather forecasts
- tide charts
- witness accounts
- engineers' reports
- legislation or the relevant regional plan.

Factors

Factors are the facts or circumstances which could affect achieving the aim. Brainstorming, using the collective experience of other staff, can benefit the appreciation process. Seek advice from more experienced colleagues. Common matters that should be considered are listed below.

- **Liable parties** – what is known about them and how and where they operate, do they present any risk?
- **Legislation** – offences and ingredients to be proved, legal issues.
- **Evidence** – what is the nature of the evidence being targeted? What and where will it be, what expertise is needed to find it, secure it and analyse it (such as paper or computer records)?
- **Location(s)** – where will evidence of offending be observed or located? How many sites? Distance from each other? Requirement for control or upstream samples?
- **Terrain** – what is the location and terrain like and how will this affect issues such as access, hazards?
- **Time** – when is action required? Day or night, what duration?
- **Courses open to subjects** – what are the subjects likely to do?
- **Area** – where is the action required? Routes in and out for subjects/us. What is known about the area that could affect the action?
- **Climate** – weather forecast, sunrise/sunset, sea conditions, tides, swell direction/size, wind and maritime forecasts.
- **Staff resources** – how many people are available; do they have the skills required?
- **Communications** – what do we have, will they work in the area?
- **Administration and logistics** – organisation of staff resources, support, meals, accommodation, equipment and transport.

Courses open

Once information has been collected and factors analysed, the courses of action available to attain the aim must be identified and one selected.

- List each possible course of action that could reasonably be taken.
- Identify the advantages and disadvantages of each course.
- Select the best course, which will become the basis of the plan to attain the aim.

Plan

Once a course has been selected a preliminary plan should be prepared. Avoid too much detail at this stage. It will be necessary to identify:

- the broad roles of the resources to be deployed
- staff numbers needed
- coordinating instructions (for example teams and phases)
- major administrative, equipment and communication arrangements
- whether the course selected is feasible, practical and within the means available.

The plan should appear to be proportionate to the task at hand. Don't use a sledgehammer to crack a walnut. But if the circumstances warrant it, a sledgehammer may be required.

Scene examination and reconstruction

Once the initial attendance has been effectively carried out, consideration can be given to a reconstruction. Reconstructing what has occurred is a strategy that many people use without realising they are even doing it. It is helpful to identify the uses of a reconstruction and what you should take into consideration. A full scene examination should be carried out as a precursor to a reconstruction.

Consideration should be given to how you can best reconstruct or show to a later audience what you are seeing.

Purpose of scene examination

Purpose of a scene examination is to:

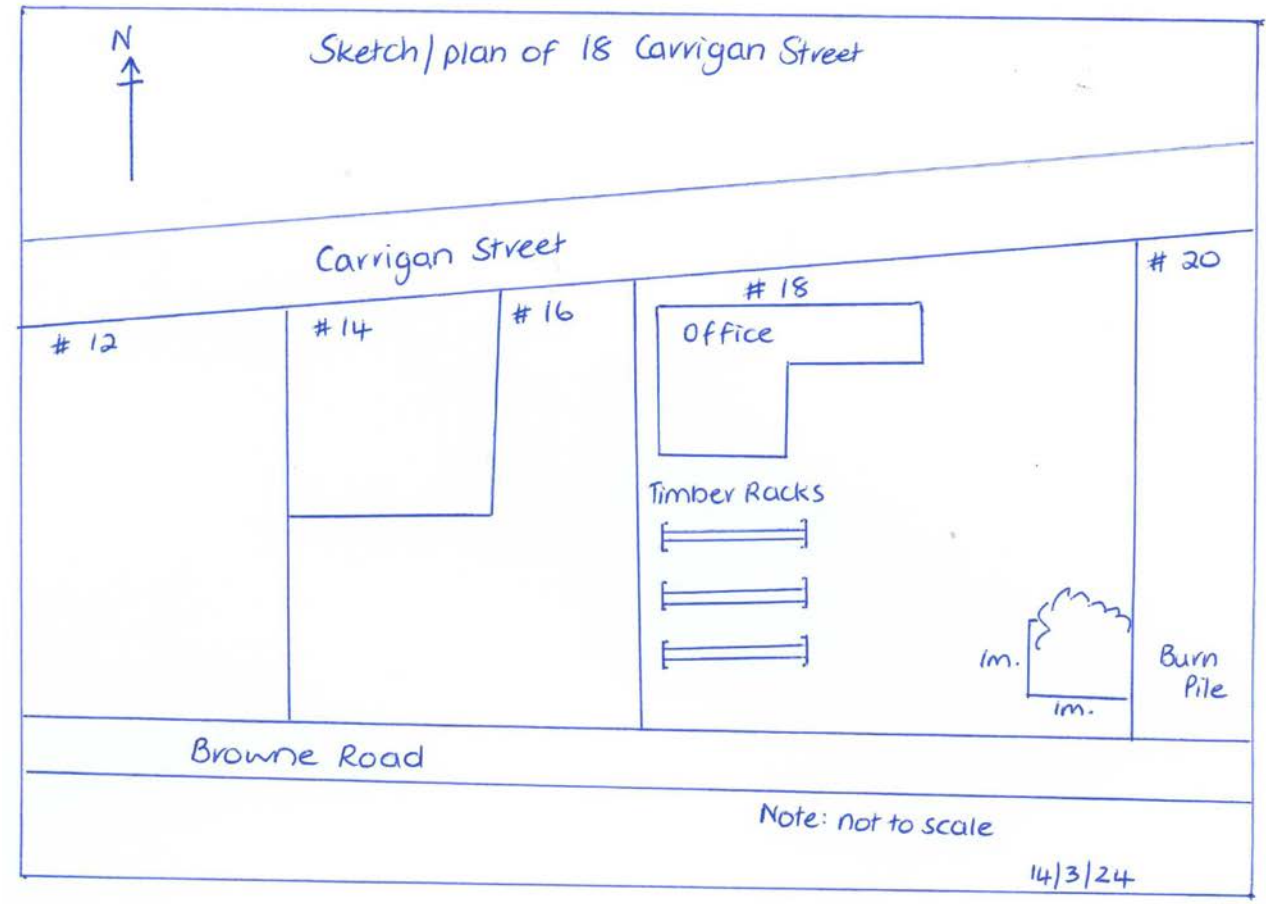
- reconstruct activity in a particular place
- locate evidence connecting such activity to other persons, places and objects in order to:
  - prove or disprove the commission of an offence
  - provide facts as a basis for enquiry
  - corroborate witnesses
  - point to and identify liable parties
  - verify admissions made by liable parties, and
  - examine possible defences.

Outcomes

Attendance at the scene of an incident may well be the only opportunity to gather certain evidence from that scene and subsequently ascertain what has occurred. When attending a scene, an enforcement officer should always consider obtaining the following:

- photographs/video
- samples
- map/sketch plan
- measurements
- physical exhibits
- detailed notes
- witness statements
- identity of persons present.

Example of a sketch plan in a notebook



A practical checklist for attending incidents and scenes

To attend a scene properly, thorough consideration should be given to a number of points. You should be able to answer every relevant question below. Consider printing this list and retaining it in the back of your notebook as a reference.

- Have I followed all health and safety procedures?
- Do I need to enter private property or am I in a public place?
- By what power can I enter private property under these circumstances?
- Have I produced my warrant of authority upon initial entry?
- Have I made a reasonable attempt to contact the occupier before commencing the inspection?
- Am I dressed appropriately for the conditions/incident?
- Do I have all the equipment that I require?
- Have I noted the weather conditions?
- Have I accurately recorded the location?
- Have I established whether the point of discharge is to land or directly to water?
- Have samples been taken upstream, downstream and at the point of discharge?
- Have I followed all sampling protocols?
- Is the labelling on the sample containers exactly consistent with subsequent documents such as lab forms and files notes?
- Have I established and recorded what the receiving waterway is?
- Have I established and recorded the direction of water flow?
- Have I taken photographs that show the overall scene as well as close-ups of relevant points?
- Have I recorded contact details of the people present for later contact if required?
- Have I taken witness statements from appropriate people? (This point is covered in depth in a later chapter.)
- Have I spoken to anyone who may have liability for the incident?
- Have I recorded their personal details?
- Have I kept accurate and full notebook entries of each of these points including the time of each point?
- Have I left a notice of inspection and recorded the details of where I have left it?

Summary

- **The environment comes before enforcement.**
- **Staff safety is paramount.**
- **Councils should develop policies to assist practical scene attendance.**
- **Staff should be prepared to attend scenes.**
- **An appreciation is a helpful tool when attending scenes.**
- **Reconstructions are useful to establish what has happened.**

Chapter

05

Te tapoko ki ngā wāhi motuhake mā te ture

Lawfully entering private property

The Big Six

1. Knowing your offence or breach
2. Record keeping
3. **Scene attendance**
4. **Lawfully entering private property**
5.
6.

Introduction

The rights of a lawful occupier or occupant of private property must be respected.

The powers to enter private property and complete a compliance inspection, including taking notes, photographs, video and samples, are invaluable tools in the enforcement officer's toolbox. The authority for these powers is contained within statute, case and common law. There are, however, strict expectations and limitations on these powers.

Statutory powers can enable entry to private property with, and without, a search warrant. In the mind of the public and the courts of New Zealand, these are among the most intrusive of state powers.

These powers must always be used appropriately by local government CME officers. Abuse or ignorance of these powers is not tolerated by the courts or the public. It is absolutely vital that officers and their supervisors have a good working knowledge of these powers.

This chapter will examine the various powers within the Resource Management Act 1991 (RMA) and associated laws as they affect your day-to-day CME role.

Management stuff

This chapter covers a key legal requirement for councils. Managers must have an in-depth knowledge of this material. Littered through the chapter you will find details of how managers can support their CME teams to meet these requirements.

Aim

This chapter is designed to provide council officers and managers with the knowledge required to enter private property and to execute their CME functions appropriately and within the law.

Background

A fundamental principle of our society is that a person's home is their castle. This principle presumes that a lawful occupier of a private property is entitled to the use of their home or property, or place of work, without having to suffer intrusions by the state or others.

The property owner or occupier has the lawful right to exclude anybody from entering their property. They can do so by classifying the unwanted visitor as a trespasser.

New Zealand law contains a Trespass Act, which specifically deals with situations involving trespass and makes trespass an offence. In addition, the Bill of Rights Act contains a provision which upholds the principle by reaffirming that "everyone has the right to be secure against unreasonable search or seizure, whether of the person, property or correspondence or otherwise".

Some aspects of entering private property are also codified in the Search and Surveillance Act 2012, which may have implications for local government officers carrying out their CME duties.

Like most laws, there can be exceptions. These exceptions allow for circumstances where a seemingly absolute principle can be put to one side. For example, some exceptions enable people to carry out ordinary and sensible everyday activities. Think of the difficulties that would arise if the property rights principle was absolute and did not allow any exceptions. How would a potentially heroic passerby respond to a fire in a stranger's property? How would something be delivered to your door?

There are three ways in which the absolute nature of the property rights principle can be lawfully put to one side to allow local government officers to complete their CME functions.

1. Implied licence.
2. Express licence (or informed consent).
3. Statutory authority.

Implied licence

Implied licence is a common law concept that considers everyday activities. For example, the courier driver delivering a package to your door operates under an implied licence to walk through your gate and up to the door for the purpose of delivering a parcel. The courier may not engage with you; in fact, you may not even be home. However, he or she would generally be 'allowed' to enter your private property for this genuine purpose.

However, if you objected to the courier being on your property, for whatever reason, you may withdraw that implied licence and ask him or her to leave. If they did not leave, they would be trespassing and would be on your property unlawfully.

Similarly, a council officer, like any other member of the community, may call at a person's house simply to talk to the occupant and has an implied licence to do so. If that implied licence is not withdrawn by the occupier, the officer is not a trespasser and is on the property lawfully.

Express licence or informed consent

Express licence or informed consent is an owner or occupier's clear assertion that a person has permission to enter their property for a particular purpose. An example of this would be a Department of Conservation permit to enable hunting and tramping within lands they administer. The express licence is to hunt or tramp. It does not license other activity such as the taking of native plants. That activity is outside the licence and could well be unlawful.

Another example is the carpet cleaner who you engage to clean your carpet. You may provide a key for them to enter the property while you are at work, expressly to clean the carpet in the lounge. They would be entitled to be within your home for this purpose, and this purpose only. If they were to engage in 'other' activity within your home, then that would be outside the permission you have given them and would potentially be classed as criminal activity.

Obtaining express licence or informed consent to enter private property, in lieu of executing a search warrant, will be discussed later in this chapter.

It is important to remember that, like any permission, consent to enter private property may be withdrawn at any time.

A common error by local government officers is thinking that 'being invited' onto a property is lawful justification for being on a property to carry out CME functions. If the owner or occupier is not fully informed of your purpose for, and the ramifications of, your being there, the inspection may be deemed unlawful.

Statutory authority

Compliance, monitoring and enforcement of New Zealand laws would be impossible if the trespass principle was truly absolute. Many regulatory and enforcement agencies require tools in addition to implied and express consent to ensure entry to private property can be made in justified circumstances.

The state provides lawfully warranted enforcement officers the power to enter private property under diverse legislation, including the Resource Management Act 1991 (RMA).

In practice, local government agencies must meet the same standards as any other agency going about their daily work when it involves entering private property.

Section 38 RMA – Warrants of authority

To be able to exercise statutory powers, there is a need to be lawfully warranted. For us, this is provided for in Section 38. Section 38(1) of the RMA provides that a local authority may authorise any of its officers 'to carry out all or any of the functions and powers as an enforcement officer under this Act'.

It is interesting that different councils tend to give their enforcement officers wildly varying designations such as Pollution Officer, Compliance Officer and Resource Officer. Regardless of your local designation or title, under the Act you are an Enforcement Officer.

It is also interesting that councils tend to have very different looking warrants with differing content. An example of one such warrant, in a warrant holder, is shown here.

Section 332 RMA – Power of entry for inspection

By far, the most common lawful means of entering private property for local government RMA compliance officers is by way of Section 332. Due to its importance to local government CME work, the section has been copied here in its entirety. Officers and their supervisors should be completely conversant with every part of this section and refer to it regularly.

332 Power of entry for inspection

(1) Any enforcement officer, specifically authorised in writing by any local authority, consent authority, or by the EPA to do so, may at all reasonable times go on, into, under, or over any place or structure, except a dwellinghouse, for the purpose of inspection to determine whether or not—

- (a) this Act, any regulations, a rule of a plan, a resource consent, section 10 (certain existing uses protected), or section 10A (certain existing activities allowed), or section 20A (certain lawful existing activities allowed) is being complied with; or
- (b) an enforcement order, interim enforcement order, abatement notice, or water shortage direction is being complied with; or
- (c) any person is contravening a rule in a proposed plan in a manner prohibited by any of sections 9, 12(3), 14(1), 15(2), and 15(2A).

(2) For the purposes of subsection (1), an enforcement officer may take samples of water, air, soil, or organic matter.

(2A) Where a sample is taken under subsection (2), an enforcement officer may also take a sample of any substance that the enforcement officer has reasonable cause to suspect is a contaminant of any water, air, soil, or organic matter.

(3) Every enforcement officer who exercises any power of entry under this section shall produce for inspection his or her warrant of appointment and written authorisation upon initial entry and in response to any later reasonable request.

(4) If the owner or occupier of a place subject to inspection is not present at the time of the inspection, the enforcement officer shall leave in a prominent position at the place or attached to the structure, a written notice showing the date and time of the inspection and the name of the officer carrying out the inspection.

(5) An enforcement officer may not enter, unless the permission of the landowner is obtained, any land which any other Act states may not be entered without that permission.

(6) Any enforcement officer exercising any power under this section may use such assistance as is reasonably necessary.

The key purpose or authority allowed by this section is 'inspection'. The Oxford English Dictionary defines inspection as "to carefully look into; to view closely and critically; to examine (something) with a view to find out its character or condition". The courts have found that this is a different concept to searching, which implies a step beyond inspection.

Closer examination of Section 332

The power is to be used only by enforcement officers authorised in writing

This doesn't mean the council has to authorise you every time you exercise the powers. It is sufficient for you to have been generally authorised to use this power, within your region, as part of your authority under section 38 of the RMA.

The power may be used at all reasonable times

What is reasonable will be dictated by the context of the event or actions that require inspection. For example, a nighttime visit to a farm that is allegedly discharging effluent into a stream at night would be reasonable. On the other hand, a routine inspection at 4 a.m. might be viewed as unreasonable.

Common sense will prevail in most circumstances. What is reasonable is not solely reliant on the subjective view of the owner or occupier, nor is it necessarily just in the view of the council officer. A helpful way of testing whether something is 'reasonable' or not, is to consider it from a completely impartial perspective, with an objective or whole view of the circumstances taken into account.

The power allows the enforcement officer to go on, into, under or over a place or structure except a dwelling house.

Authority to enter a dwelling is explicitly excluded from and not authorised by Section 332. It is important to note that a dwelling house can have quite a broad application and can include such things as caravans, the bunk house of a commercial fishing vessel, or anywhere that a person might expect to have privacy associated with personal living space.

However, what is allowed by this section is a fairly exhaustive inspection of everywhere else on a particular property or structure that might be linked to an RMA activity.

The power allows for all manner of inspections that you might be involved in, which may range from a brief look at a surface water pump through to a full inspection of a landfill construction.

The authority for inspection is very wide and is obviously designed to allow your agency to test compliance under the RMA. But that authority is limited in a wider sense and doesn't authorise entry for any old reason. For example, entry to collect a debt on behalf of the council is not authorised.

Your inspection is to determine whether:

- the RMA, regulations, plan rules and consent conditions are being complied with, or
- an enforcement order, abatement notice or water shortage direction is being complied with.

Samples of water, air, soil or organic matter (or any substance that might be a contaminant of those things) may be taken.

Section 332 provides that samples may be taken for two distinct purposes. Under subsection 2, an enforcement officer may take samples of water, air, soil or organic matter for the purposes of determining compliance.

If this power is exercised, then under subsection 2A an officer may also take samples of any substance that the enforcement officer has reasonable cause to suspect is a contaminant of any water, air soil or organic matter.

Your warrant of appointment and written authority must be produced on entry or upon any reasonable request – this is not an option but required by law.

Here is some best practice guidance on entering private property.

- It is best practice, and courteous, to take reasonable steps to attempt to locate the owner or occupier upon initial entry of a property, before commencing the inspection.
- Regardless, you must produce your warrant of authority upon initial entry, if people are present, and upon any later reasonable request to do so.
- A reasonable request will be determined by the circumstances of the case. A request by a milk tanker driver would be unlikely to be reasonable or relevant in the circumstances of a dairy farm inspection. But a request from the sharemilker's employee would likely be considered as reasonable and relevant.
- If more than one enforcement officer is involved in the inspection, each officer must produce their warrant. It is not sufficient for only one of the enforcement officers to do so.
- Producing a warrant of authority for inspection does not mean you have to release the warrant from your possession. There have been instances of people being obstructive once they have possession of an officer's warrant. A situation can deteriorate if the person won't return it or a 'tug-of-war' over the warrant starts.
- Consider providing a copy of your warrant if there is insistence on reading it closely.
- If the owner or occupier is not present, you are required to leave a notice of inspection in a prominent position, outlining the date and time of the inspection and your name. The object of this requirement is to ensure the owner/occupier is advised of the entry onto property.

- Common sense will prevail as to what is a prominent position. If you enter a paddock several kilometres from the farm owner's house, it would be sensible to call at the house and leave a notice there, or perhaps in the letterbox. You are not required to leave the notice at the point of entry.
- Take a photograph of where you left your notice, in case its existence is disputed later.

Remember that if entry to a property becomes an issue, it will be up to you to prove that you have acted lawfully. Collect all available information when on private property pursuant to section 332 RMA. Once reasonable grounds to believe an offence has been committed have been established, a search warrant or informed consent will be required to return to that property to gather any subsequent information.

Remember, best practice to avoid unnecessary legal argument. If you follow these points on every occasion, you, and your council, will have the best possible chance of weathering any challenge that comes later.

Helpful case

Although this case is more than 25 years old, there is still much to be learned from it.

Auckland Regional Council v Nuplex Industries Ltd

Auckland Regional Council prosecuted Nuplex for breach of s15(1)(c) of the RMA, discharge of contaminants into air, from the Nuplex factory at Penrose, which manufactures synthetic resins and emulsions. The defendant objected to the admissibility of evidence obtained by the council enforcement officer and argued that it was obtained unlawfully and should be held inadmissible on two grounds.

(i) s21 of the New Zealand Bill of Rights Act 1990.

(ii) The common law rule which applies to unlawfully obtained evidence.

The enforcement officer had visited the premises on 21 occasions over a two-year period. A number of the defendant's staff knew that she was an air quality enforcement officer for the council. The enforcement officer obtained samples and information on each visit.

The enforcement officer could not recall producing her warrant on any of her visits and said that it was not her usual practice to show her warrant unless she was asked to do so. On each visit the enforcement officer filled in a visitors' book and she was accompanied by one or more of the defendant's staff.

The enforcement officer wrote to Nuplex after her first visit and pointed out that non-compliance with the resource consent was contrary to the RMA and that penalties ranged up to a maximum of two years' imprisonment or a fine of up to $200,000. Condition 1 of the resource consent provided:

That this resource consent is granted by the Auckland Regional Council, subject to its servants or agents being permitted access to the relevant parts of the property at all reasonable times for the purpose of carrying out inspections, surveys, investigations, tests, measurements or taking samples.

The defendant's lawyer argued that the evidence obtained by the enforcement officer was obtained unlawfully. He argued that the officer was exercising her powers of entry under s332 and was therefore legally required, whether or not she was asked, to produce her warrant.

Judge Whiting held that the word 'required' in subsection (6) of s38 means that an enforcement officer has to produce his or her warrant if asked. The judge also held that if he was wrong in his interpretation of s38, any technical unlawfulness was cured by the consent of the defendant – first through its staff, who were aware the enforcement officer was making enquiries and investigations about the alleged non-compliance of the resource consent, and secondly by the terms of condition 1 of the resource consent.

Judge Whiting found that the enforcement officer's actions were reasonable and held that the evidence obtained by the enforcement officer was admissible.

2/07/98, Judge Whiting, DC Auckland CRN

Example of a Notice of Inspection Form

The following form is an example of one that has been developed to fulfill the requirements of Section 332(4) where an inspection has been carried out and no one is present.

A 0101

NOTICE OF INSPECTION

In accordance with Section 332 (4) of the Resource Management Act 1991

Please be advised that on (date): _____

at the time of: _____

Waikato Regional Council staff (name/s) _____

carried out an inspection at this property (address): _____

_____

_____

Additional comments: _____

_____

_____

Private Bag 3038
Waikato Mail Centre
Hamilton 3240
Freephone 0800 800 401.
www.waikatoregion.govt.nz

Waikato
REGIONAL COUNCIL

Using any reasonable assistance

Section 332(6) of the RMA provides that any enforcement officer exercising any power under s332 may use such assistance as is 'reasonably necessary'.

Assistance would extend to other people or equipment needed to complete the inspection. An example would be where a wetland ecologist accompanied you to determine whether a particular wetland met the requirements of special classification of your regional plan.

Photographs, video and notes

During the inspection you may take photographs, video and or notes if they are relevant to your lawful purpose for being there. They are excellent tools to assist in creating the reconstruction of what has occurred on site. This reconstruction may be needed by your enforcement decision maker(s), your lawyer and, potentially, a judge.

However, remembering the laws of evidence, images and notes are only aids to the memory of the enforcement officer. The primary evidence in any court is the testimony of the observations made by the enforcement officer. The value to you of notes and photographs made at the time of the event is that they are an aid to your memory and a powerful extension to your oral evidence.

Helpfully, the lawful ability to take photographs and video while inspecting a property under s332 of the RMA is confirmed through case law (Leslie William Fugle v R [2017] NZSC 24).

Other relevant legislation

Local government officers must always strive to comply with all relevant statutory requirements. This legislation can be as 'every day' as driver safety and **transport legislation** to get to and from your CME work, through to legislation that is specific to the property you are inspecting.

The sharp eyed among you would have picked up that Section 332 (5) states an enforcement officer may not enter, unless the permission of the landowner is obtained, any land which any other Act states may not be entered without that permission. Examples of this may include armed forces property under the **Defence Act**, or a regional airport under the **Civil Aviation Act**, both enacted in 1990.

Other legislative requirements may be less enduring, but still important. For example, concern at the risk of infection or disease from the exercise of powers of entry by council staff may feature from time to time in **biosecurity legislation** on certain properties

An obvious and important example is the **Health and Safety at Work Act 2015.** Important, obviously, because we all want everyone to be safe in the workplace, but also because we want to meet the legal requirements of that legislation. Health, safety and wellbeing can be particularly challenging in a regulatory role. Experience shows there have also been examples of some regulated parties using health and safety precautions insincerely, as a barrier to officers completing their CME functions. To assist when this arises, we have crafted a handout that can be given during site inspections should the need arise to clearly identify where health and safety responsibilities lie. This can be found as an appendix to this manual.

