BASIC INVESTIGATIVE SKILLS FOR LOCAL GOVERNMENT

HE PŪKENGA WHAKATEWHATEWHA MŌ TE RĀNGAI KĀWANATANGA Ā-ROHE

NATIONAL COMPLIANCE QUALIFICATION PROJECT

Over the last few years there's been an all-of-government project aimed at establishing nationally recognised qualifications for people engaged in compliance and enforcement roles. The long term goal of the project is for all staff in all agencies that have a compliance and enforcement role to achieve these qualifications.

Please note that this qualification project is still evolving. It is currently named G-REG (Government Regulation Initiative) and is being managed by the Ministry of Business, Innovation and Employment (MBIE). Learn more at www.mbie.govt.nz.

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AUTHOR’S FOREWORD

KUPU WHAKATAKI A TE KAITUHI

It is now almost 30 years since the introduction of the Resource Management Act, the purpose of which was to promote sustainable management of natural and physical resources in New Zealand. Have we done our part towards achieving that purpose?

Environmental issues, particularly around water quality, hold an exceptionally high level of public interest and are front-line news on a virtually daily basis. Certainly the expectations on local government to enforce environmental regulation have never been higher. In some respects we have come a long way. In the mid 2000s any efforts at enforcing the RMA were seen, at best, as a by-line for local government, something that should only be ‘let off the chain’ in the worst possible circumstances, and even then achieving somewhat mixed results.

By some it has been recognised that there has been significant improvement by local government in their ability to meaningfully enforce the RMA over the last decade. However, over that time our area of work has also been the subject of intense public scrutiny. This scrutiny has come through individual cases and collectively through various reports, foremost of which is the *Last Line of Defence*. On one hand this report states that “regional and unitary councils have generally improved significantly over the past decade in the way they administer their CME (compliance monitoring and enforcement) role. Increasing capacity, professionalisation and monitoring and reporting processes are evident”. However, this report also identifies that there are “highly variable practice that ranges from professional and generally adequate through to demonstrably inadequate or indeed virtually absent”. Ouch!

It is heartening to see that the Ministry for the Environment has taken this criticism seriously and mounted a substantive project to produce best practice guidelines for compliance monitoring and enforcement. These guidelines are designed to be for national use and will be available online through the MFE website by mid-2018.

The Society of Local Government Managers (SOLGM) recognised this manual and the associated training, delivered through the basic investigative skills course, by awarding it the Innovation in Organisation and People Development Award in 2017. The award recognised that over 500 local government team members had shared this training over the last decade. The judges said: “The BIS programme addresses a significant area of risk in an activity that is one of the fundamentals of local government. BIS embodies several of the values that the award promotes. This is a striking example of the sector’s ability to share good practice... The programme also embodies a continuous improvement ethos, with the developer regularly improving the course, including getting an independent review of its enforcement practice.”

It is clear that as a collective we are on the right path but it is equally clear that we need to continue to improve, achieve a consistent best practice approach, and perhaps with more urgency to do so. Certainly the current political and public climate is focusing more on sustainability.

In my view, there are demonstrably clear indicators, not only of the value being placed on our area of work, but the expectation that we do this work, and do it well.

Patrick Lynch

March 2018

[1] *Last Line of Defence: Compliance, monitoring and enforcement of New Zealand’s environmental law.* Marie A Brown. 2016.

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1 ENFORCEMENT AND INVESTIGATIVE CONCEPTS

NGĀ ARIĀ ŪRUHITANGA ME NGĀ ARIĀ WHAKATEWHATEWHA

ENFORCEMENT AND INVESTIGATIVE CONCEPTS

NGĀ ARIĀ ŪRUHITANGA ME NGĀ ARIĀ WHAKATEWHATEWHA

INTRODUCTION

The concept of law and its enforcement is as old as society itself. Whole libraries are dedicated to the subject. However, a few brief quotes are particularly helpful in defining this concept.

"What law does is to allow a society to choose its future. Law is made in the past, to be applied in the present, in order to make society take a particular form in the future."
(Making Law Work – Zaelke, Kaniaru and Kruzikova 2005)

"To pass a law and not have it enforced is to authorise the very thing you wish to prohibit."
(Cardinal Richelieu, 1585-1642, Chief Minister to Louis XIII)

This quote from Cardinal Richelieu was referred to some 400 years later when Environment Court Judge J Treadwell (1998) stated that, in relation to the Resource Management Act 1991, "Failure to provide an enforcement mechanism bears this risk".

We are in a unique situation in local government, in that we not only are required to enforce the law but we actually write it as well. This is in the form of regional plans and resource consent conditions.

AIM

The aim of this chapter is to introduce local government enforcement officers to the general concept of law enforcement and the need for investigations, enabling the enforcement officer to apply these concepts to their current role.

LAW ENFORCEMENT – OVERVIEW

A constant challenge when working in a regulatory role in local government is managing misconceptions. For example, the term 'law enforcement' may conjure media-inspired images of gun-toting police and violent criminals for your senior management, your politicians or members of the public you engage with. In reality, there are numerous agencies within New Zealand dedicated to upholding the rule of law and maintaining society as we know it. With the right skills and attitude, and by dispelling those misconceptions, your work can be completed effectively and without undue duress. It is helpful to consider other agencies that have a core role other than law enforcement, but who have enforcement responsibilities:

- New Zealand Customs Service
- Accident Compensation Corporation
- Inland Revenue Department
- Ministry for Primary Industries
- Ministry of Business, Innovation and Employment
- Department of Corrections
- Department of Conservation
- Immigration New Zealand
- Ministry of Social Development
- Department of Internal Affairs.

Each of these agencies has obligations to uphold various statutes. Each statute will provide its own focus. Local government has particular obligations under the Resource Management Act (RMA) 1991.

Section 5 of the RMA clearly outlines the purpose of the Act:

> The purpose of this Act is to promote the sustainable management of natural and physical resources.

In this Act, "sustainable management" means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while:

a. sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

b. safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

c. avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The RMA can be put into a global perspective:

"Faced with climate change and other environmental threats, as well as persistent poverty for billions of the Earth's people, 'what reason demands' is that we improve the way law works for sustainable development. Law must be strengthened, and compliance must be ensured, to achieve this paramount goal of society." (Making Law Work, 2005)

In New Zealand, the RMA has identified a number of 'matters of national importance' (Section 6). The responsibility of providing for these matters of 'national importance' falls to those people employed by councils, in particular enforcement officers. These enforcement officers are empowered to enforce the RMA (Section 38).

Before enforcement action of any kind can take place, a thorough investigation must be completed. Investigation forms the basis of further action and allows councils to enforce the law. Without thorough investigations of non-compliance councils cannot effectively achieve the purposes of the Act.

The following diagram gives an overview of examples of investigation and enforcement processes that may be appropriate to adopt.

THE INVESTIGATION AND ENFORCEMENT PROCESS AT A GLANCE

NOTIFICATION
Non-compliance or offending may be detected through:
- complaint
- monitoring
- major incident.

A PERSON IS TASKED AS BEING RESPONSIBLE FOR GATHERING INFORMATION.

1 — GATHER INFORMATION (INVESTIGATION)
May include:
- site inspection
- sampling
- expert advice
- measuring
- photographing
- interviewing people.

2 — ENFORCEMENT DECISION
May be made by:
- manager
- Enforcement Decision Group EDG (panel of managers).

3 — ENFORCEMENT OPTIONS
- No further enforcement action.
- Letter of direction.
- Abatement notice.
- Formal warning.
- Infringement.

These options can be applied on the authority of the relevant manager and do not have to go to EDG.

2 — ENFORCEMENT DECISION
May be made by:
- Prosecution Decision Group PDG (panel of managers).

3 — ENFORCEMENT OPTION
- Prosecution

INDEPENDENT LEGAL REVIEW

DISTRICT COURT
- Determines guilt.
- Imposes sentence.
- Makes orders.

As shown in this diagram 'enforcement' can be broken down into three components.

How we **gather information** once a breach is identified.

How we **decide** what we are going to do about that breach.

What subsequent **action**, if any, we should take.

These three components form the basis of this enforcement policy.

Prosecutions only

A slightly different process is followed if the matter is to be recommended for prosecution. The panel of managers that consider the recommendation includes an executive manager (and is referred to as the Prosecution Decision Group). A vital phase of the prosecution decision making process is the independent legal review.

IMPORTANT NOTE

It is vital to provide a clear process that identifies ownership of the investigation, review and authority for enforcement action and, where appropriate, an independent legal opinion to ensure appropriateness and consistency of application of enforcement.

The Office of the Auditor-General completed an audit of four regional councils in 2011. All four were found to have inappropriate processes related to granting authority to initiate prosecutions under the RMA. More later on this.

It is equally vital that all levels within a local government agency are aware of, endorse, support and follow these processes. This includes staff, management and politicians. Field staff will face immense difficulty and frustration carrying out enforcement-related work without organisational support.

INVESTIGATION

WHY INVESTIGATE?

An open-minded approach must be taken when investigating an incident to ensure the truth is established to determine liability, or lack thereof, and so an informed decision can be made as to consequences. Those consequences may include a number of enforcement actions, such as:

- no further action (this is a valid outcome, as long as it is a considered decision)
- formal warning
- abatement notice
- infringement notice
- enforcement order
- prosecution, or
- a combination of these actions.

These options will be discussed in depth in later chapters.

A thorough investigation will determine the viability of any of these consequences.

"It is important that incidents are investigated thoroughly and the correct procedure followed. If mistakes are made and/or the correct procedures are not followed, any enforcement action may fail." (RMA Enforcement Manual)

An investigation or enquiry may be initiated in a number of ways:

- a complaint by a member of the public or other entity
- through routine compliance inspection or monitoring
- by attending a significant incident where environmental impact is likely.

Regardless of how this information comes to light, it is the council's responsibility to investigate the complaint without fear or favour and decide on the appropriate response to the event.

'Open minded' is a term sometimes ignored in investigative work, often with severe consequences. An investigation must identify the cause of the offence and eliminate any other potential causes, such as (in the case of a discharge offence) upstream users or surrounding properties.

Council staff must avoid making early assumptions. For example, the fact that a discharge pipe is located on a particular property does not necessarily mean the occupier of that property is causing the offence. The pipe should be traced right back to its source, which may be the adjoining property.

Experience shows that, in the RMA context, proving an offence has been committed is very straightforward. However, determining who is liable for the offence, and to what degree, can be a minefield for investigation officers.

The depth of investigation will be determined by the nature of the event or complaint. Naturally a very minor event will not warrant the same investigation undertaken for a major oil spill in the coastal marine area. The response will also be tempered by the resources available.

It is up to individual councils and their management to decide what resources and priority such investigations warrant. However, the public have an expectation that breaches of our laws will be dealt with consistently and within the framework of enforcement guidelines and relevant statute.

QUALITIES OF ENFORCEMENT OFFICERS

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

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

IMPORTANT NOTE

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

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

REASONABLENESS/FAIRNESS

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

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

PROFESSIONALISM

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

STRONG INTERPERSONAL SKILLS

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

RESOLVE

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

OPEN MINDED

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

ACT IN GOOD FAITH

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

ATTENTION TO DETAIL

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

METHODICAL

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

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

CREDIBILITY

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

SKILL DEVELOPMENT

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

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

GUIDELINES FOR DECISIONS ON APPROPRIATE ENFORCEMENT ACTION

A decision to prosecute a person or entity has profound consequences. Different councils have different procedures in place to make this decision. Some have a single manager who makes the decision as to what type of enforcement action is appropriate while others may seek the authority of the councillors themselves to prosecute.

It is a long-established legal concept in this country that there must be a degree of separation between enforcement decisions and politicians, whether this is central or local government. However, many local government agencies have been slow to recognise this concept and continue to have inappropriate decision making processes as recognised by the 2011 Officer of the Auditor-General report[1].

Recommendation 8

We recommend that all regional councils and unitary authorities review their delegations and procedures for prosecuting, to ensure that any decision about prosecution is free from actual or perceived political bias.

IMPORTANT NOTE

One of the most significant recommendations from the 2015 review of how Waikato Regional Council 'deals with non-compliance' is that a formal enforcement policy should be adopted in line with recommendations made by the Crown Law office and the Auditor-General.

Such a policy was adopted and is available publicly at https://www.waikatoregion.govt.nz/assets/PageFiles/35151/4872_RMA_enforcement_policy_DR_(007).pdf. Council endorsement of this policy has been a significant and substantial positive step forward for this area of work, it has provided greater transparency and even greater confidence and support for this area of work. The author strongly recommends that all councils develop and adopt an appropriate like policy.

Regardless of the process it is vital that the decision is based on sound information and made within appropriate guidelines.

After a decision has been made to prosecute, the defendants are publicly and formally accused of an offence. The stigma and stress of being accused remain throughout the court process even if the prosecution is unsuccessful.

Factors that are relevant to determining appropriate enforcement action are many and, in some cases, quite complex. It is the investigation carried out by the enforcement officer that will determine the existence of these factors and the weight they should be given.

Specific to RMA enforcement decision making, the factors below should be considered in every case where non-compliance is detected. By speaking to each of these factors you are effectively determining how serious the breach is, and subsequently what the appropriate enforcement response should be. In some respects the RMA is quite a blunt enforcement tool with limited options for dealing with many and varied breaches. By considering the following factors every time you will achieve consistency in your decision making.

[1] *Managing freshwater quality: Challenges for regional councils*. Controller and Auditor-General. September 2011.

FACTORS TO CONSIDER (RMA BREACHES)

- What were, or are, the actual adverse effects on the environment?
- What were, or are, the potential adverse effects on the environment?
- What is the value or sensitivity of the receiving environment or area affected?
- What is the toxicity of discharge?
- Was the breach as a result of deliberate, negligent or careless action?
- What degree of due care was taken and how foreseeable was the incident?
- What efforts have been made to remedy or mitigate the adverse effects?
- What has been the effectiveness of those efforts?
- Was there any profit or benefit gained by the alleged offender(s)?
- Is this a repeat non-compliance or has there been previous enforcement action taken against the alleged offender(s)?
- Was there a failure to act on prior instructions, advice or notice?
- Is there a degree of specific deterrence required in relation to the alleged offender(s)?
- Is there a need for a wider general deterrence required in respect of this activity or industry?

As a result of the 2015 review of how Waikato Regional Council deals with non-compliance, there are three additional factors to consider.

- Was the receiving environment of particular significance to iwi?
- How does the unlawful activity align with the purposes and principles of the RMA?
- If being considered for prosecution, how does the intended prosecution align with the Solicitor-General's Prosecution Guidelines?

There are other generic factors established by the Solicitor-General that should be considered by any agency considering prosecution. Obviously the guidelines are written to capture all agencies and not all factors are relevant to local government scenarios. These factors are explored in more depth in later chapters, and include:

- seriousness or triviality of the alleged offence
- mitigating or aggravating factors
- age, physical and/or mental health of the offender
- age of the offence
- degree of culpability of the offender
- effect of a decision not to prosecute on public opinion
- obscurity of the law
- whether the prosecution might be counter-productive
- availability of alternatives to prosecution
- prevalence of the offence and need for specific and general deterrence
- whether consequences of a prosecution would be unduly harsh and oppressive
- reparation or compensation issues on conviction
- victim or complainant's attitude to the crime
- length and expenses of a prosecution
- cooperation of the accused
- likely sentence.

Equally important are matters that **must not** be taken into account:

- colour, race, ethnicity, sex, or marital status, religious, ethical or political beliefs
- personal knowledge of the offender
- political advantage or disadvantage to the prosecuting agency
- the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

IMPORTANT NOTE

The role of the enforcement officer is to gather information so that an informed decision on enforcement action can be made and the information is gathered in such a way as to be able to support whatever enforcement action is pursued.

SUMMARY

- **To not enforce the law is to encourage the breach of it.**
- **There is an expectation that councils enforce the RMA.**
- **The RMA is a matter of national importance.**
- **Investigations enable councils to enforce the RMA.**
- **Officers must display certain characteristics and develop certain skills.**
- **Numerous factors should be considered before taking enforcement action.**

ASSESSMENT

Complete the assessment for this chapter.

2

THE LAW OF EVIDENCE

TE TURE TAUNAKITANGA

THE LAW OF EVIDENCE

TE TURE TAUNAKITANGA

INTRODUCTION

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

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

Judicial evidence consists of a testimony, hearsay, documents, things and facts, which a court will accept as evidence of the facts in issue in a given case.

During the course of dealing with investigations and subsequent enforcement action you will be exposed to a number of legal terms and requirements. Some of these you will already be familiar with. Some you may have heard of, but are not quite sure as to their true meaning or application.

As you go about your daily work as an enforcement officer you will detect non-compliance that may eventually lead to some form of enforcement action.

When you encounter any non-compliance you should always give consideration to these legal terms and requirements. It is extremely important to:

- maintain the integrity of your council as a regulatory authority
- maintain your own integrity and credibility as an enforcement officer
- ensure you have the best chance of success with any subsequent enforcement action.

AIM

The aim of this chapter is to provide you with a basic working knowledge of the law of evidence and its application to your role as a council enforcement officer.

TERMS AND DEFINITIONS

This chapter has identified a number of legal terms and requirements relevant to the law of evidence. Many of the terms listed have hundreds of years of precedent and whole volumes dedicated to their application and interpretation. The legal industry continues to dedicate huge resources to researching and defining the law of evidence.

This chapter has reduced relevant material to brief definitions and examples where appropriate. Judge John Treadwell was a prominent Environment Court judge who offered clear direction on RMA matters. His approach as to the depth of knowledge required in respect of legal terms and definitions has been adopted in this chapter.

"I am now proposing to move into the bramble patch of criminal prosecutions. I have used that somewhat Brer Rabbit expression to indicate the presence of many legal thorns and prickles. I am not directing the comments which follow at the legal profession and I apologise to them in advance for endeavouring to simplify matters to a degree which could be dangerous. However, it must be remembered that books have been written on such questions as hearsay and burden of proof and I have no intention of confusing non lawyers with complex niceties. Rather I am trying to forewarn councillors and their officers of potential traps which should be addressed before a decision is made to prosecute." (Judge John Treadwell)

IMPORTANT NOTE

As well as the base legislation that you work under (e.g. the Resource Management Act) there are numerous other generic statutes that you will be required to work within. They are such Acts as the Bill of Rights, the Criminal Procedure Act, the Criminal Disclosure Act and many others. There are ongoing changes to these various laws that may affect some material in this chapter. Always seek professional guidance in this area. It is wise to seek guidance from someone who is current in their knowledge as well as truly qualified and experienced in this area. This does not necessarily mean the lawyer that your agency has used forever, nor is it necessarily the one with the highest hourly rate.

"Not all lawyers are created equal."
(P. Lynch 2012)

IMPORTANT NOTE

Prosecutions take place in the District Court and not the Environment Court, meaning that the criminal rules of evidence apply rather than the more relaxed approach, and lower evidential standards, of the Environment Court.

Experience is showing that parties being investigated, and often their lawyers, have not grasped this concept at all. In fact, many councils and staff do not realise this. Subsequently they approach a criminal prosecution like a matter to be heard in a civil jurisdiction. This often results in inappropriate or inadequate advice being given to subjects and unnecessary protraction of the prosecution process.

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

NATURAL JUSTICE

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

THE HEARING RULE

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

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

THE BIAS RULE

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

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

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

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

THE EVIDENCE RULE

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

BASIC TERMS – ELEMENTS AND INGREDIENTS

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

TERM	DEFINITION
Statute	A statute is an act of parliament, such as the Resource Management Act 1991.
Crime and Offence	Up until 2013 there was a statutory definition that explained exactly what technically constituted a crime. This definition no longer exists. Various 'categories' of offences have been defined under the Criminal Procedure Act. **Category 1.** Matters that can only have a fine imposed. **Category 2.** The matter carries a maximum term of imprisonment of less than two years or has no imprisonment but can have a community-based sentence imposed. **Category 3.** Carries a maximum period of imprisonment of two years or more, or is listed in Schedule 1 of the Act. **Category 4**. An offence listed in Schedule 1 of the Act. Each category carries its own process and obligations. Most RMA offences will fall into Category 3, so it is important your agency meets its obligations if pursuing such an offence through the criminal courts.
Case law	Case law is a system of law based on judicial precedents rather than statutory laws. Where there are legal arguments over what statutory law (sections, words, phrases, even concepts) applies in court, the presiding judge(s) may make a decision on their interpretation of the correct meaning. This decision is then binding on lower courts and is referred to as case law. This is how the law evolves and is clarified. Case law from other countries may be referred to in New Zealand, particularly Commonwealth countries such as England and Canada which are perceived to have similar statutes. Cases are quoted throughout this manual. It is important to note that only cases from a higher court actually provide precedent and are truly case law. Decisions from equal courts give guidance only and are not binding. Their influence should be considered on a case by case basis. The ultimate example of case law is a 2012 RMA case that went to the Supreme Court, the highest court in New Zealand, for the final interpretation of 'grey' statutory law. (SC 48/2011 [2012] NZSC 21 Carol Margaret Down v the Queen)
Defendant	The defendant is the 'person' who has been charged in the District Court and is seen by the prosecuting agency as having criminal liability for the charges being faced. This person may be "the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate". (Section 2 RMA) Since October 2009 the RMA has provided distinction between a "natural person" and a "person other than a natural person" for the purpose of penalty. (Section 339(1) RMA) As an example, in a case of unlawful dairy effluent discharge the defendants may be the farm worker (a natural person), the farm manager (a natural person) and even the corporate group (a person other than natural person) that owns the farm.
Charging Document	A Charging Document is the physical document used to commence proceedings in the District Court. It was previously referred to as an 'information'. The Charging Document is prepared by the prosecuting agency. An example of a completed Charging Document is shown at the rear of this manual in Appendix A. You will see that it contains all of the information the court would require to initiate proceedings, including the actual wording of the charge that the informant alleges. A Charging Document will be invalid if it does not disclose all the elements of an offence. Every Charging Document "must contain sufficient particulars to fully and fairly inform the defendant of the substance of the offence that it is alleged that the defendant has committed". (Section 17 Criminal Procedure Act 2011) From one incident it is possible that more than one offence has been committed and that more than one individual may be liable.

HELPFUL CASE

Auckland Regional Council v URS New Zealand Limited
CRI-2008-004-013603 Auckland District Court

This was a case where the defendant argued that there were insufficient particulars contained on the (then) information to fairly inform the defendant of what it was that they were alleged to have done.

One of their arguments was that they did not have sufficient details to establish whether they had a statutory defence available to them.

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

Some guidance to RMA practitioners:

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

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

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

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

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

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

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

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

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

It is important to remember that the same effort must be given to drafting an allegation in an infringement notice as in a charging document.

Statute of limitations	The statute of limitations is a law that restricts the time within which legal proceedings may be brought. Subsection (4) of section 338 of the RMA provides that a Charging Document must be filed up to six months from the time when the contravention first became known, or should have become known, to the local authority. Where the offence charged is a continuing offence, time runs from each and every day the offence continues. This is a very restrictive statute of limitations. In fact, it is the most restrictive in New Zealand law. This restriction is an absolute with no flexibility and a number of council cases have failed as they have attempted to commence proceedings out of time.

Prosecutor	The prosecutor is the person conducting the proceedings against the defendant. Previously this role was known as 'the informant'. In a council situation it is appropriate for both the council and their lawyer to be referred to as the prosecutor.
Elements	Elements of offences are described as the underlying factors which are common or rudimentary to any offence. For example, it is generally accepted that criminal law contains two elements. 1. A physical element, called 'the act', referred to as actus reus. 2. A mental element or state of mind, called 'the intent', referred to as mens rea.
Actus reus (physical act)	This is the physical act or effort required to commit the offence. Each offence must contain some physical, outward, external behavioural component or manifestation in order to satisfy this element, such as the physical act of discharging a contaminant.
Mens rea (mental intent)	This is the intent of the offender – what was in the mind, or often referred to as guilty knowledge. It was originally expressed in the ancient Roman maxim actus non facit reum, nisi mens rea sit (an act is not guilty without a guilty mind). Fortunately the Roman Senate did not draft the RMA. RMA offences are 'strict liability' (see definition below) so this is not an element that must be proven. *"There must be the causative chain leading back to the defendant but this causative chain need only establish, for example, sloppy or negligent management as opposed to a deliberate intention to, for instance, discharge effluent into natural water."* Judge Treadwell 1998 However, as there are statutory defences available to strict liability offences it is always good practice to conduct your enquiries, interviews and investigations as if you had to prove intent. This will help to negate inappropriate defences which might subsequently be raised. If an actual intention to commit an RMA offence is proven then this will be seen as a significantly aggravating factor at sentencing and is likely to raise the penalty considerably. For this reason mens rea is included in this chapter, and is an important concept to understand.
Strict liability	As mentioned above, RMA offences have been created as 'strict liability' offences. This means that the element of the 'intent' (mens rea) is not required to establish RMA offences. Although the prosecution is not required to prove intent, the defendant does have potential defences to any strict liability offences under sections 340 and 341 of the RMA. It is up to the defendant to establish the various elements of the defence. It is extremely important that enforcement officers consider these statutory defences during the course of their work. (This will be covered in more depth in later chapters.)
Vicarious liability	Vicarious liability is a term that relates to a person having liability through the actions or omissions of another person. The RMA (Section 340) states that where an offence is committed by any person acting as an agent (this includes as an employee or contractor) for another person, that the other person is as liable as if he or she had personally committed the offence. This can have significant implications when dealing with companies as the company directors and management may be liable for the actions of their employees. For example, as part of his daily duties a garage worker discharges sump oil into a stormwater drain. Not only is the garage worker liable, but potentially also his manager and the garage owner. A helpful tool for considering vicarious liability is the 'Culpability Pie'.
Offence section	Section 338 of the RMA actually creates the offence by detailing how other sections within the Act may be contravened. It is important to note that this section also creates an offence by 'permitting' a contravention. This is commonly used in situations of vicarious liability.
Penalty section	This is the section of an Act that details the penalty relevant to each offence created under the offence section. In the RMA this is located at section 339.

Ingredients	Ingredients of offences are described as the details or components which are unique to a specified offence. Where there is a selection of ingredients available under one section, it is up to you to identify which is the most appropriate ingredient to pursue (i.e. it is very important to determine whether it is an 'and' or an 'or'). An example of identifying offence ingredients. You have identified that a dairy farmer has unlawfully discharged dairy effluent directly from his irrigator into a stream. The separate ingredients of this offence are found in section 338(1)(a) and 15(1)(a) of the RMA. Ingredients: • a person (identify the offender) • on or between a particular date(s) • at a particular location • contravened section 15(1)(a) of the RMA by permitting • the discharge • of a contaminant (namely farm animal effluent) • into • water (namely the 'example' stream) when the discharge was not expressly allowed for by a national environmental standard or other regulations, a rule in a regional plan, or a resource consent. Each and every one of these ingredients have to be individually considered, established and able to be proven beyond reasonable doubt if an alleged offender is to be found guilty of committing this offence. The terms 'elements' and 'ingredients' are sometimes confused and used interchangeably. In practice, the difference is academic. What is important is that you understand how to identify and define the components of an offence that you must prove.

IMPORTANT NOTE

It is essential that enforcement officers have a comprehensive knowledge of the law they enforce and are fully conversant with the ingredients of every offence they may come into contact with.

The Big Five

1. Know your offence/breach
2.
3.
4.
5.

PRACTICAL EXERCISE

During the course of your compliance and monitoring work, you have identified that a timber yard has disposed of CCA treated timber off-cuts by placing them into a large stockpile at the rear of the site and then setting fire to it. The fire was lit by Barry Smith, a timber yard worker, at the direction of his site manager, James Baxter. This is not a permitted activity nor do they have any form of consent to dispose of treated timber in this way.

Your task is to:

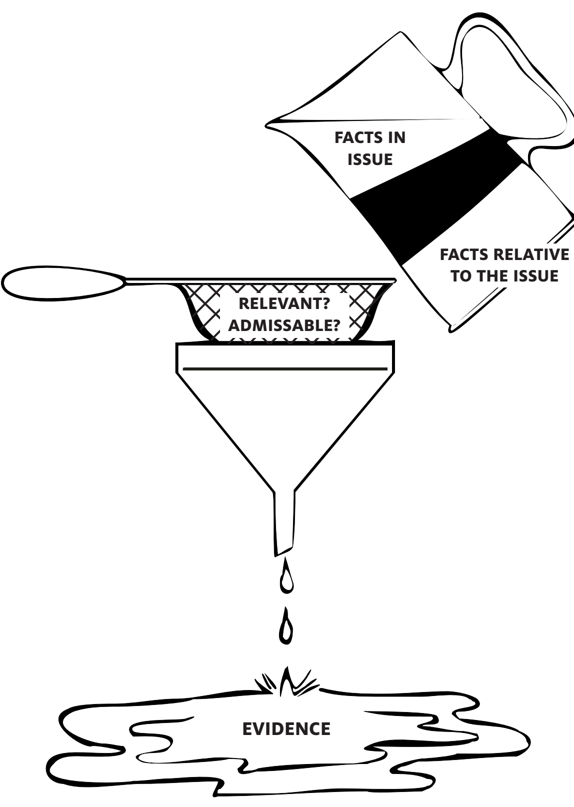
- identify the single most appropriate charge to pursue against Smith or Baxter (**Note:** even though you may identify that more than one offence has been committed, concentrate **on the one that you think is most appropriate**)
- list all of the ingredients required to prove this charge
- be prepared to discuss how you might prove each of these ingredients.

