



STAFF REPORT

TO: Environment & Planning Committee

FROM: Environment & Planning Manager

REFERENCE: C653

SUBJECT: **ENFORCEMENT PROTOCOL - EP07/05/02** – Report Prepared for 9 May 2007 Meeting.

1. PURPOSE

Staff have reviewed current guidance notes and procedures which are used in carrying out various enforcement responsibilities. Attached is a copy of the revised Enforcement Policy and Procedures 2007. It does not require any changes to current delegations or warrants of authority. It is submitted for the purpose of discussion and as a means of reporting to Councillors on a significant local authority function.

2. RECOMMENDATION

That Council receives and accepts the Enforcement Policy and Procedures 2007 as guidance to staff on carrying out local government enforcement duties.

Dennis Bush-King
Environment & Planning Manager

1. Introduction

This procedure manual is intended to provide Tasman District Council staff tasked with enforcement responsibilities direction on the principles and procedures to be adhered to when undertaking their duties under the various acts and regulations Council administers.

While intended primarily for enforcement staff this manual also provides other staff in Council and resource users in general with an understanding of the purpose and principles to be applied in monitoring and enforcing rules and regulations in Tasman District. It also provides insight into the range of enforcement tools available to Council and the selection processes undertaken to achieve desired outcomes.

This manual will be reviewed regularly and updated if and when required to reflect regulatory or procedural changes that may occur.

2. Purpose

The primary purpose of this manual is to:

- Provide enforcement officers at Tasman District Council an understanding of the enforcement policies and procedures to be adhered to while exercising their duties and obligations under specific acts.
- Provide understanding on how Tasman District Council, through enforcement, gives effect to the purpose and principles of the Resource Management Act 1991 (RMA) and the objectives of the Tasman Regional Policy Statement and Tasman Resource Management Plan.
- Provide guidance on the range of compliance promotion and enforcement tools available to enforcement staff.
- Ensure a consistent and integrated approach to enforcement in Tasman District Council.
- Provide Council staff and all resource users a clear understanding of Council's enforcement process and what is expected when contraventions occur.

3. Why Enforce

Enforcement is an integral part of the implementation and administration of the law. As an agency having unitary functions Council covers both regional and territorial authority responsibilities. As such, it has broad ranging environmental, planning, and development control responsibilities including the statutory obligation to enforce its legal duties and responsibilities under the wide range of acts it administers.

The reasons Council is required to enforce the law are essentially related to matters of health, safety and environmental protection. These are matters that Parliament has deemed to be of sufficient public interest to merit government

intervention. Council enforces the law to meet those undertakings through rules and resource consents.

The statutes under which the Council has duties and responsibilities for the enforcement of laws include the:

- Resource Management Act 1991,
- Local Government Act 2002,
- Biosecurity Act 1993,
- Marine Pollution Act 1994,
- Building Act 2004
- Fencing of Swimming Pools Act 1987
- Sale of Liquor Act 1989,
- Dog Control Act 1996
- Impounding Act 1955
- Health Act 1956,
- Transport Act 1962,
- Hazardous Substances and New Organisms Act 1996,
- Gambling Act 2003
- Prostitution Law Reform Act 2003,
- Litter Act 1979,
- Maritime Transport Act 1994,
- Local Government Official Information and Meetings Act 1987,
- Soil Conservation and Rivers Control Act 1941,
- Transport Act 1962,
- And various Council plans and bylaws.

The need to enforce compliance may arise following routine monitoring or investigation following receipt of a complaint. Structured monitoring programmes allow Council to assess the degree to which people are complying with the terms of their resource consent or the rules allowing them to undertake activities and respond accordingly. Likewise complaints investigation is a crucial function of Council in providing appropriate response to alleged breaches. In both instances, the need to take enforcement action will arise because a breach of the legislation or a breach of a statutory consent has arisen.

We can broadly categorise enforcement mechanisms as being concerned with three interrelated outcomes. These are:

- Avoidance, mitigation or remedying of adverse effects;
- Compliance; and
- Deterrents and restitution.

Typically the process of undertaking enforcement is a staged one of promoting awareness and providing assistance, warnings, issuing of enforcement notices and in serious cases, prosecution, although this may vary from time to time.

The scope of the following sections is to discuss the broad outline of enforcement investigations and standard procedures required for successful enforcement action. The standardisation of forms and reporting is also designed to assist Compliance Officers in generating a consistent approach to all enforcement investigations.

4. Enforcement Principles

4.1 Principles

The requirement to enforce compliance with the law is a mandatory obligation of most of the acts council administers. These acts provide the specific legislative framework for Council to enforce the rules and regulations. While these acts provide the enforcement tools, how Council chooses to enforce remains at its discretion. This is necessarily so when considering that compliance and enforcement is complex in law and usually complicated by many factors, all having a bearing one way or another on an appropriate response.

Although enforcement officers are given discretion regarding the enforcement option to take, the response must always be commensurate with the level of offending and provide consistency in approach.

To assist enforcement staff in selecting an appropriate response regard must always be given to the underlying set of principles guiding the use of enforcement. These principles must be adhered to when carrying out monitoring, enforcement or compliance promotion.

- Effect of non compliance

Council cannot authorise the continuation of an offence however any action taken will depend on the severity of the offence and the consequences on the environment, people or property. The enforcement response should always be commensurate with the effects.

- Administrative efficiency

The council will undertake its duties in a timely and professional manner ensuring that at all times compliance and enforcement is done in as cost efficient manner as possible.

- Objectivity

Council will ensure that all complaints or alleged breaches are investigated in an impartial and objective manner and free of interference or coercion.

- Fairness

Council will administer its enforcement responsibilities without fear or favour. There will be no bias in favour of consent holders, resource users, or complainants and any advocacy or enforcement will be applied consistently, impartially and fairly across all sectors regardless.

- Certainty

The council will provide certainty and clarity about what is not acceptable behaviour and what is, and in instances of non-compliance the likely consequence. Decisions on enforcement action will be taken in a timely manner and without undue delay or interference.

- Simplicity

It is not appropriate to put in place a system that is unduly bureaucratic. Any approach to enforcement of legal obligations, while remaining legally defensible should be simple to administer and understood by all staff, resource users and the public in general.

5. General Provisions

5.1 Enforcement Officers

The Environment and Planning Manager has the authority to appoint enforcement officers under various acts including the Local Government Act 2002, Resource Management Act 1991, Litter Act 1979 and Hazardous Substances & New Organisms Act 1996. Duly appointed Enforcement Officers have authority to undertake all statutory enforcement functions and responsibilities provided for by those acts.

5.2 Warrant of Appointment

Every Enforcement Officer in Tasman District Council is to be issued a Warrant of Appointment. The warrant serves as the officer's written authorisation and evidence of identification. This warrant should be carried by the officer at all times and be produced upon initial entry to any property whether asked or not, and upon any reasonable later request.

5.3 Surrender of Warrant

Every enforcement officer is to surrender his/her warrant upon termination of employment in Council

5.4 Powers of entry for inspection.

The power granting an Enforcement Officer entry onto private land may differ with respect to obligations and duties required to be met depending on the Act under which the power is exercised.

Power of entry to private property exists under the Resource Management Act (Section 332), The Local Government Act 2002 (Section 171), Hazardous Substances & New Organisms Act 1996 (Section 103), Biosecurity Act 1993 (Section 109) and the Dog Control Act 1996 (Section 14).

It is the Enforcement Officer's responsibility to fully understand the obligations and duties contained in these Acts prior to exercising any entry onto private land.

Note: All Enforcement Officers in Tasman District Council will hold warrants issued pursuant to these Acts stating that the enforcement officer is authorised the power of entry under these sections.

When exercising authority to enter private land the following must be undertaken:

- **In all cases** the enforcement officer must upon entering the property make every attempt to find the owner or occupier.
- **In all cases** the officer is to show his/her warrant of appointment to the owner/occupier of the property to confirm identity and if the owner/occupier later asks to see the warrant again, the warrant should be shown. .
- **In all cases** (when the owner is not available) following an inspection, a Notice of Inspection shall be written out with all relevant details and the officers business card, should accompany the notice at all times.

Note: It is a statutory requirement for Council to advise the occupant(s) that their property has been subject to an inspection under Section 332(4) of the RMA.

Officers can also use any assistance as is reasonably necessary to carry out this function. In the event that the owner or occupier refuses entry, the Enforcement Officer will contact the Co-Ordinator Compliance or the Department Manager and inform them of the situation. The Council may then apply to the District Court to issue a **“Warrant of Entry”** if the Enforcement Officer(s) is/are convinced that there will be evidence of an offence. A Constable is required to accompany the Enforcement Officer onto the site for the purpose of execution.

5.5 Interviews

It is standard practice when conducting investigations to seek an explanation from any offending person and all relevant witnesses. A written record of the conversation should always be made at the time or immediately after the conversation. A signed statement should be sought on serious matters. Whenever possible it is useful to have another enforcement officer present when investigating an incident.