Physical confrontation and obstruction

If physical confrontation arises during the course of your work, you should remove yourself from risk immediately and follow the appropriate health and safety procedure. You should forego any property entry or inspection rather than risk physical confrontation.

Training for dealing with aggressive people is commercially available from credible companies in Aotearoa. Quality training with regular refreshers can go a long way to keep officers safe.

It is also important to remember that obstruction of a council officer in the completion of their CME duties is an offence under the RMA, punishable by a maximum fine of $1500.

It would be a very rare set of circumstance that would make it appropriate for a council officer to use any kind of physical force against a member of the public. Any such occasion would only be justifiable if the circumstances of Section 48 of the Crimes Act 1961 were met.

48 Self-defence and defence of another

(1) Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

Management stuff

Defence of yourself or another is an important concept to grasp and should be carefully examined in frontline officer training.

Which entry power to use?

There will be occasions when entering private property under Section 332 of the RMA is no longer available to you. The most important thing for a frontline council officer to learn is when this is the case. The determining factors are your **purpose** for entering the property and the level of **knowledge** you have about what is happening on the private property.

As the table illustrates, if your purpose for entering the property is specifically to obtain evidence of an offence you know has been committed on the property, then Section 332 is no longer available. Entry would only be lawful, for that purpose, by way of search warrant or informed consent.

Practical application of the inspection or search powers is not a matter easily covered, due to myriad situations that might confront you as a council CME officer. The facts and circumstances surrounding an event or investigation will dictate your response. You will be required to assess the situation as it confronts you and make a wise judgment. If in doubt, contact your supervisor.

For many years, RMA enforcement officers have been confidently taking guidance as to when to use powers under sections 332 and 334 from a High Court ruling known as the Venning judgment. The content of this ruling is not only still valid, but the Supreme Court of New Zealand, our highest court, has endorsed its content. You can have complete confidence that this is the appropriate interpretation of the use of these powers.

We encourage the study of the Supreme Court ruling (Leslie William Fugle v R [2017] NZSC 24) for the full context of this case and its findings. Helpfully, this same case confirms our ability to take photographs and video during the course of the compliance inspection.

How do I enter private property lawfully?

Purpose	Knowledge	The law
I just want to talk to someone at theproperty	I don't intend to inspect the property. My interest is purely in speaking to someone.	You have a common law right to approach someone on private property to talk to them. However, if they ask you to leave then you must.
I want to enter the property to assess compliance with the RMA.	I am not aware of any specific confirmed breaches on the property.	You can rely upon your warrant of authority to enter the private property to assess compliance.
I want to enter the property to gather evidence to support enforcement decision making and potential action.	I already am certain there has been a breach of the RMA at the property.	You can obtain a search warrant for the property or obtain informed consent from the owner or occupier.

Search warrants

Applying for, and executing, a search warrant

The application for, and execution of, search warrants is technical and poses many challenges and risks. Their use cannot be taken lightly. Though all CME staff need to know when a search warrant may be required, it will only be for senior experienced staff, likely in conjunction with management and legal counsel, to apply for and execute a search warrant.

Applications for search warrants are made to an 'issuing officer'. This is defined[6] as a judge or a person (such as a registrar or justice of the peace) who is specially authorised. Be aware that not all registrars or justices of the peace are authorised to endorse search warrants.

An application is made in writing and on oath or affirmation. The paperwork required is a full affidavit, with an accompanying draft search warrant.

The issuing officer requires evidence from you that gives him or her reasonable grounds for believing there is some item, at a certain address or in a vehicle or any place, which satisfies one or all three of the following categories:

- in respect of which an offence punishable by imprisonment has been or is suspected of having been committed
- will be evidence of an offence punishable by imprisonment
- is intended to be used for purposes of committing an offence punishable by imprisonment.

The operative clause is there must have been an offence punishable by imprisonment or an intention to commit an offence punishable by imprisonment. Therefore, offences under the RMA that fall under section 338(2) and (3) are not offences for which search warrants could be obtained.

An example of an RMA search warrant application and search warrant are included as appendices to this manual. As previously stated, the preparation and application for, and execution of, search warrants is complex and should only be completed by experienced staff. These skills go beyond the scope of this manual.

A thorough understanding of the search warrant provisions of the Resource Management Act and the Search and Surveillance Act are required before pursuing this option. There is also helpful RMA specific case law that provides clear guidance as to when council staff should be executing search warrants.

Management stuff

Entering private property is a reality of CME work in the regional sector. It has to be done correctly, observing all legal and good faith obligations. All regional councils should have experienced staff, supported by legal counsel, skilled in the ability to prepare and apply for, and execute, search warrants.

Use of police

Section 335 of the RMA sets out certain obligations and requirements pertinent to a search warrant. In short, a police constable must be present when an RMA search warrant is being executed. RMA search warrants cannot be executed by an enforcement officer alone.

The police, quite rightly, will not blindly take part in executing warrants obtained by parties outside the police. They may want to scrutinise your application and satisfy themselves that there is sufficient evidence to justify the warrant's execution.

Also, while New Zealand Police are very experienced at applying for, obtaining and executing search warrants under more traditional criminal legislation, their experience is unlikely to be specific to the RMA. There are subtle but important differences with RMA search warrants, so if seeking police assistance you will need to make them aware of these differences.

As we all know, the police are incredibly busy with very heavy and onerous workloads. Even though required by law, we cannot take calling on their resources lightly. Always bear in mind that a warrant must be executed within 14 days of issue, so you ought to ensure you have access to the police within that period. It might be better to wait and make the application when you are sure the police will be available.

6 Section 3 Search and Surveillance Act 2012.

Production orders

The Search and Surveillance Act 2012 (SAS) provides a very helpful tool that allows for the obtaining of specific documents. A production order can be used as an alternative to a search warrant and can be broader than just requiring documents from a culpable party. For example, bank or other business records may be relevant and evidence of offending.

One of the advantages of a production order is there is no requirement for involvement by police. Sections 70 to 75 of the SAS Act lay out the requirements of obtaining and executing a production order.

Like search warrants, they require a formal application to an issuing officer. There are technical aspects to a production order, so again, caution and experience should prevail.

An example of an application and production order are attached as an appendix.

Statement of informed consent

If Section 332 RMA entry (for compliance inspection and producing warrant of authority) is no longer available to you, then gaining access by informed consent is a viable alternative to requiring a search warrant.

You could rely on the express permission of a lawful owner of occupier to allow you to enter and search the property. Sections 91 to 96 of the SAS Act give guidance in this area.

Be aware that to be truly informed, the person giving the express permission must be fully informed:

- of the purpose for your visit (such as to take samples or photographs)
- that enforcement action may result from your inspection.

Furthermore, care must be taken to ensure that any consent is freely given and not obtained by some perceived threat or coercion by the enforcement officer, or that the owner or occupier is under some illusion that you have legal right anyway. The arrangement between you and the occupier ought to be clear and unambiguous.

A search warrant should generally still be prepared and be available, with informed consent being an option available to investigative staff at the time of the execution of the warrant. Situations have arisen where a search warrant is to be executed but the owner or occupier feels aggrieved or uncomfortable with its execution and would prefer the search was conducted with their consent.

It must be able to be proven that the statement of informed consent was entered into freely by the owner or occupier, and the alternative of executing a search warrant cannot be perceived as a threat.

For the owner or occupier to give that consent they need to know the full implications of the search being conducted and, very importantly, their knowledge must be able to be proven later if challenged. To remove any ambiguity, a ‘statement of informed consent’ form has been developed to be filled out by the person providing consent and is included in this manual as an appendix. The form is self-explanatory.

There are hazards associated with completing a search by way of informed consent. For example, the consent can be withdrawn at any time during the search, meaning you would potentially have to leave the property, regroup and execute the search warrant anyway.

Because of the complexities associated with using informed consent to gain access to private property, it should only ever be used by experienced staff.

Duty to give certain information

Though not well drafted, Section 22 of the RMA does provide some statutory power to assist an enforcement officer during the course of their enquiry work. Practically, you can ask people for any relevant information. However, legally, there is only a requirement for them to provide limited personal details of themselves and anyone who has employed or contracted them.

22 Duty to give certain information

(1) This section applies when an enforcement officer has reasonable grounds to believe that a person (person A) is breaching or has breached any of the obligations under this Part.

(2) The enforcement officer may direct person A to give the officer the following information:

(a) if person A is a natural person, his or her full name, address, and date of birth:

(b) if person A is not a natural person, person A's full name and address.

(3) The enforcement officer may also direct person A to give the officer the following information about a person (person B) on whose behalf person A is breaching or has breached the obligations under this Part:

(a) if person B is a natural person, his or her full name, address, and date of birth:

(b) if person B is not a natural person, person B's full name and address.

The penalty for non-compliance is a maximum fine of $10,000, with a continuing offence provision of $1000 for every day or part day during which the offence continues (Section 339(2) RMA).

Of all the powers available under various statutes, this power is of limited assistance. Use it with caution. You would first have to establish reasonable grounds to believe an offence has been or is being committed by someone. You need to determine whether they meet the legal definition of being a natural person or not. You are then limited to obtaining a full name, date of birth and address of that person, or the details of any other person whom the first person is acting for.

In a practical situation, make comprehensive notes of a situation where you have required details under this section. If the person has failed to comply, then your notes will form the basis of any subsequent enforcement action.

Remember, when executing a statutory power, you must have your warrant of authority with you and produce it for inspection if required to do so. (Section 38(6) RMA).

Summary

Entry to private property may be by:

- **common law right**
- **implied licence**
- **express licence or informed consent**
- **statutory authority, or**
- **search warrant.**

The lawful means by which an enforcement officer enters private property is vital to respect people's rights and to ensure that officers act lawfully.

Chapter

06

Te tiaki taonga taunaki

Exhibit handling

The Big Six

1. Knowing your offence or breach
2. Record keeping
3. **Scene attendance**
4. Lawfully entering private property
5. **Exhibit handling**
6.

Introduction

As you know, we base our compliance decisions on reliable information, appropriately gathered. If we decide to take enforcement action, we become heavily reliant on this information, or evidence. On occasion, that evidence may be in the form of an actual physical item, referred to as an exhibit. This may include (but is not limited to):

- photographs
- samples
- documents (such as sample results)
- maps
- records of interview of culpable parties (such as an audio or video recording)
- containers
- vehicles
- equipment.

For an exhibit to be relevant, it must be able to be proven that it is linked to the offence or the offender.

If possible, the exhibit must retain its original qualities, untainted by mistreatment or process (notwithstanding the reduction of a sample by forensic testing).

Local government agencies must have reliable systems in place that achieve confidence in the chain of custody of exhibits and preserve their qualities and integrity.

It is very interesting to note that RMA cases, where chain of custody shortfalls were identified, are now more than 25 years old. To the author, this indicates that the regional sector has learned its lesson in respect of meeting its chain of custody obligations and best practice is typically being followed. This is excellent news.

For reference, though, here are three cases you may be interested to look at, as motivation not to return to bad practise.

- Northland Regional Council v Juken Nissho. Whangarei DC. 1998.
- Wellington Regional Council v O'Rourke and Cremen. Masterton DC. 1993z
- Northland Regional Council v Northland Port Corporation (NZ) Ltd and others. Whangarei DC. 1996.

Aim

The aim of this chapter is to educate council compliance officers on the requirements of exhibit handling, so as to ensure their admissibility if required.

The chain of custody

The chain of custody (COC) is also commonly referred to as the chain of evidence or the chain of possession. All are equally correct.

- The COC refers to all the individual people handling an exhibit, or its secure storage, from its discovery until its production in court, if required.
- Try to keep the COC as short as possible. The continuity of evidence may need to be proven by calling all witnesses to give evidence of their possession or handling of that exhibit.
- One accepted method of introducing proof of the COC is by way of a property record sheet or an environmental analysis COC form.

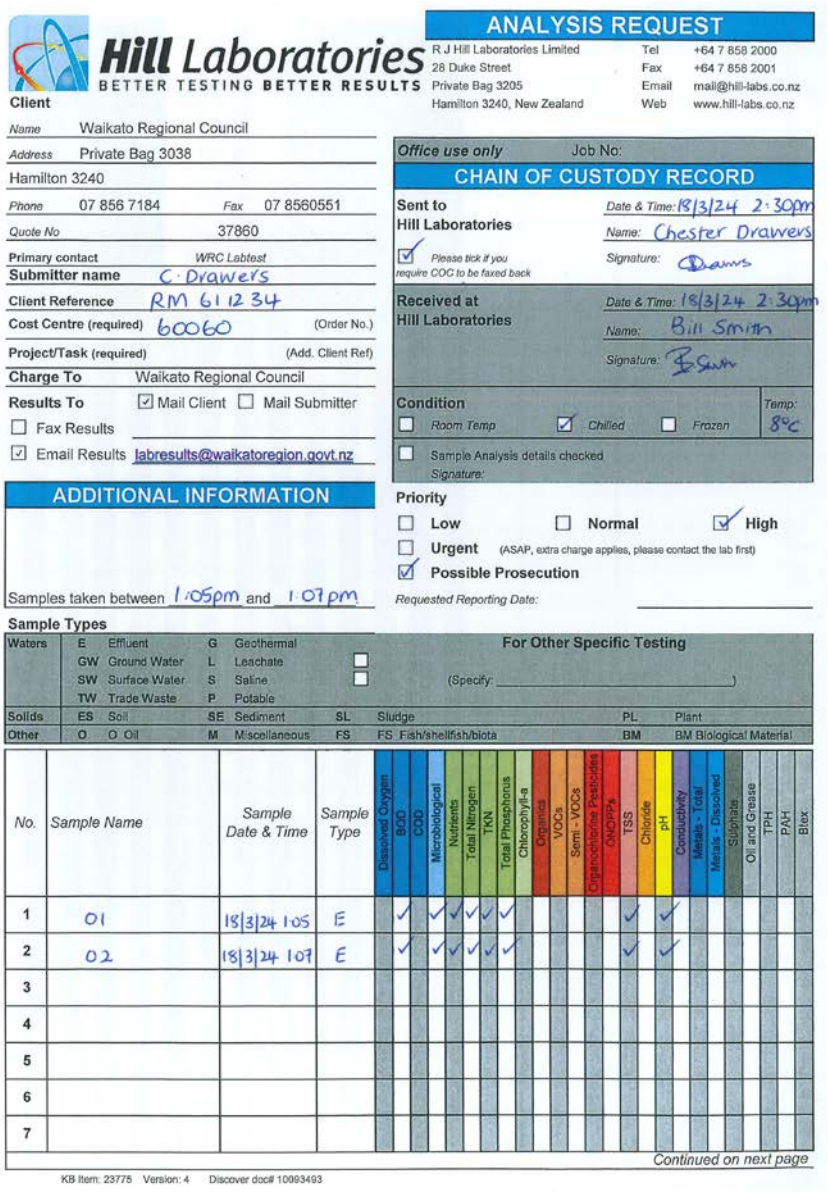
Note: the completion of these forms does not relieve the enforcement officer from making adequate notebook entries, nor does it remove the requirement to correctly label the exhibit.

Environmental analysis COC form or property record sheet form

The following forms are examples of well-established best practice for establishing the chain of custody.

An Environmental Analysis Chain of Custody form can be used for samples taken in the field that require analysis. However, should you need to secure an exhibit other than a sample for analysis then use a Property Record Sheet (PRS). All councils should develop similar forms.

Example of an environmental analysis chain of custody form



Hill Laboratories
BETTER TESTING BETTER RESULTS

ANALYSIS REQUEST

R J Hill Laboratories Limited
28 Duke Street
Private Bag 3205
Hamilton 3240, New Zealand

Tel +64 7 858 2000
Fax +64 7 858 2001
Email mail@hill-labs.co.nz
Web www.hill-labs.co.nz

Client

Name: Waikato Regional Council
Address: Private Bag 3038
Hamilton 3240
Phone: 07 856 7184 Fax: 07 8560551
Quote No: 37860
Primary contact: WRC Labtest
Submitter name: C. Drawers
Client Reference: RM 61234
Cost Centre (required): 60060 (Order No.)
Project/Task (required): (Add. Client Ref)
Charge To: Waikato Regional Council
Results To: ☑ Mail Client ☐ Mail Submitter
☐ Fax Results
☑ Email Results labresults@waikatoregion.govt.nz

Office use only Job No:

CHAIN OF CUSTODY RECORD

Sent to Hill Laboratories
☑ Please tick if you require COC to be faxed back
Date & Time: 18/3/24 2:30pm
Name: Chester Drawers
Signature: C Drawers

Received at Hill Laboratories
Date & Time: 18/3/24 2:30pm
Name: Bill Smith
Signature: B Smith

Condition: ☐ Room Temp ☑ Chilled ☐ Frozen Temp: 8°C
☐ Sample Analysis details checked
Signature:

ADDITIONAL INFORMATION

Samples taken between 1:05pm and 1:07pm

Priority
☐ Low ☐ Normal ☑ High
☐ Urgent (ASAP, extra charge applies, please contact the lab first)
☑ Possible Prosecution
Requested Reporting Date:

Sample Types

Waters	E	Effluent	G	Geothermal	For Other Specific Testing		
	GW	Ground Water	L	Leachate	☐		
	SW	Surface Water	S	Saline	☐ (Specify:)		
	TW	Trade Waste	P	Potable			
Solids	ES	Soil	SE	Sediment	SL	Sludge	PL Plant
Other	O	O Oil	M	Miscellaneous	FS	Fish/shellfish/biota	BM BM Biological Material

No.	Sample Name	Sample Date & Time	Sample Type	Dissolved Oxygen	BOD	COD	Microbiological	Nutrients	Total Nitrogen	TKN	Total Phosphorus	Chlorophyll-a	Organics	VOCs	Semi - VOCs	Organochlorine Pesticides	ONOPPs	TSS	Chloride	pH	Conductivity	Metals - Total	Metals - Dissolved	Sulphate	Oil and Grease	TPH	PAH	Btex
1	01	18/3/24 1:05	E	✓			✓	✓	✓	✓	✓							✓		✓								
2	02	18/3/24 1:07	E	✓			✓	✓	✓	✓	✓							✓		✓								
3																												
4																												
5																												
6																												
7																												

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Example of a property record sheet

PROPERTY RECORD SHEET

Waikato REGIONAL COUNCIL
Te Kaunihera ā Rohe o Waikato

PROPERTY STORE REFERENCE NUMBER

B 0171

THE PROPERTY LISTED HEREUNDER WAS (CIRCLE ITEM APPLICABLE):

SEIZED - ~~WITH~~/WITHOUT SEARCH WARRANT
BY CONSENT

SEIZED/TAKEN FROM:

Full name: James Bryan Baxter	Telephone: (021) 756 810 Business:	Home:
Address: c/- H.& P. Timber Yard, 18 Carrigan St, Hamilton		
Email: jimb@handp.co.nz		
Place taken from: H & P. Timber Yard	Time: 0945 hrs	Date: 14 March 2024
By whom: B. Evington	Designation: Enforcement Officer	
Signature:	Witness:	

Item No.	Quantity	Inventory (full description)
03	1	Piece of timber 100mm x 50mm
		Approx. 10cm long
		Burnt on one end. On other end
		HS tag.

Received from Waikato Regional Council (Name) _____ one copy of this inventory

Full name: J.B. Baxter | Signature: JBaxter | Date: 14/3/24

Property is required as an exhibit: WAIKATO REGIONAL COUNCIL	EXHIBIT NUMBER(S):	FILE No.

WHITE SHEET = RECEIPT
YELLOW SHEET = FILE COPY
GREEN SHEET = CHAIN OF CUSTODY

Follow the preformatted form. The form is in triplicate.

- White copy as a receipt if required.
- Yellow copy retained on the file.
- Green copy to record exhibit movement; usually retained in an exhibit register if there are multiple exhibits to manage.

Ensure full details are recorded for each section of this page. Ensure full details of the property are included.

Responsibility of exhibits officer

At a large incident or investigation, it may be that one person is nominated as the exhibits officer. With more routine incidents or enquiries, it is more likely that you, as the attending enforcement officer, will assume this role. A key point is that the person responsible for exhibits and initiating the COC is identified early.

The exhibits officer is responsible for:

- receiving exhibits
- ensuring exhibits are accurately labelled by the finder
- establishing a numbering system
- recording in the property record sheet and inclusion in register
- commencement of an exhibit movement sheet
- custody and security
- delivery for analysis or examination where appropriate
- ensuring continuity of evidence including delivery to court, if required
- receiving back into custody any exhibits used in court post-trial.

At a scene

Sampling

It is not for this guidebook to outline the specifics of taking samples. Clear processes should be available within each council as to the protocols of various types of sampling that may feature in CME work. Officers required to carry out sampling should have ready access to these protocols to ensure best practice is followed, every time. The more fortunate councils will have in-house scientists who can assist with developing these protocols and assist with training.

Best practice for what and where to sample can be summarised as upstream, downstream and point of discharge. The purpose of this approach is to determine actual or potential environmental effect, key factors in determining the seriousness of the discharge. Though visual observations are helpful, particularly of a visibly impacted environment, they are not sufficient to prove environmental effect to an exact standard.

Always consider whether there is more than one discharge occurring and sample accordingly.

If samples are taken, the exact location of sampling should be recorded. Take a photo of the sample(s) and a photo of the sample site. Collect sufficient samples to 'capture' what has happened. The circumstances of the incident will dictate the appropriate number, type and location of samples to be taken and analysed. If in doubt, take more rather than less and discuss the need for analysis with your supervisor.

If a sample is potentially to be used as evidence, and all CME related samples may be, it should be delivered for analysis as soon as possible. If it is delivered immediately, then ensure it is stored in a place where it cannot be tampered with. Consider whether the sample requires refrigeration.

Every endeavour must be made to avoid the suggestion that the samples may have unduly degraded or been contaminated or interfered with between collection and analysis.

Use laboratories with registered quality assurance procedures. Make sure the laboratory completes a chain of custody form to ensure the sample is not confused with another sample and is kept secure so there is no possibility of the sample being tampered with. Even when the sample is in the care of an external lab, it is for the regulator to be able to prove its security.

What may be seized as an exhibit

As already discussed, Section 332 of the RMA allows for specific samples to be taken. There are obvious limitations as to what can be seized pursuant to this section. Anything listed on a search warrant may be seized. You may seize items by one of three methods.

1. Samples pursuant to Section 332 of the RMA.
2. Anything listed on a search warrant.
3. The owner of the item may give informed consent to take that item. Like informed consent to search a property, this consent should be captured in writing with the implications clearly identified.

Practical points when an exhibit is located

These points are crucial, and mistakes made here can have a major impact down the line.

- Do not immediately move the exhibit you have found.
- Ensure its security. Can it be tampered with or lost to weather conditions?
- Where possible, photograph the evidence in situ.
- Record in your notebook relevant details. These may include:
  - time, date, place
  - full description of item
  - exact location found
  - a sketch plan to identify exact location or relationship to other relevant matters
  - circumstances of finding
  - conditions surrounding item.
- Label the exhibit.
- Arrange for the uplifting and transport of the exhibit.
- Preserve exhibits in separate containers to avoid contamination or confusion.
- Are any special arrangements needed to maintain the state of the exhibit?
- Document exhibit on a Property Record Sheet as soon as possible.
- Arrange secure storage or analysis as appropriate.

It is not anticipated that there will be numerous exhibits in an RMA situation, other than sampling. However, it is possible you will become involved in the execution of a search warrant. The types of places that could be searched in an RMA investigation may include company offices. Documents, computers, cell phones, cameras, plotters and other equipment could be sought and seized. Consideration needs to be given to management of exhibits in this type of situation.

Cloning of electronic information has become a useful investigation technique as it allows for the ready return of vital information and equipment to the subject of the search warrant. However, this is a very technical area and you should seek professional advice. Do not rely on the office computer nerd who feels he has watched sufficient episodes of CSI to competently clone a computer.

Presentation of exhibits at court

Careful consideration needs to be given to the most appropriate way to present an exhibit to the court at a defended hearing or trial. Consult with your lawyer or senior, court experienced, staff. Make it interesting. Colour, scale, clarity are all things that can enhance the presentation of exhibits and assist the court in determining their value.

Once the trial or defended hearing is concluded, and the appeal period passes, it is your responsibility to arrange for the uplifting of the exhibits from the court.

The custody chain should still be carefully recorded, the items checked off against the register and disposed of appropriately. Property taken from the defendant as an exhibit or otherwise needs to be returned, even seemingly insignificant material.

Summary

- **The chain of custody is vital to ensure the admissibility of an exhibit.**
- **The onus for establishing and proving that chain of custody sits with you, the regulator.**
- **The chain of evidence can be tracked and proven by use of specific forms.**
- **Enforcement officers handling exhibits have clear responsibilities to ensure their integrity.**
- **Any items seized must be taken in a lawful manner.**

Chapter

07

Ngā uiuinga me ngā tauākī

Interviews and statements

The Big Six

1. Knowing your offence or breach
2. Record keeping
3. **Scene attendance**
4. Lawfully entering private property
5. Exhibit handling
6. **Committing people to "paper"**

Introduction

A huge part of any CME role is being able to talk to people. But we also regularly need to speak to people in a more formal context, to capture 'their version of events'. This is interviewing. Having a conversation, but with a purpose.

