

Turning a blind eye

NZPI Environmental
compliance conference

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Rydges Hotel - Auckland

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Why survey?

- Media attention – environmental non-compliance in the headlines
- Worth testing your view as officers
- Look at whether there is an issue and also get ideas for improvement

Examples of recent headlines

'Non-compliant' farmers flushed out for alleged breaches of water consents

Millions of litres of water illegally taken: Is ECan doing enough?

Council under fire over water pollution

5:51 pm on 12 May 2016

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Canterbury Regional Council has not issued a single enforcement order or prosecuted anyone despite almost 400 complaints of stock in waterways in the past five years, says Fish and Game.



The Canterbury Regional Council has had 400 complaints of stock in waterways in the past five years. Photo: RNZ / Lois Williams

What is 'turning a blind eye?'

- Our view: Ignoring something you know is wrong (more on our view on this later)
- One respondent's view:
There is a big difference between:
 - 1) *Investigating something and deciding to take no action.*
 - 2) *Knowing/suspecting something and not being resourced to take action.*
 - 3) *Knowing, suspecting something and turning a blind eye.*

A blind eye would be ignoring, not considering the impacts, not talking about it, almost hiding it - or letting it remain hidden.

Relevant concepts:

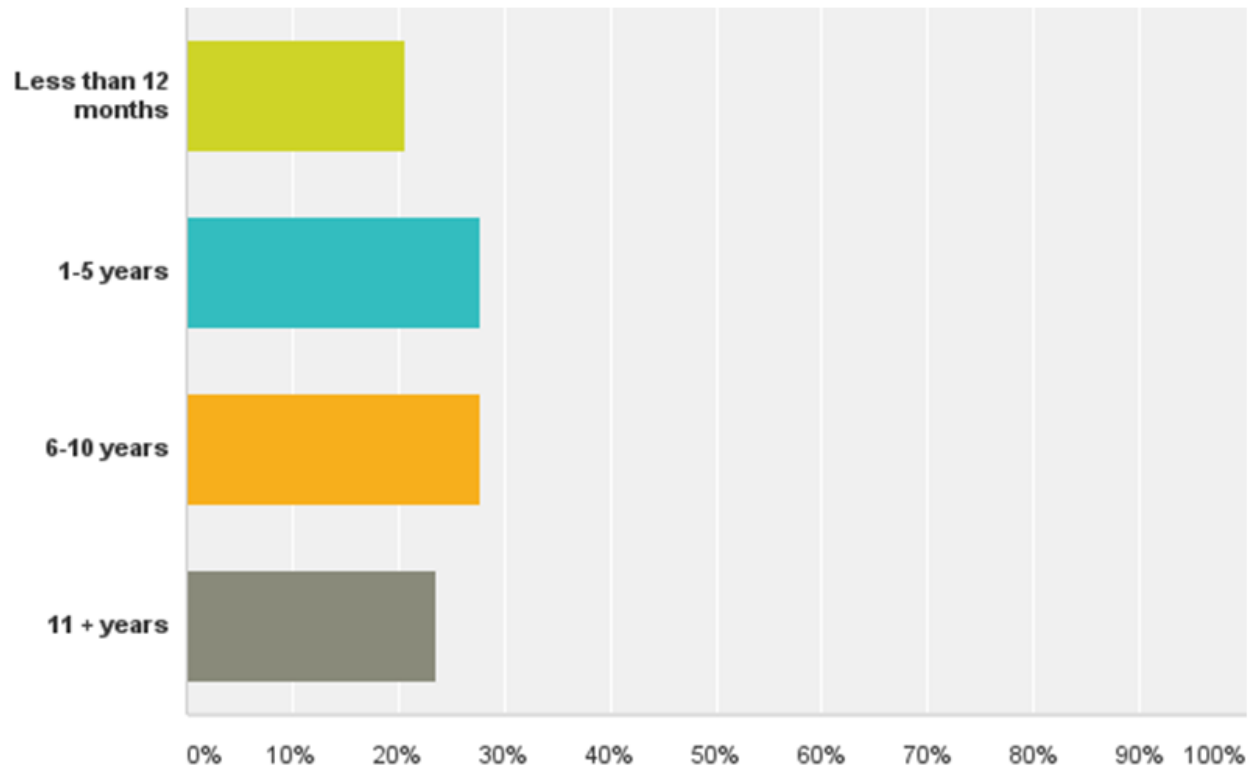
- Consistency
- Discretion
- Pragmatism
- Gunther Pauli – Gunther Pauli – author of *The Blue Economy*. Recent RMLA conference: “
 - *I am thief, but I am stealing less. You're not going to be happy, you're still going to send me to jail. But if I am a polluter and I say to you I am polluting less, that's OK? Don't be happy, it is not better, I am still polluting!*
- Routine trivialisation of environmental offending (Paula de Prez, *Journal of Environmental Law*, UK, 2000)