The RMA provides that a person so requested (section 22) is *required* to give an enforcement officer:

- his/her name and address
- The name and address and whereabouts of any other person on whose behalf the person is breaching or has breached the Act.

The fact that this is the only information a person is required to give should not stop the enforcement officer from seeking an explanation to an offence and every opportunity to do so should be given.

5.6 Diaries and File Notes

Photos, diaries and file notes (including field records) are essential for the following reasons.

- They record what the Enforcement Officer observed and any actions taken.
- They can form the basis for the brief of evidence that will be prepared in the event that that matter is taken through to a hearing.
- They can be referred to when the witness gives evidence to refresh his/her memory (prosecution only). Notes can only be referred to if the note was taken at the time of the incident, or as soon as possible after the incident. If notes cannot be taken at the scene of the incident, they should be recorded when the officer returns to the car. This will ensure the notes can be referred to in Court if necessary.

In prosecutions it is not unusual for charges to be laid between five and six months after an incident because Council requires this much time to decide whether or not to prosecute. Once charges are laid it may take a further 6 to 12 months to obtain a hearing date. Therefore staff may have to give evidence 12 to 18 months (and sometimes longer) after the incident. This is why clear and comprehensive file notes must be kept at the investigation phase. Officers may rewrite or type field notes provided that the original hand-written notes are always retained and available. Note the storage of any digital media should not include any compression or alteration of the captured image or transcript.

Generally file notes should cover:

- the time of entry to inspect the property, the reasons for doing so and the duration of the inspection.
- confirmation that the warrants were shown to the person(s) spoken to, or written notice of the inspection was left in a prominent place if the owner/occupier was not present.
- the full names and addresses of all persons spoken to and a contact telephone number for each of them.
- questions put to the interviewee, and the interviewee's response.
- any explanation or reasons given by the person(s) spoken to.
- the officer's observations.
- the weather on the day of the investigation, including whether it had been raining previously, etc (this is important when dealing with discharges into or onto land that have found their way into a watercourse).
- Reference to samples, sample labels and photos.

Enforcement officers should type a record when they return to the office after investigating a complaint. This should give a general overview of the investigation and expand or clarify any "shorthand" in hand-written notes.

5.7 Technical instruments

Enforcement officers are likely to use a variety of technical instruments in collecting samples and in carrying out field measurements. The admissibility of data generated by mechanical or computerised instruments is subject to the law of evidence. To be able to admit evidence collected by the use of an instrument it is necessary to show the following.

- The instrument was used by someone qualified to use it.
- There was correct operation of the instrument, and it was in good condition for accurate work.

Note: It may be necessary to produce the manufacturer's specifications for the instrument and give evidence that the instrument was regularly maintained and/or calibrated in accordance with the manufacturer's specifications or standard analytical methods or procedures.

If the instrument is complex and not in common daily usage, evidence must be given showing that the instrument was constructed and/or programmed on scientific principles, and is accepted as dependable for its purpose by the profession concerned in that branch of science. This sort of evidence can only be given by an expert. Advice should be sought from experts in Council if available or externally if necessary prior to the use of such instruments.

If there are any hand-written notes made recording results, these must be retained even if later typed up. Any original computer-generated printout should be retained.

5.8 Visual observations, photographs, sketches and measurements

Detailed visual observation is very important in prosecutions. Photos should always be taken and every enforcement officer should carry the camera assigned to him/her at all times. In certain cases consideration should be given to aerial photos as this is often very useful for illustrating an overview of the situation. It is important to ensure that the date and time is recorded on all photographs. A sketch will be helpful (eg, identifying sample collection points, waterways and the source of the discharge or the extent of an excavation). Global positioning system (GPS) units, Clinometers, and 100m tape measures are available to all enforcement staff.

5.9 Samples

Section 332(2) of the RMA provides that the enforcement officer may take samples of water, air, soil or organic matter, and under section 332(2A) 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.

Whenever possible collect samples of the contaminant discharged and analyse the samples so that evidence can be given of the effect of the contaminant on the environment. Remember visual observation on its own may not be sufficient to prove the substance is a contaminant as defined in the RMA.

The purpose of sampling is to identify the contaminant discharged and its likely effect on air, soil or water quality. Hence the receiving environment should also be sampled above and below the point of discharge. Make sure to establish the extent of any discharge as accurately as possible including directions of flow and speed. If there are other possible sources of contamination (e.g., two drain-pipes discharging into the same stream), samples should also be collected from these other sources to establish their effect on the receiving environment.

It is important that the investigating officer follow the standard sampling procedures contained in the Tasman District Council "Environmental Sample Collection Procedures". 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 the required number of samples and, whenever possible, take extra samples. It is better to have a surplus rather than not enough. Extra samples will allow additional or repeat analysis.

If a sample is to be used as evidence it must be stored in a place where it cannot be tampered with. Samples must be stored as per laboratory protocol dictates for the individual determinants. All samples are to be stored in the secure room which contains a refrigerator until delivery to the laboratory door. All samples should be collected in the correct containers for that particular determinant which are available from the secure storeroom or the laboratory. If there is any doubt as to what container should be used refer to the sample list in the storeroom or contact Cawthron Laboratory for advice. Samples should be analysed as soon as possible after being taken to avoid any legal attack on the validity of the analysis results. Every endeavour must be made to avoid the suggestion that the samples may have been contaminated or interfered with between collection and analysis. The method of sampling should be able to be scientifically verified (i.e., it is an appropriate sampling technique for the substance being sampled).

5.10 Chain of custody

The “chain of custody” refers to the passage of an exhibit, from where it was located until the time it is produced in Court as evidence (physical evidence such as samples, documents or photographs are referred to as “exhibits”). The chain of custody proves that an exhibit is, in fact, what it is alleged to be (i.e., what is produced in Court is precisely what was originally found at the scene).

To help ensure proof of the chain of custody, always follow these procedures.

- Ensure that one person is in charge of all exhibits.
- Bag/label a sample at the time of sampling and record in a notebook or a field sheet the time and date, place, number or label of the sample, the name of the person who collected the sample, and any other conditions affecting the taking of the sample.
- Create and complete the chain of custody form from the ‘Envmon’ database as soon as possible after sampling (A Chain of Custody form should always be completed prior to any pre-programmed sampling).

Samples must always be held in a secure area and stored in accordance with laboratory protocols to preserve their integrity. Samples must not be left unattended or out of view unless they are secure. Sample containers should be taped securely and if necessary a signature written across the outside end of the tape so it will be apparent if the container has been opened prior analysis of its contents.

The person who takes the samples should be the person who exercises continuous control over the samples until registered with the laboratory. If samples are bound for other laboratories outside the district and the matter is one that is likely to go before the courts then it is recommended that the enforcement officer hand deliver the samples to the door of the laboratory. This procedure avoids the need to call a number of witnesses to give evidence as to what happened to the sample(s) between the time of collection and the time of

analysis. Officers must maintain a complete record of the chain of custody until delivery to the laboratory.

5.11 Service of Documents

It is important that the correct procedures are observed in relation to the service of documents under the specific Acts Council administers. The mode of service of documents under the RMA is clearly detailed in Section 352.

In general it is expected that when the recipient is present, the officer shall deliver the document personally to that person. Service on a body (whether incorporated or not) can be carried out by service on an officer on the board of that body or on the registered office of the body.

If no one is present, the officer has the option of:

- Hand delivering any document to the usual or last known residence or place of business of the person (the letter box is acceptable). In some cases delivery can be by facsimile; or
- Send it to the actual or last known place of residence or business of the person; or
- Send it by any other manner that either the Court or Planning Tribunal may, on application to it, direct.

Pursuant to Section 352(5) of the RMA, where a notice or document is sent by post to a person, it shall be deemed, in the absence of proof to the contrary (e.g. registered post) to be received by the person at the time the letter would have been delivered in the ordinary course of the post.

See individual enforcement sections later in this manual for any specific document service requirements.

5.12 Cost recovery

Through its Incident Investigation Charging policy Council may recover what is considered actual and reasonable costs incurred as a result of investigating breaches of the Act. By actual and reasonable it is intended to mean those costs directly associated with the non-complying activity and which caused Council to respond as it did. Costs that may be fairly recovered include but may not be limited to:

- Staff time spent locating the activity and undertaking on-site inspection to identify/confirm breaches.
- Staff time spent determining culpability/responsibility for detected offences.
- Staff time spent in communicating and corresponding with persons/organisations responsible including matters involving remedial or mitigation works.
- Time spent in travel (from the nearest Service Centre) to a site where an activity is subsequently found to be non-complying.
- Costs incurred through disbursements such as costs of analysis.

These costs are incurred after a second or subsequent visit detects continuing non-compliance or new offending.