Being able to interview people is a core function for any enforcement officer. There are two broad types of interview: speaking to witnesses, or people who can contribute some information to the matter under enquiry; and speaking to people who may have some culpability for RMA breaches.

The result of an interview will be a written statement or an audio or video recording. These different methods still result in obtaining a 'statement'. A statement can be defined as a formal account of facts.

For clarity, when we talk of 'taking a statement', we mean:

- a person is interviewed by a council staff member, generally an enforcement officer
- a record is made, either in writing or via an audio or video recording of that person's account of the facts relevant to the matter under enquiry.

Although there are some key differences between interviewing a witness and a potentially culpable party, the basic principle is the same – to establish the truth.

Aim

The aim of this chapter is to provide enforcement officers with the skills and knowledge to be able to correctly interview witnesses and potentially culpable parties.

Objectives of an interview

These should be our objectives, regardless of who we are interviewing:

- establishing the truth of exactly what happened, including all relevant surrounding circumstances
- obtaining evidence or information that confirms what has happened
- locating, identifying or recovering items linked to what happened
- linking the potentially culpable parties to the breach
- corroborating facts already established by other witnesses, the scene, sampling or other exhibits
- covering the ingredients of the offence.

Interviewing a potentially culpable party has some extra objectives:

- establishing their mental intent (mens rea) – what did they intend to do?
- offering an opportunity for them to explain what happened – their version of events
- considering any defences that person may rely upon.

It is very unlikely that one single person will have the knowledge to give information about all the objectives, but it is important for the interviewer to establish how much the person being interviewed does know.

It is also important to remember that when we talk to people while initially attending an incident or inspection, and we record what they say in our notebooks, we are still technically conducting an interview.

Regardless of where or how the interview takes place, you are still trying to achieve all the objectives of an interview.

Witness statements

Why take a statement from a witness?

Statements made by witnesses in an RMA context are completely voluntary. But in many cases, we are heavily reliant on witnesses to establish what has happened. During an enquiry that may result in some form of enforcement action, all persons spoken to should have their statements recorded in any of the formats previously mentioned, no matter how minor their contribution to the enquiry may seem. We should strive to obtain a statement as soon as possible, while details are still fresh in a person's memory.

We commit witnesses to a statement for the following reasons.

- A witness is far more likely to be truthful if they know their words are being formally captured.
- More weight can generally be put on a witness's account if they are prepared to commit it to a formal statement.
- A witness will be less likely to change their version of events at a later date.
- A witness may be permitted to later refresh their memory from a statement made by them.
- Your council is far less vulnerable to civil action if CME staff are seen to act in good faith on information that is committed to a statement rather than as an anecdote, hearsay or rumour.

Uses for a witness statement

Statements from witnesses can assist the investigating officer in determining the extent of evidence available and to suggest further courses of action, particularly to:

- link an offender with the offence
- establish ingredients of the offence under enquiry or
- clear a suspected person of an offence (for example, by establishing statutory defences).

While a correctly obtained statement from a potentially culpable party is admissible in court as part of the prosecution evidence, a witness statement would not normally be admissible. A witness statement is instead used as the basis for the oral evidence that the witness will give in court, if required.

Guidelines for preparing a witness statement

It can be helpful to the conversation, before recording anything, to run through the incident or matter being discussed to get a general picture of what the witness can tell you. You can make very brief key notes of things to refer to later.

Once you have obtained a broad understanding of what this person knows from this 'free recall' stage, further questions can probe the account in more detail. Not only are the questions you ask important, but so is the way you ask them.

- Avoid closed questions that require only a 'yes' or 'no' response or suggest the answer. It is better to use open questions, such as "tell me what happened next" or "what did the truck look like?"
- Use clear, easy to understand and jargon-free language, appropriate to the age or level of understanding of the person being interviewed. Avoid or clarify anything that might be ambiguous.
- Avoid asking multiple questions such as "what was the person wearing and where did he go?".
- Avoid interrupting responses as this may stop the flow of information but deal tactfully with irrelevant responses.
- Be thorough. Pay attention to detail and take the time to review what you have obtained so far and check it against your other notes. Always remember: who, what, where, when, how and why?
- If not audio or video recorded, a statement can be typed or handwritten, but whatever the medium used, it must be neat and legible.
- All corrections or additions made during the taking of the statement, or upon checking by the interviewee, must be initialled by them beside the correction.
- The person making, and the person taking, the statement must both sign each page of the written statement.
- Include the time, day and date of the incident concerned.
- Give the sequence of events in chronological order.
- The statement must be recorded in first-person speech and written in narrative form but the enforcement officer physically records the statement.
- As previously mentioned, it is unlikely one witness can give you first-hand information on all aspects of the matter under investigation. It is likely you will need to take a statement from more than one witness to get the full picture.
- New interviewers may feel reluctant to include certain information in a witness statement as they may be concerned it is hearsay, opinion or the like and is 'not allowed'. Those are rules relating to the admissibility of evidence produced in court and do not impact on taking statements from witnesses.
- Hearsay, opinion, even rumour and speculation are all relevant at this stage of the enquiry and should be included in a witness statement. This information may lead to other avenues of enquiry that uncover valuable evidence.

There is no such thing as too much information in a witness statement.

The suggested format for taking a witness statement is included as an appendix to this manual. Enforcement officers should carry a stock of template forms in their field kit and get in the habit of taking witness statements whenever necessary. We advocate practise, practise, practise.

‘Offender’ interviews

You cannot go too far wrong with a witness interview. The worst thing that may happen is that you do not gather enough information, and you, or someone else, will have to revisit the witness.

There are far more legal considerations, and there is far more at stake, with an offender interview. The actual content of your interview may be placed before the court, and its admissibility will be judged.

Experience has shown that local government compliance officers who have not been exposed to formal and extensive training, despite best efforts, can find formal offender interviews very challenging. Subsequently these interviews can actually undermine an investigation.

We strongly advocate that specialist training is sought and that new or less experienced CME officers observe and work alongside experienced officers until fully competent and confident in this area.

It is strongly recommended that only trained and experienced staff carry out formal offender interviews for serious matters that are likely to end up in court.

Just like a witness, a suspect or accused person does not have to make any comment or statement. Though some statutes require that an offender answer certain information, under the RMA there are only very limited powers requiring questions to be answered. Any comments from a potentially liable party are completely voluntary.

Video or audio interviewing

Video or audio interviewing are excellent modes for capturing a statement from a potentially culpable party. Certainly, for serious matters, the first offer of mode of interview should be video and councils need to have appropriate equipment to offer this.

Video or audio interviews can:

- greatly reduce time spent during the actual interview
- capture the demeanour, tone and behaviour of both parties, not just their words
- promote more effective rights, to not only be fair but to be seen and heard to be fair
- provide a means of resolving disputes about the substance of the interview
- improve the quality of the evidence presented to the courts, if required.

The courts have held that, in terms of admissibility, recorded interviews are subject to the same rules as other forms of statement. Provided the appropriate cautions have been administered, i.e. that any admissions or confessions are voluntary and that the way in which the interview has been carried out is fair to the person being interviewed, then the recorded interview will be admissible.

The procedures for completing complex offender interviews should be the subject of further specialist training. This chapter will only allude to the basics of offender interviews.

Other relevant legislation

A competent interviewer must have a sound knowledge of the range of legislation and case law that will impact on the admissibility of any statement taken from an offender or suspect. The underlying principle in legislation and practice is fairness to the suspect. Much of the relevant law is contained within the Evidence Act and the New Zealand Bill of Rights.

Evidence Act 2006

The Evidence Act 2006 brings together common law and various statutes relating to evidence into one comprehensive Act. While it does not substantially change previous practices in relation to evidence, it brings greater clarity to the way in which information is offered in court as evidence.

The purpose of the Act is to secure the just determination of proceedings by:

- providing for facts to be established by the application of logical rules
- providing rules of evidence that recognise the rights affirmed by the New Zealand Bill of Rights Act 1990
- promoting fairness to parties and witnesses
- protecting rights of confidentiality and other important public interests
- avoiding unjustifiable expense and delay
- enhancing access to the law of evidence.

The fundamental principle of the Act is that all relevant evidence is admissible unless there is a good reason to exclude it. This was supposed to lead to a reduction in the delays in proceedings caused by legal argument over whether certain documents or statements should be admitted.

Though we advocate for in-depth specialist training in this area, here are some key points from the Act to be aware of.

- The fundamental principle of the Act is that all relevant evidence is admissible in a proceeding except evidence that is either inadmissible or excluded under the Act or any other Act (Section 7).
- The judge must exclude evidence if its probative value is outweighed by the risk of unfair prejudicial effect or if it needlessly prolongs the proceedings (Section 8).
- A judge may agree to admit otherwise inadmissible evidence with the agreement of the parties. Either party to criminal proceedings may admit facts and therefore dispense with the need to prove them (Section 9).
- An interview that is unreliable will be excluded (Section 28). When the reliability of a statement is questioned, the judge must exclude a statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability. Circumstances that might impact on reliability include:
  - the physical, mental or psychological condition of the offender
  - the nature of any questions put to the offender and the manner and circumstances
  - the nature of any threat, promise or representation.
- I would hope that this would never feature in local government circumstances, however, statements obtained through 'oppression', that is violent, inhuman or degrading conduct or threat of such conduct, are excluded (Section 29). This exclusion applies regardless of whether or not the statement is true. Oppression is defined in the section as meaning:
  - oppressive, violent, inhuman or degrading conduct towards or treatment of the defendant or another person, or
  - a threat of conduct of treatment of that kind.
- Important to note is that oppression, whether or not it existed, is considered from the point of view of the person affected. What the subject perceived in the circumstances is more important than what the officer intended.
- Section 30 also applies to statements that are improperly obtained. This could be as a result of a breach of a right, such as the Bill of Rights, or possibly through not being fully and fairly informed of the subject matter of the interview or the fairness of the questions.

The 2006 Evidence Act also introduced comprehensive obligations on your prosecutor when representing your council in court, further supporting the need for councils to seek guidance from experienced criminal prosecutors.

New Zealand Bill of Rights Act 1990

This Act is a statement of the fundamental rights of all people in New Zealand. Its purpose is to "affirm, protect and promote human rights and fundamental freedoms in New Zealand".

The Act is commonly known as the Bill of Rights (often abbreviated to NZBOR). The 29 sections in the Act relate to the following freedoms and rights.

- Freedom of thought, conscience and religion.
- Right to life (subject to certain qualifications).
- Right to vote if 18 years of age or over.
- Right not to be subjected to torture.
- Freedom from discrimination.
- Right to justice and access to a fair justice system.
- Right to live according to minority cultural practices.
- Right to protection from unreasonable or arbitrary search or detention.

How is this law relevant to us?

The Bill of Rights Act applies to any power, duty or act of any member of the Government, the judiciary or a public body that may affect an individual's basic freedoms. It also applies to any act by an individual performed pursuant to any law.

The Act, therefore, has application to local government enforcement officers and to any person investigating incidents which may lead to court action. Evidence obtained in breach of the Bill of Rights is, on the face of it, inadmissible.

There are three sections of the Bill of Rights Act that are most relevant for local government enforcement officers.

- Section 21: Everyone has the right to be secure against unreasonable search and seizure, whether of the person, property or correspondence or otherwise.
- Section 22: Everyone has the right not to be arbitrarily (randomly or without reason) arrested or detained.
- Section 23: People arrested or detained under any enactment have rights – including the right to be informed of reason for arrest or detention and right to consult and instruct a lawyer without delay – and must be informed of those rights.

Obviously, as local government enforcement officers we do not have any powers in respect of arrest or detention. However, the public that we interact with do not necessarily know that. We certainly have powers in respect of search and seizure and obviously can file criminal charges against people and companies.

We need to take extra precaution when the rights of others need to be safeguarded and be seen to be safeguarded.

The caution

If there is a single issue that raises contention in local government CME work, it is the use of what is referred to as 'the caution'. Essentially the caution is explaining certain rights to a potentially culpable party before conducting a formal interview, so that they are fully aware of the implications of making a statement.

A caution is only relevant when a prosecution is a real and likely outcome of a council's investigation. Bearing in mind the penalties associated with RMA offending, it is entirely appropriate to administer a caution, and it is best practice to do so. The caution is simply not required for lesser matters and is unhelpful to be used in those situations.

Inexperienced council officers will be reluctant to advise a co-operative person of their rights. The formality and 'officialese' of advising a person of their rights, when the person is (in their eyes) volunteering an explanation and not detained, might mean the person will 'clam up' and refuse to talk.

The danger with this approach is that a person who gives 'voluntary' answers or statements and has not been informed of their rights can easily argue later that the statements should not be admissible due to breach of the Bill of Rights Act or Evidence Act.

If a co-operative person is informed of their rights in a nonthreatening way, the only reason their co-operation should stop is if they want to exercise those rights. That is the intention of the Bill of Rights Act.

As we have already recommended, offender interview for serious offending should only be done by well-trained and experienced staff. The caution should follow a script, not be ad-libbed or paraphrased, and its exact wording should be captured at the time it is given as part of the record of interview. These are the words that should be used:

> **The caution**
>
> **The purpose of this interview is to seek your explanation, or your version of events, in respect of** ***(the purpose of interview including the breaches under investigation, and the subject's potential role in those breaches)*****.**
>
> **Such matters may constitute an offence or offences under the Resource Management Act 1991.**
>
> **I advise you that you are not obliged to say anything and anything you do say may be used in evidence.**
>
> **I have asked you to take part in this interview, but I must stress that you are here of your own free will and you are not detained, nor have you been charged in respect of this matter.**
>
> **I also advise you that you have the right to consult and instruct a lawyer without delay and in private.**
>
> **Do you understand this advice?**

Rather than using words like "I'm going to caution you now", a better approach can be something less formal (and more easily understood) like: "Before I carry on here, to be fair to you I need to explain your rights."

It must be remembered that in an RMA investigation we do not have to have an admission from an offender before taking some form of enforcement action.

There must always be independent evidence, and it is extremely unlikely that an RMA prosecution would commence based on the admission of an offender only.

It is far safer practice to err on the side of caution and not be able to obtain a statement than try to get one 'in the back door', ignore someone's rights, and be criticised by the courts for poor practice.

Full guidelines for conducting an offender interview are included as an appendix to this manual.

Duty to facilitate lawyer access

In some situations, an interview will be completed at a prearranged time. It is advisable to make the subject aware that they may wish to consult with a lawyer when arrangements are being made. This is helpful as a lawyer can be present if required and the subject should appreciate the gravity of the situation.

In a field situation, an offender interview may happen at short notice. Where the advice about the right to consult and instruct a lawyer is given, and the person indicates that he or she wishes to exercise the right, the enforcement officer has a duty to facilitate this process.

The extent to which the enforcement officer should go will depend on the particular circumstances. Generally, in RMA situations, the subject will know of a lawyer they would prefer to contact. The subject should be given a reasonable time to make reasonable efforts to consult a lawyer. What is 'reasonable' will depend on the particular circumstances and whether there are any reasons of urgency.

Remember, an offender interview under RMA circumstances is always completely voluntary. Should the subject refuse an interview, or refuse until they are represented, or should they decide to walk out halfway through an interview, that is their right and cannot be legally challenged.

What is important is the subject has been given the opportunity to give an explanation and answer any allegations.

Off the record

There is generally no problem with having an 'off the record' discussion with an offender. This 'chat' may be initiated by the offender or the enforcement officer. It may happen before or after a formal interview. Such a discussion may reveal a great deal of information that could even possibly lead to other avenues of enquiry.

However, off the record does mean off the record. You cannot then turn around and try to introduce the content of that conversation in evidence. Again, this is an area best traversed by trained and experienced staff.

Summary

- **Interviewing is a vital skill for CME officers**
- **Witness interviews and offender interviews have differing requirements**
- **There are various laws that protect the rights of an offender that must be adhered to.**

Extra reading

Interviewing offenders on more complex matters is a specialised skill that develops over time with experience. The following points have been included as extra reading only and are not intended to replace specialised training or experience. However, if you are interested in developing these skills, then you may find this material useful.

The general principles of interviewing have been divided into eight groups:

- planning
- timing
- privacy
- building rapport
- controlling
- listening
- questioning
- fairness.

Circumstances will dictate to what extent the principles can be applied, but they should be considered for every interview.

Planning

Before you begin an interview, ensure you:

- know the circumstances of the incident
- know the ingredients of any possible offence
- try to interview a suspect or offender at a place of your choice, or neutral, rather than the suspect's choice
- find out as much as you can about a suspect before the interview
- prepare a list of points that need to be covered in the interview to meet the objectives in an interview plan
- although it is important to prepare the points you want to cover, always be prepared to ask alternative follow-up questions.

Timing

Interviews should be conducted as soon as possible after the incident, and at a mutually convenient time so you have plenty of time, with no need to rush. The longer the delay, the more likely that details will be forgotten, distorted or contaminated by other information.

Be patient. People may be reluctant to talk to you because they are scared, angry, upset or agitated. They may take time to get to the point. Be prepared to spend time with them to reassure and guide them without appearing annoyed or irritated.

Privacy

Regardless of where an interview is carried out, always try to make it as private as you can.

- Select a place where there will be no interruptions or distractions.
- Interview people on their own (unless they have legal representation). You must get only one version at a time, without interjection from others.
- If the interview is being carried out at the scene of an incident, move the person out of earshot of others.
- If you are using an office rather than an interview room, be sure to remove any sensitive information that the person being interviewed could read, or even take, if you had to leave the room.

Building rapport

How well the interview goes, and the quality of information you obtain, will often depend on the rapport you establish at the outset with the person to be interviewed.

- Introduce yourself and the subject of the interview.
- Put the person at ease by spending some time in general conversation. Avoid going straight to the subject of the interview.
- Assess the person and decide on the best manner to engage them.
- Be considerate. A cup of coffee or glass of water may make all the difference.
- Be courteous but maintain control of the interview.

Controlling

While it is important to make the person being interviewed feel comfortable talking to you, you must remember you are the one controlling the interview.

- Remember the objectives you are trying to achieve and the points you want to cover.
- Lead the person to the point. Some people may approach a subject in a roundabout way, but it is up to you to direct them to the matter at hand.

Listening

Witnesses and suspects can often mention matters that they don't realise are relevant. It is important to listen carefully.

- While listening to what is said, also watch body language and listen for verbal cues that may indicate whether the person is telling you the truth.
- Never assume to know what a person being interviewed is going to tell you. Keep an open mind.

Although an interview may be well planned and everything has been considered, the person being interviewed may remain silent when spoken to by an enforcement officer. Apart from a person not wishing to speak to or reply to the questioner, their silence may be due to:

- not having fully understood the question
- digesting your question and thinking through their answer
- nervousness and the need for more time to think.

Many interviewers have a tendency to hurry questions. If you ask another question and the silence is due to the other person not fully understanding the first question, you will only make them more confused.

Use silences to:

- take note of body language
- think up further questions
- make a mental check of what you already know. Remain calm and unruffled.

Closing an interview

The final 10 per cent of the interview can be the most important. In closing an interview, do not end abruptly once you have exhausted your line of questions. Make sure you consider each of the following points.

- If the interview was written down, either have the person read the interview record or read it back to them.
- If the interview was recorded on video, ask them if they want to view the recording.
- Ask the interviewee if there is anything further they wish to add.
- In the case of a suspect, ensure they have been asked for their explanation to any of the allegations against them.
- Both the interviewer and the interviewee are to sign each and every page of a written statement.
- Explain what is going to happen next.

Thank the interviewee.

Chapter

08

Te whakamana i ngā whakataunga

Enforcement decision making

Introduction

One of the roles of the local government enforcement officer is to detect and investigate breaches of environmental regulation. Once an investigation is complete, a decision must be made as to what action the council will take, if any.

Within most council structures, the enforcement officer will make a recommendation as to what that action should be, but in the interests of trying to achieve consistency, the actual decision should be made 'further up the food chain'. But not too far up!

There are a number of options as to what action can be taken by a council in response to breaches of the RMA or any of its derivative regulations and rules. These options are designed to have an impact and must be applied as appropriately and consistently as possible. Not an easy task with the enormous range of circumstances that can feature across different environmental breaches.

Depending on the severity of the offence, and individual council policy, this decision will usually be made at a management level. Please note, it is entirely inappropriate for elected officials to be involved in enforcement decision making, directly or indirectly. More detail on this later.

Management stuff

Enforcement decision making is an area that compliance managers must be fully competent and confident in. The enforcement decision maker is the CME quality control person for your council. I would suggest that a depth of knowledge and expertise in regard to this material is an absolute prerequisite for anyone in a CME management role.

Conversely, if any manager or executive does not have that knowledge and expertise, they should not be involved in enforcement decision making and defer to those who have the appropriate knowledge

Aim

This chapter aims to detail each of the enforcement options available to council staff and to provide guidance as to how and when each should be applied.

Enforcement options

We will study the various enforcement options in depth. The options are divided into two categories: punitive and directive. Both punitive and directive options should be considered in each instance of non-compliance. It is a common error for only one or the other to be considered. Punitive and directive actions have different purposes, so a thorough understanding of each option is crucial to be a competent regulator.

Punitive options

- Formal written warning
- Infringement notice
- Prosecution

Directive options

- Letter of direction
- Abatement notice
- Enforcement order

How to make a decision

The RMA is an incredibly 'blunt' piece of legislation. It is very easy to breach. Though the Act provides a number of enforcement options, there is no legislative guidance as to what tool to use on any particular occasion. What this means is that any single unauthorised discharge into the environment is technically illegal and could attract significant penalties. If the offence is truly minor, it would not be appropriate to use weightier enforcement tools, such as prosecution. Conversely, it would be wrong to pursue a serious breach with a 'wet bus ticket'.

Regardless of which option, or options, are pursued, it is vital that a robust, fair and consistent decision-making process is followed. Decisions must be made only on full facts, not assumptions or guesses.

The 10 Factors

Because the range of potential breaches is so vast, and the Act gives no guidance as to what enforcement tool should be used in any given situation, we should base our decision making on consistent factors that are relevant to determining the seriousness of the breach.

These factors have evolved over time from the court, which has analysed many RMA cases, as to what is relevant to consider. The criteria below should be considered in ***every*** case when considering enforcement action.

1. What were, or are, the actual and potential adverse effects on the environment, including the toxicity of any discharge?
2. What is the value or sensitivity of the receiving environment or area affected, including from a cultural perspective?
3. Was the breach a result of deliberate, negligent or careless action? Was it foreseeable?
4. What efforts have been made to remedy or mitigate the adverse effects, and how effective were they?
5. Was there any profit or benefit gained by the alleged offender(s), including avoidance of investment for infrastructure?
6. Is this a repeat non-compliance or has there been previous enforcement action taken against the alleged offender(s)?
7. Was there a failure to act on prior instructions, advice or notice?
8. Is there a degree of specific deterrence required in relation to the alleged offender(s)?
9. Is there a need for a wider general deterrence required in respect of this activity or industry?
10. How does the unlawful activity align with the purposes and principles of the RMA?

There is one further factor if the matter is being considered for prosecution: how does the intended prosecution align with the Solicitor-General's Prosecution Guidelines?

Obviously, not all of these factors will be applicable in each case. The lengths you would go to, to gather information in respect of each of these factors, will be proportionate to the scale of the breach.

Experienced officers will probably give consideration to many of these factors almost subconsciously. However, while experienced officers just 'know' when action needs to be taken, this knowledge still needs to be verbalised and committed to paper. This shows that appropriate consideration has been given to each point and the subsequent decision can be justified.

It is often appropriate to use a mixture of punitive and directive options. These options are not necessarily exclusive of each other and can effectively be used together. However, seek experienced advice before mixing punitive options against individuals involved in a single case. Incorrect application of 'lesser' options can unnecessarily confuse later court processes.

Reporting your findings

In almost all cases, an enforcement officer will be required to commit his or her findings to a report, upon which a decision can be made. The report should include:

- the particulars of the case
  - what happened, including when, where and how.
  - who was involved, and the connection between the alleged offender and the incident.
- any aggravating and/or mitigating circumstances, and
- any other relevant matters
- the officer's recommendation

The depth of information on this report would be relative to the seriousness or complexity of the incident.

An example of what a basic report might look like is added as an appendix to this manual.

Punitive – prosecution

The final chapter in this guidebook explores the prosecution process in more depth. But for now, it is important to understand when this action should be recommended.

The Solicitor-General

The Solicitor-General of New Zealand holds the responsibility to ensure agencies that prosecute behave with propriety, and those suspected or accused of offending against the laws of this land are treated properly and fairly.

The Solicitor-General has published guidelines[7] for making decisions to prosecute. Councils, like any other enforcement agency, must consider these guidelines through their decision-making process.

