

HORIZONS REGIONAL COUNCIL

ENFORCEMENT GUIDELINE



November 2014

Author
Greg Bevin
Team Leader – Consents Monitoring

For more information contact

<i>Offices:</i>	<i>Head Office:</i>	<i>Depots:</i>
Taumarunui	Palmerston North	Levin
34 Maata Street Phone 07-895 5209	11-15 Victoria Avenue Phone 06-952 2800	11 Bruce Road Phone 06-367 8259
Wanganui	Freephone 0508 446 749	Taihape
6 Bates Street Phone 06-345 0705	help@horizons.govt.nz	Torere Rd, Ohotu Phone 06-388 0192
Marton	www.horizons.govt.nz	Pahiatua
Hammond Street Phone 06-327 7189	24 hr Pollution Hotline Freephone 0508 476 558	Cnr Huxley & Queen Streets Phone 06-376 7758
Dannevirke		Kairanga
Weber Road Phone 06-374 6700		Cnr Rongotea & Kairanga- Bunnythorpe Rds Phone 06-350 1761

Contents

Introduction – why is enforcement of the RMA so important to our community?	4
What is the purpose of this enforcement guideline?	5
Principles informing good enforcement decisions	5
Who within Horizons will make enforcement decisions?	6
Cost recovery	7
Council approach to enforcement decisions	7
Enforcement options	9
What factors will Horizons consider when deciding the form of enforcement action to take?	10
Further considerations relevant to high level enforcement	12
Alternative environmental resolution (restorative justice)	12
Communication	13
Appendix 1 – Restorative Justice Process (RJP)	15

INTRODUCTION – WHY IS ENFORCEMENT OF THE RMA SO IMPORTANT TO OUR COMMUNITY?

The Resource Management Act 1991 (the “**RMA**” or “**the Act**”) is designed to promote the sustainable management of natural and physical resources.¹

In order to achieve its purpose the Act provides for the development and implementation of regional plans and resource consents.

Horizons has a statutory duty to monitor compliance with consents it has issued, and to ensure that the provisions of both the RMA and its plans are enforced.² Such enforcement ensures that the RMA’s underlying purpose of environmental sustainability is achieved.

As a prosecuting authority, Horizons is also subject to a number of important legal obligations. Those obligations are for the benefit of the community and are to ensure enforcement decisions of Council are:

- Consistent;
- Transparent;
- Impartial; and
- Certain.

Generally for environmental enforcement to encourage compliance individuals and organisations must believe that:

- There is a high probability of being caught;
- The response to non-compliance will be swift, certain and fair; and
- The punishment will be severe enough to outweigh the benefits of non-compliance.³

In general regulated communities can be divided into three categories: (1) those who will not comply unless they are forced to; (2) those who might comply if presented with incentives, knowledge or capacity to do so; and (3) those who will co-operate and comply in all circumstances.⁴

A regulator which fails to hold the non-compliant to account does a disservice to the majority of resource users who co-operate and comply in all circumstances. It also acts as a disincentive for those who would otherwise comply because it fosters a “why bother” mentality.

Horizons is committed to achieving the environmental outcomes required by the RMA through an effective regulatory function. In order for that regulatory function to be effective resource users need to understand their obligations and to be held to them.

¹ Section 5 RMA.

² Sections 35 and 84 of the RMA.

³ International Network for Environmental Compliance and Enforcement. April 2009. Principles of Environmental Compliance and Enforcement Handbook.

⁴ Ibid.

Horizons will take a graduated approach to compliance which ensures that responsible and compliant resource users are acknowledged and supported, while those who are not are in the first instance made aware of their obligations or, where necessary, held accountable for their breach.

The Courts have also recognised that enforcement processes under the RMA seek not only to punish offenders but also achieve important economic and educational goals.⁵ Economic considerations are important because polluters force the true cost of their activity onto the rest of the community by causing harm to the environment. One aim of prosecutions under the RMA is to encourage polluters to internalise the costs of their activity by imposing financial costs or penalties for non-compliance.⁶

WHAT IS THE PURPOSE OF THIS ENFORCEMENT GUIDELINE?