Survey details:

- Sent to all enforcement officers
- Wanted views of officers not just managers
- Anonymous
- 140 respondents

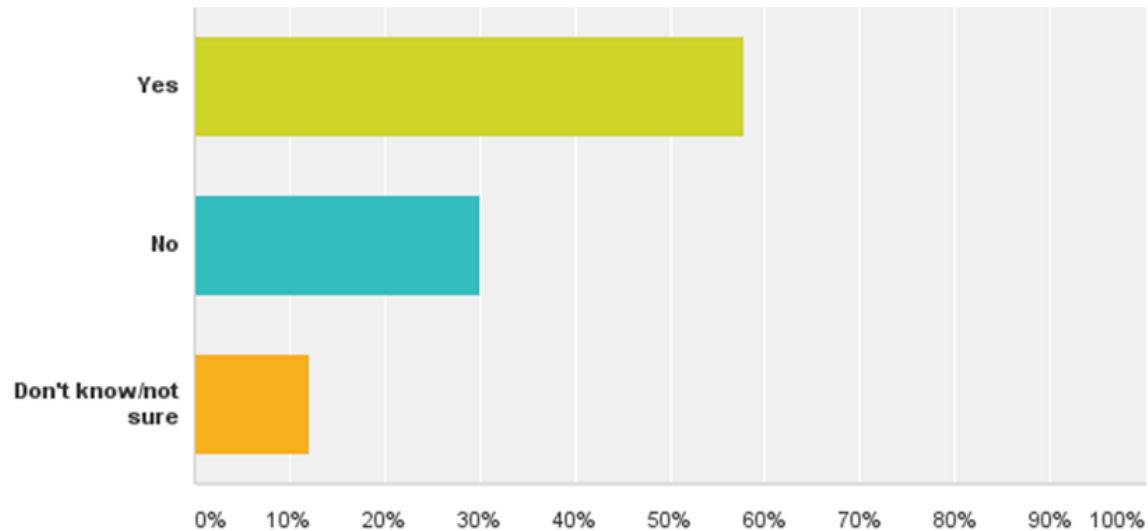
Q1: How long have you worked in environmental compliance?

Answered: 140 Skipped: 0



Q2: Based on your own experience, do you think that the council you work for has ever turned a blind eye to environmental non-compliance?

Answered: 140 Skipped: 0



Question 3

“How often has it occurred”?

This was an open question.

- Frequently – 19
- Not often – 12
- Several noted it happened less often than in the past

Many responses were along the lines of:

- “happens regularly with minor breaches when there is no significant adverse impact on the environment”
- “minor non-compliance is often ignored”
- “This occurs on an everyday basis...”
- “Numerous occasions. Mostly earthworks sites and farm dairy discharges.”

Selected responses:

- “Primarily there have been very isolated incidents where local authorities are involved largely driven by politics and community perceptions.”
- “Fairly rarely. Often it is due to the officer involved not wanting to get involved in anything too controversial and difficult. It also happens when the non-compliances are with district council consents.”
- “For significant issues, not often...”

Underlying themes:

- Turn a blind eye for minor breaches (20)
- Interference from:(17)
 - councillors
 - management
 - people with connections
- High workloads, work priorities, resourcing (12)
- Resource consent conditions difficult (4)

Other reasons given:

- Too difficult
- Attitude/approach of individual teams
- Relationship with stakeholder (becoming too close)
- Avoid difficult/controversial matters
- Council is the offender
- Character of the officer

OUR VIEW:

- All local authorities should have clear policy and guidelines on enforcement.
 - The policy is important because there is the option of informal and formal enforcement and a number of enforcement mechanisms.
- It is disappointing that for some councils there continues to be political interference in methods of monitoring and enforcement when:
 - the Auditor-General in September 2011 Report *Managing freshwater quality: Challenges for regional councils*; and
 - the Crown Law Solicitor-General's *Prosecution Guidelines* make it very clear that the decision as to whether to prosecute should be free from political influence. We think it is also fair and sensible for monitoring and decisions about other types of enforcement to be likewise free from political influence.