Two major 'tests' must be applied when making decisions to prosecute:

- the evidential sufficiency test
- the public interest test.

Under evidential sufficiency, two matters must be considered.

- Is there admissible and reliable evidence that an offence has been committed by an identifiable person?
- Is the evidence sufficiently strong enough to establish a prima facie case? That is – if evidence is accepted by a properly directed jury, it could find guilt proved beyond reasonable doubt.

Applying the evidential sufficiency and public interest tests should not sit with council staff. These are tests that should be applied by a suitably qualified and experienced prosecutor, ideally independent of council.

If prosecution is recommended as the appropriate outcome, we advocate that experienced council CME managers give the ***authority to prosecute*** but ***subject to an independent legal review***, i.e. scrutinised by someone suitably experienced and qualified to do so.

We also strongly advocate that the authority given by council is to the ***offending***.

Exactly who faces exactly what charges should only come after an independent legal review.

This approach provides three stages to prosecution decision making, which provides a real robustness to an important process.

1. The investigation officer's recommendation to prosecute.
2. The enforcement decision maker's authority to prosecute for the offending, subject to 3.
3. The independent legal review to determine evidential sufficiency and public interest, giving guidance as to exactly who faces what charges.

The Solicitor-General has given generic guidelines as to what factors should be considered before a prosecution is taken. Obviously not all the factors apply in RMA cases, but they will be considered by independent legal review.

The degree of relevance of the following factors will depend on the nature of the offence:

- seriousness or triviality of alleged offence
- strength of the available evidence
- mitigating or aggravating factors
- age and health of the accused
- age of the offence
- degree of culpability of the offender
- effect on the public opinion of the decision not to prosecute
- obscurity of the law
- whether prosecution might be counter-productive
- availability of alternatives to prosecution
- prevalence of the offence
- need for general or specific deterrence
- unduly harsh and oppressive prosecution consequences
- potential reparation/compensation advantages of prosecution
- complainant's attitude to the crime
- length and expense of a prosecution
- co-operation/remorse of the accused
- likely sentence.

7 The Solicitor General's Prosecution Guidelines as at 1 January 2025 https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/Solicitor-Generals-Prosecution-Guidelines-2025.pdf

What cannot be considered

Equally, there are factors that must not form part of council enforcement decision making.

It is absolutely vital that CME staff and managers are aware that enforcement decisions must not be influenced by:

- the colour, race, ethnic or national origins, sex, marital status or religious, ethical or political beliefs of the accused
- the council or prosecutor's personal views concerning the accused or the victim
- possible political advantage or disadvantage to the council
- the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

These factors should feature in every council's enforcement or compliance policy.

Statute of limitations

There is some confusion over how the statute of limitations impacts on RMA enforcement actions. It differs from action to action.

Prosecution – 12 months

Though somewhat clunky in its wording, section 338(4) of the RMA states "the limitation period in respect of an offence … ends on the date that is 12 months after the date on which the contravention giving rise to the charge first became known, or should have become known, to the local authority or consent authority".

Twelve months is the legal limit, not the target! All RMA investigations should be completed as soon as practicable and, for most effect, any charges should be filed in a timely manner.

The limitation is absolute. If you are out of time, you are out of time. Don't be in a position of wanting to prosecute but not being able to, due to tardiness. Nor should you charge if the limitations are arguable.

Infringement notices – no time limit

That's right, there is no statute of limitations (sort of) regarding issuing an infringement notice under the RMA. However, there is a statute of limitations[8] that applies if the fine is unpaid, and you want the court to collect the fine on your behalf.

Effectively, you would be required to issue the infringement within four months of the date of the actual breach (as opposed to when it was known of). This allows for two 28-day 'grace' periods for the fine to be paid before an unpaid infringement process can be lodged in court, allowing the court to recover the fine.

Remember, legally, you can issue an infringement notice any time. If it is paid, it is paid. If it is not paid, and you are out of time, the court simply cannot collect the unpaid fine on your behalf.

No limits

Quite simply, there is no legal limitation as to when you can pursue these enforcement options:

- formal warnings
- abatement notices
- enforcement orders.

Of course, as a matter of best practice, all responses to non-compliance should be completed in a timely manner for best effect.

8 Summary Proceedings Amendment Act 2011

Statutory defences

As previously stated, the RMA is easy to breach. The strict and vicarious liability provisions intend this to protect the environment. However, there can be genuine 'accidents', and employers can also do much to reduce, or even potentially sever, their liability. The legislation recognises this through the creation of statutory defences.

It is important to give thorough consideration to any statutory defence that may exist. Though the sections below suggest it is for the employer to prove their defence, we strongly advocate that this is proactively investigated by the regulator to see if a defence may be available. It is our strong view that investigating the potential for a statutory defence is as important as investigating the offence itself. The relevant RMA sections are summarised below.

Section 340(2)

Section 340 provides that an employer/boss/owner is liable for the acts of their employees and agents, including any contractor. In summary, a defence is available under s340(2) if the employer can prove that they:

- did not know and could not reasonably be expected to have known, and in the case of a company, the directors and management did not know nor could reasonably not be expected to have known (about the offence), or
- took all reasonable steps to prevent the commission of the offence, and
- took all reasonable steps to remedy any effects of the offence.

Section 340(3)

To obtain a conviction against a director or a manager of a company convicted of an offence, s340(3) provides that the local authority must prove that:

- the act that constituted the offence took place with the director's or manager's authority, permission or consent, and
- the director or manager knew or could reasonably be expected to have known that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.

Section 341(2)

Section 341(2)(b) is probably the most common situation relating to defences for CME officers on the ground. How many times have you come across something discharging into the environment and the responsible party states "that only just happened, the machinery broke down".

They are implying it was accidental. Be warned, there is more to something being an accident than something breaking down. Legally, there are three 'legs' that need to be present for a defence to be considered.

This is the relevant section to consider, and investigate.

341 Strict liability and defences

(1) In any prosecution for an offence of contravening or permitting a contravention of any of sections 9, 11, 12, 13, 14, and 15, it is not necessary to prove that the defendant intended to commit the offence.

(2) Subject to subsection (3), it is a defence to prosecution of the kind referred to in subsection (1), if the defendant proves—

(a) that—

(i) the action or event to which the prosecution relates was necessary for the purposes of saving or protecting life or health, or preventing serious damage to property or avoiding an actual or likely adverse effect on the environment; and

(ii) the conduct of the defendant was reasonable in the circumstances; and

(iii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred; or

(b) that the action or event to which the prosecution relates was due to an **event beyond the control of the defendant,** including natural disaster, mechanical failure, or sabotage, and in each case—

(i) the action or event **could not reasonably have been foreseen** or been provided against by the defendant; and

(ii) the **effects of the action or event were adequately mitigated or remedied** by the defendant after it occurred .

Notice of defence under section 341

If a defendant intends to rely on one of the defences in s341(2), the defendant must give written notice to the prosecutor specifying the facts that support the defence within seven days of service of summons. If the defendant fails to give notice within a seven-day period, leave of the court must be sought for extension of time. In reality, extensions of several months are readily granted.

Like with this stool, all three legs need to be present for a defence case to stand up.

Punitive – infringement notices

An infringement notice can be a helpful punitive response to a relatively minor matter.

If the decision has been made to serve an infringement notice, it is a requirement for the enforcement officer to draft a notice.

As with any allegation being considered, you must attempt to seek an explanation from the subject prior to deciding to infringe.

Individual local government agencies must ensure that they are using the correct format. The format for the notice is prescribed in law.[9] Using the incorrect format may render the notice invalid.

Councils should also give consideration to establishing a system of 'tracking' infringement notices. The kind of information that is required includes:

- the day on which the notice is to be served
- whether payment has been received
- if the fine is not paid in 28 days, a reminder notice should be sent
- if unpaid after a further 28 days, a decision will be made on whether to place the non-payment of infringement fees before the court.

Points for completion of an infringement notice.

1. A summary of rights must accompany the notice. This also is prescribed in law and cannot be amended or abbreviated.
2. Likewise, the amount of the infringement is prescribed by law and is laid out in the schedule included in this chapter.
3. Identify and name the offender correctly.
    a. In the case of a company, a company's office search should be completed, and the full and correct company name used.
    b. For an individual, their full name should be used. This is information that should have been gathered during the enquiry.
    c. Consideration should be given to issuing notices to each party identified as having liability. Each party needs to be separately considered as to the appropriateness of this enforcement action.
4. Ensure the correct address for service is included.

Infringement notice wording

Just as when you charge someone or formally warn them, if you infringe them, you are making an allegation that they have broken the law. It is a requirement to 'fairly inform' a subject of what it is they are being accused of. In an infringement notice, this occurs under the heading 'Nature of infringement'. Here is an example of what an allegation might look like.

You permitted the discharge of a contaminant, namely farm animal effluent, onto land in circumstances which may have resulted in that contaminant entering water, namely an unnamed tributary of the Paeroa Stream, when the discharge was not expressly allowed by a national environmental standard, or other regulations, a rule in a Regional Plan, or a resource consent.

Contravening or permitting?

You have the option (section 338) of a straight 'contravention' or 'permitting a contravention'. Use contravention where the party carried out the physical act. Use permitted a contravention if the situation was more passive, such as by negligence or lack of maintenance, or if the party was only vicariously involved, for example a farm owner.

The final ingredient

The final ingredient in most RMA offences relates to whether the activity is 'expressly allowed by' or 'in contravention of'. Check out section 15 versus section 9, for example. It is vital to identify which one applies in every case when drafting an infringement notice (or charging document). Where it is a situation of 'in contravention of', then the wording of the notice or charge should reflect the content of the rule, condition, etc, being breached.

Multiple infringements

It may be that you have a situation of multiple infringement notices arising from a single inspection. If this is the case, then you may need to add additional information to each infringement notice so the subject knows specifically what each one is for. Using the effluent discharge example, you may need to determine that one was "from the irrigator" while another was "from the sump". However, if a site is attracting multiple infringements notices, then perhaps their collective offending is not 'minor' and you should be considering a different punitive option.

An example of an infringement notice is included as an appendix to this manual.

9 (Schedule 2 Resource Management (Infringement Offences) Regulations 1999)

Infringement offences and fees

Unfortunately, the impact of these infringement amounts has reduced over time. Despite efforts to bring them into the 21st century, these sit at these relatively low amounts, for now.

Section number	General description	Amount $
338(1)(a)	Contravention of section 9 (restrictions on use of land)	300
338(1)(a)	Contravention of section 12 (restrictions on use of coastal marine area)	500
338(1)(a)	Contravention of section 13 (restriction on certain uses of beds of lakes and rivers)	500
338(1)(a)	Contravention of section 14 (restrictions relating to water)	500
338(1)(a)	Contravention of section 15(1)(a) and (b) (discharge of contaminants or water into water or onto or into land where contaminant is likely to enter water)	750
338(1)(a)	Contravention of section 15(1)(c) and (d) (discharge of contaminants into environment from industrial or trade premises)	1,000
338(1)(a)	Contravention of section 15(2) (discharge of contaminant into air or onto or into land)	300
338(1)(c)	Contravention of an abatement notice (other than a notice under section 322(1)(c))	750
338(1)(d)	Contravention of a water shortage direction under section 329	500
338(2)(a)	Contravention of section 22 (failure to provide certain information to an enforcement officer)	300
338(2)(c)	Contravention of an excessive noise direction under section 327	500
338(2)(d)	Contravention of an abatement notice for unreasonable noise under section 322(1)(c)	750

Punitive – formal warnings

Formal warnings are very helpful tools. They can be used in different ways when non-compliance or offending is detected. It may be appropriate to issue a formal warning when:

- for some reason, other enforcement action cannot be pursued, such as the statute of limitations has expired
- the matter does not warrant more 'weighty' actions.
- numerous offences are detected, a select few are proceeded against by way of infringement notice or prosecution, and the remaining ones are 'captured' by formal warning.

It is important to formally document the fact a company or person has a poor environmental history, particularly if they are likely to continue being non-compliant or offending. We can then allude to the formal warning if future offending occurs. This is particularly helpful when a company later wrongly tries to claim they have an excellent environmental history to attempt to mitigate any enforcement action or penalty they are facing.

It is very frustrating to know a site has an ongoing history of non-compliance, but because it has not been documented correctly, the court must assume they are innocent of any previous wrongdoing. Though formal warnings do not appear as an enforcement option within the actual RMA itself, their use and context are formally recognised by the courts through case law. (WRC v Wallace Corp, HC AK CRI 2006-4004-26)

Formal warnings must contain certain information or they will not count as part of a formal history of non-compliance.

They must state:

- it is believed an offence has been committed by this party
- what the offence is
- what the potential penalty is
- that the warning will be reconsidered if further offending occurs.

As with abatement notices, we advocate that copies of formal warnings should also be forwarded to company directors. This is to promote voluntary, and internally motivated, compliance.

Though formal warnings can be seen as a 'lesser' punishment, there has been much attention and focus on formal warnings through various case law and they have even triggered inclusion in the aforementioned guidelines from the Solicitor-General. These should be respected.

As with any allegation, and as part of a natural justice, an opportunity for explanation should always be given to someone that a regulator is considering making a formal allegation against.

Wording of a formal warning is important, it should be clear that the allegation is in the council's opinion, not that we have played the role of judge, jury and executioner.

You should include an appeal clause in the formal warning notice. Practically, this means a recipient can seek to have this warning notice rescinded or reviewed.

Best practice and quality of decision making should be no less in a matter that results in a warning being issued.

An example of a formal warning and cover letter are appendices to this manual.

Enforcement action and the media

Management stuff

Utilising media to drive CME messaging is a key part of regulatory work. Do it right and it will help drive and magnify deterrence messaging while giving your community confidence that the environmental regulator is actively safeguarding the environment from unsustainable practices.

But dealing with the media can be fraught. The changing shape of media, particularly social media, can make this even more challenging.

Defendants prosecuted under the RMA generally have a right to elect trial by jury. If a council prosecutes and there is an inappropriate or premature media report about the prosecution, this could potentially influence jurors and effectively prejudice the right of the defendant to a fair trial.

If the prosecution is successful, it will get its '15 minutes of fame'. The media will report it as soon as they are able and have no care as to whether a matter is sub judice (before the courts). Be very careful to control when the 15 minutes happens!

As a rule, we would advise against publicising lesser actions taken where the enforcement action has not happened in the public domain. There may be exceptions to this where it is in the public interest to do so.

Only senior council staff with experience in this area, and who have the appropriate authority, should issue press releases about prosecutions or make any commentary to the media on enforcement issues.

Directive – letter of direction

Compliance staff at Waikato Regional Council have developed a directive tool termed a 'letter of direction'. It is as it sounds, a letter from a council officer requesting that a certain activity cease or that some action be taken. Letters are short, sharp and easily produced with little investment of officer time. It is recognised that they can be an effective tool for dealing with lower-level non-compliance and where the subject is co-operative.

It must be remembered that such a letter is not a formal tool under the RMA and carries no statutory power. If the direction is not complied with it is not an offence, and the issue of the letter would not be recognised by the court as contributing to a history of non-compliance.

I advise caution. A letter of direction should only be used in truly minor matters, where an excellent attitude has been demonstrated by the subject and there is a strong likelihood of positive behavioural change.

The real risk posed by these letters is the potential for overuse, or that they get used in lieu of other more appropriate actions because they are easier, quicker or are likely to trigger less resistance.

Directive – abatement notices

Abatement notices are an incredibly helpful tool provided by the RMA. The courts have expressed strong support for the use of abatement notices by local government agencies responsible for enforcement of the RMA. They can be a very effective and efficient way of bringing about behaviour change. We advocate strongly that all CME staff are completely familiar with how abatement notices can and should be applied and that they are a regular, initial 'go to' when dealing with breaches of the RMA.

Abatement notices provide a formal directive to the subject without initial intervention of the court and, helpfully, provide another 'layer' of offending if not complied with. On the face of it, an abatement notice should be a straightforward document. However, case law and practice show that there are a number of 'fish hooks' to be aware of.

An abatement notice is a formal, written directive from council staff instructing an individual or company to:

- cease an activity, or prohibit them from commencing an activity, or
- require them to do something.

Generally, they are used when non-compliance has been detected and a clear message needs to be sent to the offender that they need to stop what they are doing and/or take definitive steps to "avoid, remedy or mitigate any actual or likely adverse effect on the environment" (section 322 RMA).

It is good practice (when issuing an abatement notice to a company) to serve the original of the notice to the company's registered office and also to serve copies of that notice to each of the company directors, as well as any site liaison officer or site environment officer.

There are two main purposes for this strategy. Firstly, it can often bring attention and pressure from the directors on to site management to reach compliance. This is particularly effective when there is poor communication between the site and the directors, or if there is a situation of the site attempting to hide or play down any issues of non-compliance to their senior management.

Secondly, if there is future non-compliance, it can be clearly shown that the directors had been made aware of previous non-compliance issues. This would make it very difficult to plead ignorance or establish a defence under sections 340 and 341 of the RMA. Essentially, it is making them aware of their potential liability in their role as a company director.

It is an offence to breach an abatement notice (section 338 of the RMA). An added advantage of issuing an abatement notice is, should further non-compliance occur, enforcement action can be considered for not only the original offence (for example, discharge to air) but also breach of the subsequent abatement notice.

Even though abatement notices are not in themselves punitive, they can add weight to any subsequent enforcement action. Experience has shown the courts take a dim view of any defendant who has breached an abatement notice, as they are viewed as a very reasonable approach by councils to halt offending and send a clear message to the non-compliant.

An abatement notice should be a tool that is readily drafted and served by council enforcement officers. However, experience is showing that there can be a high degree of resistance to receiving abatement notices, particularly from corporate groups. It is possible that parties will appeal an abatement notice. It is important that the wording, content and format of an abatement notice are legally correct and sufficiently robust to withstand any subsequent appeal.

The law

As abatement notices should be a readily used tool, we urge all CME officers and their managers to be completely familiar with the relevant sections of the Act.

322 Scope of abatement notice

(1) An abatement notice may be served on any person by an enforcement officer:

(a) requiring that person to cease, or prohibiting that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer, —

(i) contravenes or is likely to contravene this Act, any regulations, a rule in a plan, or a resource consent; or

(ii) is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:

(b) requiring that person to do something that, in the opinion of the enforcement officer, is necessary to ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan or a proposed plan, or a resource consent, and also necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment:

(i) caused by or on behalf of the person; or

(ii) relating to any land of which the person is the owner or occupier:

(c) requiring that person, being —

(i) an occupier of any land; or

(ii) a person carrying out any activity in, on, under, or over a water body or the water [within] the coastal marine area: who is contravening section 16 (which relates to unreasonable noise) to adopt the best practicable option of ensuring that the emission of noise from that land or water does not exceed a reasonable level.

(2) where any person is under a duty not to contravene a rule in a proposed plan under sections 9, 12(3), 14(2), or 15(2), an abatement notice may be issued to require a person —

(a) to cease, or prohibit that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer, contravenes or is likely to contravene a rule in a proposed plan; or

(b) to do something that, in the opinion of the enforcement officer, is necessary in order to ensure compliance by or on behalf of that person with a rule in a proposed plan.

(3) an abatement notice may be made subject to such conditions as the enforcement officer serving it thinks fit.

(4) an abatement notice shall not be served unless the enforcement officer has reasonable grounds for believing that any of the circumstances in subsection (1) or subsection (2) exist.

323 Compliance with abatement notice

(1) Subject to the rights of appeal in section 325, a person on whom an abatement notice is served shall:

(a) comply with the notice within the period specified in the notice; and

(b) unless the notice directs otherwise, pay all the costs and expenses of complying with the notice.

(2) If a person against whom an abatement notice is made under section 322(1)(c) (which relates to the emission of noise), fails to comply with the notice, an enforcement officer may, without further notice, enter the place where the noise source is situated (with a constable if the place is a dwellinghouse), and-

(a) take all such reasonable steps as he or she considers necessary to cause the noise to be reduced to a reasonable level; and

(b) when accompanied by a constable, seize and impound the noise source.

324 Form and content of abatement notice

Every abatement notice shall be in the prescribed form and shall state—

(a) the name of the person to whom it is addressed; and

(b) the reasons for the notice; and

(c) the action required to be taken or ceased or not undertaken; and

(d) the period within which the action must be taken or cease, having regard to the circumstances giving rise to the abatement notice, being a reasonable period to take the action required or cease the action; but must not be less than 7 days after the date on which the notice is served if the abatement notice is within the scope of section 322(1)(a) (ii) and the person against whom the notice is served is complying with this Act, any regulation, a rule in a plan, or a resource consent; and

(e) the consequences of not complying with the notice or lodging a notice of appeal; and

(f) the rights of appeal under section 325; and

(g) in the case of a notice under section 322(1)(c), the rights of the local authority under section 323(2) on failure of the recipient to comply with the notice within the time specified in the notice; and

(h) the name and address of the local authority or consent authority whose enforcement officer issued the notice or the address of the EPA, if the notice is issued by an enforcement officer appointed by the EPA.

An example of an abatement notice is an appendix to this guidebook.

Practical points for use of abatement notices

When should we issue a notice?

Practically, when is it appropriate to issue an abatement notice? We suggest that the rule of thumb for issuing an abatement notice to cease or prohibit activity has two tests.

1. Is the matter more than minor or trivial?
2. Is there a likelihood it will reoccur?

If the answer is yes to both, then you are probably appropriately placed to issue a notice.

What should it look like?

Use the correct format. The format for an abatement notice is contained in law. It can be found at Resource Management (Forms, Fees, and Procedure) Regulations 2003, Schedule 1 Form 48. Check you have not been a victim of copy and paste and that your notices follow this format.

Who do we issue it to?

The person or company to whom the abatement notice relates must be named correctly and in full. The law requires that the person's address and date of birth should also be included. In the case of a company, check the companies register for the correct name, the address of the registered office and also a list of the directors to whom a copy will be sent.

What type of notice do I use?

As previously mentioned, there are essentially two types of abatement notice. Circumstances will dictate which to use. Choosing what type of notice will also determine what subsection of section 322 of the RMA you utilise and quote in the notice.

By far, the most common notice is a direction to cease and/or prohibit from commencing an unlawful act. This direction is formally telling them to either stop the activity or, alternatively, make it legal (section 322 (1)(a)).

But please note, you cannot abate someone to apply for a resource consent *(Auckland City Council v Oman Holdings Ltd*).

If something actually needs to be done by them, your notice should be to take action (section 322 (1)(b)).

You should not tell the subject how to become compliant but merely outline the standard which is to be met. This may be done by referring them to industry guidelines or their original consent application. Telling them how to do something can open the council up to costs if that method is proven inappropriate or ineffective.

It is important for an abatement notice to fully and fairly inform the recipient not only of the action they are required to take, or refrain from taking, but also of the grounds upon which the notice is issued.

If using subsection 322(1)(b), requiring someone to take action, you must include the reasons why it is also necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment.

If you have a situation of wanting to give direction to do more than one thing (for example, cease and also take action), then separate abatement notices are advisable to avoid confusion over the content of the notice and what subsection is being invoked and, indeed, being complied with.

To where does it apply?

The location referred to in the notice must be accurate and not able to be confused with another address. If unclear, consider using a legal description or map coordinates, or even a map itself if that is the only way to clearly identify the location.

We have had some success with issuing region wide abatement notices where we know the breaches are occurring in different locations, for example, by a travelling contractor.

When must they comply?

The time frame given on an abatement notice should not be interpreted as giving a tacit approval to continue offending for a period of time.

In the case of ceasing the commission of an offence, the time frame should be immediately upon receipt of the abatement notice, as long as it is reasonable to do so immediately.

However, in the case of taking action, it must also provide a reasonable time in which to comply. Circumstances will dictate how long should reasonably be given to take a required action.

A 'stand-alone' document

If an abatement notice is challenged through appeal or at a subsequent defended hearing, then it will be considered as a standalone document. It is not sufficient to simply refer to a section of the Act or segments of a regional plan or conditions of a resource consent in an abatement notice. The actual content of those must be included in the reasons for the abatement notice.

The actual wording from the Act, the actual wording from the regional plan and the actual wording from the resource consent needs to be included in the reasons for the abatement notice. To ensure the reasons for the notice remain readable, you may consider attaching lengthy, cumbersome, or technical content as an appendix to the notice.

Directive – enforcement orders

Like any directive option, enforcement orders are only a relevant consideration if there is still something to fix or change.

In the writer's experience, applying for enforcement orders directly through the Environment Court can be a lengthy and expensive exercise and sometimes without a helpful or meaningful outcome. If they are required, then they may be most effectively and efficiently sought when they are included as part of a prosecution.

By seeking an enforcement order at the time of sentencing, an order may be able to be obtained relatively easily and without the need for a separate process and subsequent costs.

Seeking an enforcement order on its own, without an accompanying prosecution, may be appropriate if the matter was truly extreme and the time associated with commencing and concluding a prosecution was seen as an undue delay.

It is not intended to cover the application process for enforcement orders in depth in this training. Suffice to say, expert legal advice should be sought if an enforcement order is being considered.