Enforcement officers should endeavour to recover all fair and reasonable costs associated with an investigation. Once a decision to take enforcement action is made however, Council is then limited in recovering costs under this policy as it excludes any activity not deemed to be an inspection such as enforcement proceedings. In essence Council cannot charge for time spent preparing infringement or abatement notices or preparation of other enforcement proceedings. In these instances Council must rely on costs awarded by the Courts at any later hearing.

5.13 Receipt or handling of monies

No enforcement officer in Tasman District Council shall accept or handle any fees or monies associated with their duties including fines payments.

5.14 Disclosure of information

If Council prosecutes, file notes and other documents (other than correspondence and other communications between the local authority and its lawyer relating to the prosecution) must be disclosed to the defendant.

If Council takes enforcement action other than prosecution, and if the party against whom the action is taken makes a request under the Local Government Official Information and Meetings Act 1987, copies of documents on the local authority file will have to be provided unless there are reasons for withholding the information under sections 6 and 7 of the Local Government Official Information and Meetings Act.

The exception to this is disclosure of the names of complainants. Council **will not** disclose the names of complainants under the provisions of Section 27 (1) (c) of the Privacy Act 1993 which authorises the right to withhold certain information.

All requests for disclosure of information are to be referred to the Co-ordinator Compliance-Monitoring in the first instance.

5.15 Media release

Only the Environmental and Planning Manager has the authority to release information to the media relating to complaint investigation and enforcement unless he/she has delegated the authority. Under no circumstances are enforcement officers to discuss enforcement issues with the media unless first consulting with the Environmental and Planning Manager.

In prosecutions before the courts the rule of sub-judice applies. Sub-judice means that while a matter is under judicial consideration public comment on the case is prohibited as the matter has yet to be decided by the Court.

As the media often report about matters prior to the Court making a decision any press releases about enforcement matters should be restricted to the simple fact that Council is undertaking enforcement action in respect of an alleged breach.

Under no circumstance can any information be given that can lead to the identification of the names of the defendants or other parties to proceedings.

6. The Enforcement Pathway

The following section outlines the enforcement pathway expected to be undertaken from discovery of an offence through to the decision to take enforcement action.

6.1 Response on discovery of offence

The response upon discovery of an offence will be largely dependant on several factors including the need to deal with any ongoing adverse environmental effects, risk of continuing offending and the seriousness of the offence. It is expected that the response will take the following staged approach:

1. Response to effects

Upon discovery the initial response will be to assess the actual or potential environmental effects if any, resulting from the contravention. Significant adverse effects will require an immediate response prior to any other action in order to address those effects. This may include a full pollution prevention response, defaulting directly to abatement notice, enforcement or interim enforcement order in order to prevent further serious environmental damage from starting or continuing.

2. Response to offence

Following any urgent intervention to deal with effects the next stage is to conduct investigations, including evidence gathering and explanation from offenders. It is recommended, particularly with serious offences that explanations and or admissions be obtained by way of formal interviews conducted by the investigating officer.

In less serious matters it will usually be sufficient to write to the offending party or parties requiring written explanation as to why the offence occurred and the circumstances behind it. The purpose of a formal letter is threefold:

- To advise that a non-compliance has been detected and that Council believes the recipient is responsible.
- Allow the recipient opportunity to consider the matter and propose remedies.
- Provide an explanation which will assist Council in determining an appropriate response to the offence.

Regardless of the level of offending a response should always be sought from an offender. The exception to this would be matters of a very minor nature with nil environmental effects or the person has responded such that the effects are remedied and it will not happen again.

Upon receipt of any explanation the next and final stage is one of deciding on a response to the offence by determining the appropriate enforcement action if any through a sound decision making process.

Note: Notwithstanding the above Tasman District Council reserves the right to proceed directly to enforcement action, including prosecution, against parties where the circumstances support this.

3. Deciding the enforcement response

Making the correct enforcement response, often in the absence of complete information, requires considerable skill. It also requires a good knowledge or understanding of:

- The requirements, duties and transitional provisions of the various acts and regulations;
- The rules and objectives of Council's plans and policy statements;
- Ability to interrogate the NCS database;
- Common sense in knowing when to apply the principle *de minimus*;
- An ability to be decisive; and
- Diplomacy and tact (particularly when informing someone that the Council will be taking further enforcement action).

It is recognised that many of the attributes listed above can only be gained through experience in an enforcement role however it is expected that enforcement officers will endeavour to familiarise themselves with the rules, regulations and databases operated by Council and avail themselves fully of training courses and other opportunities to upskill when available.

Aside from these attributes deciding on the correct enforcement response also requires a clear understanding of the enforcement options that are available to officers and working through them to select the most appropriate for the offence given the circumstances. The following section outlines these various options.

7 Enforcement Options

Tasman District Council enforcement officers have a broad range of enforcement options available to them to resolve matters on non-compliance. Selecting the appropriate enforcement response will depend on such factors as the seriousness of the offence, the significance of adverse effect on the environment and the level remorse shown by the offender. The following range of enforcement options are available to staff in response to detected offending.

7.1 Informal options

These are options usually available as a response to minor offences with no or minor adverse effects, further non-compliance is unlikely and where formal enforcement action is not deemed appropriate, or any more effective, in achieving a desired outcome over an informal approach.

Information/Advice

This type of response is appropriate for incidents of very minor non-compliance, the purpose being to notify that non-compliance exists and request the need for compliance to be observed. Correspondence should be in writing and copies placed on file to provide a record for future reference. The correspondence need not seek a written explanation from the offender but may include educational material or plan guides.

Education

Education is a valid and useful tool for use in minor matters where the non-compliance was unintentional and educating the offender will achieve a desired outcome without the need for other enforcement action.

Education may extend to advising of the rules relating to the activity or providing understanding of the environmental effects from their actions.

Council has a number of in house resources and useful publications that may be used for this purpose.

Warning letter

A warning letter is formal notification that an offence has been committed. A warning letter is issued when the level of offending is such that other informal options are not appropriate yet formal enforcement action is not warranted after:

- Working through the enforcement decision process and;
- Considering any written response to a request for explanation.

Copies of warning letters are to be attached to any relevant files.

7.2 Formal Enforcement Options

When the offence is such that there is a real need to take action to avoid, remedy or mitigate adverse effects, ensure compliance, or provide deterrence and/or penalty one or more formal enforcement responses is required.

Infringement Notice

An infringement notice is written notice that an offence is alleged to have occurred against an Act. The notice requires the payment of an instant fine (set fee) as provided for by the Act to which the breach is alleged to be against. Fines are issued in accordance with the Summary Proceedings Act which determines the process.

The summary Proceedings Act provides that a person subject to an infringement notice may elect to pay the fee or have the matter heard in the courts

See Chapter 9 for specific detail on the infringement fine process.

Abatement notice

An abatement notice is a formal notice prescribed under the RMA that compels a recipient to act in some way as determined by the notice. The notice is issued when there is a requirement for someone to:

- Cease an activity.
- Do something necessary to avoid, remedy or mitigate an actual or potential adverse effect on the environment.
- Comply with a resource consent, rule in a plan or regulation in order to avoid an adverse effect.

See Chapter 10 for specific detail on the abatement notice process

Enforcement Orders

An Enforcement Order is an order from the Environment Court directing a person to:

- Cease an unlawful or objectionable activity that is likely to have an adverse effect;
- Take action to ensure compliance, or avoid, remedy or mitigate any adverse effects;
- Change or cancel a resource consent under certain circumstances.

An enforcement order may require the restoration of any natural and physical resource to the state it was before the adverse effect occurred. A person against whom an enforcement order is made shall comply and pay all the actual and reasonable costs and expenses of complying with the order unless the order directs otherwise (the application must include an application for Council costs). If a person fails to comply with an enforcement order, Council can carry out the required work and charge that person (failure to comply with an enforcement order is also an offence under section 338 of the Act).

The Council under section 317 of the Act must give a “Notice of Application” form to every person directly affected by the application within five (5) working days of applying for the enforcement order. The judge before deciding will hear the applicant and anyone else who wishes to be heard. The courts will then either:

- (i) Make an appropriate order; or
- (ii) Refuse the application.

The Court cannot make an enforcement order against a person who is acting in accordance with a rule in a plan or a resource consent if the adverse effect for which the order is sought were recognised at the time of approval, unless it was considered necessary to do so.

See Chapter 11 for specific detail on Enforcement Orders.

Interim Enforcement Order

The Council may also apply to the Environment Court Judge or a District Court Judge to make an interim enforcement order under section 320 of the Act if it considers other mechanisms to be too slow or an emergency works notice inappropriate. The Council's legal adviser will make the application on behalf of the Council. The Judge, if he/she so wishes will issue an interim enforcement order without holding a hearing and without the necessity to serve a notice in accordance with Section 317 of the Act.