The purpose of this guideline is to:

- Provide guidance to Horizons in respect of the discharge of its obligations as an enforcement agency under the RMA.
- Provide the community with an understanding of how Horizons approaches enforcement of the environmental legislation it administers, including the exercise of its discretion to prosecute.
- Explain how Horizons makes a decision on the form of enforcement action it will take, and set-out the factors Horizons considers when making that decision.
- Explain the importance of the independence of the enforcement functions of Horizons, and the need to ensure that they are both free and seen to be free from any form of inappropriate influence.
- Encourage a culture of compliance with the RMA, national environmental standards, regulations, plans and consents issued under the Act.

PRINCIPLES INFORMING GOOD ENFORCEMENT DECISIONS

In preparing these guidelines, and considering enforcement actions, Horizons will be guided by 5 key principles:

Proportionality

The response taken by Horizons in relation to detected breaches of the Act, plans, or resource consents will be proportionate to the seriousness of the misconduct.

The seriousness of the misconduct can be assessed by reference to factors beyond the significance of any adverse environmental effects caused by the activity. For instance, the environmental compliance history of a party may be an important factor relevant to a consideration of a proportionate response.

⁵ *Thurston v Manawatu-Wanganui Regional Council*, High Court Wellington, 27/8/10, Miller J, at [44].

⁶ *Ibid.*

Fairness and Impartiality⁷

Equality before the law is a fundamental aspect of any credible enforcement system and gives greater public confidence in enforcement decisions.

All persons will be impartially and fairly treated by Horizons using the same process of enforcement regardless of the type and nature of resource use in issue.

Transparency

An aspect of impartiality and equality of treatment is the need for transparency in decision-making. This guideline is an essential part of ensuring transparency and public confidence in the integrity of Horizons' enforcement decisions.

Consistency

In maintaining public confidence in Horizons' enforcement decisions it is important that those decisions are made consistently regardless of the person, organisation, or activity under consideration.

Timely resolution

Horizons will endeavour to exercise its discretion in a clear and timely manner that gives effect to the purpose and principles of the RMA while avoiding unnecessary costs for the ratepayer.

WHO WITHIN HORIZONS WILL MAKE ENFORCEMENT DECISIONS?

In order to have an enforcement system which ensures impartiality and fairness it is essential that enforcement decisions are made objectively and free from political or public pressure. In order to ensure the independence and integrity of its enforcement decision making process, Horizons has delegated these decisions to specific positions, with the delegation for prosecution lying with the Chief Executive (CE).

Publicly elected representatives are not involved in such decisions and acknowledge the importance that they are not perceived to be involved in the discharge of Horizons' enforcement functions.

For this reason members of the community who are subject to investigation or compliance monitoring should direct any queries they have to council officers, who will then respond. Publicly elected representatives will direct any enquiries made to them by constituents in relation to specific enforcement and compliance matters to Horizons officers for a response.

⁷ The Crown Law Office has promulgated prosecution guidelines for the conduct of indictable trials for indictable offences. Those guidelines note, at section 4, the following in relation to the need for independence of decision-making when exercising prosecutorial discretion:

"The universally central tenet of a prosecution system under the rule of law in a democratic society is the independence of the prosecutor from persons or agencies that are not properly part of the prosecution decision-making process.

In practice in New Zealand the independence of the prosecutor refers to freedom from political or public pressure. All government agencies should ensure whenever it is reasonably practical to do so, that the initial prosecution decision is made by legal officers independently from other branches of the agency and acting in accordance with the [Prosecution Guidelines]."

COST RECOVERY

Horizons will fulfil its enforcement duties in an efficient and cost effective way. This means that Horizons must make decisions allocating finite financial resources to the areas of highest priority or where they will have the greatest impact.

In order to ensure environmental compliance is not, nevertheless, compromised through a lack of funds, Horizons will recover as far as possible the costs associated with enforcement from those who fail to comply with their environmental obligations.