EVIDENCE

Now that you are able to identify the ingredients and elements of an offence, it is important to correctly identify and produce the evidence needed to prove this offence to the required standard. It is important to be able to discern between information that is available to you and what part of that information constitutes evidence.

TERM	DEFINITION
Evidence	Evidence is information given personally or drawn from a document or exhibit which tends to prove or disprove a fact.
Facts	The dictionary defines a fact as 'an occurrence of an event: a thing certainly known to have occurred or be true: the realities of a situation, a thing assumed as basis for inference'.
Facts in issue	For practical purposes the facts in issue are the ingredients of the offence that are alleged by the enforcement agency on the Charging Document or Infringement Notice or in the summary of facts and are denied by a plea of 'not guilty' or, as is increasingly common in RMA cases, contested through a disputed facts process.
Admissible	'Admissibility' is a term referring to whether the court will allow certain evidence to be given or not to be given. If the court allows evidence to be given, it is admissible. If the court refuses to hear the evidence, it is not admissible. The question whether evidence tendered is admissible may involve a sequence of questions. Are the facts sought to be proved admissible: • as being facts in issue, or • facts relevant to the issue, or • relevant on any other ground, if so, • are they outside any rule of exclusion of facts, and • in any event, is the appropriate means of proof adopted?
Relevant facts	To be admissible, evidence must also be relevant. For evidence to be relevant there must be a connection between a fact given as evidence and the facts in issue. It is the judge who will decide whether the connection is close enough to be relevant. To be admissible, evidence must always be relevant. However, relevant evidence can be inadmissible. For example, a soil sample showing that contaminants exist that was unlawfully collected would be relevant, but because it was collected unlawfully it may not be admissible.

To be received in evidence, facts must be both relevant and admissible.



This diagram summarises the preceding notes dealing with facts and shows how they interlock to form evidence.

BURDEN OF PROOF

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

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

CASE LAW

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

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

Although this case was one of murder, and some 80 years old, the Woolmington principle is of universal application throughout the entire field of criminal law including RMA prosecutions taken by your council.

Adams, *Criminal Law and Practice in New Zealand*, is of the opinion: *"It cannot be questioned that this principle is of general application in all criminal cases in New Zealand."*

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

We should not be left in any doubt about this principle.

STANDARD OF PROOF

There are two different standards of proof.

1. BEYOND REASONABLE DOUBT

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

IMPORTANT NOTE

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

Despite their age, the following cases give a good indication of how this standard should be applied.

CASE LAW

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

In New Zealand, most judges direct juries on the basis that the standard of proof beyond reasonable doubt is met if they 'are sure', or 'feel sure', that the accused is guilty, see R v Harmer CA324/02, 26 June 2003. To the extent to which the concept of reasonable doubt is separately addressed, it is referred to as a doubt which the jury regards as reasonable in the circumstances of the case. What is a reasonable doubt is sometimes explained as being more than a "vague or fanciful doubt", see R v Ross CA224/98 18 March 1999 at [14]-[18] (refer R v Wanhalla [2007] 2 NZLR 573)."

IMPORTANT NOTE

"When a site inspection is carried out and evidence is collected, the enforcement officer will not know if enforcement action will be taken and, if action is taken, what type of action will be taken and therefore what standard of proof is required. Evidence of the highest possible standard should be collected at all times."

M Flahive 2004

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

P Lynch – every day

HELPFUL CASE

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

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

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

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

2. ON THE BALANCE OF PROBABILITIES

There is a lesser standard of proof for an:

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

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

DIVISIONS OF EVIDENCE

Evidence can be broken down into a number of different divisions. For our purposes, this chapter will look at only four.

DIVISION	EXPLANATION
Direct evidence	The testimony of a witness to a given fact. Example: a person who sees an offence being committed, telling the court what they saw.
Documentary evidence	The dictionary defines a fact as "an occurrence of an event: a thing certainly known to have occurred or be true: the realities of a situation, a thing assumed as basis for inference".
Real evidence	Material objects directly presented for inspection. Example: the container from which a toxin had been discharged into the stream.
Circumstantial evidence	Facts, other than the facts in issue, from which the facts in issue may be inferred. Example: seeing a vehicle leaving a site raises the inference that the vehicle owner/user may have been at the site.

Evidence to establish proof may be either direct or circumstantial and each is equally receivable. The strength or weakness of direct evidence (the testimony of a witness to facts he has actually perceived) depends entirely upon the truthfulness and accuracy of the observational powers of that witness.

IMPORTANT NOTES

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

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

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

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

CREDIBILITY OF EVIDENCE

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

WHAT MAKES EVIDENCE CREDIBLE?

The credibility of evidence simply means the extent to which the evidence can still be regarded as true. It has nothing to do with its relevancy or admissibility, although, of course, the evidence must be relevant and admissible before the question of credibility can arise.

No question as to credibility can arise until the evidence has been admitted. The credibility of a witness depends upon his or her:

- knowledge of the facts
- intelligence
- interestedness (impartiality/freedom from bias)
- integrity (uprightness/sincerity)
- veracity (truthfulness).

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

SUMMARY

The law of evidence gives clear guidelines on what facts may or may not be proven. A working knowledge of legal terms and definitions is required for enforcement officers when gathering information.

Consideration must be given to:

- **strict liability**
- **vicarious liability**
- **admissibility**
- **relevance**
- **beyond reasonable doubt**
- **best evidence**
- **credibility**

Complete the assessment for this chapter.

3 RECORD KEEPING AND FILE MAINTENANCE

TE PUPURU MAUHANGA ME TE TIAKI KŌNAE

RECORD KEEPING AND FILE MAINTENANCE

TE PUPURU MAUHANGA ME TE TIAKI KŌNAE

The Big Five

1. Know your offence/breach
2. Record keeping
3.
4.
5.

INTRODUCTION

There are many compliance and enforcement officers across numerous agencies who do excellent field work. However, there are also some officers who do not allow that excellent work to be reflected in the recording of their work. By keeping a high standard of record, an officer is placing their agency in the best possible position to carry out any subsequent action and face any challenges that may arise.

Today, your notebook could take the form of an electronic device. i.e. an iPad or tablet. Essentially the same rules and processes apply in using and maintaining a notebook, regardless of its type. A well kept notebook will go a long way to enabling an officer to negotiate the minefield that can follow in taking enforcement action.

Notes taken by the officer in the field and in the office will transfer to file notes. These notes will form the basis of an investigation or enquiry file. This chapter will identify the need and purpose for different kinds of files. A well ordered and thorough file will enable appropriate enforcement action to be taken.

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

AIM

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

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

THE NOTEBOOK – AN ESSENTIAL TOOL

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

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

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

No one could possibly be expected to remember details of an incident that long ago. However, a well kept notebook will assist you and the prosecution immensely in this situation.

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

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

type and amount of key information you should record in your notes to later give full recollection.

Your notebook is an essential tool of your trade and you should treat it accordingly. Always carry it with you, particularly when you are in the field. Use it to record anything you may want or need to recall later. Be methodical, neat and accurate in your notebook. Use it consistently. Look after it and keep it safe and secure.

PURPOSE OF NOTEBOOKS

WHY WRITE NOTES?

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

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

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

RULES FOR NOTEBOOK USE

CONTEMPORANEOUS

Notes and records of interviews in your notebook should be made at the time or as soon as practicable afterwards. This is referred to as being 'contemporaneous'. If you can establish your notes as contemporaneous the court will be satisfied the matter was still fresh in your memory when you made the notes and will allow you to refresh your memory from these notes.

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

HOW MUCH TO RECORD

At first you should record too much detail rather than too little. At times you may feel under pressure to deal with an incident quickly, but you only get one chance at taking good notes, so do it at your pace and do it right first time. That is part of your job. You will see the benefit of taking good notes later when you prepare file notes, draft briefs of evidence and are being cross-examined in court!

NOTES ARE THE BASIS FOR FILE NOTES

Your notebook entries will form the basis for file notes, which will be key components of the incident file. You would not usually be able to refer to file notes in court to refresh your memory unless you can establish that they were completed contemporaneously. Often they are not completed for some days, and therefore would not be considered contemporaneous.

It is therefore not good practice to make a habit of adding important information in a file note that wasn't recorded in your notebook at the time. If it was important it should have been recorded in the notebook.

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

PERSONAL TOUCH

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

REVIEW YOUR NOTES SOON AFTER THE INCIDENT

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

RETAINING NOTEBOOKS

Notebooks should be carried when working and particularly in the field. Your notebook may be required years after you have completed it. You, or your agency, should securely store your completed notebooks. As more agencies move towards electronic notebooks you will need to be aware of limitations in long-term storage of notes taken electronically. There have been instances where officers have ceased employment with an agency and subsequently all of their electronic notes can no longer be accessed. Work with your IT and Records Management people to work out a system where this can be avoided.

Example of a notebook page

14.3.16	Monday - Fine
0800	Start work - Admin
0830	Attend meeting - Te Waahi, Totara Room
	re Smith & Brown Ltd (618892).
0900	Uplift files for earthwork attended yesterday.
0930	Arrive @ H & P Timber Yard
	18 Corrigan Street Hm East 3495
	Re: REQ 118065
	Reports that treated timber is being burnt
	Wind - SW - gusting to 8kph - moderate
0935	Speak to: BAXTER, James Bryan (known as Jim)
	18 Brown Street
	Hamilton
	DOB 18.4.67
	Occ: Site Manager - H & P Timber
	Ph: 07 8491212
	Mob: 021 756 810
	email: jim@HandP.co.nz
	Introductions - warrant shown - explanation for visit
	I ask to view area where the fire has occurred
	Jim acknowledges the fire but denies any treated timber
	would have been burnt
0940	With Jim, go to the SE corner of the yard - embers
	of the fire - approx 2m diameter - is being burnt on
	open ground
0945	Photograph the scene - 5 x photos taken
0948	Uplift 1 x piece 4"x2" timber - approx 10 cm long
	Has 'H5' stapled to the end of it
	Also take 2x samples of embers - place in glass
	container - taken from seat of fire. Secure in truck
1000	Leave site.
1015	Drop above samples @ Hills Labs - Ref # 150 6308.
	Chain of custody form completed

INVESTIGATION FILES

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

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

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

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

FILE NOTES

DEFINITION

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

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

USE

File notes:

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

PROCEDURE

File notes should be:

- completed regularly and in a timely manner so all facts and actions are promptly available on the investigation file
- typed
- signed and dated by the author.

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

FORMAT

File notes should include:

- paragraphs for each new subject so that the information is clear and easily located
- the date and time of each interview or other action, recorded in the margin.

CONTENT

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

This is the kind of information that should be recorded in a file note:

- The exact location of the event, incident or inspection.
- The time of entry to inspect the property, the reasons for doing so and the duration of the inspection.
- Confirmation that warrants of authority were produced upon initial entry, or 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 and email 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.
- Consider drawing a sketch plan. A picture is worth a thousand words.
- The weather at the time if it is relevant to the matter under enquiry.
- Reference to samples, videos and photos. Where were they taken? What do they indicate? How were they labelled?

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

File Note

File No:	56 01 10
Date file note created:	14 March 2016
Date(s) content of file note refers to:	14 March 2016
From:	Billy Evington
Subject:	**Unlawful discharge - H & P Timber Yard**

14/03/16	**Introduction** Respond to call that has come via REQ118065 Report of large open fire at timber yard, confidential informant believed treated timber was being burnt.
0930 hrs	Attend H & P Timber Yard. 18 Carrigan St, Hamilton East. Fine day, cold, moderate SW breeze. Park in customer parking and go directly to site office. Speak to: BAXTER/James/Bryan (known as Jim) 18 Brown Street Hamilton DOB: 18/04/67 Occ: Site Manager Ph: 07 849 1212 Mob: 021 756 810 Email: jimb@handp.co.nz Introduce myself and produce warrant of authority. I explain purpose of visit to Mr BAXTER. I ask to view area where fire has occurred. Mr BAXTER is very co-operative. He acknowledges fire stating they had had a bit of a clean up around the yard over the weekend and were burning a few off cuts and sawdust. He states this was done by 3 yard staff at his direction. He denies any treated timber would have been burnt as they are 'very particular' with treated timber off cuts.
0937 hrs	In the company of Mr BAXTER go to S.E. corner of yard. There are only wisps of smoke from the embers of fire approx 2 metres across. One piece of solid wood left at edge of, and partly in fire. Timber is 4 by 2 (100mmx 50mm) about 10 cm long, burnt at one end however clean cut end has small piece of white paper stapled to it . The marking "H5" in clear black writing on white paper tag. I take 5 photos of bed of fire and off cut.
0945 hrs	I take 2 samples from centre of embers. These are contained in wide mouth glass sample containers. I label them 01 and 02. Burnt timber also seized and place in plastic container labelled 03. Thank Mr BAXTER and tell him I will be in touch with him in due course. Depart site.
1005hrs	Drive directly to RJ Hill lab in Clyde Street and deliver samples to Garry Oldham. Chain of custody form completed.
1015 hrs	Return to office. Complete PRS for timber and secure exhibit.

Doc # 3774289
Signature: ______________________
File note completed by Billy Evington
Enforcement Officer – Waikato Regional Council
Date file note completed: 14 March 2016

EVIDENTIAL VALUE

Though file notes are an important part of an investigation file, the file notes themselves are generally not admissible as evidence because they are not the original notes made at the time of the incident.

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

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

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

IMPORTANT NOTE

Once you have compiled a file note, make it a permanent record, print it, sign it and include it in the investigation file. If you have further information, start a new file note. Do not try to revisit and edit the first file note because this may lead to duplications and inconsistent documents on the file.

FILE OWNERSHIP AND PRESENTATION

Further important concepts to grasp are:

- file ownership
- file presentation.

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

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

FILE PRESENTATION MAY AFFECT OUTCOME

An investigation file is the basis for initiating enforcement action. Judges, defence counsel and the defendant, as well as your own prosecutor, will see all or parts of that file. The standard of content and presentation can impact on the plea entered and ultimately on the penalty imposed. Files should be submitted in a professional manner, tidy, indexed and secured in a protective folder.

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

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

FILE CONTENT

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

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

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

SUMMARY

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

Complete the assessment for this chapter.

4 SCENE ATTENDANCE – PRACTICAL

I TE PAPĀTANGA – NGĀ MAHI Ā-TINANA

SCENE ATTENDANCE – PRACTICAL

I TE PAPĀTANGA – NGĀ MAHI Ā-TINANA

IMPORTANT NOTE

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

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

The charges against one of the defendants were proven, another defendant was discharged without conviction, and the charges against the remaining three defendants were dismissed. One of the defendants, Smith, applied for costs. Auckland Regional Council was ordered to pay costs of $4,000 to Smith.

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

At page 10 of the costs decision Judge Kenderdine stated:

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

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

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

INTRODUCTION

A significant part of your role as a council enforcement officer is to get 'out in the field' and take an active part in dealing with environmental incidents. An environmental incident may be relatively minor or potentially disastrous. It may be as a result of a deliberate act, negligence or a genuine accident.

An incident may be discovered through:

- emergency response
- complaint response, or
- compliance monitoring.

You may be the first on the scene and have limited resources to deal with what you are facing. You may need to take steps immediately to ensure damage is limited and mitigation is initiated. This may be as simple as liaising with another agency such as the fire service or, in certain circumstances, it may mean getting your (gloved) hands dirty yourself.

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

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

Individual councils will develop their own specific policies and procedures for incident response and staff safety. Consideration should be given to including the practical points outlined in this chapter into such policies and procedures.

AIM

The aim of this chapter is to provide practical guidelines for attending environmental incident scenes.

HEALTH AND SAFETY

Staff health and safety should always be the first consideration when attending any incident.

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

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

IMPORTANT NOTE

An employer must provide safety equipment for an employee. However, an enforcement officer must proactively take responsibility for equipping themselves to carry out their work beyond just health and safety considerations. This is their responsibility and also counts towards their professionalism as an enforcement officer.

FIELD KIT

It is suggested that all staff develop and maintain a field kit that is readily available to them. This is beyond the notebook and warrant of authority, which should be on the person at all times.

As well as Personal Protective Equipment (PPE) your field kit should include:

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

COMPLETING AN APPRECIATION

At any scene, it is important to conduct an appreciation so the incident can be attended effectively with the resources available. Many experienced staff will complete an appreciation almost subconsciously.

The appreciation process is commonly used by many organisations to ensure effective attendance at a scene. This process can be applied from high profile major incidents to day to day occurrences. It is a matter of tailoring its application to the situation.

There are five key steps in the appreciation process:

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

AIM

What is the aim of an officer's attendance at this scene? There may be more than one aim, but they should be prioritised and dealt with one by one or as resources permit.

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

1. to stop the spill or event at source (containment)
2. to mitigate effects and clean up
3. to collect evidence for possible enforcement action.

Each situation will differ, but the enforcement officer's role is not to undertake (1) and (2) themselves, but to ensure that the liable party is taking appropriate action. If it is established that the liable party is completely incapable of undertaking suitable action to stop a spill and/or clean up the effect, council staff may need to take control. There are risks involved with this and you should always seek advice from your manager before taking control.

INFORMATION

Collect all the relevant information you may require to achieve your aim. The amount and type of information you collect will depend on the urgency and scale of the incident. It may include:

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

FACTORS

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

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

COURSES OPEN

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

- List each possible course.
- Identify the advantages and disadvantages of each course.
- Select the best course, which will become the basis of the plan to attain the aim.

PLAN

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

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

COMPLETING A SCENE EXAMINATION AND RECONSTRUCTION

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

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

PURPOSE OF SCENE EXAMINATION

Purpose of a scene examination is to:

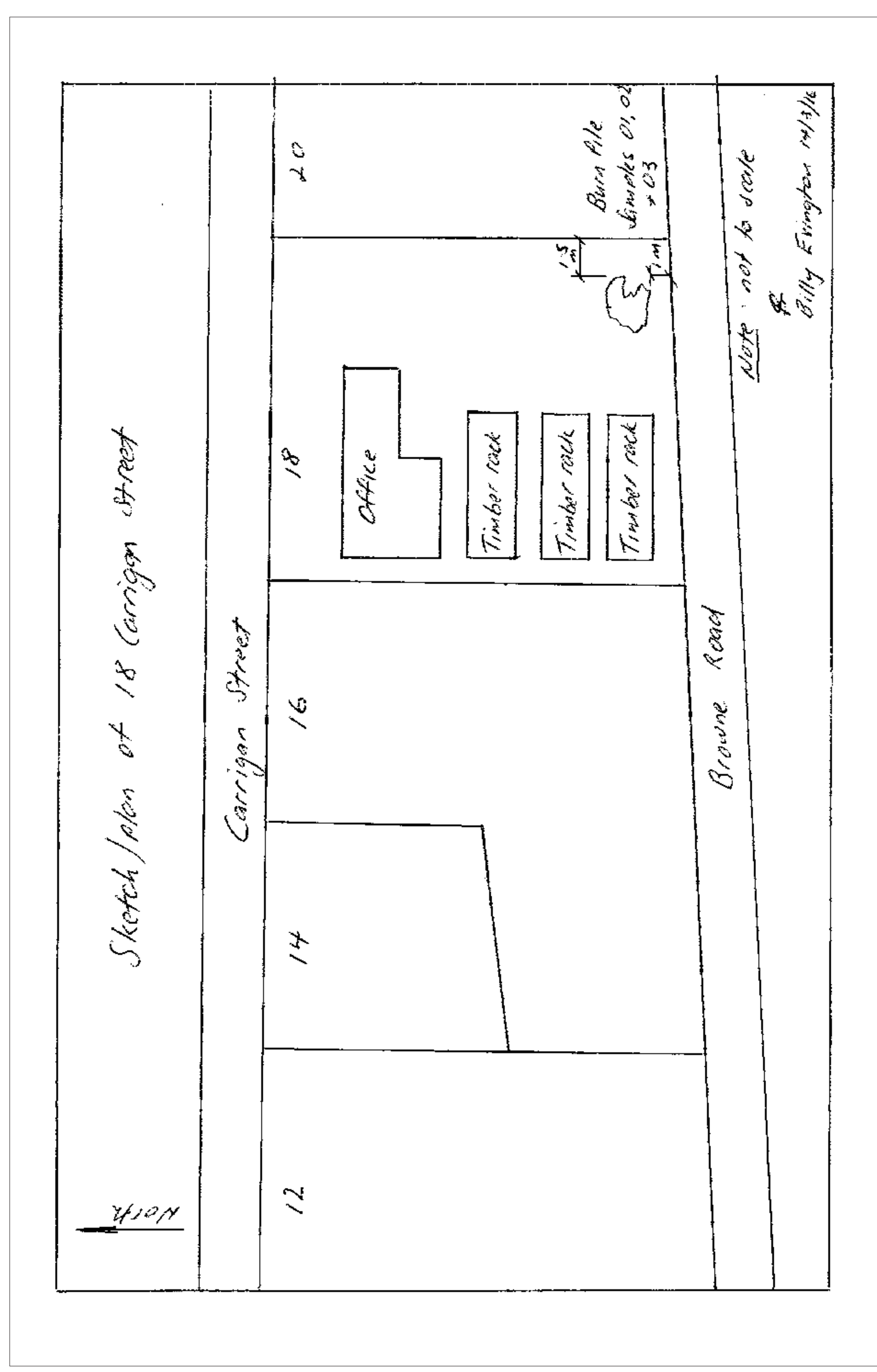
- reconstruct activity in a particular place, and
- locate evidence connecting such activity to other persons, places and objects in order to:
  - prove or disprove the commission of an offence
  - provide facts as a basis for enquiry
  - corroborate witnesses
  - point to and identify liable parties
  - verify admissions made by liable parties, and
  - examine possible defences (refer chapter 8, Statutory defences).

OUTCOMES

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

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

Example of a sketch plan in a notebook



A PRACTICAL CHECKLIST FOR ATTENDING INCIDENTS AND SCENES

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

- Have I followed all health and safety procedures?
- Do I need to enter private property or am I in a public place?
- By what power can I enter private property under these circumstances?
- Have I produced my warrant of authority upon initial entry?
- Have I made a reasonable attempt to contact the occupier before commencing the inspection?
- Am I dressed appropriately for the conditions/incident?
- Do I have all the equipment that I require?
- Have I noted the weather conditions?
- Have I accurately recorded the location?
- Have I established whether the point of discharge is to land or directly to water?
- Have samples been taken, upstream, downstream and at the point of discharge?
- Have I followed all sampling protocols?
- Is the labelling on the sample containers exactly consistent with subsequent documents such as lab forms and files notes?
- Have I established and recorded what the receiving waterway is?
- Have I established and recorded the direction of water flow?
- Have I taken photographs that show the overall scene as well as close-ups of relevant points?
- Have I recorded contact details of the people present for later contact if required?
- Have I taken witness statements from appropriate people? (This point is covered in depth in chapter 7.)
- Have I spoken to anyone who may have liability for the incident?
- Have they been cautioned correctly?
- Have I recorded their personal details?
- Have I kept accurate and full notebook entries of each of these points including the time of each point?
- Have I left a notice of inspection and recorded the details of where I have left it?

PRACTICAL EXERCISE

The course attendees will be introduced to the practical exercise. This exercise will be continued through the remainder of the course.

SUMMARY

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

ASSESSMENT

Complete the assessment for this chapter.

5 SCENE ATTENDANCE – LEGAL/INVESTIGATIVE

I TE PAPĀTANGA – NGĀ TIKANGA Ā-TURE/Ā-WHAKATEWHATEWHA

SCENE ATTENDANCE – LEGAL/INVESTIGATIVE

I TE PAPĀTANGA – NGĀ TIKANGA Ā-TURE/ Ā-WHAKATEWHATEWHA

The Big Five

1. Know your offence/breach
2. Record keeping
3. Being lawfully on property
4.
5.

INTRODUCTION

The rights of a lawful occupier or occupant of private property must be respected. The powers to enter private property, inspect, take samples and seize exhibits are valuable tools in the enforcement officer's toolbox. The authority for these powers is contained within statute and common law. There are, however, strict statutory expectations and limitations on these powers. Powers can enable entry to private property with, and without, a search warrant. In the mind of the public and the courts of New Zealand, they are among the most intrusive of state powers.

These powers must be used appropriately by enforcement officers at all times, as abuses are not tolerated by the courts or the public. Local government enforcement officers must have a good working knowledge of these powers.

This chapter will examine the various powers within the Resource Management Act 1991 (RMA) and associated laws as they affect you in your day-to-day role attending various sites and incident scenes.

AIM

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

BACKGROUND

A fundamental principle of our society is that a person's home is his or her castle. This principle presumes that a lawful occupier of a private property is entitled to the use of their home or property or place of work without having to suffer intrusions by the state or others. The property owner or occupier therefore has the inherent right to exclude anybody and everybody from entering his or her property by resorting to classifying intruders as trespassers.

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

Many aspects of entering private property have been standardised and are now codified in the 2012 Search and Surveillance Act, which has ramifications (and tools) for local government enforcement officers.

Like all law, there are exceptions which allow us to avoid the practical difficulties of such an absolute principle. These exceptions enable people to carry out ordinary and sensible everyday activities. Think of the difficulties that would arise if this principle was absolute and did not allow any exceptions. How would a potentially heroic passerby deal with a fire in a stranger's property? How would the power company read your meter?

The absoluteness of the principle is tempered by:

- implied licence
- express licence (or informed consent)
- statutory authority.

IMPLIED LICENCE

Implied licence is a common law concept that takes into account everyday activities. For example the courier driver delivering a package to your door operates under an implied licence to walk through your gate and up to the door for the purpose of delivering a parcel. The courier may not engage

with you, in fact you may not even be home. However he or she would generally be 'allowed' to enter your private property for this genuine purpose.

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

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

EXPRESS LICENCE OR INFORMED CONSENT

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

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

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

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

IMPORTANT NOTE

Beware accepting 'being invited on' as lawful justification for being on a property. If the owner/occupier is not fully informed of your purpose for being there, the potential consequences are that the inspection may be deemed unlawful.

STATUTORY AUTHORITY

Enforcement of New Zealand laws would be very difficult if the trespass principle was absolute. Enforcement requires tools in addition to implied and express consent to ensure that entry to private property can be made in justified circumstances.

The state provides lawfully warranted enforcement officers the power to enter private property under diverse legislation. The Search and Surveillance Act 2012 (SAS Act) refers to no less than 89 separate Acts of Parliament that have entry and inspection provisions. These range from the Human Assisted Reproductive Technology Act 2004 to the Radiation Protection Act 1965 to the Weights and Measures Act 1987.

It is not just the New Zealand Police who are provided statutory powers, though collectively theirs are probably the most coercive of state powers. Other central and local government agencies within New Zealand cumulatively hold an enormous number and range of administrative powers. They all significantly add to the state's ability to intrude into the lives of ordinary people far beyond the likelihood of a visit from the police.

In the context of local government, and in particular regional councils, the main statutory tools exist within the Resource Management Act 1991.

THE STATUTORY LAW

In the past, law makers have applied a reasonably uniform legal formula to the various powers of entry contained in the large variety of statutes described above. This formula has now been codified and drawn together into one statute to achieve a truly consistent approach to powers of entry, inspection and search.

In practice what this means is that local government agencies have to meet the same standards as any other agency when going about their daily work when it involves entering private property.

It also means that if the courts of New Zealand scrutinise, and then give guidance, to any agency as to the exercise of their statutory power then it is guidance that all agencies should heed. For example, let's suppose that the Ministry for Primary Industries (MPI) was involved in a black market fish poaching investigation that resulted in prosecution. During the course of the subsequent court case the judge was critical of the manner in which MPI officers exercised their powers of entry onto private property. The judge went on to give clear direction as to how those powers should have been executed. All agencies, including local government, should heed that direction.

As we have a general understanding of statutory powers, it is now time to examine the particular powers of a local government enforcement officer under the Resource Management Act 1991.

