

Environmental Compliance Conference

Enforcement 201

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Content of presentation

- Enforcement options
- Carrying out a prosecution investigation
- Role of officer in charge in prosecutions
- Giving evidence
- Disclosure

Enforcement

Outcomes fall under two broad categories:

- directive (warning letters, ANs and EOs) and
- punitive (INs and prosecution).

The choice of action should take into account the need for direction and/or punishment.

When to consider enforcement

- Repeat offender
- Serious effect on environment
- The pollution or non-compliance appears to have resulted from negligence or deliberate action
- The person or business has not addressed the issue adequately.
- The party has refused to apply for a required consent.
- The party has applied for a consent but has failed to supply information necessary to complete assessment of the application that has been requested more than once.

Factors to consider when deciding enforcement

- What outcome is desired.
- Whether the council has dealt with the party before.
- Whether the party has already been asked to take the required action and what their response was.
- Seriousness of the incident and actual and potential effect on the environment.
- What action, if any, is required to avoid or remedy any adverse effect or to ensure compliance the RMA, a Plan or a consent.
- Attitude of the party.
- Degree of deterrence required.

Formal warning letter

- Where infringement notice not necessary e.g. accidental or unforeseen single instance of non-compliance where possibility of future non-compliance.
- Explains offence & what section of RMA contravened.
- Warning that will be taken into account if any more offending.

Assessment for abatement notices

- Did the incident or activity breach the RMA?
- Has the party been requested to take the required action or cease the activity?
- Did the party fail to take the action or cease the activity?
- Is the action or ceasing of the activity necessary to avoid, remedy or mitigate an adverse effect?
- Is an abatement notice therefore necessary?



Abatement notice

An AN may be served on any person (occupier of land or person carrying out an activity) requiring that person to:

- cease (or not commence) anything done by or on behalf of that person that
 - contravenes the RMA, a rule in a plan or a resource consent; or
 - is likely to be noxious, dangerous, offensive or objectionable to such an extent that it has or is likely to have adverse effect on environment
- do something to ensure compliance and/or remediate effects of breach.







Purpose of abatement notices

- Not to punish
- Only if needed e.g.
 - if offender has been asked to do something needed to comply with RMA or remediate and has refused or failed to do it, or
 - If offender has been asked to cease an activity and continues

Form and content of abatement notice.

- Separate ANs for cease and “to do”
- name of person (must be legal entity)
- reason for notice, including environmental effects for “to do” ANs
- action required
- period for action to be completed
- consequences of not complying
- rights of appeal
- name of authority and enforcement officer.

Reasons – cease AN

Clear language and easy to understand e.g

- Kumeu Landscaping Ltd was found to have discharged sediment laden water into water, namely the Brun Creek.
- This abatement notice is issued because in my opinion such a discharge is a contravention of section 15(1)(a) of the RMA 1991. Such a contravention is an offence.

Reasons “to do” AN

- Kumeu Landscaping Ltd was found to have discharged sediment laden water into water, namely the Brun Creek.
- This abatement notice is issued because in my opinion such a discharge is a contravention of section 15 (1)(a) of the RMA 1991. Such a contravention is an offence.

Reasons “to do” AN cont.

- This abatement notice is also issued because in my opinion the required action is necessary to ensure compliance by you and your contractors with the RMA, and is also necessary to avoid, remedy or mitigate any actual or likely adverse effect on the environment caused by you and your contractors.
- Sediment has a direct impact on waterways and organisms living in these environments. It physically smothers aquatic life, damages fish gills and mouthparts, increases temperature and turbidity (cloudiness of the water) and prevents light penetrating the water, all of which significantly alter fish habitats. Sediment also transports other pollutants such as lead, hydrocarbons, agricultural nutrients and toxic substances into streams.

Reasons cont.