Councillors are putting pressure on council staff not to take action against offenders

MARTY SHARPE

Last updated 13:45, November 4 2016



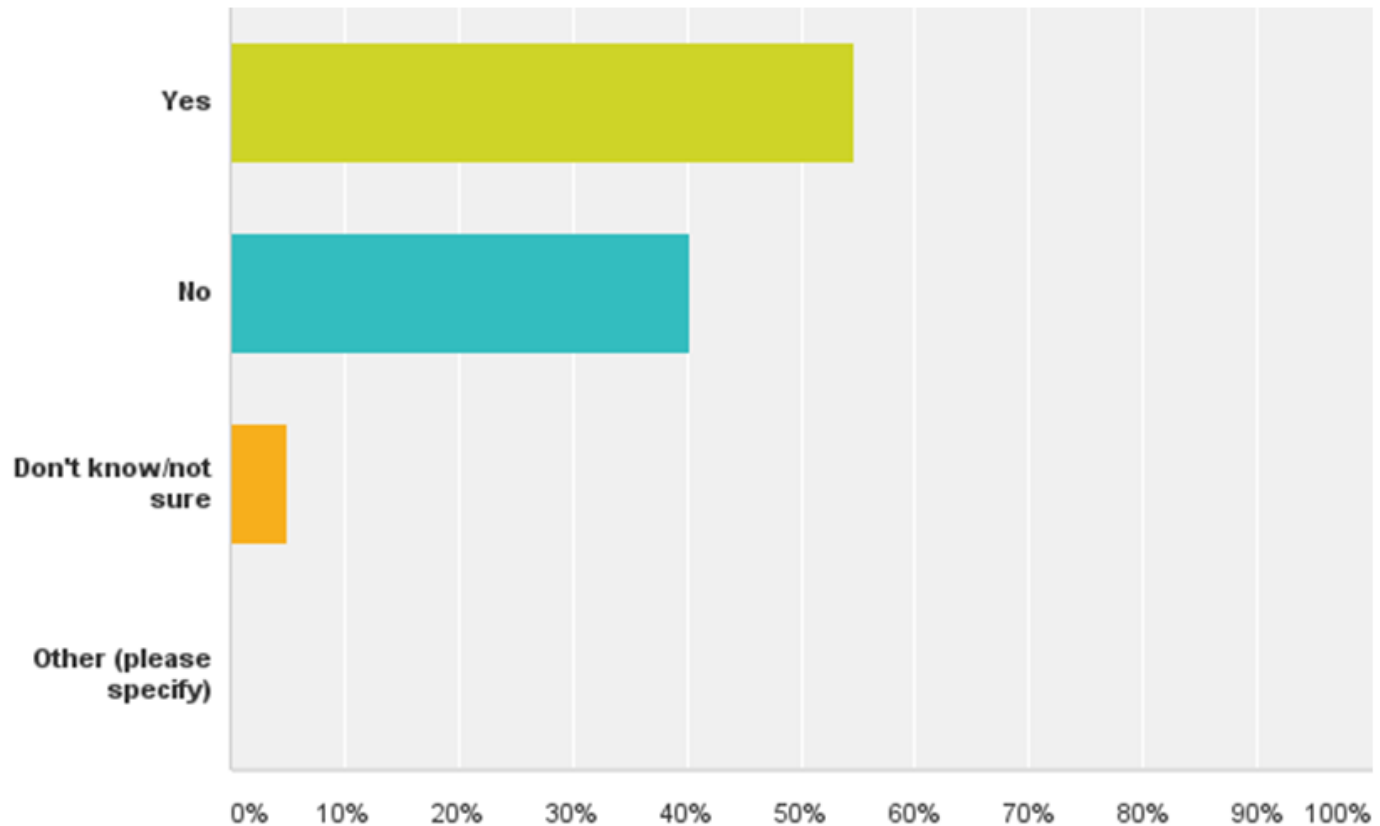
"A number of council representatives gave examples of what they saw to be incidences of political interference with enforcement decision making," the report said.

READ MORE:

- * [Councils prosecuting fewer farmers for 'dirty dairying offences'](#)
- * [Hundreds of dairy farmers caught breaking rules](#)
- * [Hauraki inspections show dairy effluent a problem on some soils](#)

Q4: Do you think that the council you work for has effective and comprehensive monitoring programmes to assess compliance with all resource consents and all permitted activity rules?