WARRANTS OF AUTHORITY

To be able to exercise statutory powers there is a need to be lawfully warranted. Section 38 RMA provides for this:

Section 38 – Enforcement officers

Section 38(1) of the RMA provides that a local authority may authorise:

- any of its officers, or
- any officers of
  - any other local authority, or
  - the new Ministry, or
  - the Department of Conservation, or
  - Maritime New Zealand

to carry out all or any of the functions and powers as an enforcement officer under this Act.

Practically, your council needs to supply you with this warrant of authority so that you may use the powers of the RMA to go about your daily work.

IMPORTANT NOTE

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

Section 332 – Power of entry for inspection

Power of entry for inspection

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

(a) this Act, any regulations, a rule of a plan, a resource consent, section 10 (certain existing uses protected), or section 10A (certain existing activities allowed), or section 20A (certain lawful existing activities allowed) is being complied with; or

(b) an enforcement order, interim enforcement order, abatement notice, or water shortage direction is being complied with; or

(c) any person is contravening a rule in a proposed plan in a manner prohibited by any of sections 9, 12(3), 14(1), 15(2) and 15(2A);

or

(d) any control imposed under Schedule 12 on a recognised customary activity is being complied with.

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

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

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

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

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

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

IMPORTANT NOTE

This section is one of the single most important sections in the Act for warranted enforcement officers. Officers should be completely conversant with this section and refer to it regularly.

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

SOME KEY CONCEPTS OF SECTION 332

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

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

The power may be used at all reasonable times

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

Common sense will prevail in most circumstances. What is reasonable is not solely reliant on the subjective view of the owner/occupier, nor is it necessarily just in the view of the council officer. Reasonableness is often examined in the cold light of the courts when a very objective or whole view of the circumstances is taken into account. You can expect the courts to take a very pragmatic and objective view of all of the relevant circumstances.

HELPFUL CASE

Auckland Regional Council v Graham

"The enforcement officer entered a pig farm in the early hours of the morning to investigate a complaint that the defendant had been spray-irrigating pig waste onto her property at night. The defendant conducted her own defence and complained about the time of the inspection. The judge considered s332 and found that the time of the inspection was reasonable because the enforcement officer was legitimately investigating an alleged unlawful discharge at night."

31/03/95, Judge Skelton, DC Auckland CRN 4090020525/0527.

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

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

However what is allowed by this section is a fairly exhaustive inspection of everywhere else on a particular property or structure. The power allows for all manner of inspections that you might be involved in, which may range from a brief look at a surface water pump through to a full inspection of a landfill construction.

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

Your inspection is to determine whether:

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

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

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

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

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

If practical, the first step the enforcement officer must take upon entering the property is to attempt to find the owner or occupier. In section 2 of the RMA, the occupier is defined as:

(a) The inhabitant occupier of any property.

HELPFUL CASE

Waikato Regional Council v Peter Goodwin Excavating Limited & Peter Warren Goodwin

(Pre-trial ruling)

Both defendants faced four charges of contravening the RMA by unlawfully undertaking activities in and around the bed of an unnamed tributary of the Waihou River. The defendants denied the charges and the case was set to proceed to a trial. A pre-trial application was made by the defendants that all the charges be discharged because the unnamed tributary was not a 'river' in terms of Section 2. They also challenged the admissibility of certain photographic and video evidence that the prosecutor wished to call at the trial. Seven photographs were taken of the unnamed tributary by a building inspector who had visited the property on unrelated business. As a result of this, Waikato Regional Council inspected the property. Regional council staff then took a series of photographs and videos showing the unlawful work in and around the bed of the unnamed tributary.

The defendants claimed that the photos and videos were taken unlawfully due to the building inspector being a 'trespasser' and that the regional council staff had ignored health and safety signs upon entry to the property and were basically completing a warrantless search of the property.

After hearing evidence the judge ruled that the unnamed tributary met the definition of a river under the RMA. The judge also ruled that the building inspector was on the property lawfully and his photographs were admissible. Finally, the judge determined the Waikato Regional Council complaint response staff were lawfully on the property under Section 332 of the RMA and that the Health and Safety Act would not override that. The argument they were trespassing also fell short.

All applications from the defendants failed and the photographs and videos were held to be admissible.

23/09/15, Judge Harland, DC Hamilton CRI-2014-077-266,268

IMPORTANT NOTE

It is good practice in routine inspections to take reasonable steps to locate the owner or occupier before commencing the inspection.

- If an owner or occupier is present, the enforcement officer must produce his/her warrant. This requirement will obviously only apply when an occupier or owner is present at the time of the entry.
- If an owner or occupier later asks to see the warrant again, the warrant should be shown.
- A reasonable request will be determined by the circumstances of the case. A request by a milk tanker driver would be unlikely to be reasonable or relevant in the circumstances of a dairy farm inspection. But a request from the sharemilker's employee would be both reasonable and relevant.
- If more than one enforcement officer inspects, each officer must produce his/her warrant. It is not sufficient for only one of the enforcement officers to do so.

Good practice is that an enforcement officer should produce his or her warrant whenever private property is entered for the purpose of inspection. This should avoid any later argument that the evidence collected is inadmissible.

- Producing a warrant of authority for inspection does not mean that you have to release the warrant from your possession.
- There have been instances of people being obstructive once they have possession of an officer's warrant. A situation can deteriorate if the person won't return it or a 'tug-of-war' over the warrant starts. Protection of your warrant of authority is important. It is good practice to produce it for inspection, but do not hand it over to anyone.

If the owner or occupier is not present you are required to leave a notice in a prominent position, outlining the date and time of the inspection and your name.

- The object of this requirement is to ensure that the owner/occupier is advised of the entry onto property.
- Common sense will prevail as to what is a prominent position. If you enter a paddock several kilometres from the farm owner's house, it would be sensible to call at the house and leave a notice there.
- You are not required to leave the notice at the point of entry.
- It would also be prudent to include in your notice the names of persons who accompanied you and details of any samples that you have taken.
- It is good practice to take a photograph of where you left your notice, in case its existence is disputed later.
- Remember that if this provision becomes an issue, it will be up to you to prove that you have acted lawfully.
- The following form is an example of one that has been developed to fulfil the requirements of this section where an inspection has been carried out.

NOTICE OF INSPECTION

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

Please be advised that on (date):

____

at the time of: ______________________________

Waikato Regional Council staff (names/s)

____

carried out an inspection at this property (address):

____

____

____

Additional comments:

____

____

____

401 Grey Street, Private Bag 3038,

Waikato Mail Centre, Hamilton 3240

Freephone 0800 800 401

www.waikatoregion.govt.nz

HELPFUL CASE

Auckland Regional Council v Nuplex Industries Ltd

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

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

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

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

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

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

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

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

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

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

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

IMPORTANT NOTE

It is fortunate for the (then) Auckland Regional Council that this evidence was deemed admissible. It was clearly a strong argument by defence and the decision could have gone either way, in this particular case it went in favour of the council.

Produce the warrant of authority as prescribed by law and avoid this type of legal argument and the risk of losing evidence.

It is probably important to note that this case is now 20 years old and expectations in respect of the professionalism and capability of local government enforcement officers has certainly risen over that period. It is even less likely that this kind of poor practice would be accepted by the courts today.

Remember, best practice to avoid unnecessary legal argument.

USING ANY REASONABLE ASSISTANCE

Section 332(6) RMA provides that any enforcement officer exercising any power under s332 may use such assistance as is 'reasonably necessary'. Where circumstances show a reasonable necessity for the use of assistance, such assistance or assistants may accompany you during your inspection. Assistance would extend to other people or equipment needed to complete the inspection. An example would be where a wetland ecologist accompanied you to determine whether a particular wetland met the requirements of special classification of the regional plan.

During the inspection you may take photographs and or notes if they are relevant to your lawful purpose for being there. They are excellent tools to assist in creating the reconstruction of what has occurred on site. However, it is important to remember that photographs and notes are only aids to the memory of the enforcement officer. The primary evidence in any court is the testimony of the observations made by the enforcement officer. The lawful ability to take photographs and video while inspecting a property under s332 RMA is confirmed through case law (Queen v Leslie William FUGLE and others CA 247/2016 [2016] NZCA 619).

So, though photographs are not evidence on their own without the testimony of the person who took them, the testimony of the person who observed the event or scene is admissible without photographs or notes. Notes or photographs strengthen the oral evidence. The value to you of notes and photographs made at the time of the event is that they are an aid to your memory and a powerful extension to your oral evidence.

SEARCH AND SURVEILLANCE ACT 2012

As well as the specific provisions under the RMA enforcement officers are also required to work within the bounds of the 2012 (SAS) Act previously mentioned that standardises the use of these powers. Section 110 is particularly relevant:

Section 110 – Search powers

Every search power authorises the person exercising it—

(a) *to enter and search the place, vehicle, or other thing that the person is authorised to enter and search, and any item or items found in that place or vehicle or thing, at any time that is reasonable:*

(b) *to request any person to assist with the entry and search (including, without limitation, a member of a hapu or an iwi if the place to be entered is of cultural or spiritual significance to that hapu or iwi):*

(c) *to use any force in respect of any property that is reasonable for the purposes of carrying out the search and any lawful seizure:*

(d) *to seize anything that is the subject of the search or anything else that may be lawfully seized:*

(e) *to bring and use in or on the place, vehicle, or other thing searched any equipment, to use any equipment found on the place, vehicle, or other thing, and to extract any electricity from the place, vehicle, or other thing to operate the equipment that it is reasonable to use in the circumstances, for the purposes of carrying out the entry and search:*

(f) *to bring and use in or on the place, vehicle, or other thing searched a dog (being a dog that is trained to undertake searching for law enforcement purposes and that is under the control of its usual handler):*

(g) *to copy any document, or part of a document, that may lawfully be seized:*

(h) *to use any reasonable measures to access a computer system or other data storage device located (in whole or in part) at the place, vehicle, or other thing if any intangible material that is the subject of the search may be in that computer system or other device:*

(i) *if any intangible material accessed under paragraph (h) is the subject of the search or may otherwise be lawfully seized, to copy that material (including by means of previewing, cloning, or other forensic methods either before or after removal for examination):*

(j) *to take photographs, sound and video recordings, and drawings of the place, vehicle, or other thing searched, and of anything found in or on that place, vehicle, or other thing, if the person exercising the power has reasonable grounds to believe that the photographs or sound or video recordings or drawings may be relevant to the purposes of the entry and search.*

Search powers are defined in Section 3 of the SAS Act as:

Search power, in relation to any provision in this Act, means—

(a) *every search warrant issued under this Act or an enactment set out in column 2 of the Schedule to which that provision is applied; and*

(b) *every power, conferred under this Act or an enactment set out in column 2 of the Schedule to which that provision is applied, to enter and search, or enter and inspect or examine (without warrant) any place, vehicle, or other thing, or to search a person.*

The Resource Management Act is expressly listed in the schedule so all of this applies to us.

What does this mean in practice? You will note that the SAS Act reflects provisions within the RMA; however there are some substantial differences as well. We need to be mindful of both statutes and work within the bounds of both.

USE OF FORCE

Use of force can be split into two broad categories – against property and against the person.

The application of force could arise in a variety of ways during an inspection visit. For example, it may be that a digger is required to dig away a significant quantity of material to enable inspection of substrata. This would be an application of force to the land and would be permissible if it formed part of the process to take particular soil samples.

Likewise, breaking open a gate or door of a structure (other than a dwelling) would be the application of force and permissible to enable inspection. Remember though that, despite power to break open, the council is still liable to remedy the damage.

However, use of force against people is expressly prohibited under section 115(3) of the SAS Act. Other agencies may be lawfully entitled to use force against the person under certain circumstances and under other legislation in the execution of their duties. Council staff would never be justified in using force against the person in the execution of their duties.

IMPORTANT NOTE

If physical confrontation arises during the course of your work then you should remove yourself from risk immediately and follow the appropriate health and safety procedure.

Obviously you should forgo entry or inspection rather than risk physical confrontation. It would be a very rare occasion that would require council staff to use physical force against another person, and such an occasion would only be justifiable in circumstances where a person was under real and imminent threat (Section 48 Crimes Act 1961).

Training for dealing with aggressive people is commercially available by credible companies and such training can go a long way to keeping officers safe.

It is also important to remember that obstruction of an enforcement officer is an RMA offence punishable by a maximum fine of $1,500 (Section 339(3) RMA). If a person does obstruct you in the course of your work it may be that enforcement under this provision is appropriate.

OTHER CONSIDERATIONS

Various industries have expressed concern at the risk of infection or disease from the exercise of powers of entry by council staff and others. Examples include the New Zealand Pork Industry Board, and more recently the kiwifruit industry (due to PSA disease).

Enforcement officers must always strive to comply with all statutory requirements, such as health and safety legislation.

IMPORTANT NOTE

Collect all available information when on private property pursuant to section 332 RMA. Once reasonable grounds to believe an offence has been committed have been established, a search warrant or informed consent will be required to return to that property to gather any subsequent information.

SEARCH WARRANTS

APPLYING FOR A SEARCH WARRANT

Applications for search warrants are made to an 'issuing officer'. This is defined under the SAS Act as a judge or a person (such as a registrar or justice of the peace) who is authorised under Section 108 of the Act. Be aware that not all registrars or justices of the peace are authorised to endorse search warrants.

An application is made in writing and on oath or affirmation. The paperwork required is a full affidavit, with an accompanying draft search warrant. There are new provisions under the SAS Act that allow for remote application for a search warrant. It is highly unlikely that council staff would be involved in this type of application.

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

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

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

An example of an RMA search warrant application and search warrant are included in this chapter. The preparation and application for, and execution of, search warrants are complex and should only be completed by experienced staff, and go beyond the scope of this basic investigative skills manual.

A thorough understanding of the search warrant provisions of the Resource Management Act and the Search and Surveillance Act are required before pursuing this option. However, the Venning judgment and subsequent case law provide clear guidance as to when council staff should be executing search warrants so it would be wise for all councils to be prepared for this contingency.

IMPORTANT NOTE

Please note that the New Zealand Police are experienced at applying for, obtaining and executing search warrants. However most of these are under the (old) Summary Proceedings Act or other legislation. There are subtle but important differences with RMA search warrants. If seeking assistance from police you will need to make them aware of these differences.

USE OF POLICE

Section 335 of the RMA sets out certain obligations and requirements pertinent to a search warrant:

(1) Every warrant under section 334 shall be directed to and executed by –

(a) Any specified constable; or

(b) Any specified enforcement officer when accompanied by a constable; or

(c) Generally, every constable; or

(d) Generally, every enforcement officer when accompanied by a constable.

As you can see RMA search warrants cannot be executed by an enforcement officer alone. The warrant must be executed with a police constable, either exclusively or in the company of an enforcement officer.

The police have a policy of not blindly executing warrants obtained by parties outside the police. They may want to scrutinise your application and satisfy themselves that there is sufficient evidence to justify the warrant's execution.

Bearing in mind that the warrant must be executed within 14 days of issue, you ought to ensure that you have access to the police within that period, or it might be better to wait and make the application when you are sure the police will be available.

FURTHER OBLIGATIONS IN EXECUTING A SEARCH WARRANT

Section 337 completes the obligations of executing a search warrant. The key principle for an enforcement officer to realise is that the seized items must remain under the control of a constable, except while being used in evidence or in the custody of the court. Being used in evidence would extend to being used by the enforcement officer to construct a prosecution case and the evidence preparation that this involves.

There are real impracticalities with this section of the legislation.

SEARCH WARRANT APPLICATION

IN THE MATTER of Sections 334 and 335 of the Resource Management Act 1991 and Sections 98,103 and 110 of the Search and Surveillance Act 2012

AND

IN THE MATTER of an application for a search warrant in respect of any place or vehicle situated at 124 Somerset Road, Paeroa 3480

TO:

of Hamilton

An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2012) who, on an application made in the manner provided in subpart 3 of Part 4 of that Act

I, **K**ane **I**an **S**mith**-S**need, Waikato Regional Council Enforcement Officer, of Hamilton, apply for a search warrant to be issued under section 334(1) of the Resource Management Act 1991 authorising every Waikato Regional Council Enforcement Officer when accompanied by a constable, to enter and search 124 Somerset Road, Paeroa 3480 and say as follows:

Introduction

1. My full name is Kane Ian Smith-Sneed. I am an Investigator employed by the Waikato Regional Council ('the Council'), and am a warranted Enforcement Officer pursuant to the Resource Management Act 1991 ('RMA').
2. The functions of the Council include, among other things, the implementation of the Waikato Regional Plan ('the Plan'), the issuing, management and monitoring of Resource Consents and the investigation of offences committed in respect of the RMA.
3. The purpose of the RMA is to promote the sustainable management of natural and physical resources.
4. The Waikato Region is defined in Schedule 2 of the Local Government Act 2002.
5. The Plan is a regional plan prepared for the Waikato Region and is implemented and administered by the Council to enable the Council to carry out its statutory functions pursuant to the RMA. The Plan includes policies, methods and rules to achieve the objectives of the plan and the rules within this plan have the force and effect of a regulation in force under the RMA.

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6. These rules include Permitted Activity Rules, Controlled Activity Rules, Discretionary Activity Rules, Restricted Discretionary Activity Rules and Prohibited Activity Rules. The activities associated with these rules must comply with the standards, terms or conditions, if any, specified in the Plan or proposed Plan.

7. This search warrant application relates to unlawful earthworks completed in and around an unnamed tributary of the Waihou River on a farm at 124 Somerset Road, Paeroa ('the property') which is within the Waikato Region. **Refer Map 1**

8. The property is listed on the Certificate of Title as being 123.7326 hectares in size and is owned by Brian Ryan Fyran.

General background

9. On 16 September 2013 Les Terr, a building inspector with the Hauraki District Council ('HDC') visited the property regarding some building work that had been done to a house at the location. Upon leaving the house he viewed some recent earthworks that had been done in a gully beside the driveway on the property. He noticed that the waterway had been cleaned out entirely by some sort of excavator. There had been a lot of earthworks completed in and around the waterway and Mr Terr was concerned by what he saw.

10. Mr Terr took a series of photographs and advised another staff member, Dean James at the HDC. Mr James then phoned and emailed the Council on the same day.

11. On 17 September 2013 Campbell David and Chris Bryant, both incident response staff at the Council visited the property.

12. Both staff members walked the length of one gully located on the northern side of the property. This gully has been estimate at approximately one kilometre long in length. They observed the gully to have had major earthworks completed and the waterway itself to have cleaned or excavated. There had been extensive vegetation clearance with a number of cut outs or benching that had been done in the gully. No erosion and sediment controls were in place.

13. The bottom of the stream in the gully was laden with sediment. The stream is an unnamed tributary of the Waihou River.

14. Mr David took a series of photographs and recorded notes from the inspection.

15. The works continued along the unnamed tributary all the way to where it meets the Waihou River. The works appear to have occurred from the eastern boundary of the property to the Waihou river. **Refer Map 1**

16. Both staff had to leave the property after viewing the entire northern gully to complete other response work. Other gullies on the property were not viewed by them.

17. I was assigned this complaint to investigate around mid October 2013.

18. On 20 November 2013 Graeme Black, Programme Manager, Land and Soil with the Council viewed the photographs taken by Mr David and Mr Terr. Mr Black's initial assessment is that the offending was serious and extensive. He also confirmed that the unnamed tributary met the definition of 'river' under the RMA.

19. In completing this investigation it is important to complete a further site visit to:

- complete an ecological assessment by a suitable ecology expert. The assessment is important to determine the impact of the offending on the environment and to determine what remediation is required
- complete an entire inspection of the property and obtain photographs, video footage, record details and obtain samples and measurements of the offending that has taken place

Offences

20. Section 13 of the RMA is entitled 'Restriction on certain uses of beds of lakes and rivers'. Sub-section (1) covers one of the offences relating to this application:

    (1) No person may, in relation to the bed of any lake or river,—
    (a) use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or
    (b) excavate, drill, tunnel, or otherwise disturb the bed; or
    (c) introduce or plant any plant or any part of any plant (whether exotic or indigenous) in, on, or under the bed; or
    (d) deposit any substance in, on, or under the bed; or
    (e) reclaim or drain the bed—
    unless expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

21. Section 15 of the RMA is entitled 'Discharge of contaminants into environment'. Sub-section (1) covers further offending relating to this application:

    (2) No person may discharge any—
    (a) contaminant or water into water; or
    (b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water...
    unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

22. For the purposes of the RMA sediment is a contaminant.

23. There are no rules in the Plan that allow for this type of activity. There is no national environmental standard that allow for this type of activity. There are no resource consents issued to the property for this type of activity.

24. The maximum penalties for an offence against section 13 and 15 of the RMA are provided for by Section 339 of the RMA. A natural person is punishable upon conviction by a term of imprisonment of not more than 2 years imprisonment or a fine not exceeding $300,000 and, in the case of a person other than a natural person (such as a company), the offence is punishable upon conviction to a fine not exceeding $600,000.

Summary

25. Due to the circumstances outlined above I have reasonable grounds for believing that offences against Section 13 and 15 of the RMA have been committed.

26. I believe on reasonable grounds that a further visit to the property is required to complete an ecological assessment for evidential purposes, as outlined in the circumstances and also complete an entire inspection of the property and obtain photographs, video footage, record details and obtain samples and measurements of the offending that has taken place.

27. The reasons outlined above will provide information which will be evidence of the offences mentioned.

28. I believe that a search of this property will locate evidence of an offence against Section 13 and 15 of the RMA.

29. I can confirm that the Council has not executed any other Search Warrants on the property within the last three months.

30. I therefore seek a search warrant to be executed within 14 days of the date of issue to complete an ecological assessment for evidential purposes, as outlined in the circumstances, and also complete an entire inspection of the property and obtain photographs, video footage, record details and obtain measurements of the offending that has taken place.

31. In accordance with Section 110 of the Search and Surveillance Act 2012 I wish to enter and search the property to complete an ecological assessment for evidential purposes, and also complete an entire inspection of the property and obtain photographs, video footage, record details and obtain samples and measurements of the offending that has taken place.

32. I wish to seize anything previously mentioned if it is necessary to provide evidence of the offending outlined.

Verification

33. I Kane Ian Smith-Sneed confirm the truth and accuracy of the contents of this application for a search warrant as listed above are correct. I am aware that it is an offence to make an application containing any assertion or other statement known by me to be false.

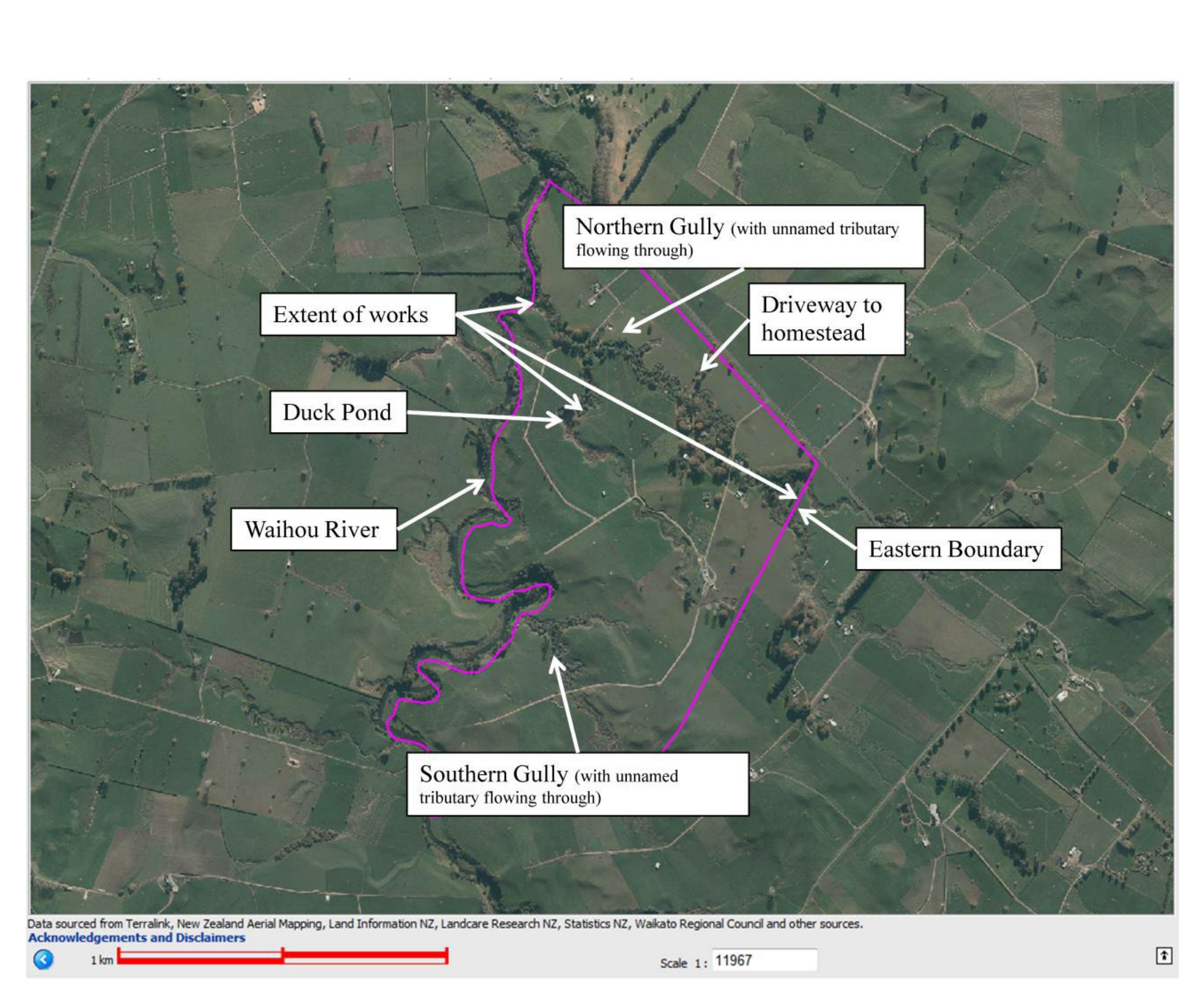
I THEREFORE APPLY for a search warrant to be issued in respect of any place or vehicle situated at 124 Somerset Road, Paeroa 3480

____

Kane Ian Smith-Sneed

Waikato Regional Council Enforcement Officer with the designation of Investigator

DATED at Hamilton District Court this 22 November 2013



Map 1: 124 Somerset Road, Paeroa

SEARCH WARRANT

Sections 334 and 335 Resource Management Act 1991 and Sections 98, 103 and 110 of the Search and Surveillance Act 2012

TO: Every Waikato Regional Council enforcement officer when accompanied by a Constable.

1. Grounds of warrant

I am satisfied, on an application made by Kane Ian Smith-Sneed on 22 November 2013 that there are reasonable grounds for believing that at 124 Somerset Road, Paeroa 3480 ('the property') there is evidence that will provide proof of an offence against section 338(1)(a) of the Resource Management Act 1991 (being an offence punishable by two years imprisonment).

The suspected offence to which this warrant relates is an offence of contravening section 13 and 15 of the Resource Management Act 1991 by Restriction on certain uses of beds of lakes and rivers (Section 13) and Discharge of contaminants into environment (Section 15)

2. Authority

This warrant authorises you, and any person called by you to assist—

(a) To enter and search the property to complete an ecological assessment for evidential purposes; and

(b) To take or complete photographs, video footage, recording of details, obtaining samples and obtain measurements of any evidence relating to the offences outlined; and

(c) To seize anything previously mentioned if it is necessary to provide evidence of the offending outlined; and

(d) To use any force that is reasonable in the circumstances to enter or break open or access any area within the place for the purposes of carrying out the search and any lawful seizure; and

(e) To use any assistance that is reasonable in the circumstances.

3. Period of execution of warrant

The power to enter and search under this warrant may be exercised on one occasion.
The warrant must be executed within 14 days from the date of issue of this warrant.

Date of issue: 22 November 2013

Name or unique identifier:

Signature: ______________________ (Authorised issuing officer)

Doc #2989391

NOTICE TO OWNER/OCCUPIER

Search and Surveillance Act 2012 Section 131(4)

***This document is a copy of a search warrant which has been executed on these premises*.**

Date and Time of the commencement and completion of the search:

Name of person with responsibility of the search:

The name of the enactment under which the search is taking place and the reason for the search under that enactment:

Resource Management Act 1991,

Items seized YES /NO:

If NO: that nothing was seized

If YES: itemise what was seized (list below or refer Property Record Sheet):

Enquiries should be made to the Waikato Regional Council at 401 Street, Hamilton East, Hamilton – free phone 0800 800 401

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PRODUCTION ORDERS

The Search and Surveillance Act 2012 provides a very helpful tool that allows for obtaining specific documents. A production order can be used as an alternative to a search warrant. One of the advantages of a production order is that there is no requirement for involvement by police. Sections 70 to 75 of the SAS Act lay out the requirements of obtaining and executing a production order.