The Judge shall instruct the Council to serve a copy of the interim enforcement order on the person whom the order is made. A person against whom the order has been made, and who has not been heard by the Judge before the order was made, may apply as soon as practicable, after the service of the order, to the Judge to change or cancel the order. The Judge may confirm, change or cancel the interim enforcement order at any time.

The interim enforcement order is a quicker method of obtaining an enforcement order. It is time-saving in that the Judge should be readily available to hear such an application and make a decision without having to hear the other side. It is a form of an injunction that takes effect once it has been served. An interim enforcement order stays in force until an application for a full enforcement order is determined, or until cancelled by the Judge under section 320(5) of the RMA.

See Chapter 12 for specific detail on the interim enforcement orders.

Prosecution

Prosecution is an enforcement tool which, if a conviction is secured, would normally result in a penalty/sentence being imposed on the alleged offender. Under Section 339 of the RMA, if a person is convicted of an offence he/she is liable:

A prosecution can be seen to have a punishment as well as a deterrent dimension. Invariably prosecution happens after an offence has taken place and is not therefore a method of fixing or mitigating the effects of an alleged offence. This is important to as it may be many months before a case is heard, by which time the effects of any breach or non-compliance may be irreversible.

There is also a financial implication to prosecution. While the local authority may have costs awarded in its favour or receive a proportion of any penalties, the costs of invoking prosecution proceedings by Council will be considerable and the process will be a time consuming method of enforcement. For this reason, prosecution should only be considered for the most serious of cases.

Water Shortage Direction

Council may issue a water shortage direction when it is considered that a serious temporary shortage of water exists in the region. A direction once issued will restrict or forbid the taking of water by users. Water Shortage Direction can only be issued for a period of 14 days but can be revoked, renewed or amended by a subsequent direction from council. The process of

public notification is well prescribed and any subsequent deliberate contravention is a prosecutable offence.

Excessive Noise Directions

Under the RMA an enforcement Officer or constable on request may issue an excessive noise direction either orally or in writing that requires a person to immediately reduce the excessive noise to a reasonable level. This direction is additional to any power under sections 322 – 325 to issue an abatement notice for excessive noise.

The issue of a notice binds a person to cease or reduce the noise for a period of up to 72 hours. Contravention of the direction can result in seizure or incapacitation of the device causing the noise.

8. Selecting an Enforcement Response

Deciding on the appropriate enforcement response is often complicated by a range of factors. In order to make a sound and justifiable decision it is essential that all relevant issues surrounding the matter are carefully considered prior to actual enforcement action being taken.

8.1 Factors Requiring Consideration

Along with the principles contained in Chapter 5 the following are all matters that need careful consideration prior to selecting a correct enforcement response. It must be remembered however, that this is not an exhaustive list and other factors may exist in certain cases:

1. Circumstances

- *The significance of the actual or potential adverse effect on the environment from the non-compliance.*

Consider the sensitivity of the receiving environment; magnitude of environmental damage and whether the effects are temporary or on-going, irreversible or able to be mitigated. Question whether the activity, while providing a breach, is of such a minor nature or effect as to be 'de minimis' and warrant no enforcement response.

- *Conduct of Offender*

Assess the deliberateness of the offender's action. Was the act as a result of deliberateness or carelessness, was the person ignorant of the law or ought to have known? Ascertain if they were under instruction from other parties or employers or acting alone? Consider closely if the incident was avoidable and what if any action was taken to mitigate when the offender became aware of the issue.

- *Previous History*

Establish if there is a previous history of non-compliance or pattern of similar offending. Ascertain if there has been a failure to act on previous warnings by Council or a record of previous enforcement action undertaken?

- *Action taken and degree of remorse shown by offender*

Is the offence still continuing or was action taken to mitigate or remedy any effects or have steps been put in place to avoid future breaches? Was Council notified at the time of incident or the offender becoming aware? Does the offender accept responsibility or deny, show remorse or have a cavalier or apathetic approach.

- *Potential or likelihood of reoccurrence*

Assess if the incident is a one-off or is there potential for it to reoccur. If so have steps been put in place to avoid any future reoccurrence or is the risk still clearly present?

2. Legal Issues

- *Establish a breach exists*

Determine that a clear breach of an Act, rule in a plan, consent or a regulation has occurred in the first place.

- *Ingredients of offence*

Establish that all the ingredients of the offence are present and clearly able to be established? Assess what standard of proof is required - on balance of probabilities or beyond reasonable doubt?

- *Statute of limitation*

Determine when Council first become aware of the offence. Remember that Section 338 (4) of the RMA limits the laying of an information in the courts to no longer than six months from when the date at which the offence became known or ought to have become known to the Council. This limitation also applies to the filing of infringement notices pursuant to the processes prescribed in the RMA and Summary Proceedings Act.

- *Statutory Defences*

Determine if they have a defence. In the RMA Statutory defences are provided for under Section 340 and 341 for offences against the act. Consider fully the availability of these as a defence in any enforcement proceedings.

- *Enforceability*

Determine the enforceability of the condition or rule. It is not policy to proceed against anyone for a breach if the legality of the rule or condition is in any question.

3. Desired Outcomes

- *Environmental Outcomes*

Determine if there is a desired environmental outcome and whether the intended enforcement action provides the right tool to achieve the desired outcome.

- *Punitive or Deterrent Effect*

Establish whether there is a need to provide an appropriate punitive or deterrent response for the level of offending.

- *Cost effectiveness*

Determine if the proposed enforcement response is the most cost effective approach for the particular level of offending and the desired outcomes sought.

8.2 **Standard of Proof**

There are two different standards of proof that require consideration in any enforcement decision process.

The standard of proof required for a prosecution and for an infringement fine offence is “beyond reasonable doubt”. A reasonable doubt is a doubt that would prevent a reasonable and just Judge or jury from coming to a conclusion.

The standard of proof for an application for enforcement order or appeal against abatement notice 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.

Before any action is taken the sufficient existence of these levels of proof must be established.

8.3 **The Enforcement Option Matrix**

The following enforcement option matrix is designed to assist in selecting an appropriate enforcement option once the above steps have been assessed and weighted. The matrix provides a useful tool in conjunction with the other checks in determining the appropriate response. It should be recognised however that the table while a useful guidance tool is limited in its ability to determine an outcome in all cases due to the varying and complicated nature of some offences. The table should however assist in providing a pathway towards a more consistent enforcement process.

	First Offence -Unlikely to happen again	First Offence - potential to occur again	Second or subsequent offence	Deliberate or knowingly negligent
No environmental effects.	No further action	Warning letter & preventative action plan	Infringement fine	Infringement fine
Minor environmental effects. (Able to be remedied)	Warning letter	Warning letter & preventative action plan	Abatement notice and/or Infringement fine	Abatement notice and/or Infringement fine
Minor environmental effects. (Unable to be remedied)	Warning letter	Warning letter & preventative action plan	Infringement fine	Infringement fine
Moderate environmental effects. (Able to be remedied)	Infringement fine	Abatement notice and/or Infringement fine	Abatement notice and/or Infringement fine	Abatement notice and/or Infringement fine
Moderate environmental effects. (Unable to be remedied)	Infringement fine	Infringement fine	Infringement fine	Infringement fine or prosecution depending on circumstances
Significant environmental effects. (Able to be remedied)	Abatement notice and/or Infringement fine	Abatement notice and/or Infringement fine	Enforcement order	Enforcement order and/or prosecution
Significant environmental effects. (Unable to be remedied)	Infringement fine or prosecution depending on circumstances	Infringement fine or prosecution depending on circumstances	Enforcement order and/or prosecution	Enforcement order and/or prosecution