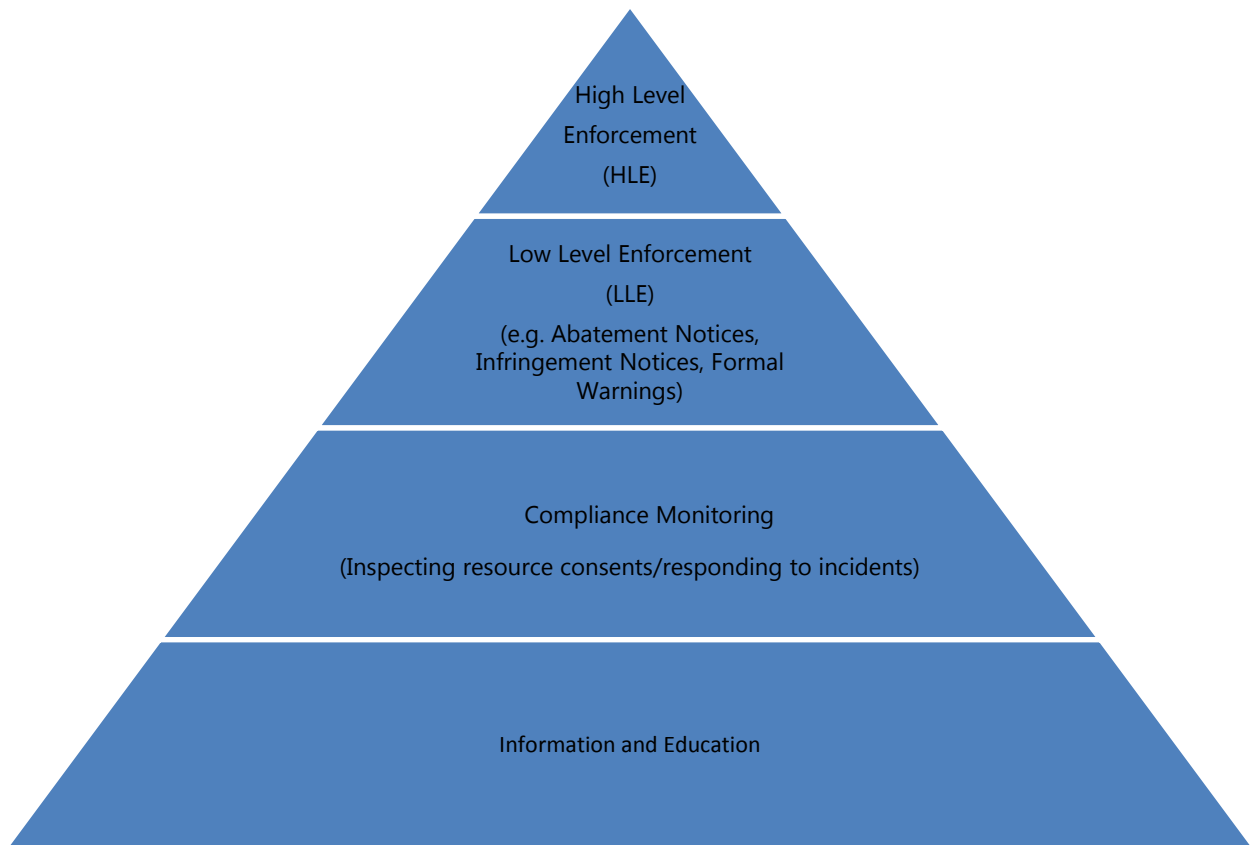
COUNCIL APPROACH TO ENFORCEMENT DECISIONS

Horizons expects all resource users to be aware of their obligations and to comply with them. Horizons will make compliance easy by providing information and education about environmental obligations to resource users.

As a result of the diversity of circumstances affecting each enforcement decision it is necessary to have flexibility and discretion in relation to enforcement decisions.

That said, the requirements of fairness and impartiality, consistency, transparency and proportionality require decisions to be made within a decision making framework which is publically known and in keeping with best practice.

Horizons have a number of tools available to it to achieve environmental compliance. Those enforcement tools range from the provision of information and education to those undertaking regulated activities, right through to the laying of criminal charges before a court. Diagrammatically the hierarchy of enforcement tools can be represented as follows



Information and education

The provision of information and education is likely to be the best option where there has been a high degree of voluntary compliance, a good previous environmental track record, and the adverse effects of the misconduct fall toward the lower end of the scale. Voluntary compliance is more likely to be achieved when people understand what it is they need to comply with.