An example of an application and production order

PRODUCTION ORDER APPLICATION

Sections 71 - 79 of the Search and Surveillance Act 2012

TO:

of Hamilton

An issuing officer (within the meaning of Section 3 of the Search and Surveillance Act 2012) who, on an application made in the manner provided in subpart 3 of Part 4 of that Act.

I, **Mary Anne HINGE**, Waikato Regional Council Enforcement Officer, of Hamilton, apply for a production order under Sections 71 and 72 of the Search and Surveillance Act 2012, for the issue of a production order requiring **The Aotearoa Dairy Supply Company** to give to **Mary Anne HINGE** the documents described in Section 8 of this application.

1. Name of Applicant

1.1 My full name is **Mary Anne HINGE**. I am employed by the Waikato Regional Council with the designation of Investigator. I am a warranted Enforcement Officer pursuant to the Resource Management Act 1991 ("RMA"). I am an enforcement officer within the definition in Section 3 of the Search and Surveillance Act 2012 ("the Act").

2. The person against whom the order is sought

2.1 I request that a production order be made against **The Aotearoa Dairy Supply Company**.

3. Conditions for making production order (Section 72, Search and Surveillance Act)

3.1 I have reasonable grounds to suspect that an offence has been committed by **John Francis Bellows** against Section 338(1)(a) RMA and a search warrant is available in respect of this alleged offence under section 334(1) RMA.

3.2 This is an enactment specified in column 2 of the schedule to the Search and Surveillance Act that authorises an enforcement officer to apply for a search warrant (further details are contained herein this application); and

3.3 I have reasonable grounds to believe that the documents sought by the proposed order:

i. constitute evidential material in respect of the offence (detailed in section 5 of this application below); and

ii. are in the possession or under the control of the person against whom the order is sought (detailed in Section 7 of this application).

Doc # 11828000

4. Provision authorising making of application for search warrant

4.1 A production order under the Act is available only in respect of an offence for which a search warrant can be obtained.

4.2 In this case a search warrant can be obtained as:

a. I have reasonable grounds to suspect that an offence has been committed by **John Francis BELLOWS** against Section 338(1)(a) of the RMA;

b. A search warrant is available in respect of offences against Section 338(1)(a) of the RMA under section 334(1) of the RMA, which is an enactment specified in column 2 of the Schedule of the Act.

c. There are grounds for an application for a search warrant under Section 334(1) of the RMA, namely:

i. I have reasonable grounds to suspect that **The Aotearoa Dairy Supply Company** has documents that are evidence of an offence against Section 338(1)(a) of the RMA.

ii. An offence against Section 338(1)(a) of the RMA is an offence that is punishable by up to 2 years imprisonment.

5. Description of offence that it is suspected has been committed

5.1 This production order application relates to an unlawful discharge of contaminants, namely farm animal (dairy) effluent into the environment from the dairy farm situated at 255 Hopkins Road, Atiamuri.

5.2 I believe that the information contained in this application shows reasonable grounds to suspect that the following offence has been committed:

5.3 *Section 15 of the RMA is entitled 'Discharges of contaminants into environment'.*
No person may discharge any—
(a) contaminant or water into water; or
(b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water;
unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

5.4 Farm animal (dairy) effluent is a contaminant pursuant to Section 2 of the RMA.

5.5 There are no national environmental standards or other rules or regulations that expressly allow for the discharges into the environment described in this application.

5.6 The maximum penalties for an offence against Section 15 of the RMA are provided for by Section 339 of the RMA. A natural person is punishable upon conviction by a term of imprisonment of not more than 2 years imprisonment or a fine not exceeding

$300,000 and, in the case of a person other than a natural person (such as a company), the offence is punishable upon conviction to a fine not exceeding $600,000.

5.7 Since 1 June 2010, the farm at 255 Hopkins Road has been operating pursuant to the Permitted Activity Rues for the Discharge of Farm Animal Effluent onto Land, being rule 3.5.5.1.

5.8 The Waikato Regional Plan at Rule 3.5.5.1 states, The discharge of contaminants onto land from the application of farm animal effluent, and the subsequent discharge or contaminants to air or water, is a permitted activity subject to the following conditions, including conditions:

a) No discharge of effluent to water shall occur from any effluent holding facilities.

f) Effluent shall not enter surface water by way of overland flow, or pond on the land surface following the application.

5.9 At the time of preparing this application the property and/or business has no resource consent with the Council for the type of activity that has occurred.

6. Facts relied on to show reasonable grounds to suspect an offence has been committed.

6.1 The functions of the Waikato Regional Council (‘the Council’) include, amongst other things, the implementation of the Waikato Regional Plan (‘the Plan’), the issuing, management and monitoring of Resource Consents and the investigation of offences committed in respect of the RMA.

6.2 The purpose of the RMA is to promote the sustainable management of natural and physical resources.

6.3 The Waikato Region is defined in Schedule 2 of the Local Government Act 2002.

6.4 The Plan is a regional plan prepared for the Waikato Region and is implemented and administered by the Council to enable the Council to carry out its statutory functions pursuant to the RMA. The Plan includes policies, methods and rules to achieve the objectives of the plan and the rules within this plan have the force and effect of a regulation in force under the RMA.

6.5 These rules include Permitted Activity Rules, Controlled Activity Rules, Discretionary Activity Rules, Restricted Discretionary Activity Rules and Prohibited Activity Rules. The activities associated with these rules must comply with the standards, terms or conditions, if any, specified in the Plan or proposed Plan.

6.6 On 31 January 2018 the Council received a complaint alleging the contamination of a tributary stream running through the property of 246 Hopkins Road, Atiamuri. The occupier of that address reported that the stream, which is usually clear, was flowing a muddy brown colour and smelt of effluent. The occupier believed an upstream neighbouring property was discharging effluent into the stream.

6.7 On 1 February 2018 at approximately 6.00 a.m. Council incident response officers **James COOK** and **Ernest SCOTT** arrived at the complainant’s address. At this time the

complainant had confirmed the stream flowing through his property was again contaminated.

6.8 Officers **COOK** and **SCOTT** observed the stream to be a dark green colour and smelling strongly of dairy effluent. They followed the contamination upstream from the complainant's property, under a bridge on Hopkins Road and on to the farm property at 255 Hopkins Road. ('The property').

6.9 255 Hopkins Road is a 110 hectare property owned and operated by **John Francis BELLOWS** and operated as a dairy farm. The operation is currently milking 240 cows and is a supplier of milk to **The Aotearoa Dairy Supply Company** under the supply number 260166. **Mr BELLOWS** has owned and operated the property since 1 June 2010.

6.10 Pursuant to section 332 of the RMA the council officers carried out an inspection of the property.

6.11 The contaminated stream was followed a short distance on to the property where it was observed that the stream started running clear. At that point in the stream it was noticed that dairy effluent was discharging directly into the stream from an overland flow.

6.12 That overland flow was followed approximately 60 metres across land to where a travelling effluent irrigator was situated. There was a circular ponded area of effluent immediately around the irrigator. This was measured by the Council officers as being approximately 30 metres in diameter and up to 200 millimetres deep. It was a flow of effluent from this pond that had travelled across land and into the aforementioned stream.

6.13 The stream is an un-named tributary of the Rawhiti Stream which converges approximately 450 metres downstream. The Rawhiti Stream ultimately flows to the Waikato River which is a further two kilometres downstream.

6.14 Water samples were taken by the Council officers. The samples were taken approximately 20 metres upstream of the discharge point into the tributary, 20 metres downstream from the same point and also at the point of discharge.

6.15 Those samples were subsequently submitted to Hills Laboratories in Hamilton for analysis. Hills have since provided a report detailing the results of that analysis.

6.16 The Council's Water Quality Scientist, **Dr Janice GREEN** has since completed an assessment of those sample analysis results. That assessment determined that the effluent had caused a high degree of contamination with what was otherwise a high quality water course.

6.17 Once the sampling was complete the Council officers followed the irrigator line from the irrigator back to its source. This was a distance of approximately 200 metres back to a pump and sump immediately next to the milking shed.

6.18 It was evident that dairy effluent that originated from the milking shed, and the nearby concrete feed pad, were both directly piped to the sump.

6.19 The sump was made of concrete and was measured as being three metres long by two metres wide and 1.5 metres in depth. It was completely full of dairy effluent and overflowing on all sides.

6.20 The area of effluent ponding around the sump was approximately 30 metres long, five metres wide with a depth, in places, of up to 200 millimetres. There did not appear to be any overland flow away from the ponded area.

6.21 Effluent of this volume and depth poses a risk of migration down through the soil and into groundwater.

6.22 While completing the inspection the Council officers met with the farm owner **Mr BELLOWS** who confirmed that the sump was the only holding facility for the effluent that came from the yard and feed pad and that it regularly overflowed.

6.23 **Mr BELLOWS** also stated that the effluent irrigator had broken down about three weeks ago and that he simply kept pumping the effluent out to the irrigator to try and reduce the amount of effluent around the sump.

6.24 The Council officers determined that every time the dairy shed or feed pad were being used by stock effluent would be produced that would continue to discharge from the sump, or the irrigator, into the environment as there was simply no capacity for storage.

7. Facts relied on to show reasonable grounds to believe documents sought are in the possession of person against whom order is sought

7.1 **The Aotearoa Dairy Supply Company** is a Waikato based company involved in the manufacturing, wholesaling and exporting of dairy produce both nationally and internationally.

7.2 The property is a supplier to **The Aotearoa Dairy Supply Company**, operating under the supply number 260166.

7.3 Pursuant to the contract of supply with **The Aotearoa Dairy Supply Company** there is an annual farm compliance audit completed by an assessor appointed by the supply company. A component of that audit pertains to effluent management.

7.4 A visual examination of the effluent system and infrastructure is conducted by the assessor on behalf on the supply company upon each such audit inspection.

7.5 Information requested and recorded within that audit process includes the effluent infrastructure, amount of effluent storage on the farm and details pertaining to the method and procedures in relation to effluent application to land.

7.6 The information that is acquired during this audit process is retained by the supply company. The information may be in the form of photographs or video taken on site by the assessor, notes and other records made during the course of the assessment, any subsequent documentation relating to the assessment including any correspondence between the supply company and the farmer relating to the audit.

7.7 I believe that the information that has been gathered by the supply company through the annual audit process, since **Mr BELLOWS** has owned and operated the property, will show that the effluent infrastructure on the farm has been such that there will have been frequent and ongoing unlawful discharges of dairy effluent into the environment since 1 June 2010, thus establishing offending since that date.

7.8 Due to the circumstances outlined above I have reasonable grounds to believe that offences against Section 15(1)(b) of the RMA have been committed on the premises of 255 Hopkins Road, Atiamuri. These being offences in respect of which the Search and Surveillance Act 2012 and Resource Management Act 1991 authorises an enforcement officer to apply for a search warrant.

7.9 I have reasonable grounds to believe that the documentation sought, described in Section 8 of this application, will constitute evidential material in respect of the offences outlined.

8. Description of the documents for which production is sought

8.1 I believe on reasonable grounds that a production order pertaining to **The Aotearoa Dairy Supply Company** is required to obtain:

Any documentation, in relation to the farming operation at 255 Hopkins Road, Atiamuri, stored electronically and/or in a hard copy form that includes and is not limited to:

All documentation, correspondence and information collected, recorded or maintained pertaining to the farm animal effluent system collated through inspection, audit or corporate reporting relating to dairy supplier 260166, for the period inclusive of 1 June 2010 through to the date of council inspection on 1 February 2018.

9. Number of occasions the person against whom the order is made should be required to produce documents

9.1 I request that **The Aotearoa Dairy Supply Company** provides the required documents on one occasion.

10. The time by which, and the way in which, the documents must be produced

10.1 I request that the documents be produced to me, **Mary Anne HINGE**, by **The Aotearoa Dairy Supply Company** within twenty working days after the date of issue of the production order to **Mary Anne HINGE** by one of the following methods:

a. Hand delivery to **Mary Anne HINGE** at the office of the Waikato Regional Council at 401 Grey Street, Hamilton; or

b. By way of email at m.hinge@waikatoregion.govt.nz.

c. Or another method agreed to in writing by **Mary Anne HINGE.**

11. Retention of produced documents

11.1 Any enforcement officer to whom a document is to be produced in compliance with this order may do one or more of the following things:

a. Retain the original document produced if it is relevant to the investigation;

b. If any document is retained, take a copy of it as soon as practicable after the document is produced and give that copy to **The Aotearoa Dairy Supply Company;**

c. Otherwise, take copies of the document, or of extracts from the document;

d. If necessary, require **The Aotearoa Dairy Supply Company** to reproduce, or to assist any person nominated by **Mary Anne HINGE** a delegate of the Waikato Regional Council to reproduce, in usable form, any information recorded or stored in the document.

12. Duration of order

I request that the production order be in place for twenty days after the date of issue.

I, **Mary Anne HINGE**, confirm the truth and accuracy of the contents of this application for a production order as listed above are correct. I am aware that it is an offence to make an application containing any assertion or other statement known by me to be false.

____

Mary Anne HINGE
Enforcement Officer with the designation of Investigator
Waikato Regional Council

DATED at Hamilton on 14 February 2018

PRODUCTION ORDER

Section 74, Search and Surveillance Act 2012

TO: Mary Anne HINGE of the Waikato Regional Council, Enforcement Officer

and

TO: The Aotearoa Dairy Supply Company

1. I have received an application for the issue of a production order under section 74 of the Search and Surveillance Act 2012 requiring the documents specified below to be produced by **The Aotearoa Dairy Supply Company.**

2. The application has been made in writing, and the truth and accuracy of its contents have been confirmed to me.

3. I am satisfied:
   a. That there are reasonable grounds to suspect that the offences of:
      i. Sections 15(1)(a) and or Section 15 (1)(b) of the Resource Management Act 1991, namely unlawfully discharging a contaminant to land and or water, has been committed. An offence created under Section 338(1)(a) of the Resource Management Act 1991.
   b. And that there are reasonable grounds to believe that the documents specified below constitute evidential material in respect of the offences.
   c. And that there are reasonable grounds to believe that **The Aotearoa Dairy Supply Company** has possession or control and, while the order is in force will have possession or control, of these documents.

4. This order requires **The Aotearoa Dairy Supply Company** to produce the following documents that are in their possession or under their control on the date of this order:
   - Any documentation, in relation to the farming operation at 255 Hopkins Road, Atiamuri, stored electronically and/or in a hard copy form that includes but is not limited to:
   - All documentation, correspondence and information collected, recorded or maintained pertaining to the farm animal effluent system collated through inspection, audit or corporate reporting relating to dairy supplier 260166, for the period inclusive of 1 June 2010 through to 1 February 2018.

5. If any document is not or is no longer, in their control, to disclose, to the best of their knowledge or belief, the location of this document.

6. The documents must be produced on one occasion during the period this order is in force.

7. The documents are to be produced, or their whereabouts disclosed, to **Mary Anne HINGE**, at the Waikato Regional Council by the following time and in the following manner:

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By 5 p.m. 16 February 2018 and by way of email to m.hinge@waikatoregion.govt.nz or another method agreed by **Mary Anne HINGE**.

8. Any enforcement officer to whom a document is to be produced in compliance with this order may do one or more of the following things:
   a. Retain the original document produced if it is relevant to the investigation;
   b. If any document is retained, take a copy of it as soon as practicable after the document is produced and give that copy to **The Aotearoa Dairy Supply Company;**
   c. Otherwise, take copies of the document, or of extracts from the document;
   d. If necessary, require **The Aotearoa Dairy Supply Company** to reproduce, or to assist any person nominated by **Mary Anne HINGE** a delegate of the Waikato Regional Council to reproduce, in usable form, any information recorded or stored in the document.

9. This production order is in force for 20 days after the date on which this order is made.

DATED at Hamilton on 14 February 2018

____ (signature / individual designation)
An authorised issuing officer

____ name (if signed)

STATEMENT OF INFORMED CONSENT

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

Beware that to be truly informed the person giving the express permission must be fully informed of:

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

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

Situations have arisen where a search warrant is to be executed but the owner or occupier feels aggrieved or uncomfortable with the execution of a search warrant and would prefer that the search was conducted with their consent.

For the owner or occupier to give that consent they need to know the full implications of the search being conducted and, very importantly, that knowledge must be able to be proven later if challenged. To remove any ambiguity in respect of that consent a 'statement of informed consent' form has been created and is included in this chapter. The form is self-explanatory.

A search warrant should still be prepared and be available; however informed consent is an option available to investigative staff at the time of the execution of the warrant. There are hazards associated with completing a search by way of informed consent. For example the consent can be withdrawn at any time during the course of the search, meaning that you would have to execute a search warrant anyway. Also it must be able to be proven that the statement of informed consent was entered into freely by the owner or occupier. The alternative of executing a search warrant cannot be perceived as a threat.

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

The Supreme Court ruling (Leslie William Fugle v R [2017] NZSC 24) and the associated Appeal Court Judgement are attached in full as appendix (X)

Statement of Informed Consent

Pursuant to Sections 92, 93 & 94 Search and Surveillance Act 2012

Date: / / 20

Location: ……………………………………………………………………………………………

Description of property to which this statement refers:

……

……

I, ……………………………………………………………….., date of birth …………………………
(Full name of person providing informed consent)

of ………………………………………………………………………………………………………
(Address of person providing informed consent)

hereby give consent to ……………………………………………………………………………
(Full name of person being granted informed consent)

of the Waikato Regional Council to enter onto the above mentioned property for the purpose of inspection and the gathering of evidence including, but not limited to, the taking of photographs, survey measurements, vegetation and soil and water samples, biodiversity assessment,

I further advise that the purpose of this request is one in respect of which I

………………………………………………………………………………….. being an enforcement officer could apply for a search warrant as a power of search conferred by the Resource Management Act 1991.

- I provide this consent as a person who has authority to grant such access to the property.
- I provide this consent to the above named staff member of the Waikato Regional Council and to any associates or contractors working for, or with, this person.
- I provide this consent for the period of :

  ………………………………………………………………………………………………..
  (Insert dates)

- I provide this consent knowing that any information collected as a result of this inspection may potentially be used as evidence in some form of enforcement proceedings inclusive of, but not limited to, warnings, infringement or prosecution pursuant to the provisions of the Resource Management Act 1991.
- I provide this consent knowing that I am not obliged to provide such consent and may refuse to consent to the search.
- I acknowledge that I may withdraw my consent at any time.

Signed: ……………………………………………………………… **Date:** ………………………
(Signature of Person providing informed consent)

Statement Witnessed by: ………………………………………………………………………..
(Full name of person witnessing this informed consent statement)

Signed: ……………………………………………………………… **Date:** ………………………
(Signature of Person witnessing informed consent statement)

Doc # 2022561

PRACTICAL POINTS FOR PRODUCING YOUR WARRANT CARD

Some staff may feel that the presentation of a warrant card could be seen as officious. Like many things, it is *how* it is done. Experience shows that if the card is shown when first coming into contact with the owner or occupier and is included as part of a non-threatening introduction, then it is readily accepted, particularly if very low key words are used.

Producing your warrant card from your wallet or purse, along with your credit cards, receipts and family photographs can appear unprofessional, so the use of warrant holders is encouraged.

All other persons accompanying you must fit into the requirements of section 332. If you have other enforcement officers with you, they must identify themselves and produce their warrants of authority. If people accompanying you are non-warranted or non-council staff, you should explain the reasons why they are being used as assistants to the owner or occupier.

Whether you use the power under section 332 or gain express permission to enter a site, you need to make careful and accurate notes at the time of your entry. Record all of the circumstances and understandings that led to you entering the property. These notes need to describe the reasons why you entered the property and the purpose of your entry. It is particularly important that you include reference to the purpose of your visit, namely to inspect. The importance of accurate and timely notebook entries cannot be over emphasised.

As described in the evidence chapter, there is nothing more powerful at a court hearing 12 months or more later than an enforcement officer giving evidence from notes made at the time of entry of the reasons for entry, the permission granted by the subject or the method used to convey the exercise of the inspection power.

You can usually bet on the defendant giving evidence from memory without notes and not being particularly clear on the events as they unfolded. In a tightly contested court hearing your notes might make all the difference when the judge has to decide whose version of events is accurate.

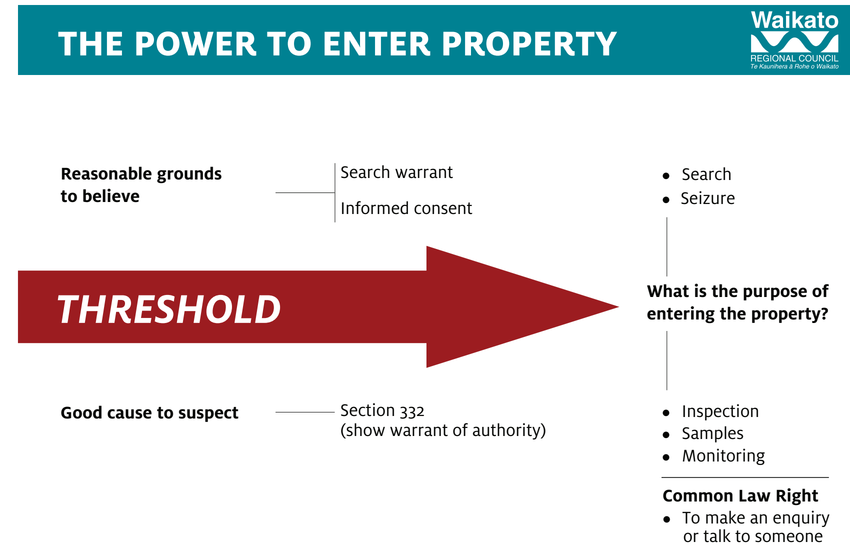
WHEN TO USE THESE POWERS

Practical application of the inspection or search powers is not a matter easily or briefly covered, due to the myriad of contexts that might confront you as an enforcement officer. The facts and circumstances surrounding an event or investigation will dictate your response. You will be required to assess the situation as it confronts you and make a wise judgement.

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

The Supreme Court ruling (Leslie William Fugle v R [2017] NZSC 24) and the associated Appeal Court Judgment are attached in full as appendix B.

Presentation and discussion in respect of pre-course assignments



The power to enter property

- The key concern for you as an enforcement officer is to be clear on what your intention for entry is at the time of entry.
- If your purpose for entering the property is to locate evidence to support enforcement action, you will need a search warrant or informed consent.
- If your purpose for entering the property is to ascertain compliance, you can rely on section 332.

OTHER POWERS

DUTY TO GIVE CERTAIN INFORMATION

Section 22 of the RMA does provide some statutory power to assist an enforcement officer during the course of their enquiry work. Unfortunately the RMA amendments introduced on 1 October 2009 were intended to bolster this power but have done little to help the enforcement officer. Instead they offer some confusion as to what you can demand from whom!

Section 22 RMA – Duty to give certain information

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

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

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

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

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

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

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

The penalty for non-compliance is a maximum fine of $10,000, with a continuing offence provision of $1,000 for every day or part day during which the offence continues (Section 339(2) RMA).

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

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

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

SUMMARY

- **Entry to private property may be by:**
  - **common law right**
  - **implied licence**
  - **express licence or informed consent**
  - **statutory authority, or**
  - **search warrant.**
- **The lawful means by which an enforcement officer enters private property is vital to the success of any subsequent enforcement action.**
- **Enforcement officers must be conversant with, and follow, all legislation and procedure relating to entry on private property.**

ASSESSMENT

Complete the assessment for this chapter.

6 EXHIBIT HANDLING

TE TIAKI I NGĀ TAONGA WHAKAATU

EXHIBIT HANDLING

TE TIAKI I NGĀ TAONGA WHAKAATU

The Big Five

1. Know your offence/breach
2. Record keeping
3. Being lawfully on property
4. Exhibit handling
5.

INTRODUCTION

Evidence is the term given to information that supports the prosecution's assertion of a fact. Evidence may be in the form of an actual physical item, referred to as an exhibit. This may include (but is not limited to):

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

For an exhibit to be relevant it must be able to be proven that it is linked to the offence or the offender. The exhibit must retain its original qualities, untainted by mistreatment or process (notwithstanding the reduction of a sample by forensic testing).

Local government agencies need to develop systems that achieve confidence in the chain of evidence of exhibits to be produced at court, and preserve their qualities and integrity.

AIM

The aim of this chapter is to educate enforcement officers as to the requirements of exhibit handling, so as to ensure their admissibility if required in court.

THE CHAIN OF EVIDENCE

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

- The chain of evidence refers to all the persons handling an exhibit from its discovery until its production in court.
- Keep the chain of evidence as short as possible. The continuity of evidence must be proved in court by calling all witnesses to give evidence of their possession of that exhibit.
- One accepted method of introducing the chain of evidence proof is by way of a property record sheet or an environmental analysis chain of custody form.

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

HELPFUL CASE

Northland Regional Council v Juken Nissho Ltd

The Northland Regional Council prosecuted Juken Nissho for contravention of s15(1)(c), discharge of contaminants into air, in breach of Juken Nissho's resource consent. One of the three charges against Juken Nissho was dismissed because the security of the samples could not be established beyond reasonable doubt. The MAF laboratory to which the council had sent the samples for analysis had a chain of custody procedure in place but did not adopt the procedure for the Northland Regional Council samples.

18/09/98, Judge Bollard, DC Whangarei CRN 7029003709, 7029003874 and 7029004299.

Environmental analysis chain of custody or property record sheet form

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

Example of an environmental analysis chain of custody form

Hill Laboratories
BETTER TESTING BETTER RESULTS

ANALYSIS REQUEST

R J Hill Laboratories Limited, 1 Clyde Street, Private Bag 3205, Hamilton 3240, New Zealand
Tel +64 7 858 2000
Fax +64 7 858 2001
Email mail@hill-labs.co.nz
Web www.hill-labs.co.nz

Client

Name: Waikato Regional Council
Address: Private Bag 3038
Hamilton 3240
Phone: 07 856 7184 Fax: 07 8560551
Client Reference: RM 61 12 34
Quote No: 37860 Order Number:

Primary Contact Asaeli Tulagi
Submitted By C Drawers
Charge To Waikato Regional Council

Results To ☑ Mail Client ☐ Mail Submitter
☐ Fax Results
☑ Email Results asaeli.tulagi@waikatoregion.govt.nz

ADDITIONAL INFORMATION

Samples taken between 1.05pm and 1.07pm.

Office use only Job No:

CHAIN OF CUSTODY RECORD

Sent to Hill Laboratories
Date & Time: 18/3/2016 2:30pm
Name: Chester Drawers
Signature: [signature]
☑ Please tick if you require COC to be faxed back

Received at Hill Laboratories
Date & Time: 18/03/2016 2:30pm
Name: Bill Smith
Signature: [signature]

Condition ☐ Room Temp ☑ Chilled ☐ Frozen Temp: 8°
☑ Sample Analysis details checked
Signature: [signature]

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

Requested Reporting Date: N/A

Sample Types

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

No.	Sample Name	Sample Date & Time	Sample Type	Tests Required
1	01	18/3/16 1.05pm	E	BOD, Suspended Solids, NH4N, NNN, TKN, TN, Total Phosphorus, Dissolved reactive phosphorus, pH
2	02	18/03/16 1.07pm	E	Faecal Coliforms, E.coli
3				BOD, Suspended Solids, NH4N, NNN, TKN, TN, Total Phosphorus, Dissolved reactive phosphorus, pH
4				Faecal Coliforms, E.coli
5				BOD, Suspended Solids, NH4N, NNN, TKN, TN, Total Phosphorus, Dissolved reactive phosphorus, pH
6				Faecal Coliforms, E.coli
7				BOD, Suspended Solids, NH4N, NNN, TKN, TN, Total Phosphorus, Dissolved reactive phosphorus, pH
8				Faecal Coliforms, E.coli
9				BOD, Suspended Solids, NH4N, NNN, TKN, TN, Total Phosphorus, Dissolved reactive phosphorus, pH
10				Faecal Coliforms, E.coli

Continued on next page

KB Item: 23775 Version: 2

Example of a property record sheet

PROPERTY RECORD SHEET

Waikato REGIONAL COUNCIL
Te Kaunihera ā Rohe o Waikato

PROPERTY STORE REFERENCE NUMBER

1352

THE PROPERTY LISTED HEREUNDER WAS (CIRCLE ITEM APPLICABLE):
SEIZED - ~~WITH~~/ WITHOUT SEARCH WARRANT
BY CONSENT

SEIZED/TAKEN FROM:

Full name: James Bryan Baxter	Telephone: Business: 07 8491212 Home:	
Address: C/O H & P Timber Yard. 18 Carigan St, Hamilton		
Place taken from: H & P Timber yard	Time: 0945 hrs	Date: 14 March 2016
By Who: B. Evington	Designation: Enforcement Officer	
Signature: [signature]	Witness: [signature]	

Item No.	Quantity	Inventory (full description)
03	1X	Piece of timber 100mm x 50mm. Approx 10cm long. Burnt on one end One end H5 tag.