Helpfully, section 338(1)(b) of the RMA provides that it is an offence to contravene, or permit the contravention of, an enforcement order.

The court takes an extremely dim view of breaches of an enforcement order; after all, such an order is a formal direction from the court. Breaches of enforcement orders pose a real risk of imprisonment for those foolish enough to breach them.

Summary

There are a number of enforcement options available to regional council staff. These options include:

Punitive

- **formal warning**
- **infringement notice**
- **prosecution**

Directive

- **letter of direction**
- **abatement notice**
- **enforcement order**

These options must be applied consistently and with consideration to established guidelines.

Chapter

09

Te tukanga kōti

The court process

Introduction

Whenever a 'person' is charged with a Resource Management Act 1991 (RMA) offence, the prosecutor (council) is alleging that an offence has occurred, and the defendant has committed it. An example of a charging document is included as an appendix to this guidebook

If the defendant acknowledges and accepts the allegation, they can plead guilty. The summary of facts is then given to the court, matters relevant to sentencing are heard, and then a penalty is decided and the matter resolved.

If the offender denies the allegation, a defended hearing is arranged. This hearing receives evidence from the parties involved. The court weighs the evidence and decides whether the defendant is guilty or not guilty. Note: The process is the same if an infringement notice is defended.

This process is administered within the criminal court system of New Zealand.

On the face of it, this process may appear to be straightforward. However, there are many, many factors that contribute to, and impact on, this process and its eventual outcome. Local government agencies are encouraged to engage experienced criminal prosecutors to represent them through RMA prosecutions. Experience has shown that, generally, a good prosecutor can turn their hand to RMA cases with better results than a civil or RMA lawyer trying to dabble in criminal law.

An example of a charging document is included as an appendix to this guidebook.

Aim

This chapter aims to make local government enforcement officers familiar with New Zealand's criminal court system and the prosecution process as it applies to RMA offences. This chapter is really aimed at being a reference for when CME staff become directly involved in an RMA prosecution.

Courts

District Courts have been established in most major towns and cities to deal with matters that are not considered serious enough to warrant an appearance in a superior court, such as the High Court. All RMA prosecutions are heard initially in the District Court. Appeals from this court are heard initially in the High Court.

The doctrine of precedent

This doctrine requires lower courts to observe the decision of higher courts when adjudicating. In broad terms, it means that, in New Zealand, the District Court is bound by decisions of the High Court, Court of Appeal and the Supreme Court.

Lower courts are bound by decisions reached in higher courts. Courts of equal status in the hierarchical structure are not bound to follow other decisions, but if they deem it prudent, they may do so.

Court officials

Judge

District Court judges are full time judicial officers appointed to preside over District Court hearings. In the case of RMA prosecutions, the District Court judge must also hold office as an Environment Judge (section 309(3)of the RMA).

There are also District Court judges especially appointed by the Governor-General to preside over trials in the district jury trials court, as well as District Court cases. Such a triple qualified judge would be required if a defendant elected trial by jury for an RMA offence.

You may hear reference to community magistrates. That also is a judicial officer but presiding over minor District Court matters. They will not preside over RMA matters.

- The judge has the overall responsibility of the court.
- Makes decisions according to the facts they receive from witnesses.
- Decides on sentence, usually after taking into account various submissions, both written and oral, from both sides.
- In jury trials, the judge directs the jury in matters of law.

Jury

- Twelve members of the community selected from the electoral rolls.
- Make a decision as to the defendant's guilt from facts given by the witnesses.

Registrar

- Reads out the charge to the court and the defendant.
- Assists the judge in administrative matters.
- Labels, numbers and records exhibits received by the court.
- The registrar may swear or affirm the witness.

Stenographer

- Records the questions asked, the answers from witnesses and the judge's decisions.

Prosecutor

- Presents the prosecution case to the court.
- Cross-examines any witnesses produced by defence.

Defence counsel

- Represents the defendant and presents the defence case to the court.
- Cross-examines witnesses produced by the prosecution.

Witness

- Relates the facts they know are relevant to the facts in issue to the court.

Defendant

- The subject of the proceedings in the District Court.

Court attendants

- Call the defendants to the stand.
- Call witnesses.
- Assist the judge and registrar.

Terms used in court

Election

- Most RMA offences are ones that can be heard either by a judge in the District Court or by a jury. The defendant is asked to elect the system they want if a plea of not guilty is entered.

Conviction

- The defendant is found guilty and a conviction is entered in the criminal justice system in their name.

Remand

- The defendant is required to appear on a future date. They can be remanded on bail, that is, given conditions that must be complied with. They can be remanded in custody. The third option is remanded at large, which means no conditions are attached for the remand period. This is the most common approach in RMA cases. However, consideration can always be given to seeking appropriate bail conditions. For example, forfeiture of passport may be appropriate if you consider the defendant a flight risk.

Adjournment

- This is similar to a remand. It means the matter before the court is set for another date. Remand relates to the defendant, while adjournment relates to the case.

Recess

- A break in the court proceedings, for example, a lunch break.

Protocol and etiquette

Terms of address

All judges, whatever the court, are addressed as 'Your Honour'. It is not necessary to use the term every time the judge is addressed, and 'Sir' or 'Ma'am' are used as alternatives.

The registrar of the court is referred to as 'The Registrar' or 'Mr or Madam Registrar'.

Defence counsel are referred to by name, such as Miss Smith, or 'counsel for the defendant'. Unless you are a solicitor admitted to the bar, do not use the term 'my learned friend'.

Addressing the court

Whenever a prosecutor addresses the court, they must stand when doing so. If spoken to by the judge, always stand.

There should only be one person standing at a time. If the prosecutor is addressing the court, then the counsel for the defendant is seated, and vice versa. If, for example, the defence counsel stands and makes an objection, the prosecutor should sit.

Usually, the only time both counsel and prosecutor are standing is if the judge is speaking to both.

Bowing

Only persons who have been admitted to the bar should bow to the judge. All other persons in the court should merely stand up when directed, and wait until the judge sits down before being seated.

Local government and the judiciary

Local government staff are responsible for the detection of offences against the RMA and, if necessary, prosecution of offenders through the criminal court system.

Though enforcement officers contribute information to the sentencing process, they should not be overly concerned about the sentence handed down. The court is solely responsible for the sentencing of the defendant. It often seeks advice from outside sources, but in the end the court makes the final decision as to sentence.

This break in the chain is essential to ensure that natural justice prevails. Our duty is clearly to gather and present the evidence in an appropriate and correct manner. The courts have a duty to hear the evidence presented by both parties and decide guilt or innocence and penalty in a totally impartial manner.

There are appeal procedures available if the prosecuting agency considers the sentence is manifestly inadequate. Likewise, the defence has the same opportunity if they consider the sentence too harsh or unjust.

Penalties available

The penalties imposed by the court have four main purposes.

1. Rehabilitate or reform the offender.
2. Deter offenders and others who are tempted to commit the same offence.
3. Punish the offender.
4. Offer remedy or recompense to the victim.

These are the options available to the sentencing judge. How sentences are decided is discussed in depth later in this chapter.

Fine

Available in most cases as an alternative to, or in addition to, any other penalty. The defendant's financial situation and ability to pay the fine must be considered by the sentencing judge. By far, a fine is the most common outcome in RMA cases.

Probation

Can be imposed in any case where the offence carries a term of imprisonment. Conditions may be imposed, such as live and work where directed and keep finances under control. Probation has a minimum term of 12 months. It is intended to assist in rehabilitating the offender and reducing the chance of re-offending.

Restorative justice

This is an alternative step taken within traditional sentencing. If the defendant pleads guilty, they can apply for restorative justice (RJ). If the prosecutor supports the application, then the court will engage an independent third party to coordinate the RJ process. It will generally involve public apology by the defendant, consultation with a relevant sector of the community and participation by the defendant in a community-supported project in lieu of a fine.

The defendant will still likely receive a conviction, however, RJ enables an attempt to make good with the community. Under some circumstances, RJ can be relevant for regional councils when they are engaged in prosecutions with territorial local authorities.

On occasion, there has been insincere attempts by defendants to seek RJ. As the prosecutor, you need to be on guard for 'insincere' processes. There are examples where defendants have pursued RJ in attempt to avoid conviction or purely to defer financial costs to their insurer. These are clearly not genuine signs of remorse or wanting to make good!

Diversion

The police operate a scheme where first time offenders can escape conviction for a minor offence if they admit guilt and complete a police-managed, community-based task. Regional councils are not set up to manage diversion schemes as they were intended and should not do so. The writer's view is that diversion is not an appropriate outcome for an RMA prosecution.

Diversion is designed to deal with minor offending. If a particular RMA breach is, in fact, minor it should be dealt with by infringement or warning. However, if it is serious enough to warrant prosecution, then it is serious enough to progress to sentencing.

Community service

Previously known as periodic detention or PD, community service is available as an alternative to imprisonment. The practicable maximum period would be seven months. The offender must work all day every Saturday for the term imposed.

Prison

Prison is for serious offences where deterrent and punishment factors outweigh those of reform or rehabilitation. It is very rare in RMA cases.

Convict and discharge

A conviction is recorded but no penalty is imposed

Discharge under section 19 of the Criminal Justice Act

This is used when a minor offence has been proved. It has the effect of a dismissal, that is, no conviction recorded.

Suspended sentence

The offender must come up for sentence within a prescribed time (not exceeding 12 months) if they re-offend. It may be conditional, for example, the offender must pay a sum of money towards the costs of prosecution or undertake psychiatric treatment.

The actual prosecution process

The prosecution process itself can be lengthy and complex. Due to the introduction of the Criminal Procedure Act 2011, there are many paths a prosecution may follow. As council staff, we must work closely with our legal advisors to ensure we remain on the most appropriate path for the particular case at hand.

Disclosure of information

When a prosecution is initiated, the content of the file must be disclosed to the defendant. The process surrounding disclosure is codified within the Criminal Disclosure Act 2008 (CDA). There are very clear rules that must be followed by the prosecutor relating to disclosure. Legal advice from experienced criminal prosecutors should be sought by local government agencies in respect of their disclosure obligations and acceptable practices. In practice, your prosecuting lawyers may manage the disclosure process themselves.

Release of information by local government agencies is generally governed by the Local Government Official Information and Meetings Act 1987 (LGOIMA). There are boundaries between these two Acts, and it is important that you have clear policies established to manage obligations under both the CDA and LGOIMA.

Under CDA, some documents are exempt from disclosure, including correspondence between the council and its lawyer relating to the prosecution. There may be attempts by defence lawyers to obtain material from the investigation file while the investigation is still underway and prior to charging documents being filed. They have no entitlement to disclosure until such time as charges have been filed. Some defence lawyers take extreme issue with this.

However, once charging documents have been filed it is important to take a proactive approach and complete disclosure as soon as possible. Full and early disclosure enables the defence to review the evidence and make an informed decision on what plea should be entered. Under the Criminal Procedure Act, there are also very clear and strict obligations on disclosure.

Remember that disclosure is an ongoing obligation. If a plea of not guilty is entered and the file is then prepared for a defended hearing, then all new material such as briefs of evidence must also be disclosed. If new information comes to light that also must be disclosed.

Plea discussion

Yes, it happens. Essentially the term refers to the situation where the defence makes an approach to the prosecuting agency and wishes to discuss ‘options’ for how to proceed with the matter. This invariably occurs as a result of the defence lawyer reviewing the evidence, following disclosure, and realising there is no reasonable defence available.

Generally, a number of matters can be negotiated. These include the number of charges, who faces them, the content of the summary of facts and other sentencing issues.

Historically, plea discussion could only ever be initiated by the defence. Under the Criminal Procedure Act, there is now formal opportunities recognised in statute for these discussions to take place. It can be a very common-sense way of proceeding, avoiding the need for a costly defended hearing. A degree of recognition should be given to the defendant when they are keen to acknowledge their liability early in proceedings.

However, extreme caution needs to be taken in plea negotiation as councils can, and have, been criticised by the courts and the public for what could be perceived as inappropriate ‘bargaining’.

Plea discussion is a very complex area and should never be entered into without sound legal advice. It is absolutely vital that both the charges and the summary of facts are agreed upon before committing to a deal. Ensure the settled position is committed to paper by your prosecutor to avoid defence counsel from changing their position in court.

Preparation for a guilty plea

Summary of facts

When the file is submitted to the prosecutor for the first appearance of the defendant there is a requirement to have a summary of facts completed and on the file.

The summary of facts is exactly that. It is a document prepared by the officer in charge of the case outlining the circumstances of the offending and how the defendant is linked to the offences.

An example of a basic summary of facts is attached as an appendix to this manual.

There is a tendency to include either too much or too little detail in a summary of facts. Experience will dictate the appropriate balance. It should be approached as if the reader has no background knowledge of the incident whatsoever. Each offence must be included and linked to the defendant, including any explanation, or lack thereof, that the defendant has made.

Should a guilty plea be entered, the summary of facts will be read by the judge and will help form the basis of sentencing.

Victim impact statements

Victim impact statements (VIS) may be included where people have suffered as a result of the offending. In an RMA application this could be quite diverse – perhaps people who have suffered as a result of objectionable odour discharge through their residential homes or lost part of their land due to lack of sediment control on a neighbouring property.

There are legal requirements under the Victims' Rights Act 2002 that must be adhered to relating to the gathering, copying and use of VIS. A form has been prepared to assist with the gathering of VIS, which is attached as an appendix to this manual.

Sentencing

Sentencing occurs when there has been a conviction entered against a defendant as a result of a prosecution. It is the process whereby a court arrives at an appropriate punishment for offending. Sentencing is a balancing exercise in which a large range of factors are weighed.

In practice, in RMA cases, there can be much debate between the prosecution and the defence when it comes to sentence. Even for relatively straightforward cases there seems to be a need for lengthy written and oral submissions from both parties relating to sentencing factors.

Generally, defence lawyers will try and minimise any aggravating factors that will cast a negative light on their client while making much of any mitigating factors. This is an understandable approach. However, the prosecution must be vigilant in the examination of such submissions and be prepared to counter any submissions that are embellished to an excessive degree or are just outright deceptive. Remember, it is these documents that the court will consider when imposing sentence.

RMA sentencing submissions tend to follow similar formats, addressing similar points. These have evolved over time with certain cases clarifying the particular nuances of RMA sentencing. These cases are routinely referred to in sentencing submissions and provide helpful guidance, not only to the sentencing judge but also to council staff when considering the seriousness of offences they are investigating.

Case law

It has long been a standard practice of sentencing judges to give a reduction of penalty of up to one third for a guilty plea by a defendant. It can be frustrating when a defendant enters a plea of not guilty, and the matter is prepared for a defended hearing at much expense and effort, for the defendant then to change their plea to guilty at the last minute and still receive this 33 per cent reduction in fine.

The Court of Appeal has now put paid to this practice by introducing a sliding scale approach. If a guilty plea is entered at the first opportunity there may be a third reduction, and if it is made at a status hearing then a fifth. However, if it is made within three weeks of a trial or hearing then only a tenth reduction will apply. R v Hessell [2009] NZCA 450

Preparation for a defended hearing or trial by jury

Should a plea of not guilty be entered then the prosecution must prepare for a defended hearing or a trial if the defendant has elected trial by jury.

The election of trial by jury introduces a further complexity, in that the prosecution must be taken over by the Crown. The Crown prosecutor geographically closest to the location of the offending will then take control of the file and meet all costs.

Hearing preparation is an onerous, time-consuming process that will require the input of experienced staff, but any enforcement officers involved in the case may be required to assist in preparation and should develop an understanding as to what is required.

Summary

- **If prosecution is the enforcement option pursued by your council then the matter will be decided within the criminal court system.**
- **Different processes are followed depending upon whether a plea of guilty or not guilty is entered by the defendant.**
- **These processes place certain requirements on local government staff.**
- **The court must consider a number of factors when sentencing an offender.**

Ngā āpitihanga
Appendices

Appendices contents

Appendix 1: Working safely together

WORKING SAFELY TOGETHER

Waikato Regional Council staff are tasked with ensuring that environmental regulations are being followed for the good of the environment and wider community.

- Council officers **are permitted by law** to enter your land for this purpose.
- Health and Safety legislation **does not** prevent or delay council access to private property.
- **Our staff are our responsibility**. They have been appropriately trained and are equipped with appropriate personal protective equipment.
- They will take reasonable care for their own health and safety and will take reasonable care that their actions or presence does not adversely affect the health and safety of other persons.

WE ARE COMMITTED TO WORKING SAFELY TOGETHER.

HEALTH AND SAFETY
SAFELY HOME. EVERYBODY. EVERY DAY.

For more information, see over:

HE TAIAO MAURIORA	HEALTHY ENVIRONMENT
HE ŌHANGA PAKARI	STRONG ECONOMY
HE HAPORI HIHIRI	VIBRANT COMMUNITIES

For more information call Waikato Regional Council on 0800 800 401 or visit waikatoregion.govt.nz.

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Waikato REGIONAL COUNCIL
Te Kaunihera ā Rohe o Waikato

HEALTH AND SAFETY AT WORK ACT 2015 (HSWA)

Our individual responsibilities

Waikato Regional Council (Council) staff are required to carry out inspections of private property in their capacity as Enforcement Officers under the Resource Management Act 1991 (RMA).

However, these inspections must be completed in compliance with health and safety legislation. This notice details the responsibility of the Council, and you, as the lawful owner or occupier of the property being inspected, under that legislation.

Section 332 of the RMA allows council Enforcement Officers to enter private property, without permission or invitation of the lawful land owner or occupier, for the purpose of assessing compliance with environmental regulations.

Under the Health and Safety at Work Act 2015 (HSWA) the Council is a **PCBU** (person conducting a business or undertaking). An enforcement officer carrying out their normal duties is defined as a **worker** by the HSWA. **A PCBU's worker's workplace** includes any place where a worker goes, or is likely to be, while at work. This includes on your property.

That means when a Council Enforcement Officer is on your property for this purpose they are operating under the jurisdiction of the Council PCBU. Likewise, **you also constitute a PCBU** and this imposes certain responsibilities on you.

Council's responsibility is to ensure, as far as is reasonably practicable, the health and safety of its workers at its workplace, in this case, on your property. Be assured that Council staff visiting your property have been appropriately trained for the work they are undertaking and are equipped with personal protective equipment which is fit for purpose.

Your responsibility, potentially as a PCBU, is to ensure, as far as is reasonably practicable, that the health and safety of any person (including council staff) is not put at risk from work carried out as part of the conduct of the business or undertaking. Please note:

- We will not attend an extensive induction process.
- We do however appreciate you making our staff aware of any risks at your property.
- We do expect that you will work safely in their presence.

Council staff have a responsibility too

- Our staff will take reasonable care for their own health and safety.
- They will take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons.
- They will comply, as far as they are reasonably able, with any reasonable instruction that is given.

The HSWA does not prevent, or unduly delay, council Enforcement Officers from carrying out their lawful duties under Section 332 of the RMA.

Waikato
REGIONAL COUNCIL
Te Kaunihera ā Rohe o Waikato

Appendix 2: Search warrant application

SEARCH WARRANT APPLICATION

IN THE MATTER of Sections 334 and 335 of the Resource Management Act 1991 and Sections 98,103 and 110 of the Search and Surveillance Act 2012

AND

IN THE MATTER of an application for a search warrant in respect of any place or vehicle situated at 123 Big Surf Road, Raglan

TO:

of Hamilton

An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2012) who, on an application made in the manner provided in subpart 3 of Part 4 of that Act

I, **Evan Kelly Slater**, Waikato Regional Council Enforcement Officer, of Hamilton, apply for a search warrant to be issued under section 334(1) of the Resource Management Act 1991 authorising every Waikato Regional Council Enforcement Officer when accompanied by a constable, to enter and search 123 Big Surf Road, Raglan and say as follows:

Introduction

1. My full name is Evan Kelly Slater. I am an Investigator employed by the Waikato Regional Council ('the Council') and am a warranted Enforcement Officer pursuant to the Resource Management Act 1991 ('RMA').

2. The functions of the Council include among other things the implementation of the Waikato Regional Plan ('the Plan'), the issuing, management and monitoring of Resource Consents and the investigation of offences committed in respect of the RMA.

3. The purpose of the RMA is to promote the sustainable management of natural and physical resources.

4. The Waikato Region is defined in Schedule 2 of the Local Government Act 2002.

5. The Plan is a regional plan prepared for the Waikato Region and is implemented and administered by the Council to enable the Council to carry out its statutory functions pursuant to the RMA. The Plan includes policies, methods and rules to achieve the objectives of the plan and the rules within this plan have the force and effect of a regulation in force under the RMA.

6. These rules include Permitted Activity Rules, Controlled Activity Rules, Discretionary Activity Rules, Restricted Discretionary Activity Rules and Prohibited Activity Rules.

The activities associated with these rules must comply with the standards, terms or conditions, if any, specified in the Plan or proposed Plan.

7. This search warrant application relates to unlawful discharge of contaminants, namely farm animal effluent, treated dairy factory wastewater and waste activated sludge (WAS) onto land where it may, and in fact did, enter water, namely the Sterling Stream, at 123 Big Surf Road, Raglan ('the property').

8. 123 Big Surf Road, Raglan, falls within the boundaries of the Waikato Region, and therefore is bound by the terms and conditions of the Waikato Regional Plan.

9. The Property is a 229-hectare dry stock farm located within the Waikato Region. The property is owned by the company Grubby Farms Limited (GFL). GFL is an incorporated company pursuant to the Companies Act 1993. The sole director of GFL is Harley Quinn, of 123 Big Surf Road, Raglan.

10. Harley Quinn was, up until January 2024, the sole shareholder in the company. On 29 January 2024, a 25% shareholding in the company was transferred to his son, Triumph Quinn.

11. GFL have operated a commercial truck wash facility at the farm since 1985. The truck wash facility originally operated under a resource consent that allowed the discharge of treated truck wash water to a tributary of the Sterling Stream, subject to certain conditions.

12. This Resource Consent expired in 2014, at which time GFL changed their system to irrigating the wash water onto land via a travelling irrigator, pursuant to permitted activity rule 3.5.5.1 of the Waikato Regional Plan (WRP), subject to certain conditions, specifically conditions:

    (e) the maximum loading rate of effluent onto any part of the irrigated land shall not exceed 25 millimetres depth per application.
    (g) effluent shall not enter surface water by way of overland flow, or pond on the land surface following the application.

13. Truck wash water and farm animal effluent hosed off a set of cattle handling yards next to the truck wash facility, is directed to a large, above ground lined Kliptank storage pond. This Kliptank pond has the capacity to hold 572,982 litres of effluent. The effluent is then pumped out to a travelling irrigator via an underground pipe system and a series of hydrants.

14. Livestock transport trucks owned and operated by a variety of different transport companies are washed at the site on a weekly basis. The drivers park at the designated wash bay and hose their stock crates out using the wash facilities provided. They are required to record the date and truck / or trailer number and sign the record each time they use the facility, in record books provided at the site for that purpose.

15. GFL then reconcile these records each month and send out invoices to the various trucking companies or operators, charging them a fee for each occasion they use the facility.

16. The nature of wash water from livestock truck cleaning is consistent with what is referred to as farm animal effluent and it contains the same contaminants commonly found in farm animal effluent produced by a dairy farming operation.

17. Smalltown Transport Co (1995) Limited have a contract to take and dispose of excess treated dairy factory wastewater and WAS from the Big Udder Dairy processing factory

at Raglan. Some of that wastewater and WAS is delivered to the GFL Kliptank pond, monthly, where it is mixed with the farm animal effluent in the pond for irrigation onto land.

18. My investigation has established that Smalltown Transport Co (1995) Limited pay GFL $4.00/m3 to take the wastewater and WAS and that during the past dairy season 1 June 2023 to 31 May 2024 a total of 37,757 m3 (37.7 million litres) was delivered to GFL, to a total value of $151,028.

19. Permitted activity rule 3.5.6.2 of the WRP permits the discharge of wastewater and WAS onto land, subject to certain conditions, specifically conditions:

    (b) the material shall not enter surface water by overland flow
    (c) the material shall not contain any human/animal pathogens or hazardous substances
    (d) the total nitrogen loading onto pasture shall not exceed the limits as specified in table 3-7, including any loading made under rules 3.5.5.1, 3.5.5.2, 3.5.5.3 and 3.5.6.3
    (e) the discharge shall maintain daily records of the volume discharged to each paddock or relevant area and the concentration of nitrogen discharge in, as a minimum, monthly samples.
    (f) the records required under condition (e) shall be made available to the Waikato Regional Council upon request
    (h) the maximum loading rate of effluent onto any part of the irrigated land shall not exceed 25 millimetres depth per application.

General Background

20. Just before 3.00pm on Tuesday 19th May 2024, Waikato Regional Council (WRC) staff arrived at Big Surf Road, Raglan, in response to a complaint by a member of the public reporting that effluent was being irrigated onto farmland in that area and that it was flowing into a stream.

21. They established that an irrigator was operating at 123 Big Surf Road, Raglan and they went to that property and met with Harley Quinn.