Answered: 139 Skipped: 1

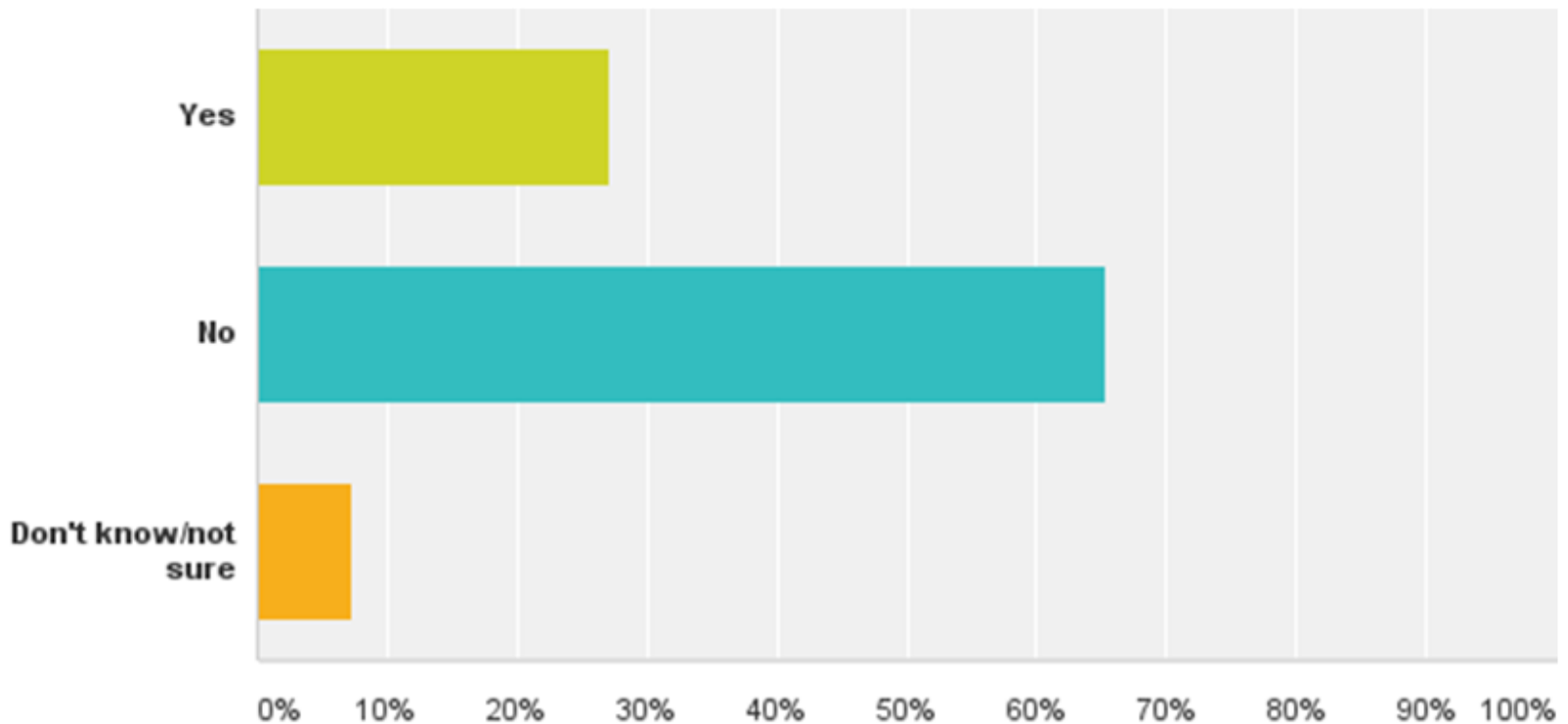


What is effective monitoring?

- Regularity
- Level of scrutiny
- Outcomes:
 - Less offending
 - Improvements in environmental indicators

Q5: Do you think all departments in the Council you work for identify and deal with non-compliance issues in a consistent manner?