Received from Waikato Regional Council	one copy of this inventory	
Full name: J. B. Baxter	Signature: [signature]	Date: 14/3/16
Property is required as an exhibit: Waikato Regional Council	EXHIBIT NUMBER(S):	FILE No.

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

IMPORTANT NOTE

For exhibits other than samples, a property record sheet is to be used.

The front of the PRS

Follow the preformatted form. The form is in triplicate.

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

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

RESPONSIBILITY OF EXHIBITS OFFICER

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

The exhibits officer is responsible for:

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

HELPFUL CASE

Northland Regional Council v Northland Port Corporation (NZ) Ltd and others

The Northland Regional Council prosecuted the Northland Port Corporation and others for the discharge of spent sandblasting sand and oil. Judge Bollard expressed astonishment that none of the three officers who collected the samples undertook responsibility for looking after the samples and making sure the whereabouts of the samples was known and the security reasonably assured from the time the samples were taken to the time the samples were uplifted from the refrigerator in the council laboratory. The judge described the evidence surrounding the samples as unpersuasive and, in some respects, substandard. As a result some of the charges were dismissed.

16/02/96, Judge Bollard, DC Whangarei CRN 5088011428-447, 527-28, 532-33.

HELPFUL CASE

Wellington Regional Council v O'Rourke and Cremen

O'Rourke and Cremen pleaded not guilty to a breach of s15(1)(b) – discharge of septic tank sludge and grease trap waste. No evidence was given by the council to establish that the sample collected was the sample analysed. This had been overlooked. The charges were dismissed.

5/11/93, Judge Skelton, DC Masterton CRN 3035007074-76.

AT A SCENE

SAMPLING

It is not for this document to outline the specifics of taking samples. Clear policy should be available within each council as to the protocols of various sampling. Enforcement officers involved in sampling should regularly refer to these protocols.

IMPORTANT NOTE

Quality Planning's *Investigation of Incidents – RMA Enforcement* provides some helpful points

Wherever 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. 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.

The receiving environment should therefore also be sampled upwind/above/upstream and downwind/below/downstream of the point of discharge. If there are other possible sources of contamination (such as two drainpipes discharging into the same stream), samples should also be collected from these other sources to establish their effect on the receiving environment.

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

If a sample is to be used as evidence it must be stored in a place where it cannot be tampered with. Some samples may require refrigeration. All evidence should be stored in a tamper-proof location, such as in a locked fridge in a locked laboratory.

All samples collected should be contained in bottles or other containers supplied by the enforcement officer, so that the officer can confirm the cleanliness of the containers used. 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, the sampling technique must be appropriate for the substance being sampled. Use laboratories with registered quality assurance procedures. Make sure that the laboratory completes a chain of custody form to ensure the sample is not confused with another sample, and is kept secure so there is no possibility of the sample being tampered with.

WHAT MAY BE SEIZED AS AN EXHIBIT

Section 332 of the RMA states:

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

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

There are obvious limitations as to what can be seized pursuant to this section. Anything listed on a search warrant may be seized. You may seize items by one of three methods.

1. Samples pursuant to section 332 RMA.
2. Anything listed on a search warrant.
3. The owner of the item may give informed consent to take that item.

PRACTICAL POINTS WHEN AN EXHIBIT IS LOCATED

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

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

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

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

PRESENTATION OF EXHIBITS AT COURT

Careful consideration needs to be given as to the most appropriate way to present an exhibit to the court at a defended hearing or trial.

AFTER COURT

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

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

PRACTICAL EXERCISE

Complete a Property Record Sheet for exhibits located during the practical exercise.

SUMMARY

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

ASSESSMENT

Complete the assessment for this chapter.

7

INTERVIEWS AND STATEMENTS

NGĀ UIUINGA ME NGĀ TAUĀKĪ

INTERVIEWS AND STATEMENTS

NGĀ UIUINGA ME NGĀ TAUĀKĪ

The Big Five

1. Know your offence/breach
2. Record keeping
3. Being lawfully on property
4. Exhibit handling
5. Committing people to “paper”

INTRODUCTION

Interviewing is an important function for any enforcement officer. You will be required to interview both witnesses and people who may have some culpability for RMA breaches. An interview is simply the formal asking of questions to obtain information and facts or to corroborate information already gathered. It is a conversation with a purpose.

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

When we talk of ‘taking a statement’, we mean that:

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

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

AIM

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

OBJECTIVES OF AN INTERVIEW

The following objectives are those we try to achieve, regardless of whether we are interviewing witnesses or suspects:

- establishing the truth
- obtaining evidence
- locating, identifying or recovering articles relevant to the subject of the interview
- linking the suspect to victims, witnesses, the scene and exhibits
- corroborating facts already established by other witnesses, the scene or exhibits
- covering the ingredients of the offence.

Interviewing a suspect has some extra objectives:

- establishing mens rea (mental intent)
- obtaining an explanation from the suspect
- considering any defences the suspect may rely upon.

Not every witness or suspect you speak to will have the knowledge to give information about all the objectives, but it is up to the interviewer to establish how much the person being interviewed does know.

It is important to remember that when we talk to witnesses or suspects at the scene and record what they say in our notebooks, we are still conducting an interview. Regardless of where or how the interview takes place, you are still trying to achieve all the objectives of an interview.

WITNESS STATEMENTS

WHY TAKE A STATEMENT FROM A WITNESS?

Statements made by witnesses in an RMA context are completely voluntary. In some cases we are heavily reliant on witnesses to establish what has happened. During an enquiry that may result in some form of enforcement action all persons spoken to should have their statements recorded in any of the formats previously mentioned, no matter how minor their contribution to the enquiry.

It is very important to commit witnesses to a statement for the following reasons.

- The witness is far more likely to tell the truth if they know it is being formally recorded.
- They are far less likely to change their version of events at a later date.
- A witness is permitted to later refresh their memory from a statement made by them.
- It is important a statement is obtained from a witness while the facts are still fresh in their memory.
- The council is far less vulnerable to civil action if council staff act in good faith on information from other sources that is committed to a statement rather than anecdote or hearsay.
- More weight can be put on the witness's account if they are prepared to commit it to a formal statement. For example, you may wish to refer to a witness account in a search warrant application. The person authorising the search warrant will tend to put more weight on information contained in a formal statement rather than just your hearsay of what a witness said.

USES FOR A WITNESS STATEMENT

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

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

While a correctly obtained statement from an offender is admissible in court as part of the prosecution evidence, a witness statement would not normally be admissible. A witness statement is instead used as the basis for the oral evidence that witness will give in court. Also, from this statement a court document, known as a formal statement, will be prepared and may be presented in court. A formal statement is a document known previously as a brief of evidence (pre Criminal Procedure Act 2011).

GUIDELINES FOR PREPARING A WITNESS STATEMENT

If circumstances permit, before recording anything run through the incident or matter being discussed to get a general picture of what the witness can tell you. You should make very brief key notes of things to come back to later.

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

- Avoid closed questions that require only a 'yes' or 'no' response or suggest the answer. It is better to use open questions, such as "tell me what happened next" or "what did the truck look like?"
- Use clear, easy to understand and jargon-free language, appropriate to the age or level of understanding of the person being interviewed. Avoid or clarify anything that might be ambiguous.
- Avoid asking multiple questions such as "what was the person wearing and where did he go?".
- Avoid interrupting responses as this may stop the flow of information, but deal tactfully with irrelevant responses.
- Be thorough. Pay attention to detail and take the time to review what you have obtained so far and check it against your other notes. Always remember – who, what, where, when, how and why?
- The statement can be typed or handwritten, but whatever medium is used it must be neat and legible.
- All corrections or additions made during the taking of the statement, or upon checking by the maker, must be initialled by the maker of the statement beside the correction.
- The person making and the person taking the statement both sign each page of the written statement.
- The enforcement officer physically records the statement.

WITNESS STATEMENTS SHOULD:

- include the time, day and date of the incident concerned
- give the sequence of events in chronological order
- be recorded in first-person speech and written in narrative form.

The suggested format for taking a witness statement is shown on the next page. Enforcement officers should carry a stock of template forms in their field kit and get in the habit of taking witness statements whenever necessary. More recent practice is to record a person's personal details on a separate cover page, rather than in the body of the statement. This allows for easier protection of personal details in disclosure phases.

Witness Statement

Location: 10 Carrigan Street, Hamilton
Date: 14 March 2016
Time: 11:15am

Lisa Mary Old states:

That is my full name. I am known as Lisa
My date of birth is 26/01/1945.
My home address is 10 Carrigan Street, Hamilton.

My postal address is as above.
My occupation is Retired.
I am employed by N/A.
My phone number at home is 07 8561423 and at work N/A.
My cell phone number is N/A
I am making this statement to Billy Evington of the Waikato Regional Council in respect of a fire at the local timber yard. This morning at about 7am I was out walking my dog as I do every morning. I was on my own. As I walked past the timber yard, it is just down the road from my house, I think it is called H and P. I noticed there was quite a large fire burning in the corner of the yard. There wasn't any wind and the smoke was going straight up. But I could smell smoke, it made me cough. I was about 10 metres from the fire as I walked past.
I only saw one person near the fire. He was quite tall, about 5 foot 8, and thin. I noticed he had bushy red hair. He was about 20 years old. He was carrying over arm loads of timber and throwing it on the fire. They were bits of building timber but

(continue statement on lined foolscap)

Doc # 919454

Statement of Lisa Old continued - 2 -

only short bits, no longer than a metre or so. My concern was that the timber might be treated and I know that treated timber should not be burnt so I hurried straight home and rang Environment Waikato and made a complaint.
I have not ever noticed a fire at that yard before. I have lived here for nearly 5 years.

I have read this statement and it is true and correct. [signature]

Statement taken & signature witnessed by:

[signature]

Billy Evington
Resource Officer
11:42 am
14 March 2016

IMPORTANT NOTE

Witnesses cannot generally give you first hand information on all aspects of the matter under investigation. You may have to take a statement from more than one witness to get the full picture.

New interviewers may feel reluctant to include certain information in a witness statement as they may be concerned it is hearsay, opinion or the like and is 'not allowed'. Those are rules relating to the admissibility of evidence produced in court and do not impact on taking statements from witnesses.

Hearsay, opinion, even rumour and speculation are all relevant at this stage of the enquiry and should be included in a witness statement. This information may lead onto other avenues of enquiry that uncover valuable evidence.

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

OFFENDER INTERVIEWS

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

There are far more legal considerations, and there is far more at stake, with an offender interview. The actual content of your interview may be placed before the court, and its admissibility will be judged. That is why this chapter, and any further training in respect of interviewing, will put far more focus on offender interviewing than witness interviewing.

IMPORTANT NOTE

Experience is showing that local government compliance officers who have not been exposed to formal and extensive training, despite best efforts, can find offender interviews very challenging. Subsequently these interviews can actually undermine an investigation. It is strongly advised that only trained and experienced staff carry out offender interviews, particularly for serious matters that are likely to end up in court.

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

Video or audio interviewing:

- reduces time spent during the actual interview
- captures the demeanour, tone and behaviour of the interviewee, not just their words
- promotes more effective rights, to not only be fair, but to be seen and heard to be fair
- provides a means of resolving disputes about the substance of the interview
- helps eliminate unfounded allegations of misconduct against the interviewer
- improves the quality of the evidence presented to the courts.

For many years now, courts and defence counsel alike have highlighted defects that are present in handwritten or type-written statements. Audio and video recording of interviews has gone a long way to address these faults.

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

The procedures for completing complex offender interviews should be the subject of further specialist training. This chapter will focus on basic offender interviews.

IMPORTANT NOTE

As a result of an independent review conducted in 2015 at Waikato Regional Council, it is a requirement to offer any interview to any potentially culpable party to be recorded by video.

IMPORTANT NOTE

Judge Treadwell (Environment Court Judge 1998) has made valuable comments in respect of interviewing offenders in an RMA context.

"The first issue I propose to cover is that of admissions or confessions.

This may seem a little dramatic in the context of resource management but it must be clearly borne in mind by authorities responsible for prosecution that the Act provides penalties for offences of two years imprisonment or $200,000 fine or possibly a combination of both. (Note the 2009 increases in penalty.)

Directors of companies have also been made liable in certain circumstances for breaches chargeable otherwise to the company of which they are directors. We are thus dealing with an act of Parliament which places the liberty of individuals at risk and I have no doubt that the High Court will apply the rules of evidence and the rules which judges have laid down over the years with a degree of rigidity.

Any such confession or admission must be made voluntarily and in particular must not be elicited by threats of action which might put the potential defendant in a position where he thinks if he confesses no further action will follow. I have seen letters produced to me in the course of prosecutions where a council officer has written to a prospective defendant stating that the council has decided that the situation warrants prosecution and that an information will be issued unless an explanation satisfactory to council is forthcoming within a specified number of days.

That type of letter is extremely dangerous if it does in fact elicit the response it seeks. The reason it is dangerous is that one of the rules relating to evidence essentially says that when an officer or authority has made up his, her or its mind to charge somebody that person must be cautioned before any further questions are addressed to that person. You see it often in television, namely a warning that you are not obliged to answer any further questions but if you do the answers may be taken down and used in evidence against you. If a letter is couched in the terms I have just expressed then in my opinion, the letter should also contain that caution.

Nevertheless the law recognises that questioning and often considerable questioning of suspects is permitted but a person cannot be interrogated against his or her will or forced to answer questions under threat of legal proceedings. There is still, to a degree, that absolute right to silence. Nevertheless if a person is properly cautioned it is perfectly open to a council officer to question, to take down the answers, and to later give them in evidence before a court."

EVIDENCE ACT 2006 AND THE BILL OF RIGHTS 1990

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

EVIDENCE ACT 2006

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

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

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

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

Relevant sections of the Act to be aware of include:

FUNDAMENTAL PRINCIPLE (s7)

The fundamental principle of the Act (s7) is that all relevant evidence is admissible in a proceeding except evidence that is either inadmissible or excluded under the Act or any other Act.

GENERAL EXCLUSION (s8)

The judge must exclude evidence if its probative value is outweighed by the risk of unfair prejudicial effect or if it needlessly prolongs the proceedings.

ADMISSION BY AGREEMENT (s9)

A judge may agree to admit otherwise inadmissible evidence with the agreement of the parties. Either party to criminal proceedings may admit facts and therefore dispense with the need to prove them.

EXCLUSION OF UNRELIABLE STATEMENTS (s28)

An interview that is unreliable will be excluded. When the reliability of a statement is questioned the judge must exclude a statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability. The Act has identified a number of circumstances; however these are unlikely to be exhaustive:

- the physical, mental or psychological condition of the offender
- characteristics of the offender (whether apparent or not)
- the nature of any questions put to the offender and the manner and circumstances
- the nature of the threat, promise or representation.

CIRCUMSTANCES NOT LIKELY TO HAVE INFLUENCED RELIABILITY

When it comes to reliability of a statement note that the court is not concerned with whether the circumstances did actually make a statement unreliable; rather the court has to be satisfied that the circumstances were not likely to have adversely affected its reliability.

EXCLUSION OF STATEMENTS INFLUENCED BY OPPRESSION (s29)

Statements obtained through oppression, that is violent, inhuman or degrading conduct or threat of such conduct, are excluded. This exclusion applies regardless of whether or not the statement is true. "Oppression" is defined in the section as meaning:

- oppressive, violent, inhuman or degrading conduct towards or treatment of the defendant or another person, or
- a threat of conduct of treatment of that kind.

Note that in determining whether oppression has occurred the judge must take into account the same circumstances outlined in s28 above.

In other words, whether or not oppression existed is considered from the point of view of the person affected. What the subject perceived in the circumstances is more important than what the officer intended.

IMPROPERLY OBTAINED STATEMENTS

Section 30 also applies to statements that are improperly obtained. This could be as a result of a breach of a right, such as the Bill of Rights, or possibly through not being fully and fairly informed of the subject matter of the interview or the fairness of the questions.

IMPORTANT NOTE

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

BILL OF RIGHTS ACT 1990

PURPOSE OF NZ BILL OF RIGHTS ACT 1990

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

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

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

HOW THE BILL OF RIGHTS ACT APPLIES TO COUNCIL ENFORCEMENT OFFICERS

The Bill of Rights Act applies to any power, duty or act of any member of the government, the judiciary or a public body that may affect an individual's basic freedoms. It also applies to any act by an individual performed pursuant to any law. The Act therefore has application to local government enforcement officers and to any person investigating incidents which may lead to court action.

ENFORCEMENT RELATED SECTIONS

Three sections of the Bill of Rights Act are most relevant for local government enforcement officers.

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

REQUIREMENT FOR ENFORCEMENT OFFICERS TO COMPLY WITH BILL OF RIGHTS ACT

Enforcement officers must comply with the Bill of Rights Act, both the spirit of the Act and the specified provisions, during the course of their duties.

EVIDENCE INADMISSIBLE IF OBTAINED IN BREACH OF BILL OF RIGHTS ACT

Evidence obtained in breach of the Bill of Rights is prima facie (on the face of it) inadmissible, unless (under section 5 of the Act) the breach is such that it may be "… justified in a free and democratic society". In determining whether evidence obtained in breach of the Bill of Rights should be admitted, the courts will apply a 'balancing test' to determine whether the breach of the person's rights is outweighed by the public interest in prosecuting the offences (R v Shaheed [2002] 2 NZLR 377).

IMPORTANT NOTE

In a local government context, we may believe that an offence has been committed and we are seeking an explanation in respect of that offence. We are not detaining that person to speak to them, nor do we have any right to do so. It is therefore wise to take a proactive stance in advising people of this through the use of 'the caution'. This approach will go some way to showing the degree of reasonableness that enforcement officers are taking in the execution of their duties, particularly in the role of interviewing offenders.

We should 'err on the side of caution'.

CAUTION

To fulfil all of the needs of the Bill of Rights and to ensure the admissibility of an offender interview, a caution must be administered prior to the commencement of recording questions and answers. The wording of this caution is contained on the next page. It is helpful to make this caution available on laminated cards as an aid for enforcement officers. It is advisable to carry this card in the front of your notebook, and refer to it when commencing an offender statement.

GUIDELINES FOR INITIATING A SUSPECT INTERVIEW

Should you come across someone during the course of your work who may have committed an offence under the RMA and enforcement action is a possibility, you are obliged to seek their explanation. There are certain legal requirements that must be followed to ensure that their explanation is useable (admissible) should the enforcement action be defended or challenged. Essentially you are initiating a suspect interview. Whether this is recorded in your field notebook, or in a more formal setting, use the following format to ensure admissibility. Remember, any comments made by the subject prior to them being properly cautioned, as below, may NOT be admissible:

Introduction

Introduction of self (name and designation), time, date, place.

Introduction of person being interviewed and anyone else present (other staff or lawyer etc).

Confirm personal details of interviewee:

- full name
- date of birth
- occupation
- employer
- work contact details
- home address
- home contact details.

Advice and caution

The purpose of this interview is to seek your explanation, or your version of events, in respect of (purpose of interview, factual subject matter, type of allegations).

Such matters may constitute an offence or offences under the Resource Management Act 1991.

I advise you that you are not obliged to say anything and anything you do say may be used in evidence.

I have asked you to take part in this interview but I must stress that you are here of your own free will and you are not detained nor have you been charged in respect of this matter.

I also advise you that you have the right to consult and instruct a lawyer without delay and in private. Do you understand this advice?

(If lawyer present)

Should you wish to confer with (lawyer) during this interview please let me know and a facility to speak in private will be provided.

Do you understand that this interview is being recorded by way of video? (Only if interview recorded.)

Guidelines

Then commence interview, record both your questions and their answers (Q and A). In a written statement it is not possible to capture every word said 'verbatim'.

If their answers are overly long or not relevant to your questions it is okay to paraphrase their answers. Explain this to them so they do not think you are changing their words.

Head up each new page with "(Surname) statement continued (page number)".

At the conclusion of the interview allow person to read the statement or read it to them. They are entitled to make any additions or amendments they wish.

Ask them to initial any amendments then sign each page endorsing the end of the statement with

"I have read this statement, it is true and correct".

Conclude interview by signing each page yourself then writing at the end of the statement:

"Statement taken and signature witnessed by (your name and designation)."

End with your signature and time of conclusion.

GUIDELINES FOR PREPARING AND CONDUCTING AN OFFENDER INTERVIEW

The composition of a written offender statement differs from a witness statement in a number of ways.

- The person being interviewed should be formally cautioned and this caution must be included in the record of interview. Even a full confession may not be admissible as evidence if the subject is not correctly cautioned. There is no point getting a confession if you cannot use it!
- The statement is completed in a question and answer format. This accurately records the exact words used by both the officer conducting the interview and the person being interviewed.
- At the completion of the interview a certain procedure must be followed. The subject of the interview should:
  - be asked to read the record of interview or the interviewing officer can read it to him/her
  - initial any mistakes
  - advise the interviewing officer of any corrections or alterations
  - write, in their own handwriting, the following endorsement: "I have read this statement, it is true and correct"
  - sign each page of the record of interview.
- If an offender refuses to sign the statement you should record on the statement:

"I have read the statement aloud to (name) and he/she has declined to sign it. The reason given for declining to sign this statement is ..."

The interviewee is completely entitled to make alterations and amendments at the conclusion of their statement.

Any material amendments, additions to the record of interview or any clarification of answers provided should be added at the end of the record of interview, rather than in the body of the statement. Not only will this be neater (avoiding cross-outs and overwriting in the body of the statement), it will also preserve the original content of the interview where an interviewee may have had a change of heart about a previous answer.

CASE LAW

The case *R v Tepania* (24/5/89, Fisher J, HC Auckland T230/88) provides a cautionary tale on how brevity in a notebook can leave the door open for a defendant to cast doubt on whether advice of rights was properly given.

Justice Fisher noted the detective's notebook did not include a verbatim account of the caution allegedly given to the accused but just contained the word "caution". As such it could not be relied upon to prove that the accused had been cautioned properly.

Justice Fisher found the accused to be essentially a truthful witness. In view of this and the other factors he was not convinced beyond reasonable doubt that the detective's account was necessarily correct. Justice Fisher exercised his discretion in favour of the accused. Both oral questions and answers and the written statement were ruled inadmissible.

As a minimum, recording words to the effect of "Caution read from card dated XX/XX/XX" in notebook records for field interviews will help prevent a similar fate befalling enforcement officers.

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

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

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

CASE LAW

In *R v Brown* 19.7.95, HC Auckland, Justice Fisher held that in circumstances where a suspect is unable to contact a lawyer out of the (phone) book, there is an obligation on the officer to assist with further steps to facilitate contact by providing a copy of the duty solicitor roster.

IMPORTANT NOTE

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

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

VOLUNTARY STATEMENTS OR ANSWERS

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

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

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

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

IMPORTANT NOTE

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

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

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

IMPORTANT NOTE OFF THE RECORD

There is absolutely no problem with having an 'off the record' discussion with an offender. This 'chat' may be initiated by the offender or the enforcement officer. It may happen before or after a formal interview. Such a discussion may reveal a great deal of information that could even possibly lead to other avenues of enquiry. However, off the record does mean off the record. You cannot then turn around and try to introduce the content of that conversation in evidence.

CASE LAW

R v Moresi

If the police give an unconditional undertaking to an accused not to use an 'off the record' interview in evidence, then it is likely that the court will make the police honour that promise on part of fairness and rule the evidence as inadmissible.

PRACTICAL EXERCISE

Complete an offender interview.

SUMMARY

- **Interviewing is a vital tool for gathering information.**
- **Witness interviews and offender interviews have differing requirements.**
- **There are statutes and case laws that protect the rights of an offender being interviewed and these must be adhered to.**

ASSESSMENT

Complete the assessment for this chapter.

FURTHER READING

GENERAL PRINCIPLES OF INTERVIEWING

Interviewing offenders on more complex matters is a specialised skill that develops over time with experience. The following points have been included as further reading. The general principles of interviewing have been divided into eight groups:

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

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

PLANNING

Before you begin an interview, ensure you:

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

TIMING

Interviews should be conducted as soon as possible after the incident, and as early as possible in the day so you have plenty of time.

Carry out the interview as early as possible after the incident.

- The longer the delay, the more likely that details will be forgotten or distorted.
- When there has been delay, information given by a witness may be contaminated as a result of speaking to others, so the information you get may be a jumble of what the witness knows and has been told.
- Always have plenty of time available and never rush an interview.
- Be patient. People may be reluctant to talk to you because they are scared, angry, upset or agitated. They may take time to get to the point. Be prepared to spend time with them to reassure and guide them without appearing annoyed or irritated.

PRIVACY

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

- Select a place where there will be no interruptions.
- Try and select a place that has no distractions.
- Interview people on their own (unless they have legal representation). You must get only one version at a time, without interjection from others.
- If the interview is being carried out at the scene of an incident, move the person out of earshot of others.

MATTERS TO CONSIDER

If you are using an office rather than an interview room, be sure that you remove any sensitive information that the person being interviewed could read, or even take, if you had to leave the room. Also, conceal other information on your desk.

BUILDING RAPPORT

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

- Introduce yourself and the subject of the interview.
- Put the person at ease by spending some time in general conversation. Avoid going straight to the subject of the interview.
- Assess the person and decide on the best way to deal with them. Assess their potential as a witness.
- Be considerate. A cup of coffee may make all the difference.
- Be courteous, but maintain control of the interview.

CONTROLLING

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

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

LISTENING

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

- While listening to what is said, also watch body language and listen for verbal cues that may indicate whether or not the person is telling you the truth.
- Never assume that you know what a person being interviewed is going to tell you. Keep an open mind.

QUESTIONING OFFENDERS

When interviewing offenders, you will be making a formal record of interview which could be admitted in court proceedings. However, there are some general principles of questioning which should always be followed:

- Prepare an interview plan – know the ingredients of the offence(s) and all the relevant matters in question, and know what outcome you want from the interview. Be prepared to depart from it though if answers take an unexpected line!
- Your plan should include broad questions. These may be background questions as to how long the person has been in this particular industry or worked on a particular farm. These are seen as non-threatening questions and serve to get the subject talking. They also establish how much knowledge the person has (or should have) in a particular industry.
- An example of the beginning of an interview plan is included as Appendix C.
- Avoid asking closed questions only requiring a 'yes' or 'no' response or suggesting the answer. Instead use open questions, such as "tell me what happened?"
- Use clear, easy to understand and jargon-free language, appropriate to the age or level of understanding of the person being interviewed. Avoid ambiguous questions and clarify ambiguous answers to your questions – never assume.
- Avoid asking multiple questions, such as "when did you leave and where did you go?"
- Keep questions relevant, professional and concise – remember the record of interview may have to be read out in court later.
- Probe explanations given by using the stock 'who, what, where, when, how and why' open questions.
- Be thorough. Pay attention to detail, taking time to review what you have obtained so far and check it against your other notes.

SILENCE IN AN INTERVIEW

Although an interview may be well planned and everything has been considered, the person being interviewed may remain silent when spoken to by an enforcement officer.

REASONS FOR SILENCE

Apart from a person not wishing to speak to or reply to the questioner, his/her silence may be due to:

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

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

USING SILENCE

Use silences to your advantage by:

- taking note of body language
- thinking up further questions
- doing a mental check on what you already know. Remain calm and unruffled.

CLOSING AN INTERVIEW

The final 10 per cent of the interview is frequently the most important. This is when the greatest amount of information, per unit of time, is exchanged.

MATTERS TO CONSIDER

In closing an interview, do not end abruptly once you have exhausted your line of questions. Make sure you consider each of the following points:

- if the interview was written down, either have the person read the interview record or read it back to them
- if the interview was recorded on video, ask them if they want to view the recording
- ask them if there is anything further they wish to add
- in the case of a suspect, ask if there is any explanation for the allegations against them
- both the interviewer and the interviewee are to **sign each and every page** of the statement
- explain what is going to happen next
- thank the interviewee.

PROTOCOL DOCUMENT

The document on the following page has been prepared to assist Waikato Regional Council staff. It also addresses two recommendations made in a review completed in 2015 into how Waikato Regional Council deals with non-compliance.

Interview Protocols / Guidelines – Using Video / Digital Voice Recorder

Note: This document was created in February 2016 following a review completed in 2015 into how the Resource Use Directorate deals with non-compliance. This document is prepared to assist staff dealing with interviews recorded by video or audio of people suspected of offending.