Compliance monitoring

Here Horizons will proactively monitor resource consents and respond to incidents in order to determine compliance and detect non-compliance. Compliance monitoring can contain a component of advice and education, but there will be a real possibility that monitoring will be escalated to more serious enforcement action if non-complying activities are not rectified promptly.

Low level enforcement (LLE)

This lower level enforcement action encompasses formal warnings, and infringement and abatement notices.

High level enforcement (HLE)

High level enforcement consists of criminal prosecutions, enforcement orders and interim enforcement orders. These are generally used for the most serious types of offending or where there is a poor record of environmental compliance. They are therefore the most infrequently used measures.

While in many cases it will be appropriate for Horizons to commence with information and education provision or compliance monitoring before reverting to low or high level enforcement, there will be cases where, by virtue of the impact on the environment or other relevant criteria, resorting to low or high level of enforcement as a first response is appropriate. Once again the considerations set out in this guideline will help inform Horizons' decisions in relation to which form of enforcement procedure will be appropriate in the circumstances.

ENFORCEMENT OPTIONS

Compliance monitoring reports and advisory letters

Compliance monitoring reports and/or advisory letters provide detailed feedback on compliance with the terms of a resource consent and rules in the regional plan.

Compliance monitoring reports and advisory letters can be viewed as a written notice requiring certain actions to be taken to achieve compliance with the RMA or to protect the environment. Failure to act in accordance with a compliance monitoring report may result in an escalation of the enforcement response.

Formal Warning

A formal written warning is a notice to an alleged offender stating an offence has been committed. Such a warning may be given when:

- A minor or technical breach has occurred;
- The environmental damage or impacts are minimal;
- The matter is one which can quickly and simply be put right;
- There appears to be no risk of on-going or repeat noncompliance.

Infringement notices

Where a resource consent or a rule in a regional plan, or a national environmental standard or other regulations has been breached, Horizons can issue an infringement notice.

An infringement notice is a written notice of an alleged offence under the RMA. An infringement notice requires the payment of a fee amount fixed by regulations, or a request to have the matter heard in Court. Payment of the fine does not lead to the recording of a criminal conviction.

Abatement notice

An abatement notice is a formal written notice that the RMA specifies can be issued only by a warranted enforcement officer, requiring certain actions to be taken or to cease within a specified time where there is or is likely to be a contravention of the RMA and/or a breach of a plan or resource consent.

Enforcement order

An enforcement order is an order made by the Environment Court that may require certain actions to be taken or ceased, or money to be paid, within a specified time.

An enforcement order is similar to an injunction, and does not result in a conviction or a criminal record.

Prosecution

Horizons has the power to lay a charge (a charging document) before the District Court for offences under the RMA and to prosecute such charges thereafter. Offences under the RMA are considered criminal matters, which may result in persons having criminal convictions.

WHAT FACTORS WILL HORIZONS CONSIDER WHEN DECIDING THE FORM OF ENFORCEMENT ACTION TO TAKE?

When deciding whether to take enforcement action, and if so of what kind, there are a number of criteria which need to be considered in every case. These are:

- The seriousness, imminence and likely permanence of adverse environmental effects, including, consideration of such factors including:
 - The magnitude of adverse effects;
 - The nature of the receiving environment;
 - Whether the effects are permanent or are of long duration; and
 - The risk of further potential follow-on adverse effects.
- Past and present conduct of the resource user, including consideration of:
 - Whether the event was deliberate or accidental;
 - The environmental compliance history of the alleged offending;

- Whether the incident could have been readily avoided;
- The apparent commitment of the resource user to ensure compliance (both past and present);
- Any documented warnings or requests made to the resource user;
- Any steps to remediate or mitigate the adverse environmental effects; or
- Demonstrated remorse.
- Significance of the alleged offending to the community, including consideration of:
 - The prevalence of the form of offence;
 - The need for deterrence;
 - The general presumption that where there is evidence of an offence a prosecution will follow;
 - The value of sensitivity of the area of natural resources affected;
 - Any profit or other benefit derived as a result of the alleged offending
 - The degree of general and specific deterrence called for;⁸
 - Any relevant special circumstances, such as the intervention of an extreme weather event or other events outside the control or reasonable contemplation of the resource user;
 - Adverse effects on other members of the community and/or resource users (victim impact); and
 - Considerations of fairness and balance.
- The failure or ineffectiveness of previous compliance promotion measures, including:
 - Implications for ensuring that the purpose of the RMA is achieved; and
 - The cost-effectiveness of the approach in terms of anticipated environmental outcomes.