Answered: 136 Skipped: 4

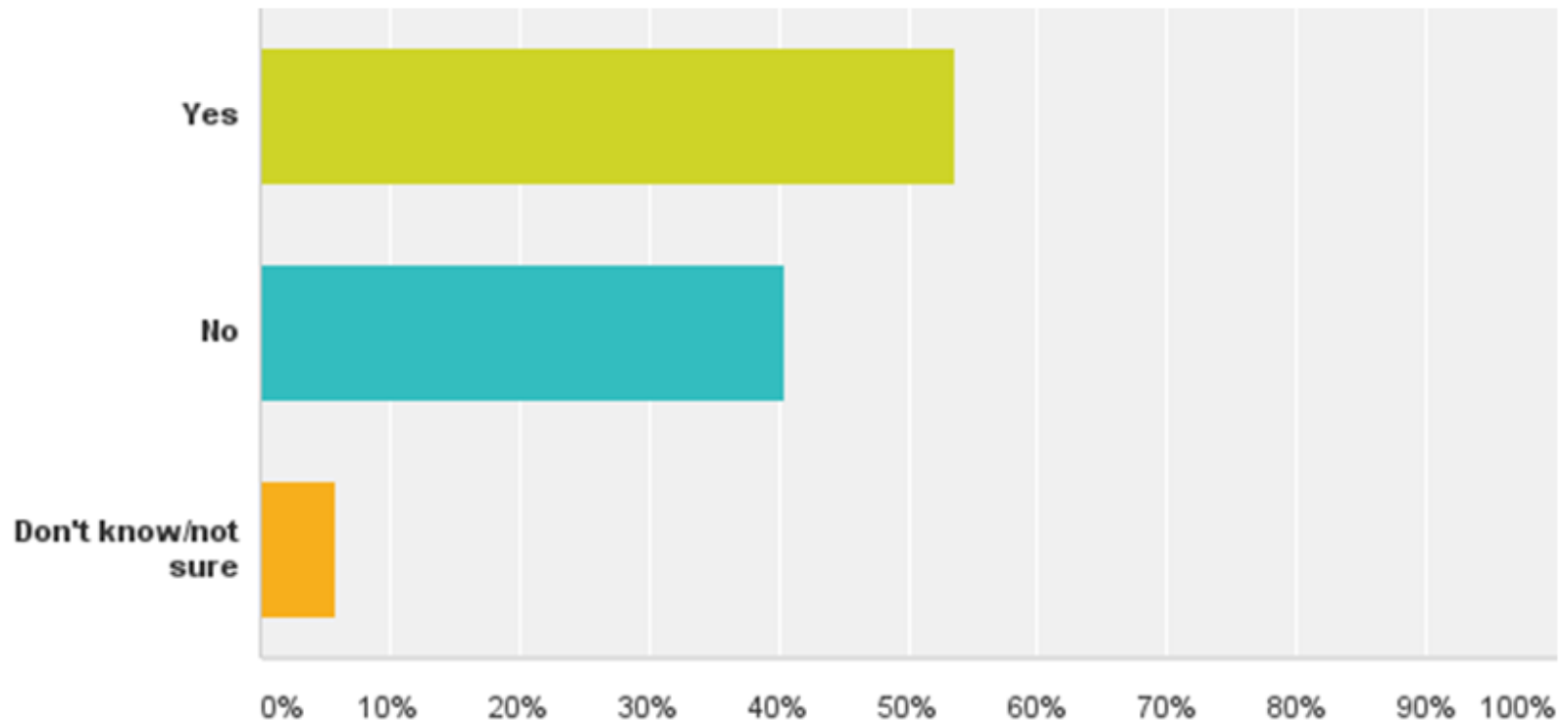


What are the issues with consistency?

- Other departments not aware of deadlines for filing charges and other implications of delay
- Attitude towards compliance
- Your views?

Q6: Is your role in enforcement affected by inconsistency of others in the Council you work for?

Answered: 138 Skipped: 2



What is meant by 'inconsistency'?

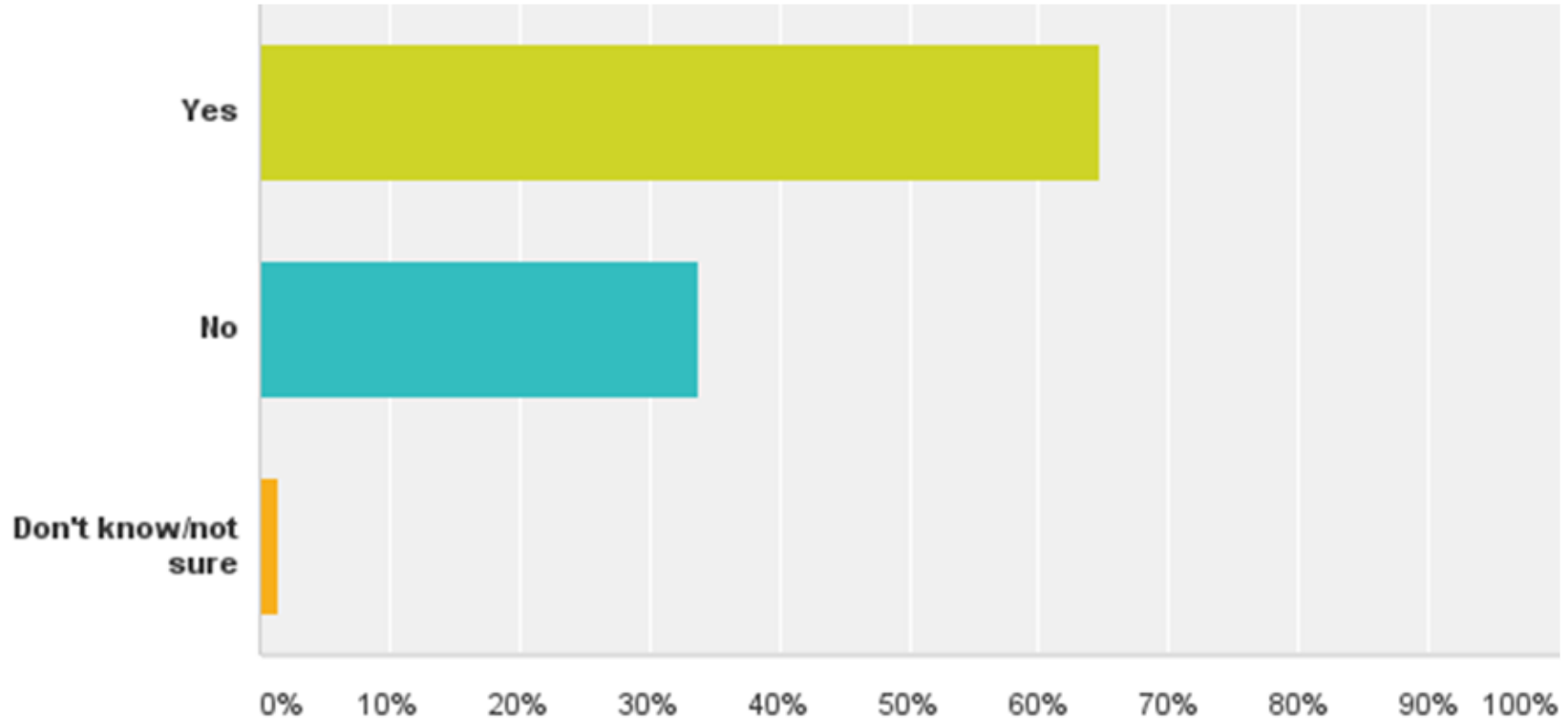
- Mixed/confusing/different messages
- Application of different standards
- Your views?