Recommendation 2:
Council's practices be modified to ensure that when suspects are interviewed in circumstances where there is sufficient evidence to suggest a prosecution is a material possibility, those interviewees are offered the option of being videoed.

Recommendation 3:
A copy of any suspect interview be made available to the person interviewed as soon as practicable, and if appropriate, before formal disclosure processes require it.

Steps

1. Explain to interviewee the various methods of conducting an interview that are available to the person at the time. These methods are video, audio and in writing (typed or handwritten).
2. Have the interviewee decide on the method of interview. Cover this facet in the preamble of the interview.
3. Start the recording and note the time of interview in notebook.
4. Ensure that the recorder is placed appropriately and is recording. (if video ensure that all parties are captured in the camera/video)
5. Complete an introduction upon starting the device ensuring the following is covered:
   - Date and time
   - Place
   - Introduce parties present (is good to have individual state their full names and details – this is good when there are more than 2 persons in the meeting for transcribing purposes)
   - After introductions advise that these are the only persons present in the room
   - Reason for the interview
   - Caution and various rights covered and understanding from the subject acknowledged;

     Caution

     You are not obliged to say anything and anything you do say maybe used in evidence

Doc # 4100654

BOR

You have the right to consult and instruct a lawyer or solicitor without delay and in private.

Not detained

I must stress that you are here of your own free will and you are not detained nor have you been charged in respect of this matter.

Understanding

Do you understand this advice?

- Cover any previous conversations that may have been mentioned prior to starting the recording.

6. Complete questions / interview in normal manner.
7. If reference is made to photographs / docs make sure they are accurately labelled for ease of reference later and reference in the interview.
8. At end of interview ensure to ask subject if they have anything more to add.
9. Offer them (any suspect) a copy of the recording on video / audio. If they request a copy that one will be made available to them as soon as practicable and if appropriate, before formal disclosure processes require it.
10. Record in notebook end time of interview.
11. Record in notebook after interview a short entry as follows in the case of an audio recording:
    - *"I John Smith acknowledge that on today's date at 1.20pm I participated in an audio interview with Wayne Reed of the Waikato Regional Council"*
    - Have subject read this and sign notebook acknowledging.

Note: If more than one person present from WRC ensure that one person leads the interview. If second person wants to add input into interview consider break in interview leave room and consult. Have interview lead ask further questions if needed.

Breaks in interview – leave recorder running and advise subject of this.

Upon return to office – as soon as practical upload interview to document management system.

12. Consider necessity to have interview transcribed at that point – maybe can wait until matter is decided whether it is proceeding to court. Consider completing file note listing 'Salient Points' from interview.

8

ENFORCEMENT OPTIONS

NGĀ WHIRINGA ŪRUHITANGA

ENFORCEMENT OPTIONS

NGĀ WHIRINGA ŪRUHITANGA

INTRODUCTION

One of the roles of the local government enforcement officer is to detect and investigate breaches of regulation. Once an investigation is complete, a decision must be made as to what action the councils will take, if any. Within most council structures the enforcement officer will make a recommendation as to what that action should be, but the actual decision will be made 'further up the food chain'.

Depending on the severity of the offence, and individual council policy, this decision will be made at management or even at council level. There are a number of options as to what action can be taken by council staff. Some of these options can have a dramatic impact and must be applied appropriately and consistently.

AIM

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

ENFORCEMENT ACTION

These are the enforcement options available that we will study in depth. You will note they are divided into two categories:

Punitive options

- Formal written warning.
- Infringement notice.
- Prosecution.

Directive options

- Letter of direction.
- Abatement notice.
- Enforcement order.

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

Specific to RMA application, the criteria below should be considered in every case when considering enforcement action:

- What were, or are, the actual adverse effects on the environment?
- What were, or are, the potential adverse effects on the environment?
- What is the value or sensitivity of the receiving environment or area affected?
- What is the toxicity of discharge?
- Was the breach as a result of deliberate, negligent or careless action?
- What degree of due care was taken and how foreseeable was the incident?
- What efforts have been made to remedy or mitigate the adverse effects?
- What has been the effectiveness of those efforts?
- Was there any profit or benefit gained by the alleged offender(s)?
- Is this a repeat non-compliance or has there been previous enforcement action taken against the alleged offender(s)?

- Was there a failure to act on prior instructions, advice or notice?
- Is there a degree of specific deterrence required in relation to the alleged offender(s)?
- Is there a need for a wider general deterrence required in respect of this activity or industry?

As a result of the 2015 review of how Waikato Regional Council deals with non-compliance, there are three additional factors to consider:

- Was the receiving environment of particular significance to iwi?
- How does the unlawful activity align with the purposes and principles of the RMA?
- If being considered for prosecution, how does the intended prosecution align with the Solicitor-General's Prosecution Guidelines?

Obviously not all of these factors will be applicable in each case. Experienced officers will probably give consideration to many of these almost subconsciously. However, while experienced officers just 'know' when action needs to be taken, this knowledge still needs to be verbalised and committed to paper. This shows that appropriate consideration has been given to each point and the subsequent decision can be justified.

IMPORTANT NOTE

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

HELPFUL CASE – BEST PRACTICE

Auckland Council v S Kelly & J S Nguy & County Cork Trustees Limited

A prosecution was taken by Auckland Council against Mr Kelly in relation to charges under the RMA of using land in breach of a regional rule (Section 9) and discharging a contaminant (Section 15). Mr Nguy and County Cork faced proceedings relating to contravention of an abatement notice.

The charges against Mr Kelly were dismissed on the grounds they were commenced out of time. In the alternative, the charges in respect of Mr Kelly were also dismissed on the basis that the prosecution had failed to establish a case to answer.

The single charge against Mr Nguy was also dismissed on the basis that the prosecution had failed to establish a case to answer and/or produce evidence that might sustain the charges. The charge against County Cork was dismissed on the basis that there was no evidence sufficient to support the charge and/or any case to answer.

Some of the judge's comments were:

- Charges against Mr Kelly were filed one day outside the six month statute of limitations.
- There was no evidence given that certain council staff were warranted officers (critical for issuing of abatement notices and inspections on the property under 332).
- That he believed the council were visiting the site for the purpose of gathering of evidence rather than determining compliance with the Act.

The judge provided other comments suggesting that best practice had not been adhered to.

28/08/15, Judge JA Smith, DC Auckland CRI-057-2014-297

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

- the particulars of the case:
    - what happened
    - when it happened
    - where it happened
    - how it happened
    - who was involved, and the connection between the alleged offender and the incident giving rise to the alleged offences committed
- any aggravating and/or mitigating circumstances, and
- any other relevant matters
- the officer's recommendation
- legal advice and supporting documentation, including copies of notices and correspondence with respect to the case.

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

An example of a basic report

Memo

File No:	56 30 05
Date:	15 March 2016
To:	Programme Manager
From:	Billy Evington
Subject:	**Burning treated timber – Enforcement Action**

Introduction
On 14 March 2016 RUD received a complaint (REQ118065) from a local resident in respect of a fire at the H & P Timber yard in Carrigan Street, Hamilton East. The concern was that yard staff were burning treated timber. This site holds no consents.

Action taken
I visited the site and met with the Site Manager, James Baxter. In his company I went to the scene of the fire. It was about 2 metres in diameter and all but embers. I took 2 samples from the seat of the fire for analysis and retrieved a piece of timber from the edge of the fire that had a treated timber tag stapled to it.

Mr Baxter stated that the fire had been started on his direction as part of tidying up the site. He denied that any treated timber would have been burnt.

The analysis report (attached) from RJ Hill shows CCA levels consistent with treated timber. Because of these findings and the treated timber located I have no doubt that treated timber was being burnt.

Besides the comments from Mr Baxter I have not conducted any formal interviews on site. The complainant has been interviewed and gives a good description of a staff member she saw adding timber off cuts to the fire. This staff member has not yet been identified.

I am not aware of any previous complaints in respect of this site or incidents of non-compliance with RMA matters.

Recommendation
- An unlawful discharge of contaminants to air from trade premises can be proven.
- The fire was small and had probably only being going for about 2 hours.
- Only one complaint was received and no long term effect has resulted.
- The site does not have a history of offending.

I believe that under the circumstances that either a formal warning or an infringement notice to the company is the appropriate course of action.

For your consideration please.

Doc # 1085773
W C EVINGTON
RESOURCE OFFICER

Complete a report to your programme manager detailing the circumstances of this offence and your recommendation.

PROSECUTION

Chapter 9 explores the prosecution process in depth. It will concentrate on the factors that must be considered before initiating this process.

The Solicitor-General holds the responsibility to ensure that agencies that prosecute behave with propriety, and that those suspected or accused of crimes are treated properly and fairly.

The Solicitor-General has published a number of guidelines for making decisions to prosecute. Councils, like any other law enforcement agency, must consider these guidelines through their decision making process.

Two major factors must be considered when making decisions to prosecute:

- evidential sufficiency
- public interest.

Under evidential sufficiency, two matters must be considered:

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

Once an evidential basis is established, the decision whether to prosecute will vary from case to case. The Solicitor-General has given guidelines as to what factors should be considered before a prosecution is taken. Obviously not all of these factors apply in RMA cases.

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

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

A decision whether to prosecute must clearly not be influenced by:

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

STATUTE OF LIMITATIONS

Any charging document must be filed "within 6 months after the time when the contravention giving rise to the charging document first become known, or should have become known" to the council (section 338(4) RMA). This is effectively reduced by a further 56 days for infringement matters, because there are two 28-day 'grace' periods for the fine to be paid before an unpaid infringement is lodged in court, allowing the court to recover the fine. These are very tight timeframes, and it is vital to identify matters that may end up in prosecution or infringement early.

Allow plenty of time to investigate a matter thoroughly and to have it reported on and decided upon through the appropriate channels.

It is very frustrating, and reflects badly on your organisation, to not be able to prosecute someone worthy of prosecution because you have run out of time!

STATUTORY DEFENCES

Bearing in mind that infringement notices and prosecutions can be defended, it is important to give thorough consideration to any statutory defences that may exist. Investigating a potential defence is as important as investigating the offence itself. These sections are summarised below.

Section 340(2)

Section 340 provides that a principal is liable for the acts of its employees and agents, including any contractor. In summary, a defence is available under s340(2) if the defendant can prove that he/she:

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

Section 340(3)

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

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

Section 341(2) Strict liability and defences

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

(a) that

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

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

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

or

(b) was due to an event beyond the control of the defendant, including natural disaster, mechanical failure, or sabotage, and in each case:

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

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

Notice of defence under section 341

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

HELPFUL CASE

Waikato Regional Council v Te Kuiti Meat Processors Ltd

The defendant was an abattoir who for many years had been storing waste in three ponds situated uphill behind the plant. The ponds sat above a known tomo hole. The hole collapsed, resulting in large volumes of waste tracking across land and through the tomo system to the nearby stream. This stream provided the water take for Te Kuiti township. Due to contamination the town lost its water supply for several days.

The discharge was readily proven. The investigation focused on the potential statutory defence available. Remediation and mitigation had been to a high standard. The collapse of the tomo was beyond the defendant's control. However the third strand of the defence, that the event was not reasonably foreseeable, was not available to the defendant. The investigation uncovered a report from an engineer in 2004 identifying the risks associated with stability of the ponds. The company had failed to move quickly enough to decommission the ponds and eliminate the risk.

6 May 2008, Judge Harland, DC Te Kuiti CRI 2007 073 000413

Auckland Regional Council v AFFCO Allied Products Ltd

AFFCO pleaded not guilty to four offences of discharging trade waste effluent from a hide-processing plant and fellmongery onto land (a stormwater system) in circumstances where it entered a tributary of the Puhihui Creek estuary.

AFFCO had installed a number of systems to prevent unauthorised discharge of trade waste from its plant. This included "first flush systems" (by which an initial quantity of water was directed to the trade waste sewer as a precautionary measure) from the stormwater drains. A problem occurred when a contractor cleaning out cesspits overloaded or blocked the valve diverting stormwater to trade waste, resulting in the discharge. The contractor had been discharging into the wrong manhole. The council did not lay charges against the contractor.

AFFCO was convicted on the charge of contravention of s15(1)(b). Judge Whiting held:

"AFFCO was in control of the site and in a position to control the activities of its contractor. To the extent that it could and should have controlled the activity at the point where the pollution occurred it is responsible for the pollution. The defendant company actively undertook the operations conducted at its Wiri Plant including the responsibility for the collection and disposal of waste material on site. It cannot abdicate its responsibilities simply by employing an agent to undertake that work on its behalf. It was in a position to exercise continued control of that activity and to prevent the pollution from occurring but failed to do so."

A charge had not been laid under s340(1)(a). However, Judge Whiting held that the evidence clearly established the contractor was acting as an agent of AFFCO and therefore s340(1)(a) applied. The judge considered whether AFFCO could establish a defence under s340(2) and held that it could not:

"... the management of AFFCO, on any reasonable objective standard, should have known that the offence was likely to be committed. I am also satisfied on the evidence that in any event AFFCO failed to take reasonable steps to prevent the commission of the offence."

29/09/00, Judge Whiting, DC Auckland, CRN 9048006616-9.

IMPORTANT NOTE

MANAGING MEDIA

Publicising enforcement action – prejudice to the defendant

Defendants prosecuted under the RMA for offences against s338(1) have a right to elect trial by jury. If a council prosecutes and there is a media report about the prosecution, this could influence the jury and prejudice the right of the defendant to a fair trial. It may take some time for the defendant to make a decision as to whether or not to elect trial by jury.

However, an appropriate media release at the time of laying charges can help a council to achieve its objective of widespread compliance. The deterrence factor of such a media release cannot be underestimated. It is also an efficient way of letting the public know that the council is actively enforcing the RMA.

Only council staff with experience in this area, and who have the appropriate authority, should issue press releases about prosecutions. There should be nothing in the press release that tends to identify the defendant at the early stages of prosecution.

Sub judice

Sub judice means that a matter is under judicial consideration (that is, before the courts), so discussing certain details of a case with the media, or the general public, is not appropriate. This is because the matter has not yet been decided by the court and is still debatable. Clearly, the modern media do report about matters prior to the court making a decision. Good practice is for the press release to be limited to the fact that enforcement action is being taken in respect of an alleged breach of the RMA.

Once a conviction has been entered and a sentence imposed the council is free to make a far more detailed press release as there is no prejudice to the defendant.

HELPFUL CASE

Manawatu–Wanganui Regional Council v Lakeview Farm Fresh Ltd

The Manawatu–Wanganui Regional Council prosecuted Lakeview Farm Fresh Ltd for breach of s15(1)(c) of the RMA. The defendant sought an order dismissing the charges on the grounds that the media reports on the activities of the company had affected its rights under paras (a) and (c) of s25 of the New Zealand Bill of Rights Act 1990:

25. Minimum standards of criminal procedure –

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court:

(b) ...

(c) The right to be presumed innocent until proved guilty according to law.

It was accepted by the council and the defendant that there had been a fair amount of publicity given to the activities of the defendant in respect of odours alleged to have emanated from its premises. Judge Treadwell noted that the council:

"... has been active in advising the public of steps it has taken with a view to remedying alleged odour nuisances. Occasionally an article has omitted the word 'alleged' indicating that the defendant company is in fact the culprit. Many of the articles also assume that the alleged discharge is in fact offensive and objectionable... The local press has also pursued the defendant company with some enthusiasm as evidenced by headlines 'Company Causes Stink' and 'Freephone for Smell Complaints' followed by an article clearly associating smell with the defendant company."

Judge Treadwell found that there would not be a substantial risk that the fairness of the trial would be prejudiced, because the defendant had elected trial by judge alone. Judge Treadwell held that there is a difference between media material which may influence a potential jury and the situation where a case is to be dealt with by judge alone.

The defendant also argued that the media reports would influence witnesses. Judge Treadwell held that:

"Witnesses are called to give the Court their evidence on oath and I do not find that the views of the local press and or the Regional Council could necessarily lead such witnesses to effectively commit perjury or to have their views affected to such a degree that they would tell the Court that odour was offensive when they were previously of the opinion that it was not."

Judge Treadwell held that the Bill of Rights Act had not been breached, but restricted his comments to trial before judge alone. Judge Treadwell warned local authorities to be careful about the information contained in press releases:

"Whilst the actions of the informant may not in this case lead to an injustice I would observe that informants should not use the media to portray themselves as knights in armour guarding the public good. It is perfectly sufficient for them to indicate to the public that they are taking action in respect of alleged public nuisances but it is in my opinion not desirable nor is it the role of a public authority to make the type of press release which has been made in several instances in relation to the present matter where an official release clearly covers disputed factual matters which are more properly the prerogative of the Court."

26 17/05/00, Judge Treadwell, DC Levin CRN 9031005197-9031005205.

INFRINGEMENT NOTICES

In Wellington City Council v McCready, Judge Keane described the infringement procedure as:

"... a process which enables offences of the least relative significance to be processed swiftly, efficiently, and inexpensively. To enable this to happen it abrogates minimum rights, and reverses the usual onuses. But, equally, it transforms the offence into an infringement, and no conviction is ever imposed. The transformation is not complete. The one who commits the infringement faces a liability which can be enforced like a fine. But the absence of a conviction is a distinction of real, and probably decisive, significance."

THE INFRINGEMENT NOTICE

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

Individual local government agencies must ensure that they are using the correct format. The format for the notice is prescribed in law. (Schedule 2 Resource Management (Infringement Offences) Regulations 1999) Using the incorrect format may render the notice invalid.

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

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

Points for completion of an infringement notice:

1. A summary of rights must accompany the notice. This also is prescribed in law and cannot be amended or abbreviated.
2. Likewise the amount of the infringement is prescribed by law and is laid out in the schedule below.
3. Identify and name the offender correctly.
   (a) In the case of a company, a company's office search should be done and the full and correct company name used.
   (b) For an individual, their full name should be used. This is information that should have been gathered during the enquiry.
   (c) Consideration should be given to issuing notices to each party identified as having liability. Each party needs to be separately considered as to the appropriateness of this enforcement action.
4 Ensure the correct address for service is included.
5. The wording of the infringement notice is similar to the wording of a charging document in a prosecution. It must 'fairly inform' the person of why they are being infringed. It is a requirement to identify each ingredient of the offence in the wording of the infringement notice. Ingredients are discussed in depth in chapter 2.

INFRINGEMENT NOTICE WORDING

Infringement notice wording

It is a requirement to 'fairly inform' a subject of what it is they are being accused of, whether this is by infringement notice or by filing of a charging document. In an infringement notice this occurs under the heading 'Nature of infringement'. A recent RMA case helps guide councils as to what lengths they should be going to so as to fulfil this obligation. (ARC v URS New Zealand Ltd Judge McElrea CRI 2008–004–013603 as referred to in chapter 2 in full).

An example of 'nature of infringement' wording

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

Contravening or permitting?

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

The final ingredient

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

Multiple infringements

It may be that you have a situation of multiple infringement notices arising from a single inspection. If this is the case then you may need to add additional information to each infringement notice so that the subject knows specifically what each one is for. Using the effluent discharge example, you may need to determine that one was "from the irrigator" while another was "from the sump".

General points

Enforcement officers should keep their files in good order. Copies of the infringement notice, reminder notice and notice of hearing should be placed on the file. Any draft notices should be discarded so there is no confusion as to which one was actually issued.

Resource Management (Infringement Offence) Regulations 1999. Infringement notice schedule

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

Infringement notice example

INFRINGEMENT NOTICE

PROJECT CODE: **RMXXXXXXA** **NOTICE NUMBER:** ***[From BusSup]***

(Issued under the authority of section 343C(3) of the Resource Management Act 1991)

ENFORCEMENT AUTHORITY
Waikato Regional Council
401 Grey Street
PO.Box 4010
Hamilton 3247

ENFORCEMENT OFFICER IDENTIFICATION
William Clarence Evington

To: *H & P Timber Company Limited*
Address: c/- Dragon Accountants Limited
94A Clarence St
HAMILTON

You are alleged to have committed an infringement offence against the Resource Management Act 1991, as follows:

Details of Alleged Infringement Offence

Section of Resource Management Act 1991 contravened: Section 15(1)(c) being an offence against section 338(1)(a) of the Resource Management Act 1991.

Nature of Infringement: You permitted the discharge of a contaminant, namely contaminants associated with the burning of Copper, Chrome, Arsenic (CCA) treated timber, from an industrial premise, namely H & P Timber Company Limited yard, 18 Carrigan Street, Hamilton, into air, this discharge not being expressly allowed by a national environmental standard, or other regulations, a rule in a Regional Plan as well as a proposed regional plan for the same region (if there is one), or a resource consent.

Location: 18 Carrigan Street, Hamilton

Date: 14 March 2016 Approximate time: 7.00am

THE FEE FOR THIS INFRINGEMENT IS **$ 1000.00**

Payment of Infringement Fee

The infringement fee is payable to the enforcement authority within 28 days after 19 March 2016

The infringement fee is payable to the enforcement authority at: by post to P.O. Box 4010 Grey Street, Hamilton OR by payment at the Council's Hamilton Office at 401 Grey Street, Hamilton East.

The contact details of the enforcement authority are as follows: **Waikato Regional Council, 401 Grey Street, PO Box 4010, Hamilton East, Hamilton 3247**

Payments by cheque should be crossed "Not Transferable".

Signature of Enforcement Officer: ______________________________

IMPORTANT PLEASE READ SUMMARY OF RIGHTS ATTACHED

(Please detach and return with payment)

Name: *H & P Timber Company Limited*

Our Reference: *[from BusSup)* Total: $*1000.00*

Doc # 4114532

SUMMARY OF RIGHTS

Note: If, after reading this summary, you do not understand anything in it, you should consult a lawyer immediately.

Payment

1. If you pay the infringement fee within 28 days after the service of this notice, no further action will be taken against you in respect of this infringement offence. Payments should be made to the enforcement authority at the address shown on the front of this notice.

Note: If, under section 21 (3A) or (3C) (a) of the Summary Proceedings Act 1957, you enter or have entered into a time to pay arrangement with an informant in respect of an infringement fee payable by you, paragraphs 3 and 4 below do not apply and you are not entitled either to request a hearing to deny liability or to ask the Court to consider any submissions (as to penalty or otherwise) in respect of the infringement.

Further Action

2. If you wish to raise any matter relating to circumstances of the alleged offence, you should do so by writing to the enforcement authority at the address shown on the front of this notice within 28 days after the service of this notice.
3. If you deny liability and wish to request a hearing in the District Court in respect of the alleged offence, you must, within 28 days after the service of this notice, write to the enforcement authority at the address shown on the front page of this notice requesting a Court hearing in respect of the offence. The enforcement authority will then, if it decides to commence court proceedings in respect of the offence, serve you with a notice of hearing setting out the place and time at which the matter will be heard by the Court.

Note: If the Court finds you guilty of the offence, costs will be imposed in addition to any penalty.

4. If you admit liability in respect of the alleged offence but wish to have the Court consider submissions as to penalty or otherwise, you must, within 28 days after the service of this notice, write to the enforcement authority at the address shown on the front page of this notice requesting a hearing in respect of the offence AND in the same letter admit liability in respect of the offence AND set out the submissions that you would wish to be considered by the Court. The enforcement authority will then, if it decides to commence court proceedings in respect of the offence, file your letter with the Court. There is no provision for an oral hearing before the Court if you follow this course of action.

Note: Costs will be imposed in addition to any penalty.

Non-payment of Fee

5. If you do not pay the infringement fee and do not request a hearing within 28 days after the issue of this notice, you will be served with a reminder notice (unless the enforcement authority decides otherwise).
6. If you do not pay the infringement fee and do not request a hearing in respect of the alleged infringement offence within 28 days after the service of the reminder notice, you will become liable to pay COSTS IN ADDITION TO THE INFRINGEMENT FEE (unless the enforcement authority decides not to commence court proceedings against you).

Defence

7. You will have a complete defence against proceedings relating to the alleged offence if the infringement fee is paid to the enforcement authority at the address shown on the front page of this notice within 28 days after the date of service of this notice on you. Late payment or payment made to any other address will not constitute a defence to proceedings in respect of the alleged offence.

8.

(1) This paragraph describes a defence additional to the one described in paragraph 7. This defence is available if you are charged with an infringement offence against any of sections 9, 11, 12, 13, 14, and 15 of the Resource Management Act 1991.

(2) You must prove either of the following to have the defence:

(a) that—

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

(ii) your conduct was reasonable in the circumstances; and
(iii) you adequately mitigated or remedied the effects of the action or event after it occurred; or

(b) that—
(i) the action or event to which the infringement notice relates was due to an event beyond your control, including natural disaster, mechanical failure, or sabotage; and
(ii) you could not reasonably have foreseen or provided against the action or event; and
(iii) you adequately mitigated or remedied the effects of the action or event after it occurred.

(3) Subparagraph (2) does not apply unless—

(a) you deliver a written notice to the enforcement agency; and

(b) in the notice, you—
(i) state that you intend to rely on subparagraph (2)(a) or (b); and
(ii) specify the facts that support your reliance on subparagraph (2)(a) or (b); and

(c) you deliver the notice—
(i) within 7 days after you receive the infringement notice; or
(ii) within a longer period allowed by a District Court.

(4) If you do not comply with subparagraph (3), you may ask the District Court to give you leave to rely on subparagraph (2)(a) or (b).

8A

(1) This paragraph describes a defence additional to those described in paragraphs 7 and 8. This defence is available if—

(a) you are—
(i) a principal; or
(ii) an employer; or
(iii) the owner of a ship; and

(b) you may be liable for an offence alleged to have been committed by—
(i) your agent; or
(ii) your employee; or
(iii) the person in charge of your ship.

(2) If you are a natural person, including a partner in a firm, you must prove either of the following to have the defence:

(a) that you—
(i) did not know, and could not reasonably be expected to have known, that the offence was to be, or was being, committed; and
(ii) took all reasonable steps to remedy any effects of the act or omission giving rise to the offence; or

(b) that you took all reasonable steps to—
(i) prevent the commission of the offence; and
(ii) remedy any effects of the act or omission giving rise to the offence.

(3) If you are a body corporate, you must prove either of the following to have the defence:

(a) that—
(i) neither the directors nor any person concerned in the management of the body corporate knew, or could reasonably be expected to have known, that the offence was to be, or was being, committed; and
(ii) you took all reasonable steps to remedy any effects of the act or omission giving rise to the offence; or

(b) that you took all reasonable steps to—
(i) prevent the commission of the offence; and
(ii) remedy any effects of the act or omission giving rise to the offence.

Queries/Correspondence

9. When writing or making payment of an infringement fee, please indicate –

(a) The date of the infringement notice; AND

(b) The infringement notice number; AND

(c) The identifying number of each alleged offence and the course of action you are taking in respect of it (if this notice sets out more than 1 offence and you are not paying all the infringement fees for all the alleged offences); AND

Your address for replies (if you are not paying all the infringement fees for all the alleged offences).

FULL DETAILS OF YOUR RIGHTS AND OBLIGATIONS ARE SET OUT IN SECTIONS 340 TO 343D OF THE RESOURCE MANAGEMENT ACT 1991 AND SECTION 21 OF THE SUMMARY PROCEEDINGS ACT 1957.

NOTE: ALL PAYMENTS, ALL QUERIES, AND ALL CORRESPONDENCE REGARDING THIS INFRINGEMENT MUST BE DIRECTED TO THE ENFORCEMENT AUTHORITY AT THE ADDRESS SHOWN.

FORMAL WARNINGS

There may be occasions when non-compliance or offending is detected, and it is decided to limit the enforcement action to a formal warning.

This situation may arise when:

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

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

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

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

The suggested wording of a formal warning letter is on the next page.

As you can see it is important to specifically identify the actual offence that they are being warned for.

IMPORTANT NOTE

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

They must state:

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

IMPORTANT NOTE

Waikato Regional Council includes an appeal clause in the formal warning notice. Practically, this means a recipient can seek to have this warning notice rescinded or reviewed. Best practice and quality of decision making should be no less in a matter that results in a warning being issued.

Example of a formal warning

File No: 56 30 05
Document No: 4063321
Enquiries to: WC Evington

401 Grey Street
Hamilton East
Hamilton 3216

Private Bag 3038
Waikato Mail Centre
Hamilton 3240

ph +64 7 859 0999
fax +64 7 859 0998
www.waikatoregion.govt.nz

15 March 2016

James Baxter
c/. H & P Timber
18 Carrigan Street
Hamilton

Dear Mr Baxter

Formal warning in respect of incident on 14 March 2016

As you are aware I visited the H & P Timber yard on 14 March 2016 in response to a complaint in respect of a controlled fire at the yard.

The concern was that treated timber was being burnt. Samples that I took from the fire remains during my visit have been analysed. It has been confirmed that copper, chrome and arsenic (CCA) levels consistent with treated timber were present.