⁸ General deterrence is the deterrent to resource users other than the alleged offender. A personal deterrent is a future deterrence personal to the offender.

FURTHER CONSIDERATIONS RELEVANT TO HIGH LEVEL ENFORCEMENT

High level enforcement such as prosecutions and applications to the Environment Court for enforcement orders will only be commenced where Horizons is satisfied that the evidence which can be adduced in court is sufficient to provide a reasonable prospect of success (an evidential sufficiency test).

This consideration is important because commencing a prosecution is a significant action and may have long lasting implications for a defendant. In addition the commencement of proceedings may involve a significant cost and Horizons will satisfy itself that the commitment of financial resources to such steps is a prudent use of rate payer moneys prior to commencing high level enforcement action.

Four factors will be considered before commencing a prosecution:

- First, whether the evidential sufficiency test is met;
- Whether a prosecution is considered to be in the public interest;⁹.
- Whether the environmental effects of the breach are such as to warrant court action; and
- The culpability of the offender.

Before commencing a prosecution Horizons will seek legal advice on the matters listed above.

ALTERNATIVE ENVIRONMENTAL RESOLUTION (RESTORATIVE JUSTICE)

Once charges have been laid an alleged offender is able to approach Horizons with information relevant to a possible defence or to negotiate the withdrawal of some charges on a without prejudice basis. These discussions normally occur between the defendants and Horizon's legal representatives.

Such discussions are not appropriate before a prosecution has been commenced or while Horizons is completing any investigation or considering whether to take enforcement action.

Restorative justice is an alternative process where an offender can make good the harm they have caused having accepted culpability or guilt. This process occurs within the Court system and has the following general requirements:

- The person(s) enter guilty pleas at the appropriate time and accepts responsibility;
- There is genuine remorse for what has happened and a will to put things right;
- The extent of the environmental harm caused is low and/or readily remedied;

⁹ As defined in the Crown Law Office's *Prosecution Guidelines*, July 2014.

- Same or similar offending has not occurred in the past (i.e. the person(s) concerned does not have previous warnings, abatement notices, convictions or the like).

It is important to note the restorative justice process is not a 'soft option' in that the outcomes of this process are likely to be more demanding than what the court may have imposed by way of sentence.

In considering whether to enter into a Restorative Justice process Council will adopt a 'high threshold' in assessing whether the above criteria has been satisfied. While this may not necessarily exclude more serious offending, it is likely to exclude deliberate or repeat offending where remorse remains questionable despite guilty pleas.

Appendix 1 sets out the restorative justice process ("**RJP**") and requirements which Horizons will follow.

COMMUNICATION

Where appropriate Horizons will ensure appropriate communications occur with all relevant parties as part of an investigation or as a response to a non-compliance. This is to ensure people are aware of their responsibilities and Horizons' potential responses. To this end Horizons will follow an enforcement communication protocol. This entails:

- Where possible Horizons will provide interim updates and/or advice about an investigation into a contravention of the RMA. This will occur after Horizons has sought legal advice and considered the matters detailed below.
- Horizons will advise alleged offenders of the outcome of any enforcement decision.

When communicating to the public through the media in relation to enforcement action there are five key principles Horizons will adhere to:

- Avoiding prejudice to fair trial interests;
- Supporting the administration of justice and the integrity of the criminal justice system;
- Respecting the principle of open justice;
- Recognising the public interest in receiving accurate information about the criminal justice system and criminal prosecutions; and
- Treating victims of crime with courtesy and compassion, and respecting their dignity and privacy.¹⁰

Whilst a matter is being investigated comments are rarely appropriate and if comment is made it will be limited to providing an explanation as to the general

¹⁰ Crown Law, *Media Protocols for Prosecutors*, issued January 2010.

issues raised and not address a particular case or its circumstances.¹¹ As noted above prior to making any comment legal advice will be sought.