8.4 Deciding the response

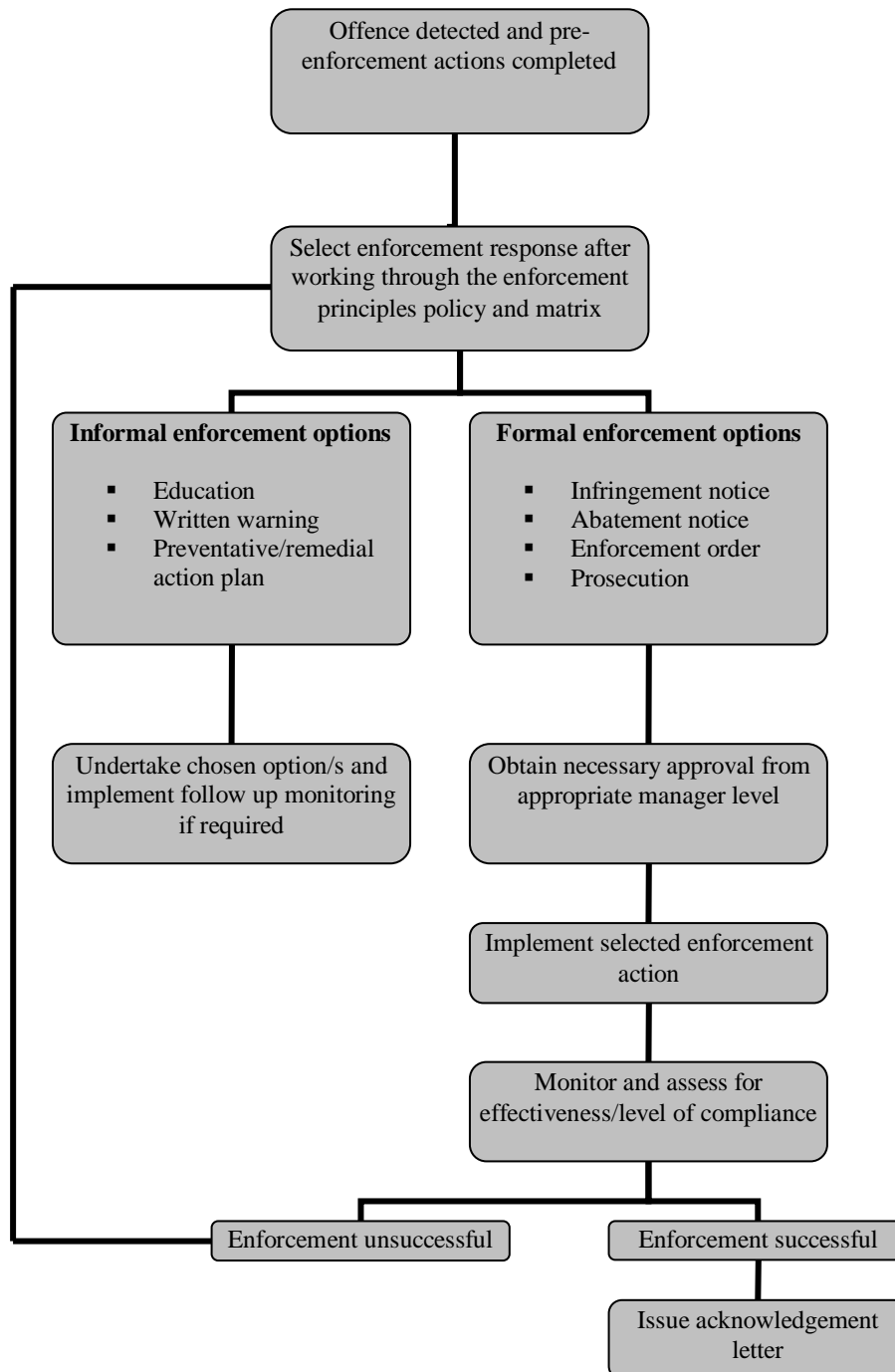
Once an interim decision has been made it should be rechecked for consistency against the principles and policies outlined in this document. If at this stage the enforcement officer is satisfied that the response selected is appropriate it is necessary to seek final approval from the Co-ordinator Compliance-Monitoring prior to initiating any action. Once approval is sought the matter should proceed as directed.

8.5 Evaluating effectiveness

In order to develop an effective enforcement process in Council all enforcement action undertaken by officers should be evaluated for effectiveness in achieving the desired outcome. In both successful and unsuccessful actions where further enforcement action was required, it is useful to examine what was effective or not, what could have been improved or changed to make the

process more effective. This information should be fed back to the Co-ordinator Compliance to implement change if necessary.

The following diagram presents an overview of the enforcement selection process that should occur in deciding an appropriate response to detected offending.



9. Infringement fine procedure.

9.1 Statutory provisions

The statutory provisions for infringement fines are:

- Resource Management Act 1991 - Sections 343A to 343D.
- The Resource Management (Infringement Offences) Regulations 1999 including schedule.
- Summary Proceedings Act 1957 – Sections 21, 78A & 78B.
- Summary Proceedings Regulations 1958 – Regulations 15B to 15E, First schedule and forms SP10 and SP10A.
- Litter Act 1979.

As the option of issuing an infringement fine is limited to certain offences under the RMA staff should make themselves familiar with the above provisions giving particular regard to the first schedule of the Resource Management (Infringement Offences) Regulations 1999 containing the sections of the RMA where offences may be dealt with through infringement fine procedure. This schedule also contains the maximum penalty fee available for individual offences.

See Appendix 1 for the Infringement Fine Schedule.

9.2 Authority to issue

Infringement fines can only be issued by staff who are authorised as enforcement officers by Tasman District Council under section 38 of the Resource Management Act, or Litter Control Officers under Section 14 of the Litter Act. While Enforcement Officers have the authority to prepare and issue infringement fines the decision to issue an infringement notice must first be approved by the Co-ordinator Compliance-Monitoring.

In cases of uncertainty or where a formal legal direction may be desirable the enforcement officers or the Co-ordinator Compliance will not exercise delegated authority as of right. In these matters the following process is to be adopted.

- Step 1 Compliance Officer to discuss the matter with the Co-ordinator Compliance.
- Step 2 Upon agreement to proceed enforcement officer collates evidence and completes necessary paperwork.
- Step 3 Co-ordinator convenes meeting with both the E & P Manager and E I Manager to discuss case.
- Step 4 Upon agreement and sign off from managers proceed to issue of fine.

9.3 Standard of proof

The local authority is required to prove the offence to the standard of beyond reasonable doubt. The standard of proof which is required of the defendant to establish a defence is on the balance of probabilities. Defences to the infringement notice are clearly defined in the summary of rights which accompany the notice.

9.4 Costs

Council cannot recover costs associated with the collection of evidence or the prosecution process including preparing infringement fines.

9.5 Forms

Infringement fines issued under the RMA must be completed on the approved infringement fine template prescribed by schedule 2 of the Resource Management (Infringement Offences) Regulations 1999. These forms are found in the Infringement Fine Database.

9.6 Information to be contained in notice

All infringement notices issued by enforcement officers must include the following mandatory fields:

- Notice Number – (*generated automatically*)
- Name of enforcement officer issuing notice
- Name of Enforcement Authority
- Full name and address of recipient
- Section of Act contravened
- Detailed nature of infringement
- Location
- Date and time
- Fee and date for payment
- Signature of Enforcement Officer

Infringement fine notices can only be generated using the Infringement Fine Database where these required fields are either mandatory boxes or automatically generated. The notice will not be able to be continued unless these fields are completed. Regardless it is vitally important that all issuing officers fully check their notices for correctness prior to issue.

A failure to ensure that all necessary information is contained in the notice may result in it being struck out at any subsequent hearing.

9.7 Who can receive an infringement notice

An infringement notice must be issued to the person or company responsible for the infringement offence. If multiple parties are identified as responsible for an offence a separate infringement notice should be served on each and every offender either jointly or as principal and agent.

Those who may be proceeded against are:

- Individuals
- Companies
- Incorporated bodies
- Public authorities

Those who may not be proceeded against are:

- The crown

9.8 Timeframes

The timely issue of the notice is crucial to a later successful outcome if the fine remains unpaid. Section 338(4) of the RMA requires that commencement of court proceedings for offences against the act must be within six months of offence occurring or becoming known to the enforcement agency. Commencement of proceedings in the case of infringements is the filing of the reminder notice in court 28 days after its issue. As the due process required to be gone through under the Summary Proceedings Act will occupy time in itself, success will depend on issuing fines notices as early as possible to allow the process to run its course within the six month deadline. This time pressure is particularly important when correspondence such as explanation letters are being sought from offender prior to a notice being issued.

9.9 Continuing and multiple offences

Continuing offences

Section 339(6) of the RMA provides:

The continuing existence of anything or the intermittent repetition of any actions, contrary to any provision of this act shall be deemed to be a continuing offence.

This provision of the act recognises the aggravating nature of certain ongoing offences and provides Council with the ability to issue an infringement notice for each and every day a person responsible has committed the offence. Council also has the ability to deal with matters of continuing offences through the issue of infringement notices as a representative sample.

Enforcement officers dealing with continuing offences must seek approval from the Co-ordinator Compliance-Monitoring before issuing either representative or multiple infringement notices.

Multiple offences

During the course of investigations enforcement officers may detect more than one offence occurring on a property or associated with an activity. These breaches may constitute offences against different sections of the act. In these cases a separate infringement fine can be served for each and every offence detected.

Enforcement officers dealing with multiple offences must seek approval from the Co-ordinator Compliance-Monitoring before issuing multiple infringement notices.

9.10 Methods of Service

Infringement notices must be served pursuant to the requirements of section 343C of the RMA. This means the infringement notice must be delivered in person or posted to the usual or last known address.

In most instances the infringement notice will be served by ordinary post. It is not necessary that it be by registered post and for the purposes of the Summary Proceedings Act will be deemed to be served on that person.

Any enforcement officer may deliver an infringement notice. If a notice is to be delivered in person it is recommended that the officer serving:

- Show their warrant
- Serve the notice and explain if necessary
- Bring to the attention of the recipient their summary of rights
- Provide a covering letter detailing the circumstances and contact details if not the issuing officer
- Record in their diary the date and time and details of service

9.11 Invoicing and Tracking

There is no need to generate any invoices when issuing infringement fines as the Infringement Fine Database will automatically initiate an invoicing process.