The overall circumstances of this incident have been considered. Please find attached a copy of a formal warning for this offence. No further enforcement action will be taken on this occasion, however, this warning will be considered and may be referred to should further offending be detected.

Please note a copy of this letter is being sent to the company office and directors of H & P Timber Ltd.

I would like to take this opportunity to remind you of your obligation in respect of environmental regulations. Please find enclosed a copy of our outdoor burning brochure which details what can and cannot be safely burnt.

Yours faithfully

WC (Billy) Evington
Resource Officer

Waikato Regional Council's freephone 0800 800 401

Paeroa	phone	+64-7-862 8376
Taupo	phone	+64-7-378 6539
Whitianga	phone	+64-7-866 0172

Example of a formal warning

FORMAL WARNING

TO:	James Bryan Baxter
ADDRESS:	C/o H & P Timber 18 Carrigan Street Hamilton

You are considered to have contravened the Resource Management Act 1991 (RMA), as follows:

Section of RMA contravened:
Section 15(1)(c) being an offence against section 338(1)(a) of the RMA.

Nature of breach resulting in formal warning:
Contravened Section 15(1)(c) of the Resource Management Act 1991, in that you discharged a contaminant, namely contaminants associated with the burning of treated timber, from a trade premise, namely H & P Timber Limited, into air when that discharge was not expressly allowed by a national environmental standard or other regulations, a rule in a regional plan, or a resource consent.

Location:
18 Carrigan Street, Hamilton

Date of offence: 14 March 2016 **File Number:** 56 30 05

The circumstances of the offence have been considered and it is deemed appropriate to deal with this matter by way of formal warning.

You are formally warned as a result of the above offence.

Please note that this formal warning now establishes, or contributes to, a history of non-compliance associated with the entity named in this formal warning. It will be considered and may be referred to should further breaches against the RMA be detected in the future.

If you wish to raise any matter relating to circumstances of the alleged offence, you should do so by writing to the council officer who issued the formal warning at the address shown on the covering letter of this notice within 14 days of receipt of this warning.

Signature of Enforcement Officer:
W C Evington

Date of issue: 15 March 2016

Important information:

It is important to note that offences against the RMA can be dealt with by other measures such as infringement notice, or in more serious cases, by way of prosecution.

Infringement notices issued under the RMA carry penalties of between $300 and $1000.

Penalties available to the Court when dealing with RMA prosecutions include:

- in the case of a ‘natural’ person, to imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000;
- in the case of a person other than a natural person (such as a company), to a fine not exceeding $600,000.

Under the Resource Management Act, “Person” is defined as including the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate.

Doc #4101681 1 of 1

LETTER OF DIRECTION

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

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

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

ABATEMENT NOTICES

IMPORTANT NOTE

The courts have expressed strong support for the use of abatement notices by local government agencies responsible for enforcement of the RMA. Experience is showing abatement notices to be a very effective enforcement tool.

Abatement notices:

- provide a formal directive to the subject without intervention of the court
- are cost effective
- provide another 'layer' of offending if not complied with.

On the face of it, an abatement notice should be a straightforward document. However, case law and practice shows that there are a number of 'fish hooks' to be aware of.

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

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

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

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

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

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

HELPFUL CASE

This was a case where a company and three of the company directors were charged with permitting the multiple ongoing discharges of dairy effluent. Each of the four parties faced 10 charges relating to separate instances of discharge and breaches of abatement notices. At the subsequent defended hearing six of the 10 charges against one director were dismissed, as a copy of one of the early abatement notices had not been sent directly to her. Later notices had. The prosecution could not establish to the required standard that she had knowledge of the effluent issues prior to the later notices. The court felt that it could not convict her on the earlier charges without proof that the first notice had been bought to her attention.

28 August 2009. Waikato Regional Council v Hillside Ltd E Crafar, A Crafar and F Crafar. Judge Newhook Hamilton DC CRI 2008-019-002997.

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

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

CASE LAW

This is a very helpful High Court ruling that supports the approaches being taken by regional councils on a number of points, particularly with abatement notices. The High Court has confirmed that councils can issue abatement notices simply to comply with, and therefore reinforce, existing rules (i.e. sections of the RMA, permitted activities rules or consent conditions) and that the direction can be ongoing (i.e. not for a finite period) and that it is for the recipient to become compliant, not for the council to tell them how to become so.

Northland Regional Council v Craig Douglas Roberts

CRI 2013-488-000046 [2014] NZHC 284

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

Section 322 – Scope of abatement notice

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

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

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

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

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

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

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

(c) requiring that person, being —

(i) an occupier of any land; or

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

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

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

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

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

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

Section 323 – Compliance with abatement notice

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

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

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

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

(a) take all such reasonable steps as he or she considers necessary to cause the noise to be reduced to a reasonable level; and (b) when accompanied by a constable, seize and impound the noise source.

EDITORIAL NOTE

This section has no equivalent in previous legislation; however, s7 Noise Control Act 1982 contained a similar provision to that in subs (2).

Section 324 – Form and content of abatement notice

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

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

(b) the reasons for the notice; and

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

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

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

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

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

Example of an abatement notice

Waikato Regional Council Abatement Notice

Section 324, Resource Management Act 1991

To:	William Matthew Clooney
Date of Birth:	01/10/1965
Address:	1313 Baker Street, RD 11, Hamilton 4321

Waikato Regional Council gives notice that you must cease, and are prohibited from commencing the following action:
The unlawful discharge of farm animal (dairy) effluent.

The location to which this Abatement Notice applies is:
The dairy farm operating with Fonterra supply number 12345, and associated with 1233-1253 Baker Street, Hamilton.

You must comply with this abatement notice immediately on receipt of this notice and no later than:
12 May 2017

This notice is issued under:
Section 322(1)(a)(i) of the Resource Management Act 1991.

The reasons for this notice are:

Background

1. The activity to which this abatement notice relates is the unlawful discharge of farm animal (dairy) effluent at the dairy farm associated with 1233-1253 Baker Street, Hamilton (hereafter referred to as 'the property')

2. A Certificate of Title for the property lists the owners as being William Matthew Clooney, Maurine Claire Clooney and Brian Patrick Pitt.

3. The property is operated as a dairy farm.

4. The property falls within the boundary of the Waikato Region and is subject to the terms and conditions of the Waikato Regional Plan ('the Plan').

5. There is no resource consent relating to the management of dairy effluent for this property. The property is reliant on the permitted activity rule 3.5.5.1 of the Plan to manage effluent. This relevant rule of the Plan is reproduced in full in **Appendix A** of this abatement notice.

6. Farm animal (dairy) effluent is a contaminant (by definition) under the provisions of the Resource Management Act 1991.

7. Section 15(1) of the Resource Management Act 1991 states: "No person may discharge any—
   (a) Contaminant or water into water; or
   (b) Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water;
   unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent."

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8. I am a warranted Enforcement Officer pursuant to Section 38 of the RMA with the designation of Resource Officer with the Farming Services team for the Waikato Regional Council (WRC).

History

9. The farm effluent system on the property consists of an (in-ground) concrete sump and a stationary irrigator.

10. On 30 July 2013 WRC staff visited the property to inspect the farm effluent system. During that 2013 visit it was observed that the effluent system comprised of a very small sump with a stationary irrigator, and assessed as having insufficient storage capacity.

11. On 15 August 2013 a letter was sent by WRC staff (Fred Damon) to report on the site inspection. In that letter, Mr Damon identified that the effluent system had significantly inadequate storage capacity, and the existing irrigation set up was considered unlikely to comply with permitted activity rule 3.5.5.1 of the Plan. Accordingly, that letter requested that written details of an improvement plan for the effluent system be provided to WRC by 28 October 2013.

12. On 23 February 2014 a further letter was sent as a reminder that the requested improvement plan details had not been received and were overdue. That letter requested that such details be provided to WRC by 10 March 2014.

13. No written details were subsequently received.

14. On 28 August 2015 WRC staff visited the property to inspect the farm effluent system. During that 2015 visit it was observed that effluent was overflowing from the sump, and also that effluent was ponding on land around the stationary irrigator. The overflow of effluent nor the ponding of effluent on land were not permitted activities, so were both a breach of rule 3.5.5.1.

15. During that 2015 visit it was noted that a new sand trap and larger sump were being prepared for installation, albeit yet to occur.

16. On 21 September 2015 a letter was sent by WRC staff (Jack Ocean) to report on the site inspection. In that letter, Mr Ocean advised the compliance status of the effluent system was “significant non-compliance”, and that infringement notices (2) were issued for the overflow of an effluent storage facility as well as for effluent ponding at the irrigator. That letter also requested details of an improvement plan for the effluent system be provided to WRC by 21 December 2015.

17. To date, no details of an improvement plan have yet been provided to WRC.

Current

18. On 25 March 2017 I visited the property with Vivienne Roberts (WRC Farming Services team) to complete an inspection of the farm effluent system.

19. During this inspection we met William Clooney. Mr Clooney advised that the farm milks up to 210 cows, the effluent sump is relatively new, having been installed subsequent to previous WRC inspections, and that the sump holds “4 milkings”. Mr Clooney also explained that the irrigator is operated at night time, due to the proximity to the “Waikato Expressway” (State Highway One).

20. The current effluent sump is larger than had been observed during previous WRC inspections, having a diameter of approximately 3 metres across.

21. During the site inspection it was observed that effluent was ponding on land all around the stationary irrigator. It also appeared that some ponding in the vicinity may have had resulted from the previous location of the irrigator.

22. The ponding of effluent on land is not a permitted activity. This is a breach of rule 3.5.5.1.

23. Although a farm drain was located within the paddock, during the inspection no effluent was observed to be entering, or have previously entered, that farm drain.

24. Due to the very limited capacity that is currently available for effluent storage (i.e. the concrete sump), the effluent system has little option other than to overflow or irrigate, regardless of soil conditions or weather conditions. That, combined with the use of a stationary irrigator that operates at night and without monitoring, mean that the farm effluent system is considered a high risk of non-compliance.

25. In my opinion, based on the circumstances detailed in this notice, there has been a breach of Section 15(1) of the Resource Management Act 1991 in that farm animal effluent has been discharged to land in a manner not expressly allowed.

26. In my opinion, there have been ongoing contraventions of section 15(1) of the Resource Management Act 1991.

27. In my opinion the actions detailed in this notice are required to prevent the further contravention of section 15 (1) of the Resource Management Act 1991.

If you do not comply with this notice, you may be prosecuted under section 338 of the Resource Management Act 1991 (unless you appeal and the notice is stayed as explained below).

You have the right to appeal to the Environment Court against the whole or any part of this notice. If you wish to appeal, you must lodge a notice of appeal in form 49 with the Environment Court within 15 working days of being served with this notice.

An appeal does not automatically stay the notice and so you must continue to comply with it unless you also apply for a stay from an Environment Judge under section 325(3A) of the Resource Management Act 1991 (see form 50). To obtain a stay, you must lodge both an appeal and a stay with the Environment Court.

You also have the right to apply in writing to the Waikato Regional Council to change or cancel this notice in accordance with section 325A of the Resource Management Act 1991.

The Waikato Regional Council authorised the enforcement officer who issued this notice. Its address is: Waikato Regional Council, Private Bag 3038, Waikato Mail Centre, Hamilton 3240. Phone (07) 859 0999, Facsimile (07) 859 0998.

The enforcement officer is acting under the following authorisation:
A warrant of authority issued by the Waikato Regional Council, pursuant to section 38 of the Resource Management Act 1991, authorising the officer to carry out all or any of the functions and powers as an enforcement officer under the Resource Management Act 1991.

Dean Davis Sinatra
Enforcement Officer with the designation of Resource Officer
Waikato Regional Council

Date 5 May 2017

Appendix A - Waikato Regional Plan

Permitted Activity Rule 3.5.5.1 - Discharge of Farm Animal Effluent onto Land

The discharge of contaminants onto land outside the Lake Taupo Catchment from the application of farm animal effluent, (excluding pig farm effluent), and the subsequent discharge of contaminants into air or water, is a permitted activity subject to the following conditions:

a) No discharge of effluent to water shall occur from any effluent holding facilities.

b) Storage facilities and associated facilities shall be installed to ensure compliance with condition a).

c) All effluent treatment or storage facilities (e.g. sumps or ponds) shall be sealed so as to restrict seepage of effluent. The permeability of the sealing layer shall not exceed 1x10-9 metres per second.

d) The total effluent loading shall not exceed the limit as specified in Table 3-8, including any loading made under Rules 3.5.5.2 and 3.5.5.3, 3.5.6.2, 3.5.6.3 or 3.5.6.4.

e) The maximum loading rate of effluent onto any part of the irrigated land shall not exceed 25 millimetres depth per application.

f) Effluent shall not enter surface water by way of overland flow, or pond on the land surface following the application.

g) Any discharge of contaminants into air arising from this activity shall comply with permitted activity conditions in Section 6.1.8 of this Plan.

h) The discharger shall provide information to show how the requirements of conditions a) to g) are being met, if requested by the Waikato Regional Council.

i) The discharge does not occur within 20 metres of a Significant Geothermal Feature.

j) Where fertiliser is applied onto the same land on which farm animal effluent has been disposed of in the preceding 12 months, the application must be in accordance with Rule 3.9.4.11.

HELPFUL CASE

A very important point was established in the case below that will affect the validity of any abatement notices being completed. This case should always be referred to when drafting an abatement notice.

Waikato Regional Counsel v Huntly Quarries Ltd and Ors (DC AK CRN 2024011394)

The defendants operated a quarry. They had resource consents relating to discharge of stormwater associated with quarrying activities. One consent related to discharge of stormwater into a tributary of the Waikato River. Another related to discharge into a pond, which in turn discharged into a watercourse directly connected to the Waikato River.

An abatement notice was issued requiring the company to take four steps. These related to diverting stormwater should sediment solids exceed a certain level, the construction of sediment retention ponds and to revegetate a given area. These steps were either not completed or only partially completed.

The defendants were charged with breaching an abatement notice. One thrust of the defence was that the abatement notice did not contain 'proper reasons' as required by law (section 324(b) RMA). The notice did list reasons, but only as they related to the breach of the resource consents, not as they related to the necessity to avoid, remedy or mitigate environmental effect.

Judge McElrea states:

"under subsection (1)(b) there are two separate elements that must be present, a notice relying on subsection (1)(b) must in my view state reasons that cover both elements... where the enforcement officer relies on s322(1)(b) rather than (1)(a) the reasons must encompass adverse environmental effects. This requirement is not present under subsection (1)(a) dealing with the cessation of infringing activities, where breach of a resource consent is sufficient.

It is tempting to say that where the defendant is already aware of the reasons for the notice they need not be stated in the notice, but there are three contrary considerations:

(i) The law is clear that a notice which does not state reason is invalid: Dunn v Clutha District Council (Environment Court, ENF 126/96, 26 March 1997, Jackson E J presiding).

(ii) The Court, for example when hearing an appeal, has to know what the reasons for the notice are to be able to deal with the appeal. If the reasons are not stated in the notice, a messy and potential chaotic situation is likely to develop with no clear evidence of the reasons sometimes being available and/or considerable time being taken to establish them.

(iii) The abatement notice may be relevant to other parties, for example a landlord, a mortgagee or other person with a legal interest in the property. Alternatively, in a less formal way it may be relevant to a lender to the business, for example a bank. All those parties should be able to tell from the notice itself what it is all about, and that depends in part on the reasons given in the notice. I do not accept that they can be taken as read or derived from a prior course of dealings.

Mr Casey [general counsel] *raised the separate practical issue that, without reference in the notice to the alleged adverse effects on the environment, a recipient of the notice will not be able to decide whether to challenge the notice. I agree. It is a fourth point.*

... As he put it, how can a defendant be expected to know there is a right of appeal on the issue of adverse environmental effects if that reason is not stated in the notice? The conclusion I have reached is that the defect here is a basic one, which affected the efficacy and operation of the notice right from day one. It is in my view an invalid notice and no proper prosecution can be based upon it.

The defense was successful and the charge dismissed.

It is clear that, **when drafting an abatement notice pursuant to section 322(1)(b)** (when council is requiring a person to do something, as opposed to requiring that person to cease or prohibit activity), the reasons for that requirement be clearly listed. It is not sufficient to say that it is "necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment". **The reasons must encompass adverse environmental effects.**

IMPORTANT NOTE

So, even if the abatement notice is not appealed, any prosecution that may arise from subsequent breaches of the abatement notice can fail if the matter is defended and the original abatement notice is found wanting.

PRACTICAL POINTS FOR COMPLETION OF AN ABATEMENT NOTICE

Use the correct format. The format for an abatement notice is actually contained in law. It can be found at RMA (forms, fees, and procedure) Regulations 2003 Schedule 1 Form 48.

- The person or company to whom the abatement notice relates must be named correctly and in full. The law requires that the person's address and date of birth should also be included. In the case of a company check the companies register for the correct name, the address of the registered office and also a list of the directors to whom a copy will be sent.
- Determine whether you are giving a direction to cease AND/OR prohibit from commencing OR take action. This will determine what subsection of section 322 you utilise. If you have a situation of wanting to give direction to do more than one (for example, cease AND ALSO take action), then separate abatement notices are advisable to avoid confusion over the content of the notice and what subsection is being invoked.
- The location must be accurate and not able to be confused with another address. If unclear use a legal description or map coordinates.

Time restrictions:

- the time period shall be a reasonable time in which to take the required action
- in the case of ceasing the commission of an offence, the timeframe should be immediately upon receipt of the abatement notice. Councils should not be seen to be giving approval for offending to continue
- if an abatement notice is issued under section 322(1)(a)(ii) and the person is complying with the RMA, regulations, rule in a plan or resource consent then the time shall not be less than seven days (refer section 324 (d)).

IMPORTANT NOTE

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

- You cannot abate someone to apply for a resource consent *(Auckland City Council v Oman Holdings Ltd)*.
- You should not tell the subject how to become compliant but merely outline the standard which is to be met. This may be done by referring them to industry guidelines or their original consent application. Telling them how to do something can open the council up to costs if that method is proven inappropriate or ineffective.
- It is important for an abatement notice to fully and fairly inform the recipient not only of the action they are required to take, or refrain from taking, but also of the grounds upon which the notice is issued. If using subsection 322(1)(b) requiring someone to take action, you must include the reasons why it is also necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment.

ENFORCEMENT ORDERS

In the writer's experience applying for enforcement orders can be a lengthy and expensive exercise and sometimes without a helpful or meaningful outcome. If they are to be applied for then they are most effectively and efficiently sought when they are included as part of a prosecution. By seeking an enforcement order at the time of sentencing they may be able to be obtained relatively easily and without the need for a separate process and subsequent costs. They would only be considered as an independent process (for example, without an accompanying prosecution) if prosecution was inappropriate for some reason, perhaps the statute of limitations had passed.

It is not intended to cover the content of enforcement orders in depth in this training. Suffice to say expert legal advice should be sought if this is considered to be the most appropriate action to pursue.

PROSECUTION AND PENALTIES

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

As for other serious offences against the RMA the maximum penalty is two years' imprisonment, or a fine not exceeding $300,000 in the case of a natural person and a fine not exceeding $600,000 in the case of a person other than a natural person (for example, a company).

If the offence is a continuing one, the offender is also liable to a further fine of a maximum of $10,000 per day or part of a day during which the offence continues. The court takes an extremely dim view of breaches of an enforcement order; after all, such an order is a formal direction from the court. The first two periods of imprisonment imposed under the RMA were for breaches of enforcement orders.

PRACTICAL EXERCISE

Complete an abatement notice.

PRACTICAL EXERCISE

Complete either a formal warning letter or an infringement notice for the offence identified in the practical exercise.

SUMMARY

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

Punitive

- **Formal warning**
- **Infringement notice**
- **Prosecution**

Directive

- **Letter of direction**
- **Abatement notice**
- **Enforcement order**

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

ASSESSMENT

Complete the assessment for this chapter.

9

THE COURT PROCESS

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THE COURT PROCESS

TE TUKANGA KŌTI

INTRODUCTION

Whenever a 'person' is charged with a Resource Management Act 1991 (RMA) offence, the prosecutor (council) is alleging that an offence has occurred and that the defendant has committed it.

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

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

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

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

AIM

This chapter aims to make local government enforcement officers familiar with New Zealand's criminal court system and the prosecution process as it applies to Resource Management Act offences.

THE DISTRICT COURT

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

DISTRICT COURT JUDGES

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

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

COMMUNITY MAGISTRATES

A community magistrate is a judicial officer presiding over minor District Court matters. They will not preside over RMA matters.

THE DOCTRINE OF PRECEDENT

APPLICATION

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

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

COURT PROCEDURE AND FUNCTIONS

We will now focus on some terms specific to the court system.

COURT OFFICIALS AND THEIR FUNCTIONS

Judge

- Has the overall responsibility of the court.
- Makes his/her decisions according to the facts s/he receives from witnesses.
- Decides on sentence, usually after taking into account various submissions, both written and oral, from both sides.
- In jury trials, the judge directs the jury in matters of law.

Jury

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

Registrar

- Reads out the charge to the court and the defendant.
- Assists the judge in administrative matters.
- Labels, numbers and records exhibits.
- In some courts, the registrar may swear in the witness.

Stenographer

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

Prosecutor

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

Defence counsel

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

Witness

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

Defendant

- The subject of the proceedings in the District Court.

Court attendants

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

TERMS USED IN COURT

Election

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

Conviction

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

Remand

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

Adjournment

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

Recess

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

PROTOCOL AND ETIQUETTE

Terms of address

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

Justices of the peace are addressed as 'Your Worship', or alternatively, 'Sir' or 'Ma'am'. The registrar of the court is referred to as 'The Registrar' or 'Mr or Madam Registrar'.

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

Addressing the court

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

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

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

Bowing

Only persons who have been admitted to the bar should bow to the judge. All other persons in the court should merely stand up and wait until the judge sits down. They then sit down.

LOCAL GOVERNMENT AND THE JUDICIARY

Relationship

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

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

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

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

PENALTIES AVAILABLE

The penalties imposed by the court have four main purposes:

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

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

Fine

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

Probation

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

Restorative justice

This is an alternative to traditional sentencing. If the defendant pleads guilty they can apply for restorative justice (RJ). If the prosecutor supports the application then the court will engage an independent third party to coordinate the RJ process. It will generally involve public apology by the defendant, consultation with a relevant sector of the community and participation by the defendant in a community supported project in lieu of a fine. The defendant will still receive a conviction, however it enables an attempt to make good with the community. Under some circumstances RJ can be relevant for regional councils when they are engaged in prosecutions with territorial local authorities.

There has been a recent 'trend' for some defendants to seek restorative justice. As the prosecutor you need to be on guard for 'insincere' processes. There are a growing number of examples where defendants have pursued restorative justice in an attempt to avoid conviction or purely to defer financial costs to their insurer. These are clearly not genuine signs of remorse or wanting to 'make good'!

Diversion

The police operate a scheme where first time offenders can escape conviction for a minor offence if they admit guilt, and complete a police-managed community based task. Generally regional councils have not been set up to manage diversion. The writer's view is that diversion is not an appropriate outcome for an RMA prosecution. Diversion is designed to deal with 'minor' offending. If a particular RMA breach is, in fact, minor it should be dealt with by infringement or warning. However, if it is serious enough to warrant prosecution then it is serious enough to progress to sentencing.

Community service (previously known as periodic detention or PD)

Available as an alternative to imprisonment. The practicable maximum period would be seven months. The offender has to work all day each Saturday for the term imposed.

Prison

For serious offences where deterrent and punishment factors outweigh those of reform or rehabilitation. Very rare in RMA cases.

Convict and discharge

A conviction is recorded but no penalty is imposed

Discharge under section 19 of the Criminal Justice Act

This is used when a minor offence has been proved. It has the effect of a dismissal, that is, no conviction recorded.

Suspended sentence

The offender must come up for sentence within a prescribed time (not exceeding 12 months) if they re-offend. It may be conditional, for example the offender must pay a sum of money towards the costs of prosecution or undertake psychiatric treatment.

THE ACTUAL PROSECUTION PROCESS

The prosecution process itself can be lengthy and complex. Due to the introduction of the Criminal Procedure Act 2011, there are many paths a prosecution may follow. As council staff, we must put our faith in our legal advisors that we are on the correct one.

DISCLOSURE OF INFORMATION

When a prosecution is initiated, the content of the file must be disclosed to the defendant. The process surrounding disclosure is now codified within the Criminal Disclosure Act 2008 (CDA). There are very clear rules that must be followed by the prosecutor relating to disclosure. Legal advice from experienced criminal prosecutors should be sought by local government agencies in respect of their disclosure obligations and acceptable practices. In practice your prosecuting lawyers may manage the disclosure process themselves.

Release of information by local government agencies is generally governed by the Local Government Official Information and Meetings Act 1987 (LGOIMA). There are boundaries between these two Acts and it is important that you have clear policies established to manage obligations under both the CDA and LGOIMA.

Under CDA some documents are exempt from disclosure, including correspondence between the council and its lawyer relating to the prosecution. There may be attempts by defence lawyers to obtain material from the investigation file while the investigation is still underway and prior to charging documents being filed. They have no entitlement to disclosure until such time as charges have been filed. Some defence lawyers take extreme issue with this.

However, once charging documents have been filed it is important to take a proactive approach and complete disclosure as soon as possible. Full and early disclosure enables the defence to review the evidence and make an informed decision on what plea should be entered. Under the new Criminal Procedure Act there are also very clear and strict obligations on disclosure.

Remember that disclosure is an ongoing obligation. If a plea of not guilty is entered and the file is then prepared for a defended hearing, then all of the new material such as briefs of evidence must also be disclosed. If new information comes to light that also must be disclosed.

PLEA DISCUSSION

Yes, it happens. Essentially the term refers to the situation where the defence makes an approach to the prosecuting agency and wishes to discuss 'options' for how to proceed with the matter. This invariably occurs as a result of the defence lawyer reviewing the evidence and realising that there is no reasonable defence available.

Generally there are a number of matters that can be negotiated. These include the number of charges, who faces them, the content of the summary of facts and other sentencing issues.

Historically, plea discussion could only ever be initiated by the defence. Under the Criminal Procedure Act there is now formal opportunities recognised in statute for these discussions to take place. It can be a very common sense way of proceeding, avoiding the need for a costly defended hearing. A degree of recognition should be given to the defendant when they are keen to acknowledge their liability early in proceedings.

However, extreme caution needs to be taken in plea negotiation as councils can, and have, been criticised by the courts and the public for what could be perceived as inappropriate 'bargaining'.

IMPORTANT NOTE

Plea discussion is a very complex area and should never be entered into without sound legal advice. It is absolutely vital that both the charges and the summary of facts are agreed upon before committing to a 'deal'. Ensure that the settled position is committed to paper by your prosecutor to avoid defence counsel from changing their position in court.

HELPFUL CASE

Auckland City Council v North Power Ltd

The defendant had pleaded guilty to two charges under s338(1)(a) for clearing indigenous vegetation without a resource consent in contravention of the district plan.

Approximately 72 informations (charges) had been laid by the informant council. Discussions between the parties resulted in an agreement whereby all but two of the charges were withdrawn and the defendant would elect summary jurisdiction and would plead guilty. The council then said that it was not seeking any fine in addition to the enforcement order (which would cover remediation work and the recovery of some costs). Given all these factors, the District Court said at paragraph 23:

Counsel must anticipate that the Court is likely to view this as an abuse of the process of the Court. Criminal proceedings should not be used as a means of achieving civil remedies. Reparation for harm done is certainly one of the purposes of sentencing under s7 of the Sentencing Act 2002, but it sits alongside purposes such as accountability, denunciation and deterrence – the last of these being particularly important in the RMA context as Machinery Movers makes clear.

The court was also 'surprised' that there was no victim impact statement, which prosecutors are obliged to put before the court (s17 Victim's Rights Act 2002). The court considered that the difficulty in assessing the land owners' losses in a sentencing hearing was a 'special circumstance' which would make imposing a sentence of reparation inappropriate.

In relation to fines, the court said at paragraph 67:

The combined influence of s8 and 40 (2) of the Sentencing Act 2002 may mean that further upward movement in the level of fines can be expected. Certainly earlier levels of fines cannot be taken as a reliable guide.

The defendant was ordered to pay a fine, and an enforcement order was made to require remediation work to be done.

[2004] NZRMA 354

PREPARATION FOR A GUILTY PLEA

SUMMARY OF FACTS

When the file is submitted to the prosecutor for the first appearance of the defendant there is a requirement to have a summary of facts completed and on the file.

The summary of facts is exactly that. It is a document prepared by the officer in charge of the case outlining the circumstances of the offending and how the defendant is linked to the offences.

An example of a basic summary of facts is attached in appendix D.