- Ensure it is clear what the recipient has done that is a breach and exactly what Plan Rule & conditions/RMA section have been breached
- Be precise e.g. don't refer to something occurring on day of site visit when what you saw was evidence it had occurred in the past

ANs – important points

- Be specific about what location the abatement notice applies to
 - The requirements must be specific. Use active speech e.g. “monitor the pump every week”, not “ensure the pump is monitored every week”
 - Don’t just ask for a report e.g. a RAP - ask for it for approval by Council and then require that they comply with the approved RAP.
 - Don’t issue a questionable AN in the hope they won’t appeal and that you’ll just cancel if they do. If not right, don’t issue.
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Enforcement orders

Order made by Environment Court under s319 requiring a person to:

- cease, or not commence anything done by or on behalf of that person that may contravene the Act, regional rule or resource consent
- do something necessary to ensure compliance or avoid, remedy or mitigate any adverse effect
- mitigate or remedy any actual or likely adverse effect on the environment
- pay money (reasonable costs) to avoid, remedy or mitigate adverse effects on the environment...

Enforcement orders

Use

- Serious environmental risk.
- Remediation required
- Offender continuing contravening activity and ignoring an abatement notice
- As part of prosecution sentencing



Interim Enforcement Orders

- Made without service on affected parties and without a hearing.
- Appropriate where
 - Urgent action required; or
 - Where emergency provisions in s330 cannot be used; or
 - Sanction & protection of court desirable
- Judge will consider
 - What effect of not making order will have on environment
 - Whether should hear applicant or any other person
 - Such other matters as Judge thinks fit.



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Infringement notice

- Where an Enforcement Officer observes a person committing an infringement offence or has reasonable cause to suspect an offence is being committed, an infringement notice in respect of that offence may be served on that person.
- Must be issued within four months of council being aware of offence because of two 28 day appeal periods.

When to issue infringement notices

- 1st offence and effects more than minor.
- Repeat offence and minor effects.
- Breach of an abatement notice.
- Failure to provide information (s22).
- Do not wish to prosecute.
- Sufficient evidence to prove offence occurred.

Form and content of infringement notice

- Details of offence.
- Amount of infringement fee for offence (\$300-\$1,000).
- Time within which fee must be paid.
- Summary of provisions of s21(1) of SPA.

INs - important points

- Don't keep on issuing INs if ongoing breach. Stop & consider if prosecution needed. Can only prosecute for offences after last IN issued.
- Advise offender in covering letter that liable to full fine if appeal – don't make it seem like a threat!

Content of abatement & infringement notices

Make sure

- Only one offender for each notice.
- Name of offender is correct and is a legal entity – do a company search if is a company.
- Address is correct – street address or address for service.
- Use plain language in covering letter & clearly explain offence.

Prosecution

Use / Situation

- Serious incident with significant environmental effects.
- Repeated incidents despite abatement notices & infringement notices.
- Repeat offender
- Discharge resulting from failure to comply with abatement notice
- Breach of enforcement order.

Prosecution example











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Investigation for prosecution

- Plan carefully
- Ensure all elements of offences can be proved
 - Everything recorded
 - Photos
 - Measurements e.g. sediment controls, minor residential units
 - All evidence seized
- Think about possible defences

Investigation

- Check for gaps in evidence or information.
- Site visit if necessary.
- Search warrant if necessary.
- Expert report, if needed
- Interview witnesses.
- Interview defendant/s.
- Write prosecution/enforcement order report.
- Obtain authority to prosecute.
- Instruct lawyer.

Investigation

- Check facts with other officers who have been dealing with the breach
- Make sure there is actually a breach of the RMA
 - Which section
 - What are the ingredients?
- Prepare investigation plan
- Create electronic file
- Start hard copy file

Investigation file

- Basis for prosecution
 - Copies will be given to Council legal representative & defence lawyer
 - Must be clearly set out so documents can be easily found
 - Must contain all relevant information gathered & records of the investigation
 - Ask any officers involved with monitoring the site or any remediation to copy you into every communication.
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Investigation file content