9.12 Infringement Fine Process

9.12.1 Payment after issue of infringement notice

If payment is made within the 28 days from date of service monies will be receipted by the cashiers and lodged against the record in the database and no further action will be required. All records will be updated automatically. No further action is required and the matter is concluded.

Note: Under no circumstances should enforcement staff receive or agree to handle any monies including fee payments from infringement notices.

9.12.2 Non payment after issue of infringement notice

The database will track time periods and will automatically notify the Co-ordinator Compliance when the reminder notice and date for lodgement in court is due.

If 28 days have passed since date of issue of infringement notice and the offender has not requested a hearing a reminder notice will be sent using the reminder notice form SP10 generated from the database. This process will be undertaken by the Administration Officer Regulatory for signature by the issuing officer.

If payment is made within the 28 days from date of service of the reminder notice monies will be receipted by the cashiers and lodged against the record in the database and no further action is required. Records will be updated automatically.

9.12.3 Non payment after issue of reminder notice

If 28 days have passed since the date of issue of the reminder notice and the offender has not requested a hearing Council may take two options:

- Take no further action in respect of the matter
- File a copy of reminder notice with the Courts

In most instances Tasman District Council will endeavour to recover costs and monies owing including fines. For that reason unpaid Infringement notices will generally be lodged before the courts unless there is good reason not to.

Upon the notice being lodged the Court registrar will send notice of the fine to the defendant. The defendant has 28 days after the date the fine is imposed to pay the fine. The Court can allow further time for payment and payment by instalments.

If the defendant has not paid the fine 21 days after the date the fine is imposed, and if the Court has not made an order extending the time within which the defendant has to pay the fine or allowing payment by instalments, the Court registrar will send the defendant a further notice of the fine informing the defendant that if the fine is not paid within 28 days after the date on which it was imposed, and no arrangement has been entered into for an extension of time or for payment by instalments, enforcement action may be commenced.

If the defendant does not pay the fine, the registrar may issue a warrant to seize property, or make an attachment order attaching any salary or wages payable or to become payable to the defendant, or issue a deduction notice requiring a bank to deduct the amount due from a sum payable or to become payable to the defendant.

Every month Tasman District Council will receive a monthly statement of disbursements from the Courts. A copy of this is forwarded to the Co-ordinator Compliance-Monitoring for circulation to enforcement officers.

9.13. Challenge to the infringement notice

A person receiving an infringement notice may raise any matter relating to the circumstances of the offence by writing to Council within 28 days of the date on which the infringement notice was served or delivered.

The Council has the discretion to either accept the circumstances that are raised and take no further action, or continue with the infringement process by issuing a reminder notice.

Any decision to take no further action must be approved by the Co-ordinator Compliance – Monitoring. The person must be notified in writing that a decision not to proceed has been taken and a copy of letter filed

9.14. When a court hearing is requested

Under the Summary Proceedings Act the recipient of an infringement notice may request a Court hearing before or within 28 days after service of a reminder notice. The local authority may also allow the defendant extra time to request a hearing. The request must be in writing, signed by the defendant and delivered to the local authority at the address specified in the infringement notice. The defendant can either admit liability or not admit liability.

9.15. Irregularities and errors in an infringement notice, reminder notice and/or notice of hearing

Section 78B of the Summary Proceedings Act provides that if the defendant did not receive the reminder notice or a copy of the notice of hearing or if some other irregularity occurred in the procedures leading up to the order for the fine or costs, the Court can, on the application of the defendant:

- set aside or modify the order
- grant a rehearing
 - require another copy of the reminder notice or notice of hearing to be served on the defendant, or
- make an order as to costs.

Under the Summary Proceedings Act the notice filed in Court is to be treated as an information, and a copy of the notice served on the defendant is to be treated as a summons to the defendant. If there is an error in the infringement notice, the reminder notice and/or the notice of hearing, section 204 of the Act applies and the notices are invalid if there has been a miscarriage of justice. If there is an error in the infringement notice filed, the local authority at the hearing can seek an amendment according to section 43 of the Act.

10. Abatement notices

An abatement notice is a formal written notice prescribed under the RMA that enables Council to require certain actions to be taken or ceased within a specified time frame. They are used when there are reasonable grounds to believe that there is or is likely to be a contravention of the RMA and/or an adverse effect on the environment.

Use of abatement notices can be divided into three main categories

- Directing that an actual or potential unlawful activity that contravenes the RMA, a rule in a plan, a resource consent or regulation shall cease or not commence (cease notice).
- Directing that an action be undertaken that is necessary to comply with the RMA, a rule in a plan, resource consent or regulation, and avoid, remedy or mitigate adverse effect on the environment (action notice).

- Directing that a lawful activity that is noxious, dangerous, offensive or objectionable to such an extent as to have an adverse effect on the environment shall cease or not be undertaken. (Section 17 duty to avoid notice).

10.1 Statutory grounds

The statutory grounds for issuing notices are contained in sections 322 – 325(A) of the Act. These sections specify matters such as form and content and are required to be adhered to if a notice is to remain valid. It is important that all enforcement officers are familiar with the sections.

10.2 Authority to issue

Abatement notices may only be served by an enforcement officer who is duly authorised by Tasman District Council under section 38 of the act.

10.3 Standard of Proof

Abatement notices can only be served where the enforcement officer has reasonable grounds to believe that any of the circumstances specified in Section 322 (1) and (2) exist. It should be noted that the discretion to serve notice under Section 322 lies with the enforcement officer and not the Council and therefore it is vitally important that officers apply this discretion responsibly. Reasonable grounds in this context means on **the balance of probabilities** that grounds exist. It is desirable, but not a requirement that the co-ordinator Compliance Monitoring is consulted before the issue of an abatement notice.

10.4 Timeframes

An abatement notice should be served as soon as practicable after the discovery of the contravention.

10.5 Who to Serve Notice On

An abatement notice shall be served on the party responsible for the contravention. Parties can include:

- A person
- A company
- An incorporated body
- A public authority

It is important that all parties responsible for the contravention are identified and subject to the abatement notice including every person or party having control or responsibility for the action of others causing a contravention. In these cases consideration should be given to serving notices not just on the contractors but their employers, not just site managers but also the registered companies and individual directors.

Owners and occupiers of land may also be subject to abatement notices to avoid, remedy or mitigate adverse effects occurring on their land irrespective of whether they are responsible for the contravention. This can include historic offences where the adverse effects are still on-going despite ownership changes

An abatement notice **cannot** be issued against the crown or a trust unless the trust is an incorporated body.

10.6 Form and Content

The various abatement notice templates are located in the NCS Compliance database. These forms are preformatted and contain the information required to be included in an abatement notice. Mandatory fields need to be completed in order to generate the notice. It is important that all issuing officers fully check any notice for errors prior to issue.

The abatement notice must specify the subsection of s 322 that is relied upon by the enforcement officer. Sometimes it is appropriate to rely on more than one subsection of s 322.

Section 322(1)(a)(i) – requires a person to cease, or prohibits a 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 the Act, any regulations made under the Act, a rule in a plan, or a resource consent.

Section 322(1)(a)(ii) – requires a person to cease, or prohibits a person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer, 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.

Section 322(1)(b)(i) – requires a 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 the Act, any regulations made under the Act, 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 caused by or on behalf of that person.

Section 322(1)(b)(ii) – requires a 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 the Act, any regulations made under the Act, 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 relating to any land of which the person is the owner or occupier.

Section 322(1)(c) – requires a person, being an occupier of any land or 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 s 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.

Section 322(2(a)) – 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 that person 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.

Section 322(2)(b) – 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 that person 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.

NOTE: A failure to ensure that all necessary information is contained in the notice including the subsection of 322 may result in the notice being struck out at any subsequent hearing if challenged.

10.7 Appeals to notices

Notices can be appealed. Lodgement of a Notice of Appeal under Section 325(2) of the Act, does not automatically act as a stay of the abatement notice pending the Environment Court's decision on the appeal unless:

- (a) 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 the Act, any regulation, a rule in a plan, or a resource consent; or
- (b) A stay is granted by an Environment Judge under sub-section 3D

An appeal, by any person, to the Environment Court is to be lodged with four (4) copies, plus the original, and is accompanied by the required Court filing fee. There is a prescribed form for the lodging of an appeal.

In accordance with Section 325(2) (c), the person shall lodge the appeal with the Environment Court and supply the Council with a copy of the appeal and any other relevant documentation within 15 working days of service of the abatement notice on the appellant. The Council is to advise the Court of receipt of the appeal.

Pursuant to Section 273(3), the Registrar of the Court will fix the time and place of the hearing and, not less than fifteen (15) days prior to the hearing advise all parties. The Court has a duty to advise the Council of its decision. Section 279(4) allows all or part of the case to be struck out if it is considered by the judge to be frivolous or vexatious.