22. Mr. Quinn confirmed that he was irrigating wash water from his Kliptank pond onto land, that he had run the irrigator for four hours earlier that day and that it had been running for a further two hours that afternoon. He explained that he had been irrigating from the same stationary position for all that time and that he had not been using the irrigators travelling function.

23. Mr. Quinn took WRC staff to the site of the irrigator. They found that the irrigator was positioned on a flat area at the top of a hill, immediately above a steep sided gully. There was a 50m wide area of heavily ponded effluent around the irrigator, up to 200mm in depth in places.

24. WRC staff instructed Mr. Quinn to turn off the irrigator, which he left to do. They found that effluent was flowing off the ponded area in four distinct flow paths down into the gully below. In the bottom of the gully they located a wet area where ground water was coming to the surface and forming into a natural watercourse that flowed out of the bottom of the gully.

25. These staff noted a steady flow of effluent down the length of this watercourse and they followed the watercourse down to a point where it discharged into the Sterling Stream, that flowed through the farm along one boundary.

26. They took several water samples, both upstream and downstream of the discharge point, for analysis. The subsequent analysis of these samples by Hill Laboratories

confirmed that the samples taken from the irrigator site, the watercourse and the Sterling Stream downstream of the mixing point, were contaminants consistent with what is found in farm animal effluent and treated dairy factory wastewater.

27. The discharge of farm animal effluent and wastewater via irrigation, overland and in to the Sterling Stream on 19 May 2024 is a breach of Permitted Activity rules 3.5.5.1 and 3.5.6.2 and therefore the permitted activity rules are not applicable.

28. In completing this investigation, it is important to complete a further site inspection to:

- Locate and seize the truck wash facility record books described in paragraph 14 above, to establish the identity of all trucking companies and individuals who have used the truck wash facility in the past dairy season (1 June 2023-31 May 2024) and the frequency of use, to be able to identify the type of effluent contaminant and to determine the likely volume of effluent generated at the site over the course of that season, that is subsequently irrigated onto land.
- Locate and seize bore and water use records, either written or electronic, to establish the volume of water used at the truck wash facility over the same period.
- Carry out a site examination to measure the size of the effluent application land area, record the location of all effluent irrigation hydrants, measure the length of irrigation pipe and irrigator drag hoses, travelling irrigator nozzle size and to take photographs and GPS coordinates to subsequently map the effluent application area and effluent infrastructure.
- Locate and seize written and/or electronic records including maps, daily irrigation records, application depths and total effluent loading records, to show how conditions a) to g) of Rule 3.5.5.1 are being met.
- Locate and seize written and/or electronic records including maps, daily irrigation records, application depths and total effluent loading records, to show how conditions a) to h) of Rule 3.5.6.2 are being met.

Offence

29. Section 15(1)(b) of the Resource Management Act 1991 states: "*No person may discharge any—*
(a) Contaminant or water into water; or
*(b) **Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water**; or*
(c) Contaminant from any industrial or trade premises into air; or
(d) Contaminant from any industrial or trade premises onto or into land—
unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent."

30. In relation to the paragraph above I believe that two rules under the Plan have been contravened:

(i) **Permitted Activity Rule 3.5.5.1 Discharge of Farm Animal Effluent onto Land –** which says: '*The discharge of contaminants onto land outside the Lake Taupō Catchment from the application of farm animal effluent, (excluding pig farm effluent), and the subsequent discharge of contaminants into air or water, is a permitted activity subject to the following conditions:*
(e) The maximum loading rate of effluent onto any part of the irrigated land shall not exceed 25 millimetres depth per application.
(f) Effluent shall not enter surface water by way of overland flow, or pond on the land surface following the application.

(h) The discharger shall provide information to show how the requirements of conditions a) to g) are being met, if requested by the Waikato Regional Council.

(ii) **Permitted Activity Rule 3.5.6.2 – Discharge of Sludges and Liquids from Activated Sludge Treatment Processes to Land –** which says: *The discharge of sludges and liquids from activated sludge treatment processes onto or into land outside the Lake Taupo Catchment and any consequent discharge of contaminants to air is a permitted activity subject to the following conditions:*
(b) The material shall not enter surface water by overland flow.
(c) The material shall not contain any human/animal pathogens or hazardous substances
(d) The total nitrogen loading onto grazed pasture shall not exceed the limits as specified in table 3-7, including any loading made under rules 3.5.5.1, 3.5.5.2, 3.5.5.3 and 3.5.6.3
(e) the discharger shall maintain daily records of the volume discharged to each paddock or relevant area and the concentration of nitrogen in the discharge in, as a minimum, monthly samples.
(f) the records required under condition e) shall be made available to the Waikato Regional Council upon request.
(g) the maximum loading rate of effluent onto any part of the irrigated land shall not exceed 25 millimetres depth per application.

31. There are no rules in the Plan that permit the discharge described in paragraphs 23-27 above. There is no national environmental standard that allows for this type of discharge. There are no resource consents issued to the property for this type of discharge.

32. On 6th July 2024 I requested in writing, the records referred to in Rule 3.5.6.2, through Mr. Peter Parker, the lawyer representing GFL and Mr. Quinn in this matter. Mr. Parker had advised me that as he was representing GFL and Mr. Quinn, then all requests for information must go through him. On 14 July 2024 I requested in writing the records referred to in Rule 3.5.5.1 from Mr. Parker after he asked for clarification. As of today, I have not received any of the records requested nor have I had any contact from Mr. Parker in relation to this request, since 15 July 2024.

33. The maximum penalties for an offence against section 15 of the RMA are provided for by Section 339 of the RMA. A natural person is punishable upon conviction by a term of imprisonment of not more than 2 years or a fine not exceeding $300,000 and, in the case of a person other than a natural person (such as a company), the offence is punishable upon conviction to a fine not exceeding $600,000.

Summary

34. Due to the circumstances outlined above I have reasonable grounds for believing that an offence against Section 15 of the RMA has been committed.

35. I believe on reasonable grounds that a further inspection at the property is required to:

- Locate and seize the truck wash facility record books described in paragraph 14 above, to establish the identity of all trucking companies and individuals who have used the truck wash facility in the past dairy season (1 June 2023-31 May 2024) and the frequency of use, to be able to identify the type of effluent contaminant and to determine the likely volume of effluent generated at the site over the course of that season, that is subsequently irrigated onto land.
- Locate and seize bore and water use records, either written or electronic, to establish the volume of water used at the truck wash facility over the same period.

- Carry out a site examination to measure the size of the effluent application land area, record the location of all effluent irrigation hydrants, measure the length of irrigation pipe and irrigator drag hoses, travelling irrigator nozzle size and to take photographs and GPS coordinates to subsequently map the effluent application area and effluent infrastructure.
- Locate and seize written and/or electronic records including maps, daily irrigation records, application depths and total effluent loading records, to show how conditions a) to g) of Rule 3.5.5.1 are being met.
- Locate and seize written and/or electronic records including maps, daily irrigation records, application depths and total effluent loading records, to show how conditions a) to h) of Rule 3.5.6.2 are being met.

36. The reasons outlined above will provide information which will be evidence of the offence mentioned.

37. I believe that a search of this property will locate evidence of an offence against Section 15 of the RMA.

38. I can confirm that the Council has not executed any other Search Warrants on the property within the last three months.

39. I therefore seek a search warrant to be executed within 14 days of the date of issue to:

- Locate and seize the truck wash facility record books described in paragraph 14 above, to establish the identity of all trucking companies and individuals who have used the truck wash facility in the past dairy season (1 June 2023-31 May 2024) and the frequency of use, to be able to identify the type of effluent contaminant and to determine the likely volume of effluent generated at the site over the course of that season, that is subsequently irrigated onto land.
- Locate and seize bore and water use records, either written or electronic, to establish the volume of water used at the truck wash facility over the same period.
- Carry out a site examination to measure the size of the effluent application land area, record the location of all effluent irrigation hydrants, measure the length of irrigation pipe and irrigator drag hoses, travelling irrigator nozzle size and to take photographs and GPS coordinates to subsequently map the effluent application area and effluent infrastructure.
- Locate and seize written and/or electronic records including maps, daily irrigation records, application depths and total effluent loading records, to show how conditions a) to g) of Rule 3.5.5.1 are being met.
- Locate and seize written and/or electronic records including maps, daily irrigation records, application depths and total effluent loading records, to show how conditions a) to h) of Rule 3.5.6.2 are being met.

40. In accordance with Section 110 of the Search and Surveillance Act 2012 I wish to enter and search the property to complete the actions outlined in the above paragraph.

41. I wish to seize anything previously mentioned if it is necessary to provide evidence of the offending outlined.

Verification

42. I Evan Kelly Slater confirm the truth and accuracy of the contents of this application for a search warrant as listed above are correct. I am aware that it is an offence to make an application containing any assertion or other statement known by me to be false.

I THEREFORE APPLY for a search warrant to be issued in respect of any place or vehicle situated at 123 Big Surf Road, Raglan.

_____

Evan Kelly Slater

Waikato Regional Council Enforcement Officer with the designation of Investigator

DATED at Hamilton District Court this _____ 2024

Appendix 3: Search warrant

SEARCH WARRANT

Sections 334 and 335 Resource Management Act 1991 and Sections 98, 103 and 110 of the Search and Surveillance Act 2012

TO: Every Waikato Regional Council enforcement officer when accompanied by a Constable.

1. Grounds of warrant

I am satisfied, on an application made by Evan Kelly Slater on August 2024 that there are reasonable grounds for believing that at 123 Big Surf Road, Raglan ('the property') there is evidence that will provide proof of an offence against section 338(1)(a) of the Resource Management Act 1991 (being an offence punishable by two years' imprisonment).

The suspected offence to which this warrant relates is an offence of contravening section 15 of the Resource Management Act 1991 by the Discharge of Contaminants into the environment.

2. Authority

This warrant authorises you, and any person called by you to assist—

(a) To enter and search the property to locate and seize the truck wash facility record books described in paragraph 14 of the search warrant application, to establish the identity of all trucking companies and individuals who have used the truck wash facility in the past dairy season (1 June 2023 – 31 May 2024); and

(b) To locate and seize bore and water use records, either written or electronic, to establish the volume of water used at the truck wash facility over the same period; and

(c) To carry out a site examination to measure the size of the effluent application land area, record the location of all effluent irrigation hydrants, measure the length of irrigation pipe and irrigator drag hoses, travelling irrigator nozzle size and to take photographs, video recordings and GPS coordinates to subsequently map the effluent application land area and effluent infrastructure.

(d) To locate and seize written and/or electronic records including maps, daily irrigation records, application depths and total effluent loading records to show how conditions a) to g) of Rule 3.5.5.1 are being met; and

(e) To locate and seize written and/or electronic records, including maps, daily irrigation records, application depths and total eluent loading records to show how conditions a) to h) of rule 3.5.6.2 are being met; and

(f) To use any force that is reasonable in the circumstances to enter or break open or access any area within the place for the purposes of carrying out the search and any lawful seizure; and

(g) To use any assistance that is reasonable in the circumstances.

3. Period of execution of warrant

The power to enter and search under this warrant may be exercised on one occasion.
The warrant must be executed within 14 days from the date of issue of this warrant.

Date of issue: August 2024

Name or unique identifier:

Signature: _____ (Authorised issuing officer)

NOTICE TO OWNER/OCCUPIER

Search and Surveillance Act 2012 Section 131(4)

***This document is a copy of a search warrant which has been executed on these premises*.**

Date and Time of the commencement and completion of the search:

Name of person with responsibility of the search:

The name of the enactment under which the search is taking place and the reason for the search under that enactment:

Resource Management Act 1991,

Items seized YES /NO:

If NO: that nothing was seized

If YES: itemise what was seized (list below or refer Property Record Sheet):

Enquiries should be made to the Waikato Regional Council at 160 Ward, Hamilton – free phone 0800 800 401

Appendix 4: Production order application

PRODUCTION ORDER APPLICATION

Sections 71 - 79 of the Search and Surveillance Act 2012

TO:

of Hamilton

An issuing officer (within the meaning of Section 3 of the Search and Surveillance Act 2012) acting upon an application detailed hereunder, made in the manner provided in subpart 2 of Part 3 of that Act.

I, **Bruce Thomas Wayne**, Waikato Regional Council Enforcement Officer, of Hamilton, apply for a production order under Sections 71 and 72, and to be issued under Section 74, of the Search and Surveillance Act 2012, for the issue of a production order requiring **Te Kowhai District Council,** or any assistants, to give to **Bruce Thomas Wayne** the documents described in Section 8 of this application.

1. Name of Applicant

1.1 My full name is Bruce Thomas Wayne. I am employed by the Waikato Regional Council (**the Council**) with the designation of Investigator.

1.2 I am a warranted Enforcement Officer pursuant to the Resource Management Act 1991 (**RMA**).

1.3 I am also an enforcement officer within the definition in Section 3 of the Search and Surveillance Act 2012 (**the Act**).

2. The person against whom the order is sought

2.1 I request that a production order be made against **Te Kowhai District Council, 123 Park Drive, Te Kowhai.**

3. Conditions for making production order (Section 72, Search and Surveillance Act)

3.1 I have reasonable grounds to suspect that offences have been committed by **Te Kowhai District Council or employees thereof** against Section 338(1)(a) of the RMA and that a search warrant is available in respect of these alleged offences under Section 334(1) of the RMA.

3.2 This is an enactment specified in column 2 of the schedule to the Search and Surveillance Act 2012 that authorises an enforcement officer to apply for a search warrant (further details are contained herein this application); and,

3.3 I have reasonable grounds to believe that the documents sought by the proposed order:

a. constitute evidential material in respect of the offences detailed in Section 5 of this application below; and,

b. are in the possession or under the control of the person against whom the order is sought as detailed in Section 7 of this application.

4. Provision authorising making of application for search warrant

4.1 A production order under the Act is available only in respect of an offence for which a search warrant can be obtained.

4.2 In this case a search warrant can be obtained as:

a. I have reasonable grounds to suspect that offences have been committed by **Te Kowhai District Council or employees thereof** against Section 338(1)(a) of the RMA.

b. A search warrant is available in respect of the above offences under Section 334(1) of the RMA, which is an enactment specified in column 2 of the Schedule of the Act.

c. The grounds for an application for a search warrant under Section 334(1) of the RMA are:

i. I have reasonable grounds to suspect **Te Kowhai District Council** has documents that are evidence of **Te Kowhai District Council** offending against Section 338(1)(a) of the RMA.

ii. The offence this production order application relates is against Section 338(1)(a) & (b) of the RMA and is punishable by up to 2 years imprisonment or a fine not exceeding $300,000 for a natural person, and in the case of a person other than a natural person (company), a fine not exceeding $600,000.

5. Description of offence that it is suspected has been committed

5.1 This production order application relates to **Te Kowhai District Council**, who between the 6th of April and the 10th of April 2023, did unlawfully discharge a contaminant, namely raw human effluent and waste water from the Te Kowhai District Council Waste Water Treatment Plant **(WWTP)** situated at 123 Park Drive, Te Kowhai (**the property**) onto land in circumstances which may result in that contaminant entering water, namely the Scenic Stream near Whatawhata.

5.2 The Te Kowhai WWTP was commissioned in 1971 and was originally an oxidation pond plant (2 ponds) and serves a population of approximately 9000 residents. Upgrades to the plant over several years included the installation of floating curtains in Pond 1 to improve hydraulic retention, the installation of Aquamats in Pond 2 to break down solids and nutrients, and the construction of a membrane filtration plant to further remove suspended solids and pathogens.

5.3 A further upgrade was completed in 2017 with the membrane filters replaced to achieve higher flow rates, an upgrade of the chemical dosing system and improvements to plant automation to reduce operator input. The WWTP treats wastewater from domestic and industrial sources and has a Resource Consent issued by the Council allowing the discharge of no more than 4,000m^3 (4,000,000 litres) per day of membrane treated effluent to the Scenic Stream near Whatawhata.

5.4 I have reasonable grounds to suspect that an offence against Section 15 of the RMA, described in paragraph 6, has been committed by **Te Kowhai District Council**.

5.5 Section 15 of the RMA is titled 'Discharges of contaminants into environment' and states:

(1) No person may discharge any—

(a) contaminant or water into water;

(b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water;

unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

5.6 Untreated liquids and solids in the form of discharge from the WWTP is a contaminant pursuant to Section 2 of the RMA.

5.7 There are no national environmental standards or other rules or regulations that expressly allow for the discharges into the environment described in this application.

5.8 Since June 2009, the property has been operating pursuant to Resource Consent AUTH666.666.666 (**the consent**) for the **Discharge to Water**.

5.9 The activity authorised by the consent states:

''*To discharge treated municipal effluent to the Scenic Stream near Whatawhata.*''

5.10 Schedule Three of the consent, applicable from 30 June 2011 until expiry of the consent states:

"*The discharge shall be of membrane treated effluent and shall not exceed 4,000m3 per day*."

5.11 The maximum penalties for contravening Section 15 of the RMA which is an offence under Section 338 are provided for by Section 339 of the RMA. A company is punishable upon conviction to a fine not exceeding $600,000, and person is punishable upon conviction to imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000.

6. Facts relied on to show reasonable grounds to suspect an offence has been committed.

6.1 The functions of the Waikato Regional Council (**the Council**) include, amongst other things, the implementation of the Waikato Regional Plan (**the Plan**), the issuing, management and monitoring of Resource Consents and the investigation of offences committed in respect of the RMA.

6.2 The purpose of the RMA is to promote the sustainable management of natural and physical resources.

6.3 The Waikato Region is defined in Schedule 2 of the Local Government Act 2002 as a Regional Council.

6.4 The Plan is a regional plan prepared for the Waikato Region and is implemented and administered by the Council to enable the Council to carry out its statutory functions pursuant to the RMA. The Plan includes policies, methods, and rules to achieve the objectives of the plan, and the rules within it have the force and effect of a regulation in force under the RMA.

6.5 These rules include Permitted Activity Rules, Controlled Activity Rules, Discretionary Activity Rules, Restricted Discretionary Activity Rules and Prohibited Activity Rules. The activities associated with these rules must comply with the standards, terms or conditions, if any, specified in the Plan or proposed Plan.

[Please note: Some content of the application has been removed.]

6.34 Calculations by WRC using data provided by Te Kowhai District Council using the average daily inflow over a year to the WWTP estimate the discharge of raw human effluent and wastewater to be between 13,000m^3 and 16,000m^3, meaning that anywhere between 13,000,000 and 16,000,000 litres was discharged across land and into the waterways.

6.35 The Scenic Stream is a tributary of the Waikato River which is of significant cultural, spiritual, historical and environmental importance to Tainui.

6.36 Section 340 of the RMA also provides that where an offence is committed against the RMA, any person acting as an agent (including any contractor) or employee of another person, that other person may also be liable under that Act in the same manner and to the same extent, as if he, or she or it had personally committed the offence.

7. Facts relied on to show reasonable grounds to believe documents sought are in the possession of person against whom order is sought

7.1 **Te Kowhai District Council** is a company involved in the treatment of human effluent and wastewater at the Te Kowhai WWTP.

7.2 **Te Kowhai District Council** operated WWTP at Te Kowhai in April 2023.

7.3 **Te Kowhai District Council** will have documentation relating to unlawful discharge of contaminants to the Scenic Stream noted in Section 8.1 of this application.

7.4 I believe that information held by **Te Kowhai District Council** referred to in paragraph 7.3, relating to the discharge of contaminants into environment, namely the Scenic Stream will provide corroborative evidence to show that **Te Kowhai District Council** have breached Section 15(1)(b) of the RMA.

7.5 Due to the circumstances outlined above I have reasonable grounds to believe that offences against Section 15(1)(b) of the RMA has been committed at the WWTP. These are offences in respect of which the Search and Surveillance Act 2012 and Resource Management Act 1991 authorises an enforcement officer to apply for a search warrant.

7.6 I have reasonable grounds to believe that the documentation sought, described in Section 8 of this application, will constitute evidential material in respect of the offence outlined.

8. Description of the documents for which production is sought

8.1 I believe on reasonable grounds that a production order pertaining to **Te Kowhai District Council** is required to obtain:

All records relating to the unlawful discharge of contaminants by **Te Kowhai District Council** to the Scenic Stream over the specific days, being 6, 7, 8, 9 and 10 of April 2023 *but not limited to:*

a. Records of any log on and log off details for the ASPEX or SCATA wastewater programs for the period 5 April through to 12 April 2023

b. Details of any pump maintenance records at WWTP for the listed period

c. Incident reports, memos, emails and any documentation relating to the discharge at the Te Kowhai WWTP from any Te Kowhai District Council staff, contractors or agents over the listed period including internal reports, notes, emails, or memos

d. Details of any alarm activations and print outs of the 'Inlet Log' from 12.00am on 4 April 2023 to 6am on 6 April 2023

e. Details and calculations of any estimated discharge from the WWTP by using historical or average inflow of sewage data

f. Copies of any laboratory analysis reports regarding the sampling of the discharge at the WWTP over the specified dates, including the locations the samples were taken by Environmental Services or any associated companies or contractors

g. Copies of any statements obtained by Te Kowhai District Council staff relating to the discharge

h. Details of any person(s) contacted regarding the discovery of the discharge and subsequent role of that person(s)

i. Role description for 'Wastewater Operator' at Te Kowhai District Council

j. Copies of any training records or certification for Mr Richard Grayson relating to the duties of a Wastewater Operator

k. Records of any previous work issues or performance issues relating to Mr Richard Grayson.

9. Number of occasions the person against whom the order is made should be required to produce documents

9.1 I request that **Te Kowhai District Council** provides the required documents on one occasion.

10. The time by which, and the way in which, the documents must be produced

10.1 I request that the documents be produced to me, **Bruce Thomas Wayne**, by **Te Kowhai District Council** within **10 working days** after the date of issue of the production order to **Bruce Thomas Wayne** by one of the following methods:

a. Hand delivery to **Bruce Thomas Wayne** at the office of the Waikato Regional Council at 160 Ward Street, Hamilton; or

b. By way of email at: bruce.wayne@waikatoregion.govt.nz

c. Or another method agreed to in writing by **Bruce Thomas Wayne**.

11. Retention of produced documents

11.1 Any enforcement officer to whom a document is to be produced in compliance with this order may do one or more of the following things:

a. Retain the original document produced if it is relevant to the investigation,

b. If any document is retained, take a copy of it as soon as practicable after the document is produced and give that copy to **Te Kowhai District Council**,

c. Otherwise, take copies of the document, or of extracts from the document,

d. If necessary, require **Te Kowhai District Council** to reproduce, or to assist any person nominated by **Bruce Thomas Wayne** a delegate of the Waikato Regional Council to reproduce, in usable form, any information recorded or stored in the document.

12. Duration of order

12.1 I request that the production order be in place for twenty (20) working days after the date of issue.

I, **Bruce Thomas Wayne**, confirm the truth and accuracy of the contents of this application for a production order as listed above are correct. I am aware that it is an offence to make an application containing any assertion or other statement known by me to be false.

_____

Bruce Thomas Wayne
Enforcement Officer with the designation of Investigator
Waikato Regional Council
DATED at Hamilton on the 13th June 2023

Appendix 5: Production order

PRODUCTION ORDER

Section 74, Search and Surveillance Act 2012

TO: **Bruce Thomas Wayne** of the Waikato Regional Council, Enforcement Officer

and

TO: **Te Kowhai District Council, 123 Park Drive, Te Kowhai.**

1. I have received an application for the issue of a production order under Section 74 of the Search and Surveillance Act 2012 requiring the documents specified below to be produced by **Te Kowhai District Council.**

2. The application has been made in writing, and the truth and accuracy of its contents have been confirmed to me.

3. I am satisfied:

    a. That there are reasonable grounds to suspect that the offences of:

        I. Section 15(1)(b) of the Resource Management Act 1991, Discharge of contaminates into environment, namely contaminant onto land in circumstances which may result in that contaminant entering water, are offences created under Section 338(1)(a) of the Resource Management Act 1991.
        II. And that there are reasonable grounds to believe that the documents specified below constitute evidential material in respect of the offences.
        III. And that there are reasonable grounds to believe that **Te Kowhai District Council** has possession or control and, while the order is in force will have possession or control, of these documents.

4. This order requires **Te Kowhai District Council** to produce the following documents that are in their possession or under their control on the date of this order:

5. All records relating to the unlawful discharge of contaminants by **Te Kowhai District Council** to the Scenic Stream over the specific days, being 6, 7, 8, 9 and 10 of April 2023 *but not limited to:*

    a. Records of any log on and log off details for the ASPEX or SCATA wastewater programs for the period 5 April through to 12 April 2023

    b. Details of any pump maintenance records at WWTP for the listed period

    c. Incident reports, memos, emails and any documentation relating to the discharge at the Te Kowhai WWTP from any Te Kowhai District Council staff, contractors or agents over the listed period including internal reports, notes, emails, or memos

    d. Details of any alarm activations and print outs of the 'Inlet Log' from 12.00am on 4 April 2023 to 6am on 6 April 2023

    e. Details and calculations of any estimated discharge from the WWTP by using historical or average inflow of sewage data

    f. Copies of any laboratory analysis reports regarding the sampling of the discharge at the WWTP over the specified dates, including the locations the samples were taken by Environmental Services or any associated companies or contractors

g. Copies of any statements obtained by Te Kowhai District Council staff relating to the discharge

h. Details of any person(s) contacted regarding the discovery of the discharge and subsequent role of that person(s)

i. Role description for 'Wastewater Operator' at Te Kowhai District Council

j. Copies of any training records or certification for Mr Richard Grayson relating to the duties of a Wastewater Operator

k. Records of any previous work issues or performance issues relating to Mr Richard Grayson.