- Site visits – notebook entries & file notes
- Correspondence with defendant/s, witnesses, experts
- Samples chain of custody & analysis
- Expert reports
- Interviews/statements
- All other evidence
- Internal reports, correspondence
- Any search warrant docs
- Resource Consent, if any
- Invoices
- Background material

Experts

- Decide whether need council or external expert
- For example
 - if environmental damage, get ecologist's report on damage
 - if protected tree cut down or damaged, get arborist's report
 - Unstable fill, geotech expert
- Must be
 - suitably qualified
 - experienced in giving evidence
 - able to give evidence clearly
 - able to be impartial & not an advocate for the Council

Witnesses

- If not already happened, interview all witnesses you need to:
 - Ascertain whether breach has happened
 - Who was responsible
 - Provide evidence of offence
 - Provide evidence of effects of offence
- Get a signed statement from each witness

Defendant/s

- Once obtained all evidence, interview defendant/s
- When organising interview tell them
 - What interview is about
 - That they are not required by law to attend
 - That they can bring a legal representative
- Make sure you have all the documents you need to put to them
- Look for evidence of intention – not necessary to prove offence but increases fine.

Investigation report

- If recommending prosecution or enforcement order, write report that includes
 - Facts of offence/s
 - Sections of RMA breached
 - Effects of offending (illustrate with photos)
 - Attitude of offender/s – any deliberateness or recklessness
 - Need for deterrence
 - Any profits or savings arising from offending
 - Previous history of offender/s

Handing file to legal representative

- Make sure file is complete
- Make a copy of the file
- Copy photos and interview recordings onto memory stick or discs
- Prepare a draft summary of facts
- Provide copies to your legal representative

Working with other councils

- Are there possible breaches of other plans – District or Regional?
- If so, contact relevant council
- Consider joint enforcement action
- Remember we are all working towards the same goal – protection of the environment.

Defended hearing – role of officer in charge

- Draft briefs of evidence/evidential statements
- Ensure sufficient copies of exhibits
- Work with prosecutor throughout preparation and hearing – check all submissions
- Organise witnesses including
 - Ensuring they know when to attend
 - Organising travel and accommodation if necessary
 - Explaining hearing procedure to them
 - Generally looking after them

Giving evidence

- Swearing in/affirming
- Evidence in chief – may be
 - Reading brief of evidence, or
 - Answering questions from Council lawyer
- Cross examination by defence lawyer
 - Resist efforts by lawyer to put words in your mouth
 - Don't give an opinion or guess at something – stick to the facts as you know them
 - If asked about something that is outside your area of experience, say so

Giving evidence cont.

- Re-examination by Council lawyer if they think cross-examination has raised issues that need addressing
- Judge's questioning – may happen at any time during your evidence
- General hints
 - Face the Judge as you give your answers
 - Take your time and think carefully before answering
 - If you don't know the answer, say so

Sentencing hearing

- Prepare victim impact statements, if needed
- If has been no hearing (guilty pleas) check statement of facts before finally agreed. Remember that it is the only description of the offence the Judge will see and make sure it is full enough
- Check Council lawyer's legal submissions
- Provide comment on defence submissions to prosecutor
- Attend the sentencing

Initial Disclosure

- Not more than 21 days after a prosecution has commenced you must provide the defendant/s with
 - A summary that describes the facts on which it is alleged an offence by the defendant has occurred
 - A summary of their right to apply for more info before entering a plea
 - The maximum penalty
 - A list of their previous convictions if you have them

Full disclosure

- As soon as practicable after a not guilty plea, a prosecutor must provide full disclosure, which is basically the full file with certain info. removed or deleted.
- Also provide a list of info. being withheld and the section under which it is withheld
- Disclosure is an ongoing obligation.

Information to be withheld

- Info not relevant to the prosecution
- Communication between Council and its lawyer regarding the prosecution
- Analytical or evaluative material prepared by a council officer for another officer or prosecutor
- Info that is publicly available and obtainable from another source
- Info previously given to defendant
- Info does not exist or cannot be found
- Personal details of witnesses