Potential impacts of 'inconsistency'

- Staff morale/work satisfaction
- Stakeholder frustration
- Council criticised/undermined
- No compliance action taken because of delay (e.g. statutory limitation period)
- Obstacle to improving the rate of non-compliance
- Link to environmental outcomes

Q7: Do you think that every instance of non-compliance should be addressed by some form of informal or formal enforcement action?

Answered: 139 Skipped: 1



OUR VIEW:

Local authorities should take appropriate enforcement action when there is non-compliance **unless** there is a valid reason not to take action e.g. the adverse effects or likely adverse effects are de minimus.

One respondent referred to helpful guidance in a decision of Judge Sheppard (*Culpan v Vose*):

“For normal purposes, councils allow certain tolerances. Council officials may choose not to enforce strict compliance where the degree of noncompliance is trivial and has no adverse effect on others. Such a practical approach has long existed, and is unobjectionable.”

OUR VIEW:

- The type of enforcement action depends on the circumstances.
- Enforcement ranges from informal (verbal warning and/or letter) to low level formal enforcement (infringement and/or abatement notices) to high level (prosecution and/or application for enforcement orders).
- If informal or low level enforcement is taken and this is appropriate, then this is not turning a blind eye.
- The key to selecting the enforcement action is: appropriateness of the action, fairness and consistency.

Question 8:

If you could make changes to the response to non-compliance for the council you work for, what changes would you make (if any)?

Improvement ideas - consistency:

- “Consistent approach by all officers. This is potentially quite difficult as all cases are slightly different with different environmental effects, compliance histories etc.”
- “More consistency across different council branches”
- “A consistent monitoring regime across all resource consents - it also relates to the writing of resource consents - they must be monitorable and measurable. Then a more consistent approach to non-compliance can be established.”
- “The change I would make would be to have internal peer review to ensure all staff are taking the same action to non-compliances. Whether this be via a training session or by follow up inspections by fellow officers to ensure they rate the site the same (compliant/non-compliant).”
- “Mandatory reports including fully reasoned decisions for compliance action (including decisions not to take action) based on various consistent factors. “
- “Make every non compliance the start of informal approach, informing that failing to met requirements/time frames etc. will lead to enforcement, even if this is for information requirements only (as-builts, management plans etc.)”

Improvement ideas - monitoring:

- “Active searching for activities that should be consented but are not currently, rather than waiting for incidents, building consent processes or other ways they are brought to light. This would help to avoid the situations where for example one business has a equipment wash with a consent and his neighbour carries out the same activity over the stormwater drain, unless the public complains it will not be picked up by council.”
- “There is an assumption that people comply with PA rules, they don't. Audit of PA activities is rare but should be increased to 10-20% to give councils an understanding of the extent of non-compliance.”
- “More robust rules surrounding monitoring and reporting on permitted activity sites, especially earthworks and clean-fills.”
- “Greater emphasis on monitoring of permitted activities”
- “Resource us to monitor permitted activities (the Council I work for only actively monitors consented activities.”