6. If any document is not or is no longer, in their control, to disclose, to the best of their knowledge or belief, the location of this document.

7. The documents must be produced on one occasion during the period this order is in force.

8. The documents are to be produced, or their whereabouts disclosed, to **Bruce Wayne**, at the Waikato Regional Council by the following time and in the following manner:

   By 5.p.m on the 27th of June 2023 and by way of email to bruce.wayne@waikatoregion.govt.nz or another method agreed by **Bruce Wayne**.

9. Any enforcement officer to whom a document is to be produced in compliance with this order may do one or more of the following things:

   a. Retain the original document produced if it is relevant to the investigation,
   b. If any document is retained, take a copy of it as soon as practicable after the document is produced and give that copy to **Te Kowhai District Council,**
   c. Otherwise, take copies of the document, or of extracts from the document,
   d. If necessary, require **Te Kowhai District Council** to reproduce, or to assist any person nominated by **Bruce Wayne** a delegate of the Waikato Regional Council to reproduce, in usable form, any information recorded or stored in the document.

10. This production order is in force for twenty (20) days after the date on which this order is made.

DATED at Hamilton on the: 13th of June 2023

_____ (signature / individual designation)
An authorised issuing officer

_____ name (if signed)

Appendix 6: Statement of informed consent

Statement of Informed Consent

Pursuant to Sections 92, 93 & 94 Search and Surveillance Act 2012

Date: / / 20

Location: ……

Description of property to which this statement refers:

……

……

I, ……, date of birth ……
(Full name of person providing informed consent)

of ……
(Address of person providing informed consent)

hereby give consent to ……
(Full name of person being granted informed consent)

of the Waikato Regional Council to enter onto the above mentioned property for the purpose of inspection and the gathering of evidence including, but not limited to, the taking of photographs, survey measurements, vegetation and soil and water samples, biodiversity assessment,

I further advise that the purpose of this request is one in respect of which I

…….. being an enforcement officer could apply for a search warrant as a power of search conferred by the Resource Management Act 1991.

- I provide this consent as a person who has authority to grant such access to the property.
- I provide this consent to the above named staff member of the Waikato Regional Council and to any associates or contractors working for, or with, this person.
- I provide this consent for the period of :

  ……..
  (Insert dates)

- I provide this consent knowing that any information collected as a result of this inspection may potentially be used as evidence in some form of enforcement proceedings inclusive of, but not limited to, warnings, infringement or prosecution pursuant to the provisions of the Resource Management Act 1991.
- I provide this consent knowing that I am not obliged to provide such consent and may refuse to consent to the search.
- I acknowledge that I may withdraw my consent at any time.

Signed: …… **Date:** ……
(Signature of Person providing informed consent)

Statement Witnessed by: ……..
(Full name of person witnessing this informed consent statement)

Signed: …… **Date:** ……
(Signature of Person witnessing informed consent statement)

Doc # 2117671

Appendix 7: Witness statement

Witness Statement

Location: 10 Carrigan Street, Hamilton
Date: 14 March 2024
Time: 11:15am

Lisa Mary Old states:

That is my full name. I am known as Lisa
My date of birth is 26/01/1945
My home address is 10 Carrigan Street, Hamilton

My postal address is as above
My occupation is Retired
I am employed by N/A
My phone number at home is 07 856 1423 and at work N/A
My cell phone number is 021 763 519
My email address is lmold45@xtra.co.nz
I am making this statement to Billy Evington of the Waikato Regional Council in respect of a fire at the local timber yard. This morning at about 7am I was out walking my dog as I do every morning. I was on my own. As I walked past the timber yard, it is just down the road from my house, I think it is called H and P. I noticed there was quite a large fire burning in the corner of the yard. There wasn't any wind and the smoke was going straight up. But I could smell smoke, it made me cough. I was about 10 metres from the fire as I walked past. I only saw one person near the fire. He was quite tall, about 5 foot 8, and thin. I noticed he had bushy, red hair. He was about 20 years old. He was carrying loads of timber in his arms and throwing it on the fire. They were bits of building timber but only short bits, no longer than a metre or so. My concern was that the timber might be treated and I know that treated timber should not be burnt so I hurried straight home and rang the Waikato Regional Council 0800 number

(continue statement on lined foolscap)

Doc # 1010793

Statement of Lisa Old continued ...2.

and made a complaint. I have not ever noticed a fire at that yard before. I have lived here for nearly five years.

I have read this statement and it is true and correct

Old.

Statement taken and witnessed by:

Billy Evington
Resource Officer
11:42am
14.3.24

Appendix 8: Guidelines for initiating a suspect interview

Guidelines for initiating a suspect interview

Should you come across someone during the course of your work who may have committed an offence under the RMA and enforcement action is a possibility, you are obliged to seek their explanation.

If there is a strong likelihood of the action being a prosecution, then there are certain legal requirements that must be followed to ensure that their explanation is useable (admissible) should charges be defended or challenged.

Essentially you are initiating a suspect interview. Whether this is recorded in your field notebook, or in a more formal setting, use the following format to ensure admissibility. Remember, any comments made by the subject prior to them being properly cautioned, as below, may NOT be admissible.

Introduction
Introduction of self (name and designation), time, date, place.
Introduction of person being interviewed and anyone else present (other staff or lawyer, etc).
Confirm personal details of interviewee:

- Full name
- Date of birth
- Occupation
- Employer
- Work contact details
- Home address
- Home contact details

Advice and caution
The purpose of this interview is to seek your explanation, or your version of events, in respect of (purpose of interview, factual subject matter, type of allegations).

Such matters may constitute an offence or offences under the Resource Management Act 1991.

I advise you that you are not obliged to say anything and anything you do say may be used in evidence.

I have asked you to take part in this interview, but I must stress that you are here of your own free will and you are not detained, nor have you been charged in respect of this matter.

I also advise you that you have the right to consult and instruct a lawyer without delay and in private. Do you understand this advice?

(If lawyer present)
Should you wish to confer with (lawyer) during this interview please let me know and a facility to speak in private will be provided.

Do you understand that this interview is being recorded by way of video? (Only if interview recorded.)

PLEASE NOTE: THE CAUTION IS NOT REQUIRED IF THE MATTER IS NOT LIKELY TO END IN PROSECUTION. THE REST OF THE PROCESS IS THE SAME, REGARDLESS OF WHAT ACTION ENFORCMENT MAY FOLLOW.

Guidelines
Then commence interview, record both your questions and their answers (Q and A). In a written statement it is not possible to capture every word said 'verbatim'.

If their answers are overly long or not relevant to your questions it is okay to paraphrase their answers. Explain this to them so they do not think you are changing their words.

Head up each new page with "(Surname) statement continued (page number)".

At the conclusion of the interview allow the person to read the statement or read it to them. They are entitled to make any additions or amendments they wish.

Ask them to initial any amendments then sign each page endorsing the end of the statement with:

"I have read this statement; it is true and correct."

Conclude interview by signing each page yourself then writing at the end of the statement:

"Statement taken and signature witnessed by (your name and designation)."

End with your signature and time of conclusion.

Appendix 9: Memo

Memo

File No:	56 10 96C
Date:	20 August 2024
To:	Robert Isaac
From:	Novalea Crowe
Subject:	**Appropriate Action - Earthworks in High-Risk Erosion area – Klondike Road, Taupo - REQ203XXXE**

Introduction
Seeking your consideration and authority in respect to appropriate follow up from Waikato Regional Council (WRC) in regards a site visit undertaken by Paul George and I on 29 November – a complaint from neighbours in respect to earthworks viewed from roadside.

Background
Concerns were raised with Incident Response in respect to the quantity of soil moved and the works being undertaken in dry water courses. The complainant was concerned due to works having an impact on properties if the existing dry water courses were filled in, as future heavy rain could cause flooding.

The work was undertaken by Trevor Spade Limited – property developers (purchased land subdivided off a farm previously owned by residents for 55 years). Three directors – Terry Smith, Stuart Jones and David Brown. Stuart lives on site and was responsible for the works. They used Image Ltd as the consultant and had received confirmation from the local council that the development could go ahead however no consideration of any WRC rules were undertaken.

A site visit was conducted as outlined above, the works were almost complete, two of the three directors met us on site when I phoned the contact number at the gate.

Follow up email correspondence was sent to the directors, the consultant and surveyor working for them, outlining the breach of the Waikato Regional Plan - due to quantity of soil moved in HRE area exceeding allowable quantities and possibility of future environmental concerns.

It appears that the old Otawa stream used to run through the property. It is now a dry basin which appears to have been grazed for a long period of time.

File Note - Site visit 29 November 2023 can be accessed via the following link: https://discover.wairc.govt.nz/otcs/llisapi.dll/Overview/27978XXX
Media - 2023-11-30-07 - REQ203XXX - Site visit photos https://discover.wairc.govt.nz/otcs/llisapi.dll/link/27973XXX

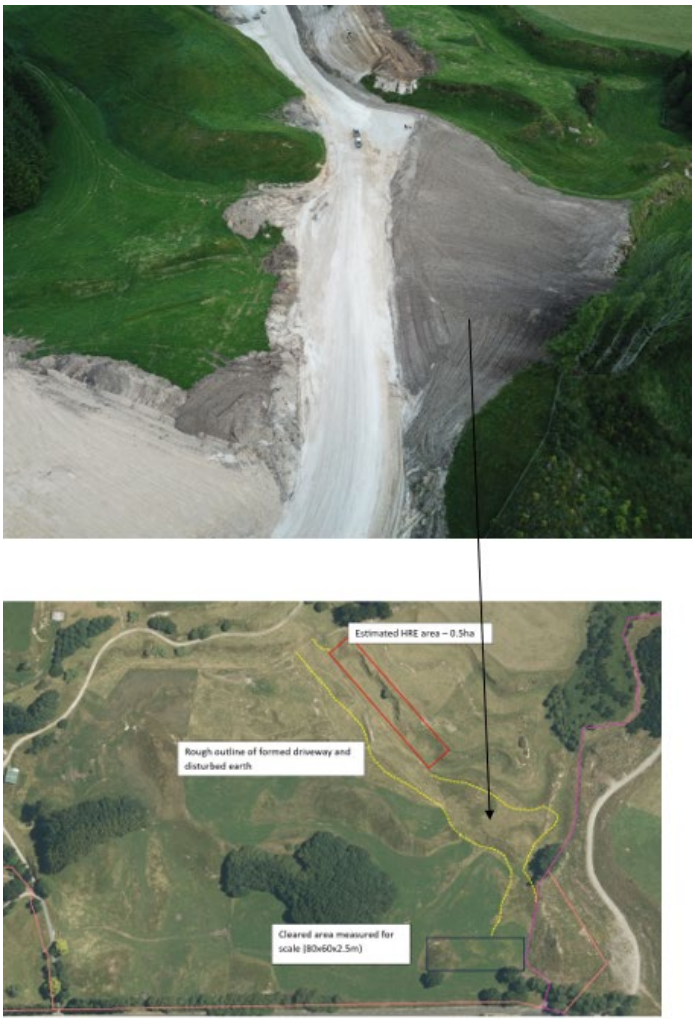
Relevant rules: (Resource Management Act)
Section 9 Restrictions on use of land
(2) No person may use land in a manner that contravenes a regional rule unless the use—
(a) is expressly allowed by a resource consent; or
(b) is an activity allowed by section 20A.

Waikato Regional Plan
Rule 5.1.4.14 Controlled Activity Rule - Soil Disturbance, Roading and tracking & Vegetation clearance…in HRE Areas.
Except as restricted by Rule 5.1.4.16, the following activities, occurring in any continuous 12 month period and located in
a high risk erosion area:

1. Roading and tracking activities between 100 and 2,000 metres in length, or
2. Soil disturbance activities between 250 and 1,000 cubic metres in volume (solid measure), or
3. Soil disturbance activities between 0.2 and 2.0 hectares in area, or

HIGH RISK EROSION AREA
Means any part of any activity (where the activity is not otherwise permitted)

a. where the pre-existing slope of the land exceeds 25 degrees; or
b. on coastal frontal dunes on the East Coast; or
c. on coastal sand country on the West Coast (Mokau to Karioitahi) where loose sands are at the ground surface or within 10 centimetres of the surface; or
d. within 50 metres landward of the coastal marine area of an estuary, except in the landward margin of an authorised stopbank; or
e. adjacent to water bodies (including ephemeral watercourses draining catchments greater than 100 hectares, but excluding any other ephemeral rivers or streams), where:
    i. the land slope is between 0 degrees to 15 degrees – within 10 metres from any lake, wetland or the bed of a river or lake, or
    ii. the land slope is greater than 15 degrees – within that distance from the wetland, the bed of a river or lake, or from mean high-water springs to the first point at which the slope reduces to 15 degrees or less, or 100 metres (whichever is the lesser, outside the minimum distance described in i)).



History
The company has no history as far as I am aware.

Further:
A revisit was undertaken on 18 December to view the mitigation advised. As promised by the owners, all work had stopped, all exposed contoured areas had been topsoiled and seeded. The site was tidy and being managed well. The small amount or works that the site wished to continue with would fall under the 0.2 threshold and I therefore advised that this could be finished, covered and seeded as per the rest.

Considerations

1. **What were or are the actual adverse effects on the environment?**
   No sediment runoff was noted at the site visit so environmental effect minimal. Pumice soils in area so the potential for this to occur as there was only topsoil used as bunding.

2. **What were are the potential adverse effects on the environment?**
   Refer to comment above.

3. **What is the value or sensitivity of the receiving environment or area affected?**
   The receiving environment is farmland.

4. **What is the toxicity of discharge?**
   Sediment - smothering agent of aquatic life and plants.

5. **What degree of due care was taken and how foreseeable was the event?**
   Works were deliberate, and although environmental minimal - still a breach of WRP.

6. **What effects have been made to remediate or mitigate the adverse effects**?
   As per correspondence above, revisit was undertaken, photos taken showing topsoil placed over most of exposed site, seeding undertaken.

7. **What has been the effectiveness of those effects?**
   Unknown, at this time. The surveyor was undertaking stormwater modelling to ascertain location of culverts to manage stormwater

8. **Was there any profit or benefit gained by the alleged offender?**
   The subdivision approval was only recently granted (it had been applied for around a year ago, but boundaries had to be aligned to include the old farm sheds which wanted included (hence the delay). I believe that once it was approved, the owners have jumped the gun and started prior to an engineering assessment/report being undertaken.

9. **Is this a repeat non-compliance or has there been previous enforcement action taken against the alleged offender?**
   No.

10. **Was there failure to act on prior instructions or advice?**
    No.

11. **Is there a degree of specific deterrent required in relation to the alleged offenders?**
    This programme is focused on behavioural change, environmental effects very minimal however contractors /farmers need to be aware of rules pertaining to works that they may be undertaking on a regular basis. Further, there are more works that the owners wish to do, in HRE area.

12. **Is there a need for a wider general deterrent required in respect of this activity or industry?**
    In this instance, as there was no noted environmental effect, I believe that a FW is appropriate to the company. This will highlight the importance of checking with both the DC and WRC for any future works planned.

13. **Was the receiving environment of particular significance to iwi?**
    No - privately owned farmland.

14. **How does the unlawful activity align with the purposes and principles of the RMA?**
    The activity is in contravention of the purposes and principles of the RMA.

15. **If being considered for prosecution, how does the intended prosecutor align with Solicitor General's prosecution guidelines?**
    Prosecution not being considered.

Recommendation

I recommend Council issue a Formal Warning to Spade Limited for exceeding 0.2ha soil disturbance in HRE area, with summary letter to the consultant acting for the company.

Wording:
Section 9(2)
Contravened Section 9(2) of the Resource Management Act 1991 in that it permitted the use of land, namely the carrying out of earthworks associated with a subdivision development

in a manner that contravened a regional rule, namely Waikato Regional Plan rule 5.1.4.14 in that between 0.2 and 2.0 hectares of soil disturbance was completed in a High-Risk Erosion area, without resource consent, where that use of land was not expressly allowed by a resource consent or by section 20A of the Resource Management Act, 1991.

For your consideration and direction please.

Novalea Crowe

Incident Response Officer

Appendix 10: Service of formal warning

In reply please quote: EAC10XXX
IRIS Document No: 82XXX
File No: 60 XX XXA

Waikato Regional Council
Te Kaunihera ā Rohe o Waikato

Private Bag 3038
Waikato Mail Centre
Hamilton 3240, NZ

waikatoregion.govt.nz
0800 800 401

31 July 2024

Robert Kane
21 Metro Way
RD 7
Taupo

Dear Mr Kane,

Service of Formal Warning

On 15 February 2024, Waikato Regional Council staff completed a compliance inspection of the dairy farm located at 21 Metro Way, Taupo (White Gold Supply number 261). An unlawful discharge of farm animal (dairy) effluent resulting from over-irrigation was observed during the inspection. This discharge was in breach of permitted activity rule 3.5.5.1 of the Waikato Regional Plan.

The circumstances resulting in the unlawful discharge have been considered and a decision has been made to issue you with a Formal Warning, in your capacity as the Farm Manager responsible for day-to-day effluent management on farm.

This Formal Warning relates to an alleged contravention of Section 15(1)(b) of the Resource Management Act 1991 and is enclosed.

It should be noted that the observed unlawful discharge was serious and reached the threshold for further investigation with a view to possible prosecution. However, it has been decided that a Formal Warning will be issued on this occasion.

The Formal Warning has been added to the farm's compliance history and will be considered should further non-compliance be detected in future. Further compliance inspections will be carried out at the property in due course to ensure your effluent is being managed sustainably and lawfully.

Should you have any queries in respect of this matter please contact me on 021 XXX 9078 or by email at lauren.lane@waikatoregion.govt.nz.

Sincerely,

Lauren Lane
Rural Compliance Officer
Resource Use Directorate

Doc # 2983XXXX

Waikato Regional Council
Te Kaunihera ā Rohe o Waikato

Appendix 11: Formal warning

Formal Warning

To:	Asgard Holdings Limited
Address:	Bean Counter & Co Limited 45 Charles Street Putaruru 3411
Date Of Birth:	N/A

Asgard Holdings Limited is considered to have contravened the Resource Management Act 1991 (RMA), as follows:

Section of RMA Contravened:

Section 15(1) being an offence against section 338(1)(a) of the RMA.

Nature of Breach Resulting in Formal Warning:

Contravened Section 15(1)(b) of the Resource Management Act 1991 in that it permitted the discharge of a contaminant, namely farm animal effluent, onto land, where it may enter water, namely groundwater, where that discharge was not expressly allowed by a national environmental standard or other regulations, a rule in a regional plan, or a resource consent.

Location:

The property situated at 21 Rainbow Way, Ohau, and associated with Fonterra dairy supply number 78XXX (hereafter referred to as 'the property').

Date of Offence:	On or about 30 May 2024	**File No:**	60 XX XXA
		Warning No:	EAC10XXX

The circumstances of the offence have been considered and it is deemed appropriate to deal with this matter by way of formal warning.
Asgard Holdings Limited is formally warned as a result of the above offence.

Please note that this formal warning now establishes, or contributes to, a history of non-compliance associated with the entity named in this formal warning. It will be considered and may be referred to should further breaches against the RMA be detected in the future.

If you wish to raise any matter relating to circumstances of the alleged offence, you should do so by writing to the council officer who issued the formal warning at the address shown on the covering letter of this notice within 14 days of receipt of this warning.

Signature of Enforcement Officer:

Jonathan Gensik
Waikato Regional Council

Date of Issue: 29 July 2024

IMPORTANT INFORMATION

It is important to note that offences against the RMA can be dealt with by other measures such as infringement notice, or in more serious cases, by way of prosecution.

Infringement notices issued under the RMA currently carry penalties of between $300 and $1000.

Penalties available to the Court when dealing with RMA prosecutions include:

- in the case of a 'natural' person, to imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000;
- in the case of a person other than a natural person (such as a company), to a fine not exceeding $600,000.

Under the Resource Management Act, “Person” is defined as including the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate.

Appendix 12: Infringement notice

INFRINGEMENT NOTICE

File No:	60 XX XXA	**Notice Number:**	EAC89XX

(Issued under the authority of Section 343C of the Resource Management Act 1991)

Enforcement Authority:
Waikato Regional Council
Private Bag 3038
Waikato Mail Centre
HAMILTON 3240

Enforcement Officer Identification:
Deanna Jayne Nikoia

To:	Sunburst Limited
Date of Birth:	N/A
Address:	C/- An Accountant Limited 3 Brown Street Pukekohe 2120

You are alleged to have permitted an infringement offence against the Resource Management Act 1991, as follows:

Details of Alleged Infringement Offence

Section of Resource Management Act 1991 Contravened: Section 15(1) being an offence against section 338(1)(a) of the Resource Management Act.

Contravened Section 15(1)(b) of the Resource Management Act 1991 in that it permitted the discharge of a contaminant, namely farm animal (dairy) effluent, onto land, where it may enter water, namely ground water, where that discharge was not expressly allowed by a national environmental standard or other regulations, a rule in a regional plan, or a resource consent.

Location: The dairy farm situated on Smith Road, Te Kowhai and associated with the dairy supply number Fonterra 71XXX

Date: On or about 20 October 2022 **Approximate Time:** N/A

The Fee for this Infringement is: $750.00

PAYMENT OF INFRINGEMENT FEE

The infringement fee is payable to the enforcement authority within 28 days after 9 February 2023.

The infringement fee is payable to the enforcement authority via Internet Banking using the payee bank details below or by eftpos at the Council's Hamilton Office at 160 Ward Street, Hamilton.

The contact details of the enforcement authority are as follows:
Waikato Regional Council, Private Bag 3038, Waikato Mail Centre, Hamilton 3240

Signature of Enforcement Officer:

Deanna Nikoia

IMPORTANT PLEASE READ STATEMENT OF RIGHTS ATTACHED

Online Payment Option

PAYEE BANK DETAILS	
BANK A/C NO:	06-0317-009XXXX-00
BANK A/C NAME:	Waikato Regional Council
CODE:	EAC89XX
REFERENCE:	BP

SUMMARY OF RIGHTS

Note: If, after reading this statement, you do not understand anything in it, you should consult a lawyer immediately.

Payment

1 If you pay the infringement fee within 28 days after the service of this notice, no further action will be taken against you in respect of this infringement offence. Payments should be made to the enforcement authority at the address shown on the front of this notice.

Note: If, under section 21 (3A) or (3C) (a) of the Summary Proceedings Act 1957, you enter or have entered into a time to pay arrangement with an informant in respect of an infringement fee payable by you, paragraphs 3 and 4 below do not apply and you are not entitled either to request a hearing to deny liability or to ask the Court to consider any submissions (as to penalty or otherwise) in respect of the infringement.

Further Action

2 If you wish to raise any matter relating to circumstances of the alleged offence, you should do so by writing a letter and delivering it to the enforcement authority at the address shown on the front of this notice within 28 days after the service of a reminder notice in respect of the offence.

3 If you deny liability and wish to request a hearing in the District Court in respect of the alleged offence, you must, within 28 days after the service of a reminder notice in respect of the offence, deliver to the enforcement authority at the address shown on the front page of this notice a letter requesting a Court hearing in respect of the offence. The enforcement authority will then, if it decides to commence court proceedings in respect of the offence, serve you with a notice of hearing setting out the place and time at which the matter will be heard by the Court.

Note: If the Court finds you guilty of the offence, costs will be imposed in addition to any penalty.

4 If you admit liability in respect of the alleged offence but wish to have the Court consider submissions as to penalty or otherwise, you must, within 28 days after the service of this notice, write to the enforcement authority at the address shown on the front page of this notice a letter requesting a hearing in respect of the offence in the same letter admit liability in respect of the offence set out the submissions that you would wish to be considered by the Court. The enforcement authority will then, if it decides to commence court proceedings in respect of the offence, file your letter with the Court. There is no provision for an oral hearing before the Court if you follow this course of action.

Note: Costs will be imposed in addition to any penalty.

Non-payment of Fee

5 If you do not pay the infringement fee and do not deliver a letter requesting a hearing within 28 days after the service of this notice, you will be served with a reminder notice (unless the enforcement authority decides otherwise).

6 6. If you do not pay the infringement fee and do not deliver a letter requesting a hearing in respect of the alleged infringement offence within 28 days after the service of the reminder notice, you will become liable to pay COSTS IN ADDITION TO THE INFRINGEMENT FEE (unless the enforcement authority decides not to commence court proceedings against you).