Once charges have been laid Horizons has a specific obligation to avoid prejudicing a fair trial or hearing. To this end comment can be made regarding:

- The general nature of the charges;
- Once the defendant has appeared in Court the name, age and residence (town or city or region only) of the defendant (subject to name suppression or other rules);
- Date and location of next Court appearance;
- Guidance on the type of hearing (e.g. remand, committal, plea, pre-trial hearing etc);
- Information about what happened procedurally with the case (e.g. whether the case has been discontinued, or the charges reduced); and
- Names of the prosecution and defence representatives/counsels that appeared in Court.¹²

In general Horizons **will not** make comment on the following matters before a conviction:

- Any previous convictions of the accused whether directly or indirectly unless these have being ruled admissible and referred to in open Court;
- Personal information, address or telephone numbers of witnesses and victims unless there is express consent and in some cases, defendants
- Personal opinions in relation to a particular case, especially about the outcome of a hearing, an individual's guilt or innocence or a sentencing outcome; and
- Comment on any judicial decision other than to summarise or explain the effect of the decision.¹³

¹¹ Ibid page 3.

¹² Ibid.

¹³ Ibid.

APPENDIX 1 – RESTORATIVE JUSTICE PROCESS (RJP)

The RJP will be initiated following the decision to prosecute and the issue of court summons. The delegation to initiate this process lies with the Chief Executive Officer.

Once this occurs Horizons may approach the defendant(s) and invite them to participate in a RJP. An offer to participate in a RJP may be made at the time of the service of the summons. The offer will be in the form of a written letter.

Any acceptance to participate in a RJP must be in writing to Council. The acceptance offer must include an intimated guilty plea.

Horizons will consider a RJP having considered the following matters where the following circumstances exist:

- The defendant(s) admit their guilt and accept responsibility for the offending;
- The environmental effects of the offending are minor and/or easily remedied;
- The culpability of the defendant(s) is low (e.g. offending was due to an accident);
- The offending is a one-off, with the defendant concerned having no previous warnings, non-compliances or enforcement action in relation to the same or similar conduct;
- The defendant(s) show genuine remorse for the offending;
- There is a strong desire by the defendant(s) to put things right;
- There is no financially adverse impact on Horizons and its cost recovery guideline; and
- The existence of any other factors which Horizons considers relevant (for instance, if ill health or age was a factor which contributed to the offence).

Where Horizons decides to undertake a RJP process this will require the defendant to enter into a written Restorative Justice Agreement (RJA). This agreement may require the defendant(s) to:]

- Contribute money to an appropriate environmental and/or research project that relates to the natural resource affected by the offending.
- Agree to undertake, at their cost, investigations to determine the environmental effects of the offending and possible remediation/mitigation required;
- Undertake, at their cost, remedial/mitigation works to the satisfaction of council;

- Accept an amended compliance monitoring regime (e.g. 3-4 inspection per year, with certain inspections being non-notified) until such time as full compliance is consistently achieved;
- Provide Horizons with environmental management plans and/or procedures detailing how they will achieve compliance on an ongoing basis. These plans/procedures will have to approved by Horizons;
- Undertake infrastructural up-grades to ensure compliance is achieved; and
- Publicly acknowledging their wrong doing and remorse.

A RJP can be initially proposed by either Horizons or a defendant. Whether a RJP is appropriate will nevertheless be determined by Horizons at its sole discretion and after it has carefully considered the above factors. Horizons may also seek legal advice.

A RJA is to be formalised between the defendant (or their legal representative) and the Group Manager, Strategy and Regulation.

Where the defendant(s) has met all the terms of the RJA, Horizons will advise the Court accordingly. However, it is important to note the decision as to the final penalty ultimately lies with the Court. In the event a defendant(s) fails to meet the terms of a RJA, Horizons may at its sole discretion cancel the RJA and pursue more formal enforcement action, including a continuation of a prosecution. This ensures the RJP is only available to those defendants who genuinely accept responsibility for their offending by strictly meeting the terms of the RJA.