Improvement ideas – remove interference:

- “Have a strong way to push elected members out of operational matters (without jeopardising our jobs).”
- “More consistency, especially Council needs to be more robust from political interference, so that CEO and senior management do not overrule decisions made by enforcement decision group.”
- “Less negotiation with customers because meetings and memos and being really polite all the time costs a lot of money to ratepayers. The UK system is better I hear.”

Improvement ideas – other Council departments:

- “I would require all departments to undertake enforcement, regardless of whether they see themselves as 'advisors' or 'customer service representatives'. They have expert knowledge in their fields and should undertake enforcement. They have the ability to see and understand some specialised technical aspects of non-compliances and should be required to undertake the necessary enforcement, even if this is informal or advisory. If that could not be done, then I would double the current enforcement staff, and make sure that each only has to undertake formal enforcement for 6 months in the year to reduce the drain that enforcement has on staff.”
- “Bring an understanding to all divisions that they have a duty to report non-compliance if it becomes known to them. Bring an understanding that the purpose of compliance is not just to fine people, but encompasses also advice, education and the building of relationships to foster compliance. Undermining this is undermining the purpose of the scientific research, Plans, consenting process and education initiatives.”

Improvement ideas – appropriate tools

- “If there is a minor breach and there are no effects a verbal warning and letter should be the course of action. Compliance should focus on the larger and /or major breaches that have greater impacts/effects as opposed to a side fence that is 10cm too high.”

Improvement ideas – process:

- “An easier way to issue notices or fines without the computer work.”
- “Simplify the drafting and issuing of Abatement and Infringement Notices. Consider adopting instant notices as above.”

OUR VIEW on the criticism of abatement and infringement notices:

- The RMA has the best range of tools available when compared to other regulatory legislation.
- Abatement and infringement notices are inexpensive, quick and easy to issue and are an effective deterrent.
- Abatement notices have wide scope & high rate of compliance. If the recipient appeals and the notice has flaws, the local authority can cancel the notice and issue a fresh and correct abatement notice or take other enforcement action.
- Most infringement fees are paid.
- The key for abatement and infringement notices is to provide tools to make things easy e.g. councils should have good templates with helpful notes.
- For abatement notices - keep things simple.

Improvement ideas – prosecution:

- “Complete external decision-maker for prosecutions. Panel/dedicated staff that make lower level compliance decisions to ensure consistency rather than ad hoc decision making by various enforcement staff.”
- “Get a prosecutions investigator.”
- “Employ a staff member specifically for carrying out enforcement and prosecution work once the investigation work has completed.”
- “I am generally satisfied with the way that non-compliance is addressed. There is scope for more resource to be put into addressing more of the high end offending, with more senior staff to target those deliberately choosing not to comply and profiting from that. It is difficult to push through court cases and manage an ongoing flow of routine compliance cases.”

Improvement ideas – no change needed:

- “Over the years we have upgraded our response to non compliance. Nothing at this stage.”
- “I think the process is good. If the issue is minor with little to no adverse effects, then no further action. “

Improvement ideas – Council double standards:

- “Council to be sterner in relation to non-compliance from it's own contractors and CCO's. In my experience Council is much more likely to turn a blind eye to non-compliance by its own - in my opinion this is an appalling double standard and Council's own contractors and CCO's should be setting an example for industry by adhering to best practice, complying fully and being held to account in the event of non-compliance.”

Improvement ideas – themes:

- Remove interference
- Resourcing
- Preserve discretion
- Greater consistency
- Less paperwork
- More resourcing for prosecutions
- Monitoring – need greater focus on PAs

Question 9:

If you have anything further to add that you consider relevant to the topic, please do so.

Ideas to assist:

- “Stop wasting your time on this mickey mouse vocation/profession! You need to influence the real decision makers (central government and CEOs) instead of tinkering around the edges for perceived minimal improvements.”
- Enforceability of conditions: regular meetings between resource consents planning team and enforcement officers.
- Consistency: strategy, internal body of case notes, paper trail for all actions.

Ideas to assist:

- Resourcing: greater use of admin staff
- Internal Council processes:
 - Better / more training
 - 'champion' role
- Other ideas:
 - Prosecutions: senior staff, separate role

Thank you to everyone who responded to our survey. We will give the record of your responses to conference organisers to put on the website.

We like many of your suggestions for improvements. 😊 We wanted to help and add to what you came up with We selected farm dairy effluent monitoring and enforcement as this is an important area and we think many regional councils/unitary authorities can make improvements in this area.

Firstly to put the problem of farm dairy effluent into context:

- The total cow population in NZ in the 2014/15 season was 5.02 million.
- Based on this number - more than 350 million litres of effluent per day is produced from the dairies alone during the milking season.
- This amount of effluent loading (loading = strength of effluent BOD5) is equivalent to the effluent loading produced by approximately 35 million people.