10.8 Cancelling an abatement notice

Section 325A of the RMA provides for the following.

- The local authority can cancel the abatement notice if it considers the notice is no longer required. Written notice of cancellation must be given.

- Any person directly affected by the abatement notice may apply in writing to the local authority to change or cancel the notice. The local authority must give written notice of its decision. If the local authority, after considering an application to change or cancel the abatement notice, confirms the abatement notice or changes it in a way other than that sought, the person who applied for the cancellation or change may appeal to the Court in accordance with section 325(2).

It is general policy that an enforcement officer once satisfied that the conditions of an abatement notice have been met will cancel the notice and inform the person by way of written notification. This provides certainty for the recipient that they have achieved what is expected of them. Exceptions will be for notices preventing a person from commencing anything or continuing anything in contravention of the act or a rule in a plan or regulation.

11. ENFORCEMENT ORDERS

11.1 Purpose of enforcement orders

An enforcement order is an order made by the Environment Court ordering a person to comply with the provisions of the RMA, a rule in a regional or district plan, or the terms and conditions of a resource consent. An interim enforcement order can be sought where there is imminent risk of irreparable environmental damage. In these cases a judge can dispense with a hearing and grant an order. Any interim order so issued will be subject to a deferred hearing at a later date to confirm the order. The process for applying for an interim order is the same as an enforcement order.

Enforcement orders have wide scope and can:

- Require that a person stop doing something, or prevent them from doing something, which is contrary to the RMA.
- Require a person to do something which is necessary to ensure compliance with the RMA.
- Require a person to avoid, remedy or mitigate an adverse effect on the environment.
- Require a person to pay money or reimburse any other person taking action on their behalf.
- Change or cancel a resource consent - but only if the information provided by the applicant was inaccurate and materially influenced the decision to grant consent.
- Grant a dispensation from the need to comply with RMA requirements, direct compliance with the procedures, or suspend the policy statement or plan where the proper procedure has not been carried out in preparing a policy statement or plan,

11.2 Delegated Authority

The delegated authority to initiate any enforcement order (including an interim enforcement order) lies with the Environment and Planning Manager in consultation with the Chair of the Environment and Planning Committee.

11.3 Statutory power

The relevant sections of the act are 314 to 319 and 321. The scope of an enforcement order is set out in section 314. Please refer to the individual sections of the act for detail.

11.4 Award of costs

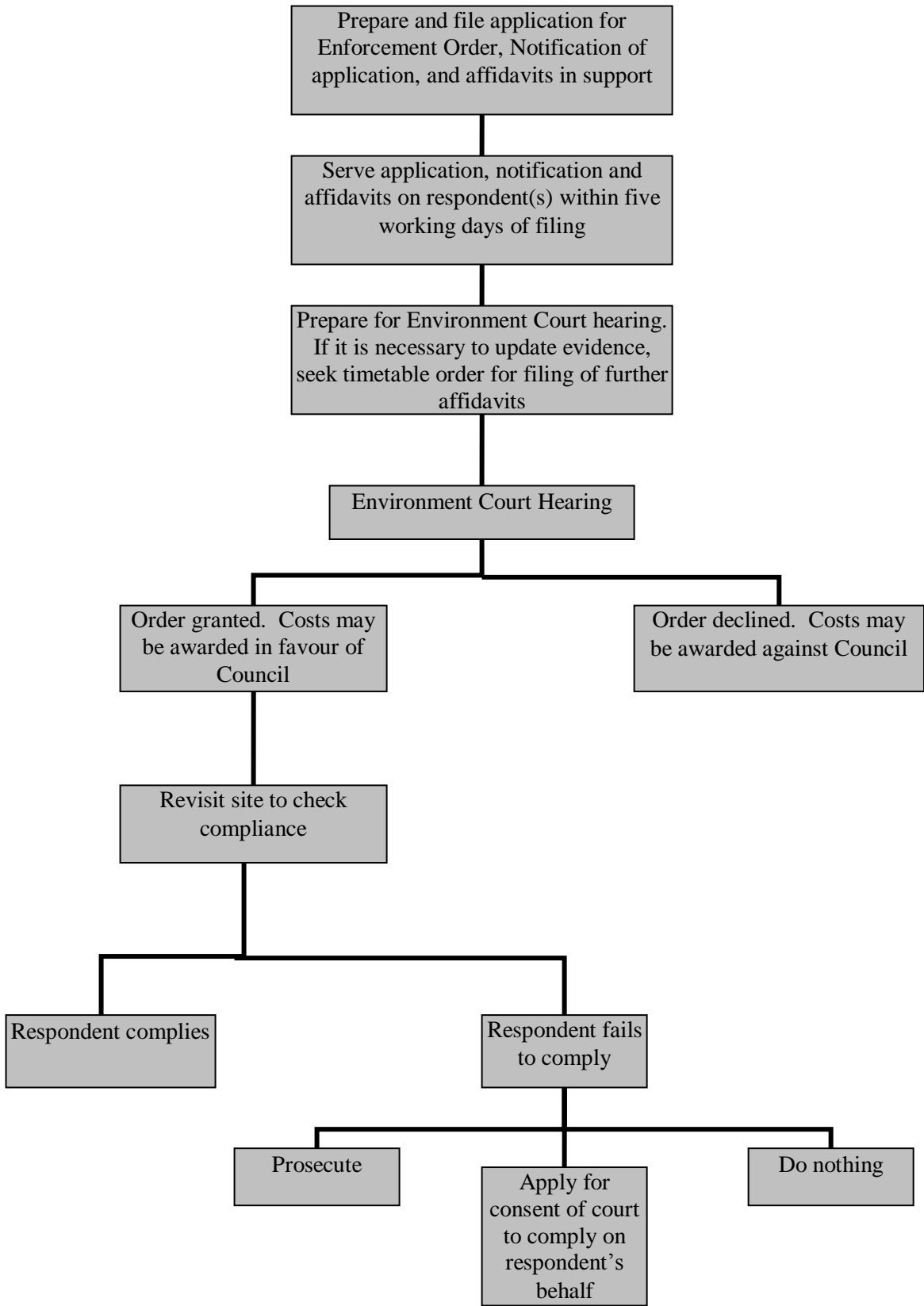
Section 285 of the RMA provides the relevant statutory provision for the awarding of costs in the Environment Court.

11.5 Application forms

Application for enforcement or interim enforcement order is made on the prescribed form, Form 43 of the Resource Management (Forms, Fees and Procedure) Regulations 2003.

11.6 Enforcement order procedure

The following diagram represents an overview of the enforcement order procedure.



11.7. Preparing the application

Application for an Enforcement Order must be prepared on the correct form (Form 43) of the Resource Management (Forms, Fees and Procedure) Regulations 2003. Sworn affidavits must accompany the application setting out the grounds for the order.

11.8 Filing in the Court

The Environment Court charges a \$55.00 filing fee for lodging an application. Tasman District Council's legal counsel will generally file the application before the court.

11.9 Notification to affected parties

Section 317 of the RMA requires that the applicant must serve an application for an enforcement order (Form 43) and notice of application (Form 44) on every person directly affected by the order. This must be undertaken within 5 working days of application being made.

11.10 Preparing evidence

Evidence is generally in the form of sworn affidavits from Council officers and witnesses. These are to be completed by the officer in charge of the case once authorisation to proceed has been granted from the Manager Environment and Planning. Upon completion the application form, affidavits and other accompanying documents (making the enforcement file) must be forwarded to legal counsel who will review prior to filing before the courts.

11.11 Court procedure

Tasman District Council's legal counsel is charged with presenting council's case before the courts. It is expected that the officer in charge of the case will also attend and provide assistance to Counsel if and when required.

Officers and witness will not generally need to attend in person when affidavit evidence is presented in the Environment Court unless requested for the purpose of cross examination by opposing parties.

12. Interim Enforcement Orders

The Council may also apply to the Environment Court Judge or a District Court Judge to make an interim enforcement order under section 320 of the Act if it considers other mechanisms to be too slow or an emergency works notice inappropriate. The Council's legal adviser's will make the application on behalf of the Council. The Judge, if he/she so wishes will issue an interim enforcement order without holding a hearing and without the necessity to serve a notice in accordance with Section 317 of the Act.

The Judge shall instruct the Council to serve a copy of the interim enforcement order on the person whom the order is made. A person against whom the order has been made, and who has not been heard by the Judge before the order was made, may apply as soon as practicable, after the service of the order, to the

Judge to change or cancel the order. The Judge may confirm, change or cancel the interim enforcement order at any time.

The interim enforcement order is a quicker method of obtaining an enforcement order. It is time-saving in that the Judge should be readily available to hear such an application and make a decision without having to hear the other side. It is a form of an injunction that takes effect once it has been served. An interim enforcement order stays in force until an application for a full enforcement order is determined, or until cancelled by the Judge under section 320(5) of the Act.