Defence

7 You will have a complete defence against proceedings relating to the alleged offence if the infringement fee is paid to the enforcement authority at the address shown on the front page of this notice within 28 days after the service of a reminder notice in respect of the offence. Late payment or payment made to any other address will not constitute a defence to proceedings in respect of the alleged offence.

8 (1) This paragraph describes a defence additional to the one described in paragraph 7. This defence is available if you are charged with an infringement offence against any of sections 9, 12, 13, 14, and 15 of the Resource Management Act 1991.

(2) You must prove either of the following to have the defence:

(a) that-

(i) the action or event to which the infringement notice relates was necessary for the purposes of saving or protecting life or health, or preventing serious damage to property, or avoiding an actual or likely adverse effect on the environment; and

(ii) your conduct was reasonable in the circumstances; and

(iii) you adequately mitigated or remedied the effects of the action or event after it occurred; or

(b) that-

(i) the action or event to which the infringement notice relates was due to an event beyond your control, including natural disaster, mechanical failure, or sabotage; and

(ii) you could not reasonably have foreseen or provided against the action or event; and

(iii) you adequately mitigated or remedied the effects of the action or event after it occurred.

(3) Subparagraph (2) does not apply unless -

(a) you deliver a written notice to the enforcement agency; and

(b) in the notice you -

(i) state that you intend to rely on subparagraph (2)(a) or (b); and

(ii) specify the facts that support your reliance on subparagraph (2)(a) or (b); and

(c) you deliver the notice -

(i) within 7 days after you receive the infringement notice; or

(ii) within a longer period allowed by a District Court.

(4) If you do not comply with subparagraph (3), you may ask the District Court to give you leave to rely on subparagraph (2)(a) or (b).

8A (1) (1) This paragraph describes a defence additional to those described in paragraphs 7 and 8.
This defence is available if—

(a) you are -

(i) a principal; or

(ii) an employer; or

(iii) the owner of a ship; and

(b) you may be liable for an offence alleged to have been committed by—

(i) your agent; or

(ii) your employee; or

(iii) the person in charge of your ship.

(2) If you are a natural person, including a partner in a firm, you must prove either of the following to have the defence:

(a) that you -

(i) did not know, and could not reasonably be expected to have known, that the offence was to be, or was being, committed; and

(ii) took all reasonable steps to remedy any effects of the act or omission giving rise to the offence; or

(b) that you took all reasonable steps to -

(i) prevent the commission of the offence; and

(ii) remedy any effects of the act or omission giving rise to the offence.

(3) If you are not a natural person (for example, you are a body corporate), you must prove either of the following to have the defence:

(a) that -

(i) neither the directors (if any) nor any person involved in your management knew, or could reasonably be expected to have known, that the offence was to be, or was being, committed; and

(ii) you took all reasonable steps to remedy any effects of the act or omission giving rise to the offence; or

(b) that you took all reasonable steps to -

(i) prevent the commission of the offence; and

(ii) remedy any effects of the act or omission giving rise to the offence.

8B (1) This paragraph describes a defence additional to the defences described in paragraphs 7, 8, and 8A. This defence is available if you are charged with an infringement offence against section 15A(1)(a) of the Resource Management Act 1991 (relating to dumping waste or other matter in the coastal marine area from a ship, aircraft, or offshore installation).

(2) In order to have the defence, you must prove all of the following in relation to the act or omission that is alleged to constitute the offence:

(a) that the act or omission was necessary -

(i) To save or prevent danger to human life; or

(ii) To avert a serious threat to any ship, aircraft, or offshore installation; or

(iii) In the case of force majeure caused by stress of weather, to secure the safety of any ship, aircraft, or offshore installation; and

(b) that the act or omission was a reasonable step to take in all the circumstances; and

(c) that the act or omission was likely to result in less damage that would otherwise have occurred; and

(d) that the act or omission was taken or omitted in such a way that the likelihood of damage to human or marine life was minimised.

8C (1) This paragraph describes a defence additional to the defences described in paragraphs 7, 8, 8A, and 8B. This defence is available if you are charged with an infringement offence against section 15B(1) or (2) of the Resource Management Act 1991 (relating to certain discharges of a harmful substance, a contaminant, or water in the coastal marine area from a ship or offshore installation).

(2) You must prove either of the following to have the defence:

(a) that the harmful substance, contaminant, or water was discharged for the purpose of securing the safety of a ship or an offshore installation, or for the purpose of saving life and that the discharge was a reasonable step to effect that purpose; or

(b) that the harmful substance, contaminant, or water escaped as a consequence of damage to a ship or its equipment or to an offshore installation or its equipment, and-

(i) such damage occurred without your negligence or deliberate act; and

(ii) as soon as practicable after that damage occurred, all reasonable steps were taken to prevent the escape of the harmful substance, contaminant, or water or, if any such escape could not be prevented, to minimise any escape.

Queries/Correspondence

9 When writing or making payment of an infringement fee, please indicate –

(a) The date of the infringement notice; AND

(b) The infringement notice number; AND

(c) The identifying number of each alleged offence and the course of action you are taking in respect of it (if this notice sets out more than 1 offence and you are not paying all the infringement fees for all the alleged offences); AND

Your full address for replies (if you are not paying all the infringement fees for all the alleged offences).

FULL DETAILS OF YOUR RIGHTS AND OBLIGATIONS ARE SET OUT IN SECTIONS 340 TO 343D OF THE RESOURCE MANAGEMENT ACT 1991 AND SECTION 21 OF THE SUMMARY PROCEEDINGS ACT 1957.

NOTE: ALL PAYMENTS, ALL QUERIES, AND ALL CORRESPONDENCE REGARDING THIS INFRINGEMENT MUST BE DIRECTED TO THE ENFORCEMENT AUTHORITY AT THE ADDRESS SHOWN.

Appendix 13: Abatement notice

Waikato Regional Council Abatement Notice

Section 324, Resource Management Act 1991

To:	Wade Wilson
Date of Birth:	1 July 1974
Address:	27 Hakiramata Road, Taupo

Waikato Regional Council ("WRC") gives notice that you must cease and are prohibited from commencing the following action:

Cease the unlawful discharge of sediment

The location to which this Abatement Notice applies is:
27 Hakiramata Road, Taupo – hereafter referred to as 'the property'.

You must comply with this abatement notice immediately on receipt of this notice and no later than:
21 February 2024

This notice imposes the following further conditions:
Not applicable

This notice is issued under:
Section 322(1)(a)(i) of the Resource Management Act 1991. ('Act')

The reasons for this notice are:

1. The activity that this notice refers to is the soil disturbance and earthworks on the property.

2. A certificate of title shows the property is owned by Wade Wilson Developments Ltd, (hereafter referred to as 'the company').

3. A Companies Office search shows Wade Wilson as the sole director of this company.

4. The property is located within the boundaries of the Waikato region, therefore is bound by the terms and conditions of the Waikato Regional Plan ('the plan').

5. Section 9(2) of the Resource Management Act 1991 states: "*No person may use land in a manner that contravenes a regional rule unless the use –*
(a) Is expressly allowed by a resource consent, or
(b) Is an activity allowed by Section 20A."

6. Section 15(1) of the Resource Management Act 1991 states: "No person may discharge any—
(a) Contaminant or water into water; or
(b) Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; …
unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent."

7. The works on the property, as described in this notice, are located at the top of a valley, consisting of steep and hilly terrain. This property meets the definition of a high-risk erosion area under the Waikato Regional Plan in that the pre-existing slope of the land exceeds 25 degrees.

8. Sediment is considered a contaminant pursuant to Section 2 of the Act.

9. The plan contains a Controlled Activity Rule 5.1.4.14, requiring resource consent for soil disturbance, road and tracking and vegetation clearance and riparian vegetation clearance in high risk erosion areas. It also requires consent for soil disturbance should the total length of works conducted exceeds 100 metres but is under 2000 metres.

10. The plan also contains Permitted Activity Rule 5.1.5 which sets out the conditions which have to be met when undertaking this type of activity, including the installation and maintenance of erosion and sediment controls.

11. There are no national environmental standards, or other regulations, rules in a regional plan or resource consent relating to the property that expressly authorise any of the above-listed activities.

12. I am a warranted enforcement officer pursuant to section 38 of the Act with the designation of Incident Response Officer in the Incident Response team.

Circumstances of this notice are

13. On 31 January 2024, Waikato Regional Council ('Council') received a complaint regarding earthworks being conducted at the property.

14. On the morning of 19 February 2024, I contacted the owner of the subject address, Wade Wilson. Mr. Wilson confirmed he was the owner and stated he had engaged a contractor to complete earthworks on existing tracks at the property. He further stated he had a section of new track added in and believed it to be 50 to 100 metres in length.

15. Mr. Wilson confirmed he had not consulted with Council prior to the works taking place and was not aware of the rules surrounding new tracks and high-risk erosion areas.

16. At 1:50pm on 19 February 2024, Incident Response Officer Sharon Milovich and I visited the property and met two males who introduced themselves as Wade Wilson and Arthur Curry. Mr. Curry confirmed that he was the contractor engaged by the owner to carry out earthmoving on the subject property. Mr. Curry said he was self-employed.

17. Mr. Curry stated he had conducted the works on the property relating to the maintenance of existing tracks, as well as the single addition of a new track. He took me to the site of the new track. I observed a fresh track cut into the side of a steep hill which led down into a valley, eventually coming native bush and then to an unnamed tributary of the Waitake Stream.

18. Mr. Curry also stated he had cut the track into the side of the hill. He said he had taken the overburden and placed it back into the track, using it to build the track, and compacting it back down with the digger as he went. He indicated to me where the trail started and ended. No overburden was removed from site. All overburden was reused in the construction of the track. Mr. Curry stated he believed the track was to provide livestock access to the lower parts of the property.

19. Ms Milovich and I then walked the new track to take its measurements. The total length of the new track was 141 meters long. We also measured 29.6 meters of that to have a cut slope batter in excess of 3 meters in height. The average gradient of the cut slope batter was 35 degrees. The

natural, undisturbed gradient of the hillside in which the track was cut into is in excess of 25 degrees.

20. Near the start of the new track, I observed a slippage of loose soil (discharge of contaminate to land) which had slid from the edge of the track, down the hillside, towards the unnamed tributary. This slippage was approximately 18 meters long and about 30 metres across at it's widest point, tapering down to less than 3 metres at it's narrowest point. I observed no sediment controls in place and no signs that sediment control had been used.

21. In my opinion, there have been contraventions of Section 15(1)(b) and Section 9(2) of the Resource Management Act 1991.

22. In my opinion the actions detailed in this notice are required to prevent the further contravention of section 15(1)(b) and section 9(2) of the Resource Management Act 1991.

If you do not comply with this notice, you may be prosecuted under section 338 of the Resource Management Act 1991 (unless you appeal and the notice is stayed as explained below).

You have the right to appeal to the Environment Court against the whole or any part of this notice. If you wish to appeal, you must lodge a notice of appeal in form 49 with the Environment Court within 15 working days of being served with this notice.

An appeal does not automatically stay the notice and so you must continue to comply with it unless you also apply for a stay from an Environment Judge under section 325(3A) of the Resource Management Act 1991 (see form 50). To obtain a stay, you must lodge both an appeal and a stay with the Environment Court.

You also have the right to apply in writing to the Waikato Regional Council to change or cancel this notice in accordance with section 325A of the Resource Management Act 1991.

The Waikato Regional Council authorised the enforcement officer who issued this notice. Its address is: Waikato Regional Council, Private Bag 3038, Waikato Mail Centre, Hamilton 3240. Phone (07) 859 0999, Facsimile (07) 859 0998.

The enforcement officer is acting under the following authorisation: A warrant of authority issued by the Waikato Regional Council, pursuant to section 38 of the Resource Management Act 1991, authorising the officer to carry out all or any of the functions and powers as an enforcement officer under the Resource Management Act 1991.

Lucius Arilius
Enforcement Officer with the designation of Incident Response Officer,
Waikato Regional Council

Date: 21 February 2024

Appendix 14: Charging document

MOJ9001

Charging Document

s 14 Criminal Procedure Act 2011

CRN:

Filed in the District Court at Wellington **on:**

Defendant

Name:* Barry Marx Allen **PRN:**

Address: 38 Waring Street
Dunedin

Gender:* Male
Date of birth:* 26 January 1985
Driver licence no: N/A
Occupation: Company Director

Offence details

I, Scott Cullen Kerr Hunter, Enforcement Officer, of Waikato Regional Council, have good cause to suspect that Barry Marx Allen has committed the offence specified below.

Date of offence:* Between 12 and 28 January 2023 (inclusive)

Offence location:* Mahaki

Offence description:* Contravened s 15(1)(b) of the Resource Management Act 1991 by permitting a contaminant, namely sediment laden water from the process of iron ore extraction, onto land in circumstances which may result in that contaminant entering water, namely the Pacific Ocean, where the discharge was not expressly allowed by a national environmental standard or other regulations, a rule in a regional plan or proposed regional plan, or a resource consent.

Legislative reference:* Resource Management Act 1991, Section 15(1)(b), Section 338(1)(a), Section 339(1)(a), Section 339(1A) & Section 340(1)(a)

State the full legislative reference, including year and relevant section(s) of the Act

Maximum penalty:* Imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000

Offence category:* 3 **Representative charge:*** Yes **Alternative charge:*** No

Select Yes if the offence description is worded as a representative or alternative charge.

Register Charge: N/A

Child Protection (Child Sex Offender Government Agency Registration) Act 2016

First appearance hearing

Date: **Time:**

Court: Wellington District Court

Prosecutor details

Prosecutor:* Waikato Regional Council

Address for service:* Lawyer & Co Limited
(c/- Lawyer Prime)
12 Customs Street
Porirua

Signed:*

*Important: All fields marked * are mandatory. Please ensure all details are entered correctly, sign this document, and present it to the District Court to file the charge*

Appendix 15: Summary of facts

IN THE DISTRICT COURT **CRN 240755xxxxx to 00xx**

AT TE AWAMUTU

BETWEEN **WAIKATO REGIONAL COUNCIL**

Informant

AND **LEGION LOGGING LIMITED**

C / - An Accountant

1 Whittaker Street

Te Awamutu

(Defendant 1)

Charges

Restrictions on use of land

Sections 9(1) & 338(1)(a)

Resource Management Act 1991

Restrictions on use of beds of rivers

Section 13(1) & 338(1)(a)

Resource Management Act 1991

Breach of Abatement Notice

Section 338(1)(c)

Resource Management Act 1991

Penalty

Section 339(1)

Resource Management Act 1991

A fine not exceeding $600,000.

SUMMARY OF FACTS

Introduction and relevance of the NES-PF:

1. Plantation forestry related activities such as afforestation, harvesting and associated earthworks and river crossings are generally provided for as permitted activities pursuant to the *Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* **(NES-PF)** which was enacted on 1 May 2018.

2. The general purpose of the NES-PF is to provide a nationally consistent set of regulations that manage core plantation forestry activities including earthworks, harvesting and river crossings through permitted activities with conditions to avoid, remedy, or mitigate the adverse environmental effects of sediment on waterbodies.

3. Forestry activities that do not comply with the permitted activity conditions or are not provided for within NES-PF regulations become controlled, restricted discretionary or discretionary activities that require a resource consent pursuant to the *Resource Management Act 1991* **(the Act)**.

4. NES-PF regulations 25 (earthworks), 38 (river crossings) and 64 (harvesting), require these activities to be notified to the relevant Regional Council within at least 20 days and no more than 60 working days before the date on which the earthworks, river crossing or harvesting is planned to begin, for these activities to be undertaken as a permitted activity.

5. The location of the plantation harvest this summary relates to is located within the Waikato Region and is therefore subject to the provisions of the Waikato Regional Plan which came into effect on 30 August 2007.

6. Waikato Regional Council **(WRC)** requires earthworks management and harvest plans and a map of the proposed activities to accompany notifications. Information and advice on the notification process, including the notification form, is available online via WRC's public website.

7. No application for any resource consent was made by any party in respect of the forestry operations described in this summary.

8. Guidance with regard to understanding and applying the NES-PF regulations is made available by the Ministry for Primary Industries via their public website. Information regarding performance standards and best practice methodologies for forestry harvesting, earthworks, river crossings, roading and associated activities are also made available through a number of forestry industry publications, including the New Zealand Forestry Owners Association and Farm Forestry New Zealand public websites.

Resource Management (National Environmental Standards for Commercial Forestry) Regulations 2017

9. The National Environmental Standards for Commercial Forestry **(NES-CF)** came into effect on 3 November 2023 to replace the NES-PF. These standards provide nationally consistent regulations to manage the environmental effects of forestry in New Zealand and applies to both plantation forestry and exotic continuous-cover forests (carbon forests) deliberately established for commercial purposes.

10. The events detailed within this summary fall under the provisions of the NES-PF, however any new activities commenced after 3 November 2023 are subject to the new regulations.

Background and description of activities:

11. This summary relates to the unlawful use of land, the unlawful disturbance of the bed of a river, and the unlawful discharge of a contaminant (sediment, woody debris, and forestry slash) into the environment as a result of a plantation forestry harvesting operation carried out at the address of 12 Gotham Road, Te Awamutu.

12. Harvesting is defined in section 3 of the NES-PF:

means felling trees, extracting trees, thinning tree stems and extraction for sale or use (production thinning), processing trees into logs, or loading logs onto trucks for delivery to processing plants.

13. The property is located approximately 2.5 kilometres west of Te Awamutu and is adjacent to native forest managed by the Department of Conservation **(DoC)**. The Waitemata Streams' headwaters begin in the DoC land and flow through 12 Gotham Road before joining the Takapau River south-west of Te Awamutu.

14. The Waitemata Stream is classified as a Fish Spawning Habitat class waterway for Banded Kokopu and Rainbow Trout under the NES-PF and is a perennial stream. Its headwaters are classified as a 'Natural State' waterway under the Waikato Regional Plan.

15. On 1 March 2021, 12 Gotham Road **(the property)** was purchased by Logan View Limited. The property was originally 172 ha, primarily a dry stock farm with woodlots of plantation forestry, however this was sub-divided with 121 ha being sold to another investor. The remaining 51 ha was retained by Logan View Limited and contained approximately 18.2 ha of plantation macrocarpa and radiata pine trees in 8 separate woodlots.

16. Logan View Limited was incorporated in the Companies Office Register on 6 of May 2021 and has two directors: the defendant Adam West and Selena Kyle.

17. On 7 August 2022, a Harvest and Earthworks Management plan was submitted to WRC in accordance with the provisions of the NES-PF. The harvest plan was submitted by Oliver Queen from Arrow 2019 Limited on behalf of Mr. West and the defendant Legion Logging Limited **(LLL)** and included a detailed description of the earthworks and harvest activities that was proposed to take place at the property and along the paper road extension of Gotham Road.

18. Legion Logging Limited was incorporated in the Companies Office Register on the 16 February 2017, and has two directors, the defendant Adam West and Selena Kyle.

19. Mr. West has a 50% shareholding in LLL and is physically responsible for the operation of the logging business on behalf of the company. He works in the business carrying out harvesting operations and associated earthworks and is responsible for implementing the harvest and earthworks plans, maintaining daily control of activities on the site, managing log production and compliance with NES-PF regulations. He has been managing plantation forest harvesting since 2010.

Harvest Plan and Methodology

20. In the submitted harvest plan, Mr. West and LLL notified a time frame to harvest the radiata pine block of four to six months starting from 22 August 2022. This would have seen the harvest completed between December 2022 and February 2023.

21. The land had been identified as rolling to steep based on the topography of the land, and hauler harvesting on the steeper terrain was specified in the plan by Mr. Queen.

22. Cable harvesting using a hauler is a method where suspended aerial haul cables are suspended over a harvest area, and cut stems are suspended from the cable and winched to a processing area. This method of extraction minimises the environmental effects by reducing the need for earthworks and constructing tracks to access the harvestable trees, however, can be more expensive than other methods and requires loggers on the ground to both cut and attach the trees to the cable system.

23. The woodlots are on land that has a yellow zone erosion susceptibility classification (ESC) with regards to the NES-PF. Erosion Susceptibility Classification is defined in Section 3 of the NES-PF as:

means the system that determines the risk of erosion on land across New Zealand based on environmental characteristics, including rock type and slope and that classifies land into the following 4 categories of erosion susceptibility according to level of risk: low (green), moderate (yellow), high (orange) and very high (red).

24. The harvest planner detailed that forestry tractors with a cable winch and excavators equipped with grapples were to be used: *"LLL will shovel and cable winch the trees by excavator and tractor winch to suitable areas, then transport the logs with a forestry tractor and trailer to the load out skid site for load out."*

25. The widening of tracks on the property to a width of 4.5 metres was also proposed, along with the installation of three temporary culverts across three fords on the 'paper road'. These culverts were to cross tributaries of the Waitemata Stream.

There was no mention of the installation / upgrade or the construction of any temporary river crossings on the property in the submitted plan.

26. A ‘paper road’ is a road that appears on a map but has not been built. In this instance, it is an unformed extension of Gotham Road affording access to DoC land and farm paddocks owned by other residents in that area.

27. Four fill sites were to be added, two on the property, and the remaining two to be constructed alongside the paper road. The volume of earthworks that was proposed was approximately 4,070m^3.

28. On 11 August 2022, AUTH204XXX.01.01 was provided to LLL and Mr. West, acknowledging the notification and proposed harvest plan received by WRC.

29. LLL owns and operates a number of large, forestry equipped excavators and a ‘skidder’ machine and uses a harvesting system commonly referred to as ‘ground-based’.

30. Ground-based harvesting is the most common extraction method. It typically is the lowest cost and highest production option. Trees are felled, either mechanically or manually, stems are then shovelled, or dragged along the ground using a skidder, or ‘forwarded’ to a processing site (landing/skid) for processing into logs for loading out.

31. The environmental effects of ground-based harvesting requires more extensive earthworks and tracking to be implemented increasing the risk of soil disturbance and destabilisation of the ground, than other cable-based methods.

32. For the harvesting operations described in this summary, the company operated an excavator equipped with a felling and bunching head (used to mechanically fell trees), an excavator equipped with a grapple to handle and move stems (felled trees), a skidder used to drag stems to landings (also known as a skid) and an excavator equipped with a processing head to process stems into logs for grading.

33. Mr. West additionally had a forestry tractor and 4WD trailer to forward logs to a load out zone on the property for loading out onto conventional log trucks.

69. WRC staff failed to locate or identify any form of culvert in the stream, or if logs had been placed parallel to the culvert due to the crossing being covered in spoil and debris.

70. Failing to ensure a culvert of 300mm was installed in the bed of the tributary where the temporary river crossing was constructed is a breach of NES-PF Regulation 48(1) by non-compliance with the relevant clauses of the NES-PF, and therefore an offence against 13(1)(a) & (d) of the Act.

71. When asked by WRC officers if the temporary river crossing was included in the submitted harvest and earthworks plan to WRC, Mr. West said he was unsure. A review of the submitted harvest and earthworks plan indicated the presence of an existing culvert crossing however no culvert could be located.

Explanation

72. On 30 November 2023, Mr. West was formally interviewed at the property. During the interview he accepted he completed the earthworks, including the construction of the temporary river crossing, and harvesting, and all the machinery belonged to him.

73. He stated he was trying to eliminate how much work he had to do around the harvest site and earthworks and was waiting to remove the wood before completing any maintenance to the site.

74. He conceded that some of the soak holes were not maintained and had build-ups of sediment in them and stated this was because he had relocated his bucket excavator offsite during July and was unable to perform the maintenance.

75. He stated he could not maintain the stormwater controls or tracks due to the wet weather at the property over winter.

Environmental Impact

76. *The environmental impacts relating to the potential adverse ecological effects of sediment laden water and slash that was discharged into the Waitemata Stream is still to be completed by a WRC Ecologist.*

77. The Waitemata Stream is classified as a Fish Spawning Habitat class waterway for Banded Kokopu and Rainbow Trout under the NES-PF and is a perennial stream. It flows into the Takapau River which is regarded as very attractive river to fish, holding good stocks of both brown and rainbow trout.

78. The effects of sediment in streams for fish species can include reduced water clarity affecting feeding behaviour, hinder upstream migrations, habitat loss where sediment degrades fish habitat and food sources. Sediment entering streams has not only an immediate adverse effect on stream biota but also long-term effects as sediment loads move downstream.

79. The Environment Court has previously observed that fine sediment is “the most pervasive and significant contaminant in New Zealand’s waterways”.

George Papp
Investigator
Waikato Regional Council

Waikato
REGIONAL COUNCIL
Te Kaunihera ā Rohe o Waikato

He taiao mauriora **Healthy environment**

He hapori hihiri **Vibrant communities**

He ōhanga pakari **Strong economy**

ISBN 978-1-99-117173-3 (print)
ISBN 978-1-99-117174-0 (online)

Printed March 2025 #7629
Private Bag 3038, Waikato Mail Centre,
Hamilton 3240, New Zealand
0800 800 401 waikatoregion.govt.nz