“Dirty dairying” figures drop, but environmental groups say they are misleading (26/10/2016 Fairfax article, Marty Sharpe)

“Legal action against farmers responsible for “dirty dairying” has taken a nose-dive – but environmental groups say that’s because the council monitoring the largest dairy area is doing such a poor job.

.....

- Waikato accounts for more than a third of the nation's dairy farms. While Waikato Regional Council was not alone in giving notice of inspections – half the 16 regional councils do this – it was the only authority that inspected so few of its farms.*

....

The regional councils that visited all farms every year were Taranaki (1743 farms), Northland (944), Southland (919), Otago (465), Wellington (173) Gisborne (5), Tasman (146), Marlborough (56), and Hawke's Bay (80).

West Coast Regional Council visited 72 per cent (of 391 farms), Auckland 76 per cent (of 289), Horizons 74 per cent (of 888), Bay of Plenty 40-60 per cent (of 700) and Nelson 66 per cent (of three).

Environment Canterbury did not provide figures for 2015/16 but in the previous year it visited 85 per cent (of 1149).

Waikato visited just 656, or 15 per cent of the region's 4400 farms

Eight councils (Taranaki, Otago, Southland, Northland, Bay of Plenty, Wellington, Marlborough and Nelson) make unannounced inspections.

Those in Waikato, Tasman, Auckland, Hawke's Bay, Canterbury and West Coast give farmers 24-48 hours' warning.

Horizons and Gisborne give farmers up to a week's notice”

Comparison of two different methods of monitoring

– What difference does this make?

We asked Waikato Regional Council and Northland Regional Council to provide information about method of monitoring and enforcement for dairy farms.

**Waikato RC compared with Northland RC -
Monitoring of dairy farms & abatement and infringement notices**

	Waikato RC 2010/2011 season	Waikato RC 2015/2016 season	Northland RC 2010/2011 season	Northland RC 2015/2016 season
Number of farms	Approx. 4200	4,400 – 4,500	956	944
Number of farms inspected	22% (503 helicopter + 415 ground = 918)	14.5% (656)	100% (956)	100% (944)
Method of inspection	By air and foot.	By foot	By foot	By foot
Is notice given about inspection?	NO	YES 24 – 48 hours' notice	NO	NO
Number of farms with significant non-compliance	12% (111)	10.5% (69) Note: Some of these are non-compliance with water takes	27.8% (265)	14.2% (134)
Number of farms with non-compliance	22% (201)	61.7% (405)	32.1% (307)	21.3% (201)
Number of farms with full compliance	66% (606)	27.8% (182)	40.1% (384)	64.5% (609)
Number of abatement notices	12	4	144	71
Number of infringement notices	24	18	150	54

OUR VIEW:

Waikato RC

- 25.1 percent of the Waikato Region monitored over the last three seasons show they have severely undersized or no infrastructure - these get a partial compliance i.e. nothing was wrong on the day, but the system can't cope 365 days a year.
- These farms are required to put a plan in place to improve their infrastructure.

OUR VIEW:

- The criticism in the Fairfax article - of Waikato RC and other councils who only inspect a proportion of dairy farms and/or give notice of inspections - is justified.
- The decision to change the process for monitoring in the Waikato Region (including giving notice of inspections to farmers) is not the fault of Waikato RC staff. This decision was made by councillors.
- Northland RC has a gold standard for monitoring and enforcement of dairy farms. Northland RC can manage this with a team of 3 full time officers and one contractor. Other councils should be able to do the same or similar. The process includes the following:
 - Advisory visits at request of farmers and recommendations made.
 - Annual ground inspections on a random schedule of every farm undertaken at peak of season
 - Follow-up inspections and meetings with the farmer where there is significant non-compliance
 - Letter with report on the monitoring to every dairy farmer. The letters state the compliance grade, the reasons for any non-compliance, the action required and include deadline and often include recommendations.
 - Consistent response to non-compliance
 - Frequent use of abatement and infringement notices
 - Prosecution for serious cases.

OUR VIEW – for dairy farm monitoring In order to obtain a true picture of non-compliance and tackle the problem the process should include at the very least:

- Monitoring of all dairy farms in every region on an annual basis. The only way to assess the rate of non-compliance is to check all farms.
- Inspection without any prior notice.
- Frequent use of low level enforcement.
- Prosecution for serious cases.

OUR VIEW:

- The response to our survey shows that some people are frustrated by the internal procedures or lack of.
- It is possible for a few dedicated people to make changes to improve monitoring and enforcement. The Northland RC procedure for monitoring and enforcement of dairy farms was designed by one Council officer (Dennis Wright) and is implemented by Dennis and the rest of the Northland RC FDE team.

End of presentation

Thank you for your attention