12.1 Appeals to Enforcement Orders

Appeals to the confirmation, change or cancellation of an interim/enforcement order must be made to the High Court. Section 299 of the Act provides for the right of appeal to the High Court on points of law. An appeal under this section of the Act shall be in accordance with the High Court rules. The only exception is where those rules are inconsistent with Sections 300 to 307 of the Act.

13. Prosecution

Prosecution is an enforcement tool which, if a conviction is secured, would normally result in a penalty/sentence being imposed on the alleged offender. Under Section 339 of the Act, if a person is convicted of an offence he/she is liable to:

- Up to two years imprisonment and a fine not exceeding \$200,000. If the offence is a continuing one, a further fine of \$10,000 for each day the offence continues.
- If a person is convicted of a offence of failing to provide information to an officer, he/she is liable to a fine of \$10,000 and if the offence is a continuing one, a further fine not exceeding \$1000 for every day or part day that the offence continues.
- If a person is convicted of obstruction or hindering any person in the execution of their duties under the Act he/she is liable of a fine not exceeding \$1500.

Although each case should be considered on its own merits, the following factors will need to be considered when determining whether a prosecution should be taken.

- **Culpability:**
 1. How deliberate was the action?
 2. Was lack of care demonstrated?
 3. Was the offence a repeat incident?
 4. Was there any failure of the alleged offender to act on instruction?
 5. Was there any lack of co-operation?
- **Environmental Effects**
 1. What are the actual adverse effects of the incident?
 2. What are the potential adverse effects of the incident?

3. What mitigation measures are required?

- **Public Awareness**

1. What is the public interest/expectation?
2. What degree of deterrence is required?

13.1 Delegated authority

The Environment and Planning Manager has delegated authority to initiate prosecution proceedings in the District Court in consultation with the Chairperson of the Environment and Planning Committee. Instances where prosecution is considered should be discussed firstly with the Co-Ordinator Compliance Monitoring. A recommendation will then be discussed with the Manager Environmental Information, before the file is passed onto the Environment and Planning Manager.

All prosecution will be handled through the Council's solicitor. The provisions of the Summary Proceedings Act 1957 govern District Court procedures in relation to prosecution.

Proceedings are commenced by laying an information, which shall contain such particulars as will fairly inform the defendant of the substance of the offence with which he/she is charged. Council staff should prepare a summary of the facts, which may be used in the preparation of any affidavit that may accompany the laying of an information.

Important factors:

- For the laying of information against an alleged offender, the Council has six (6) months from the time of the contravention was first known; and
- Enforcement action cannot be taken against the crown except for seeking a declaration as to the lawfulness of the Crowns action.

14. Court Hearings

14.1 Procedure at a Hearing

Prosecutions are governed by the provisions of the Summary Proceedings Act 1957. Proceedings are commenced by laying an information. Pursuant to Section 17 of the Summary Proceedings Act, every information shall contain such particulars as will fairly inform the defendant of the substance of the offence. The prosecution is bound by the particulars given in the information and the evidence must relate to those particulars and prove them fully.

Where the defendant does not plead guilty, the Court shall hear the informant first (the Council and such evidence that the Council may site as proof). The Court shall then hear the defendant and his/her evidence. Unless the Court otherwise directs, neither party may sum up (i.e there is no right of reply).

14.2 Opening Address

The obligation on the Court to hear the informant first, gives the Council the right to an opening address. The exercise of this right is very important. It enables Council to set the scene, to indicate to the judge the essential features of the case and what the Judge has to look for in the evidence. In the opening address the Council's representative should refer to:

- (a) The circumstances that gave rise to the prosecution;
- (b) The purpose and principle of the Act;
- (c) The main points of the offence;
- (d) Reference to any statutory definitions (e.g. contaminant) and any Court interpretation(s) which are relevant; and
- (e) If appropriate, refer to the gravity of the offence.

It is appropriate in the opening address to remind the Judge that if the defendant is to rely on any defence under the Act, the onus is on the defendant to prove that defence. Under Section 67(8) of the Summary Proceedings Act the prosecution is not obliged to negate every possible exception or excuse. On occasions it may be appropriate to anticipate possible defences available in cases of strict liability and to say that the defendant did not take all reasonable steps to avoid, remedy or mitigate the action or event leading to the prosecution.

The use of dairies, field notes and relevant samples and photographs may be introduced as evidence.

In the event that the Judge wishes to know in advance what the main contested issue will be, the Council's representatives still have a responsibility to prove every essential element of the offence.

14.3 Evidence

The onus in any proceedings is on the Council to prove by evidence every necessary element of the offence 'beyond reasonable doubt'.

The Council must prove:

- What was done;
- When it was done;
- Where it was done;
- How it was done; and
- Based on the facts, clearly demonstrate that a breach and an offence was committed against the Act.

The Court must not be left in uncertainty on any essential points. The Judge will not ask any questions, fill in any gaps in the Council's case (clarification of a point may be asked), nor perform a balancing act between the cases of the parties. The Judges' function is to decide whether the prosecution has proved its case beyond reasonable doubt.

In a prosecution the object is to prove historic fact. The best evidence is that of witnesses – those who saw the action or event that brought about the prosecution, or indeed the effects of that action or event. The Council is entitled to draw inferences from the facts described by eyewitnesses (circumstantial

evidence), although inferences must be logical from proven facts, not mere speculative guesswork.

In prosecutions witnesses may be required to give technical evidence, concerning the taking and analysis of samples. Such witnesses may also be asked for their opinion as to events, causes, effects etc. These are expert witnesses, whose status in Court is based on their acknowledged expertise and experience.

14.4 Expert Witness

With most prosecution cases, the Council's legal counsel will be accompanied by relevant staff who may testify as expert witnesses. An expert witness is a person who by virtue of his/her professional training and/or experience is entitled to:

- (a) Inform the Court about the necessary scientific or technical facts involved in the case; and/or
- (b) Draw scientific or technical inferences from the facts and inform the Court accordingly; and/or
- (c) Express opinions in evidence.

Council officer testimonies can have a dual role, as an ordinary witness as to what happened and as an expert witness as to the facts. As and when necessary, the expert witness can take the facts from others and interpret them for the Court.

14.5 Defences under the Act

When considering whether or not a prosecution is justified, it is not necessary to prove that a person intended to commit the offence. There are however, defences available to the defendant under Section 341(2) of the Act. These defences are:

- (a) If the defendant can prove the following:
 - (i) The action of event to which the prosecution relates was necessary for the purpose 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 defendant's conduct was reasonable under the circumstances; and
 - (iii) The effects of the action or events were adequately mitigated or remedied by the defendant after it occurred; or
- (b) If it can be proved that the event was 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 have been provided against the defendant; and
 - (ii) The effects of the action or event were adequately mitigated or remedied by the defendant after it occurred.

In respect of this defence, the defendant must within seven (7) days after the service of the summons (or such further time that the Court may allow), forward to the prosecutor a written notice stating his/her intention to rely on the above section and also specifying the facts that support his or her reliance on the section. They must also prove their case in Court to the same degree of certainty as the prosecution case.

The defendant being prosecuted under Section 338(1) may elect trial by jury as a conviction may incur an imprisonment term of up to 2 years.

Sections 341A & B relate to liability and defences for breaches of Sections 15A and 15 B of the Act.

APPENDIX 1 Sections of the RMA that give rise to an infringement offence

Offence specified as infringement offence	General description of offence	Infringement fee for offence
Section 338(1)(a)	Contravention of section 9 (restrictions on use of land).	\$300
	Contravention of section 12 (restrictions on use of coastal marine area).	\$500
	Contravention of section 13 (restriction on certain uses of beds of lakes and rivers).	\$500
	Contravention of section 14 (restrictions relating to water).	\$500
	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
	Contravention of section 15(1)(c) and (d) (discharge of contaminants into environment from industrial or trade premises).	\$1,000
	Contravention of section 15(2) (discharge of contaminant into air or onto or into land).	\$300
Section 338(1)(c)	Contravention of an abatement notice (other than a notice under section 322(1)(c)).	\$750
Section 338(1)(d)	Contravention of a water shortage direction under section 329.	\$500
Section 338(1)(a)	Contravention of section 15A(1)(a) (dumping of waste or other matter from any ship, aircraft, or offshore installation)	\$500
Section 338(1)(b)	Contravention of section 15B(1) and (2) (discharge in the coastal marine area of harmful substances contaminants, or water from a ship or offshore installation)	\$500
Section 338(2)(a)	Contravention of section 22 (failure to provide certain information to an enforcement officer).	\$300
Section 338(2)(c)	Contravention of an excessive noise direction under section 327.	\$500
Section 338(2)(d)	Contravention of an abatement notice for unreasonable noise under section 322(1)(c).	\$750