There is a tendency to include either too much or too little detail in a summary of facts. Experience will dictate the appropriate balance. It should be approached as if the reader has no background knowledge of the incident whatsoever. Each offence must be included and linked to the defendant, including any explanation, or lack thereof, that the defendant has made.

Should a guilty plea be entered, the summary of facts will be read by the judge and will help form the basis of sentencing.

VICTIM IMPACT STATEMENTS

Victim impact statements (VIS) may be included where people have suffered as a result of the offending. In an RMA application this could be quite diverse – perhaps people who have suffered as a result of objectionable odour discharge through their residential homes or lost part of their land due to lack of sediment control on a neighbouring property.

There are legal requirements under the Victims' Rights Act 2002 that must be adhered to relating to the gathering, copying and use of VIS. A form has been prepared to assist with the gathering of VIS, which is attached in appendix E.

SENTENCING

Sentencing occurs when there has been a conviction entered against a defendant as a result of a prosecution. It is the process whereby a court arrives at an appropriate punishment for offending. Sentencing is a balancing exercise in which a large range of factors are weighed.

In practice in RMA cases there can be much debate between the prosecution and the defence when it comes to sentence. Even for relatively straightforward cases there seems to be a need for lengthy written and oral submissions from both parties relating to sentencing factors. Generally defence lawyers will try and minimise any aggravating factors that will cast a negative light on their client while making much of any mitigating factors. This is an understandable approach. However the prosecution must be vigilant in the examination of such submissions and be prepared to counter any submissions that are embellished to an excessive degree or are just outright deceptive. Remember, it is these documents that the court will consider when imposing sentence.

RMA sentencing submissions tend to follow similar formats, addressing similar points. These have evolved over time with certain cases clarifying the particular nuances of RMA sentencing. These cases are routinely referred to in sentencing submissions and provide helpful guidance, not only to the sentencing judge but also to council staff when considering the seriousness of offences they are investigating.

In Auckland Regional Council v Machinery Movers, [1994] 1 NZLR 492 at 501, the High Court noted that:

Like many other statutes, the RMA is silent on the matters which may be taken into account on sentencing. To a large extent, the relevant criteria must be inferred from a consideration of the broad legislative objectives.

The High Court quoted and approved of the sentencing factors in R v Bata Industries Ltd (1992) 9 OR (3d) 329 (liability); 7 CELR (NS) 293 (sentencing) and added:

Within the subtopic of public welfare offences, environmental offences have their own set of special considerations... The severity of the sentence should vary in accordance with several factors, including:

A. The nature of the environment affected;

B. The extent of the damage afflicted;

C. The deliberateness of the offence;

D. The attitude of the accused.

In sentencing corporations convicted of environmental offences, the court should consider:

A. The size, wealth, nature of operations and power of the corporation;

B. The extent of attempts to comply;

C. Remorse;

D. Profit gained from the offending;

E. Criminal record or other evidence of good character.

In the sentencing notes of almost every prosecution under the RMA since the Machinery Movers case, some or all of the sentencing factors for environmental offences as stated in the Bata decision and approved by the High Court in Machinery Movers have been referred to.

The Sentencing Act 2002 "applies to all sentencing on criminal charges including charges laid under the Building Act 1991 and the Resource Management Act" (*Selwyn Mews Ltd v Auckland City Council High Court, Auckland, CRI2003-404-159 to 1 61*). The Sentencing Act 2002 also amended section 339 by inserting subsection (4), providing for a sentence of community work to be imposed. Sections 7, 8 and 9 of the Sentencing Act 2002 set out the purposes of sentencing. They are included in full in the 'further reading' section.

CASE LAW

It has long been a standard practice of sentencing judges to give a reduction of penalty of up to one third for a guilty plea by a defendant. It can be frustrating when defendants enter a plea of not guilty; the matter is prepared for a defended hearing at much expense and effort, only for the defendant to change their plea to guilty at the last minute and still receive this 33 per cent reduction in fine.

The Court of Appeal has now put paid to this practice by introducing a sliding scale approach. If a guilty plea is entered at the first opportunity there may be a 1/3 reduction, if it is made at a status hearing then 1/5. However if within three weeks of a trial or hearing then only a 1/10 reduction will apply.

R v Hessell [2009] NZCA 450

PREPARATION FOR A DEFENDED HEARING OR TRIAL BY JURY

Should a plea of 'not guilty' be entered then the prosecution must prepare for a defended hearing or a trial if the defendant has elected trial by jury.

The election of trial by jury introduces a further complexity, in that the prosecution must be taken over by the Crown. Your local Crown prosecutor will then take control of the file and meet all costs.

Hearing preparation is an onerous, time consuming process that will require the input of experienced staff, but any enforcement officers involved in the case may be required to assist in preparation and should develop an understanding as to what is required.

Preparation of a defended hearing or trial cannot be examined in depth in this forum. However, some of the preparation required is included as further reading. Additional material in respect of sentencing is also included as further reading.

SUMMARY

- **If prosecution is the enforcement option pursued then the matter will be decided within the criminal court system.**
- **Different processes are followed depending upon whether a plea of guilty or not guilty is entered by the defendant.**
- **These processes place certain requirements on local government staff.**
- **The court must consider a number of factors when sentencing an offender.**

ASSESSMENT

Complete the assessment for this chapter.

FURTHER READING

WITNESS SUMMONS

The prosecution will be based around evidence gathered during the course of the investigation. This evidence may be in a variety of forms including documentary and oral (see chapter 2 for more depth).

For this evidence to be admitted into court at a defended hearing there is a requirement for it to be produced by a witness. To ensure a witness attends court, they must be summonsed.

A witness summons is a formally binding document advising a person they are required to attend a hearing.

Failure to appear if not summonsed is an embarrassment, and may well lead to the case being dismissed and expenses awarded against the council.

Failure to appear after having been served a summons could result in a bench warrant for arrest being issued.

PREPARING FOR A DEFENDED HEARING

There are a number of matters to attend to should a matter be defended. The largest single task is preparing the briefs of evidence. Each witness appearing for the prosecution must have a brief of evidence prepared for them.

A brief of evidence is a document that clearly outlines in a logical manner all the admissible evidence a witness can give about the matter before the court.

Again, experienced criminal prosecutors should be engaged for a defended hearing.

Function

A brief of evidence is prepared for every witness.

Collectively the briefs will:

- prove all the ingredients of the offence
- identify the defendant as the offender.

The briefs of evidence will also:

- enable the prosecutor to assess whether a prima facie case exists
- guide the prosecutor when presenting the prosecution case as to what each witness will say.

IMPORTANT NOTE

Individual witnesses may not prove all the ingredients of the offence, but the total information from all the witnesses must prove the facts.

PREPARING BRIEF OF EVIDENCE

Layout

Briefs should always:

- be typed in double spacing
- be written in the first person
- have a left hand margin of 50mm (2”)
- have blocked paragraphs
- be typed on one side of the paper only
- have only one main point in each paragraph.

Introductory paragraph

When briefs of evidence are prepared, the first paragraph will include:

- full name of the witness
- witness’ occupation/position
- city or town they are from.

If it is a brief for an officer, it will include their duties and their office (no personal details are required).

Note: Unless it is relevant to the charge, do not include the home address of a witness.

Evidential content

The body of the brief contains the matters the witness can prove.

- The evidence must be relevant and admissible.
- The facts must be accurate.
- The facts must not be ‘coloured’.
- It must cover the chain of evidence if relevant.
- It must be in chronological order.
- It must cover the identification of the defendant.
- It will show the production of exhibits where necessary.

The preparation of the file for a defended hearing should be managed by an experienced staff member, or if the council has yet to gain that experience, assistance should be sought from a lawyer with prosecution experience.

As soon as advice has been received that charge/s are going to be defended, preparation of the file should commence immediately.

DO NOT LEAVE IT TO THE LAST MINUTE!

Expert witnesses

Be aware when you are relying on expert witnesses to give evidence in a criminal hearing that they are bound by the 'High Court Rules – Code of Conduct for expert witnesses'. Failure to adhere to these rules may result in their evidence being deemed inadmissible.

SENTENCING ACT CONSIDERATIONS

7. Purposes of sentencing or otherwise dealing with offenders

(1) The purposes for which a court may sentence or otherwise deal with an offender are –

(a) to hold the offender accountable for harm done to the victim and the community by the offending; or

(b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or

(c) to provide for the interests of the victim of the offence; or

(d) to provide reparation for harm done by the offending; or

(e) to denounce the conduct in which the offender was involved; or

(f) to deter the offender or other persons from committing the same or a similar offence; or

(g) to protect the community from the offender; or

(h) to assist in the offender's rehabilitation and reintegration; or

(i) a combination of two or more of the purposes in paragraphs (a) to (h).

(2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

8. Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court:

- must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
- must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
- must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and must take into account any information provided to the court concerning the effect of the offending on the victim; and
- must impose the least restrictive outcome that is appropriate in the circumstances; and
- must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
- must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
- must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

9. Aggravating and mitigating factors (irrelevant subsections removed)

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

(a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon:

(b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:

(c) that the offence was committed while the offender was on bail or still subject to a sentence:

(d) the extent of any loss, damage, or harm resulting from the offence:

(g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:

(h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

(i) the hostility is because of the common characteristic; and

(ii) the offender believed that the victim has that characteristic.

(i) premeditation on the part of the offender and, if so, the level of premeditation involved:

(j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

(a) the age of the offender

(b) whether and when the offender pleaded guilty

(c) the conduct of the victim

(d) that there was a limited involvement in the offence on the offender's part

(e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding

(f) any remorse shown by the offender, or anything as described in section 10 (g) any evidence of the offender's previous good character.

(3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

(4) Nothing in subsection (1) or subsection (2):

(a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or

(b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.

The High Court in Selwyn Mews (High Court, Auckland, CRI2003-404-159 to 161) said at paragraph 354 that Machinery Movers "continues to have application but must now be read in the light of the provisions of the Sentencing Act 2002".

Paragraphs 37 to 42 of that decision provide a useful summary of the principal provisions that may be relevant.

...It [the Sentencing Act 2002] calls for a systematic approach to sentencing, commencing with a consideration of the purposes of sentencing under s7. Not all those purposes will always be relevant to sentencing in environmental cases. For example, in some cases the harm done may be to the community generally rather than specific members of it. Reparation to particular victims may be relevant in some cases but not others. Rehabilitation will have no relevance to corporate offenders and may not be relevant to individuals who are otherwise of good character.

[37] But many of the purposes of sentencing in s7 will usually be relevant in environmental cases including holding the offender accountable for harm done; promoting a sense of responsibility for the harm; denunciation and deterrence (both personally and generally).

[38] The principles of sentencing in s8 will also be relevant particularly (under s8(a)) the gravity of the offending and the degree of culpability involved. That will include the extent of any damage or adverse effects caused to the environment and the extent to which there was deliberate or reckless conduct. As well, the court will need to consider the issues of seriousness of the offence and penalties under s8(b), (c), and (d); consistency in sentencing levels under s8(e); the effects on victims under s8(f) where applicable; and the particular circumstances of the offender under s8(h) and (i). Where there are issues about mitigating any adverse effects on the environment such as repairing damage or clean up work, then s8(j) and 10 will become relevant.

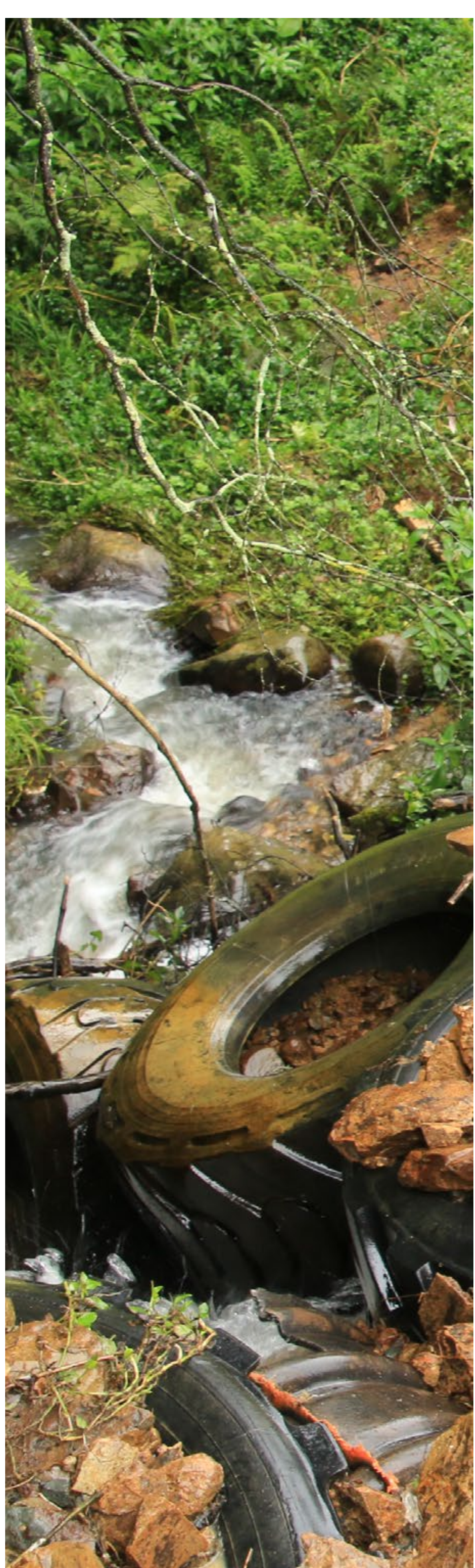
[39] Aggravating and mitigating factors under s9 are to be considered. Although a number of these do not have particular relevance in environmental cases, the matters to be considered are not exclusive: s9(4).

[40] In environmental cases, fines will most often be the appropriate penalty. There are a number of provisions of the Sentencing Act relevant to fines. Section 13 provides that a fine must be imposed unless any of the specified exceptions in s13(1) (a), (b), (c), or (d) applies. Other provisions relevant to fines are s14 and 39 to 43. Obviously, the capacity of the offender to pay a fine will be very relevant and the court has power to order an offender to make a declaration of financial capacity if necessary. That might have been a useful tool in the present case.

[41] Under the Resource Management Act, the court also has power to impose a sentence of imprisonment or community work: s339(1) and (4). If a sentence of imprisonment is being considered, s16 of the Sentencing Act is important. First, regard must be had to the desirability of keeping offenders in the community so far as practicable in terms of s(1). Secondly, there is a presumption against imprisonment unders 16(2). Section 8(g) is also relevant (the least restrictive outcome in the circumstances).

[42] Under the Resource Management Act, enforcement orders under s314 may also be made either instead of or in addition to other penalties: s339(5). As monetary orders may be made under s314(d), reparation under the Sentencing Act may have less relevance in environmental cases but the power exists under s12, 14 and 32 to 38. Where a monetary order is not made under s314(d), attention must be given to s12 Sentencing Act which requires a reparation order to be made where a victim has suffered loss or damage to property unless it would create undue hardship or there are other special circumstances rendering such an order inappropriate.

See also paragraphs 40 to 43 of Waitakere City Council v Gionis, 17/1 2/02, Judge McElrea, DC Auckland, CRN 1090034293, 1090034295, 2090007563, for comments the applicable provisions of the Sentencing Act 2002.



APPENDICES

NGĀ ĀPITIHANGA

APPENDIX A

Example of a completed information form

MOJ9001

Charging Document

s 14 Criminal Procedure Act 2011

CRN:

Filed in the District Court at Thames **on:** 30 October 2013

Defendant

Name:* Justin Ryan Tyme **PRN:**

Address: 327 State Highway 52
Paeroa Road
RD1 Thames 3570

Gender:* Male
Date of birth:* 02/04/58
Driver licence no:
Occupation: Farmer

Offence details

I, Walter Michael Mitty, Enforcement Officer of Waikato Regional Council, have good cause to suspect that Justin Ryan Tyme has committed the offence specified below.

Date of offence:* Between 9 May 2010 and 5 May 2013

Offence location:* at Hikuai

Offence description: * Contravened Section 15(1)(a) of the Resource Management Act 1991

in that you permitted the discharge of a contaminant, namely farm animal effluent into water, namely a farm drain which flows to an unnamed tributary of the Paeroa River, in a manner not expressly allowed by a national environmental standard or other regulations, a rule in a regional plan, or a resource consent

Legislative reference:* Section 338(1)(a) & 15 (1)(a)Resource Management Act 1991

State the full legislative reference, including year and relevant section(s) of the Act

Maximum penalty:* 2 years imprisonment and / or a $300,000 fine

Offence category:* 3 **Representative charge:*** yes **Alternative charge:*** no

Select Yes if the offence description is worded as a representative or alternative charge.

First appearance hearing

Date: **Time:**

Court:

Prosecutor details

Prosecutor:* Meredith Connell

Address for service:* PO Box 2213, Auckland 1140
Email: reception@meredithconnell.co.nz
Phone: 09 3367500

Signed:*

*Important: All fields marked * are mandatory. Please ensure all details are entered correctly, sign this document, and present it to the District Court to file the charge.*

APPENDIX B

ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA247/2016
[2016] NZCA 619

BETWEEN	LESLIE WILLIAM FUGLE First Appellant
	PACIFIC FARMS DEVELOPMENT LIMITED Second Appellant
AND	THE QUEEN Respondent

Hearing:	2 November 2016
Court:	Miller, Winkelmann and Asher JJ
Counsel:	C M Stevens and I Tokmadzic for Appellants J C Pike QC for Respondent
Judgment:	19 December 2016 at 10 am

JUDGMENT OF THE COURT

A An extension of time to appeal is granted.

B Leave to appeal is granted.

C The appeal is dismissed.

D Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publically available database until final disposition of trial. Publication in law report or law digest permitted.

FUGLE & ANOR v R [2016] NZCA 619 [19 December 2016]

REASONS OF THE COURT

(Given by Winkelmann J)

[1] The issue on this appeal concerns the limits of the power conferred by s 332 of the Resource Management Act 1991 (RMA) to local authority enforcement officers to enter onto private property to inspect for compliance with the RMA, regulations, plans and resource consents.

[2] The appellants, Mr Fugle and Pacific Farms Development Ltd, appeal a pre-trial decision of Judge Thompson ruling evidence admissible at a forthcoming trial in respect of charges under the RMA.[1] The evidence was gathered during the course of 13 inspections of the site the subject of the charges, purportedly carried out under the authority of s 332 of the RMA. The appellants say that from around the time of the second site inspection, the Council knew offences had been committed under the RMA and in those circumstances entry on to the site could only be authorised by a search warrant issued under s 334 of the RMA. That section provides for the issue of search warrants for the collection of evidence in connection with imprisonable offences under the RMA.

[3] It follows, the appellants say, that every entry onto the land after the second visit was not authorised by s 332, the officers were trespassing on the land and the evidence gathered during the visits was gathered unlawfully and in breach of the appellants' rights protected by s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA). The District Court was wrong to hold to the contrary.

Background

[4] Pacific Farms Development is one of two holders of resource consents for the development where the alleged offending occurred. Mr Fugle is the sole director of Pacific Farms Development and was named as the owner's/developer's

[1] *R v Fugle* DC Palmerston North CRI-2014-054-3231, 18 April 2016 [DC judgment].

representative in the draft management plan provided to the Horizons Regional Council with Pacific Farms Development's applications for resource consent.

[5] On the face of the record, it was a condition of that consent that the site be subject to a "weekly monitoring programme to assess the site's compliance with" the resource consent. Section 332 of the RMA authorises council enforcement officers to enter on to land to check for compliance with resource consents. Section 332 provides:

> **332 Power of entry for inspection**
>
> (1) Any enforcement officer, specifically authorised in writing by any local authority or consent authority to do so, may at all reasonable times go on, into, under or over any place or structure, except a dwellinghouse, for the purpose of inspection to determine whether or not—
>
> (a) this Act, any regulations, a rule of a plan, a resource consent, section 10 (certain existing uses protected), or section 10A (certain existing activities allowed), or section 20A (certain lawful existing activities allowed) is being complied with; or
>
> (b) an enforcement order, interim enforcement order, abatement notice, or water shortage direction is being complied with; or
>
> (c) any person is contravening a rule in a proposed plan in a manner prohibited by any of sections 9, 12(3), 14(1), 15(2), and 15(2A).
>
> (2) For the purposes of subsection (1), an enforcement officer may take samples of water, air, soil, or organic matter.
>
> (2A) Where a sample is taken under subsection (2), an enforcement officer may also take a sample of any substance that the enforcement officer has reasonable cause to suspect is a contaminant of any water, air, soil, or organic matter.
>
> (3) Every enforcement officer who exercises any power of entry under this section shall produce for inspection his or her warrant of appointment and written authorisation upon initial entry and in response to any later reasonable request.
>
> (4) If the owner or occupier of a place subject to inspection is not present at the time of the inspection, the enforcement officer shall leave in a prominent position at the place or attached to the structure, a written notice showing the date and time of the inspection and the name of the officer carrying out the inspection.

> (5) An enforcement officer may not enter, unless the permission of the landowner is obtained, any land which any other Act states may not be entered without that permission.
>
> (6) Any enforcement officer exercising any power under this section may use such assistance as is reasonably necessary.

[6] The first site inspection took place on 14 March 2014. Non-compliance with the resource consent was immediately observed — the Council issuing an inspection notice recording that the consent holders had been assessed as "[s]ignificantly [n]on-complying with resource consents" in connection with erosion and sediment control. The assessment recorded:

> The non-compliances identified above are serious and require urgent attention. By failing to comply, [the consent holders] have contravened section 9 (2) of the [RMA], which in turn is an offence under section 338(1) of the [RMA]. Failure to take effective action within the timeframes specified within this notice will result in enforcement action [being] taken.

The timeframe for compliance was six days later, 20 March 2014.

[7] The next inspection took place on 21 March 2014, with the subsequent inspection notice noting the same non-compliance issues. On this occasion the notice stated "[f]ailure to take effective action within the timeframes specified within this notice will result in enforcement action [being] taken". The notice gave the consent holders until 28 March to remedy the non-compliance.

[8] A third inspection followed a week later, on 28 March. The inspection notice issued for this visit recorded that the resource consent holders had failed to meet the 28 March deadline and continued:

> By failing to comply [the resource consent holders] have contravened section 9(2) of the [RMA], which in turn is an offence under section 338(1) of the RMA. Ongoing non-compliance is not acceptable therefore [the Council] is now considering enforcement action in relation to these offences.
>
> … Given the continued failure to meet the dates specified in the previous notices [the Council] will not be extending these time frames to take the necessary action to comply.

[9] Mr Fugle was sent a copy of this notice. Contrary to the timeframe given in the inspection notice, the letter enclosing the notice extended the time for completion

of the compliance to 9 or 11 April 2014 (both dates being given at different points). The letter said "[f]ailure to ensure compliance by this date will result in enforcement action being initiated by [the Council] against [the resource consent holders]".

[10] Around this time an advisor associated with the development, Mr Coulson, emailed Mr Fugle to report on a meeting with Council officers regarding the compliance issues:

> On discussion with the guys they were looking at taking enforcement action this week by way of an abatement notice to cease works. I said I would discuss with you how we could get the site compliant by next Wednesday so on that basis they had agreed to suspend action until then.

[11] Ten more inspections and nine inspection notices followed, although the date for compliance, 28 March 2014, was now in the past. Every one of the nine inspection notices included a statement that the resource consent holders had been assessed as significantly non-complying with resource consents and continued:

> Ongoing non-compliance is not acceptable therefore [the Council] is now considering enforcement action in relation to these offences.
>
> … Given the continued failure to meet the dates specified in the previous notices [the Council] will not be extending these time frames to take the necessary action to comply.

[12] The last s 332 site inspection occurred on 12 August 2014. A search warrant for the site was obtained on 12 September 2014 and executed on 19 September. On 30 October 2014 the Council charged Mr Fugle and Pacific Farms Development with continuing offences, with a date range between 2 May 2014 and 19 September 2014.

[13] During the course of the s 332 inspections, the Council officers took photographs and videos, some of which it intends to produce as evidence in support of the charges. We understand that it is this evidence which was the subject of the admissibility argument.

[14] In the District Court, Mr Fugle and Pacific Farms Development relied on the documentary record of the inspections to argue that, from the time of the completion of the very first site visit on 14 March 2014, the purpose of the s 332 inspection mechanism had been met and exhausted. From that date, Council officers had

formed the opinion that an offence had been committed. Thereafter, it was argued, visits to the site were for the purpose of action "in respect of which an offence has been or is suspected of having been committed against [the RMA] or regulations that is punishable by imprisonment".[2] That being so, s 334 came into play and the "inspection" power under s 332 could not be used to gather evidence. Section 334 provides:

> **334 Application for warrant for entry for search**
>
> (1) An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2012) who, on an application made in the manner provided in subpart 3 of Part 4 of that Act, is satisfied that there is reasonable ground for believing that there is in, on, under, or over any place or vehicle anything—
>
> (a) in respect of which an offence has been or is suspected of having been committed against this Act or regulations that is punishable by imprisonment; or
>
> (b) which there is reasonable grounds to believe will be evidence of an offence against this Act or regulations that is punishable by imprisonment; or
>
> (c) anything which there is reasonable ground to believe is intended to be used for the purpose of committing an offence against this Act or regulations that is punishable by imprisonment—
>
> may issue a warrant authorising the entry and search of any place or vehicle.
>
> (2) The provisions of Part 4 of the Search and Surveillance Act 2012 apply.
>
> (3) Despite subsection (2), sections 118 and 119 of the Search and Surveillance Act 2012 apply only in respect of a constable.

District Court judgment

[15] Judge Thompson was satisfied that the inspection power under s 332 could be used repetitively to monitor compliance with the provisions of a resource consent.[3] He said that the section itself sets no limit on the occasions of its use.[4] It does not provide that, if evidence of what may be offending under the RMA is observed, no

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2 See Resource Management Act 1991, s 334(1)(a).
3 DC judgment, above n 1, at [19].
4 At [19].

further inspection may be made. Nor does it provide that no further s 332 inspection may be made where there is a possibility information which is gathered will later be used to support a prosecution.

[16] Of the relationship between ss 332 and 334 he said:[5]

> The point at which the situation changes is the point when prosecution action is decided upon. Even though compliance monitoring may still be appropriate after that time, the *Waikato RC v Campbell* judgment makes it clear that observations or material from entries onto the property after such a decision is made should not be given in evidence, and that a search warrant must be sought to authorise evidence gathering entries after that point.

[17] In reaching this view he drew upon the following passage in the judgment of Venning J in *Waikato Regional Council v Campbell* :[6]

> [42] As I read the Act and s 332 in particular, it is contemplated that an enforcement officer making an inspection under s 332 may obtain evidence which would support a prosecution under the Act. The purpose of the inspection process is to determine whether the property owner is complying with the Act, regulations, resource consents, etc. or not. It follows that the section contemplates that non-compliance may be detected. If the property owner is not complying then the council will have to determine what steps might be appropriate as a consequence of that non- compliance. As counsel, Mr Quinn submitted, a whole suite of options is available to the council at that stage. They range from a letter requesting compliance to the issue of an infringement order … to ultimately, a prosecution. Which of the various steps might be appropriate will depend on all the circumstances including but not limited to the extent of the non-compliance, the severity of the effect, whether it is an ongoing or a one-off matter and the particular history of the property owner. If a decision is taken to prosecute then the information obtained during the course of that inspection to determine compliance would prima facie be admissible.
>
> [43] However, if a decision was taken to prosecute then it would be wrong for the council and its enforcement officer to rely on s 332 to then return to the property to gather further evidence to support the prosecution. At that stage the purpose of the entry onto the property has changed from inspection to determine compliance to an entry onto the property to obtain evidence to support a prosecution. The proper way for such further evidence to be obtained is by way of search warrant.
>
> [44] The determining factor is the underlying purpose for the visit to the property. That is clear from the wording of s 332. An inspection is authorised under s 332 if it is for the purpose of determining compliance or contravention: 332 (1). If the purpose of the visit is to obtain evidence to

5 At [21].
6 *Waikato Regional Council v Campbell* [2003] NZRMA 481 (HC).

support a prosecution of an offence punishable by imprisonment then s 334 applies and a warrant is required.

[18] The Judge concluded that there was nothing in the documentary material to lead him to conclude that the Council had decided to prosecute at any time during the currency of the s 332 inspections.[7] He noted the time gap between the last s 332 inspection (12 August 2014), and the issue of the search warrant (12 September 2014) and the laying of the first charges (30 October 2014).[8] He saw nothing in the documents, or the sequence of events they revealed, to suggest a manipulation of the inspection and search provisions of the Act.

Extension of time and leave to appeal

[19] The appellants were late in filing their notice of application for leave to appeal to this Court, because the notice was mistakenly filed first in the High Court. They thus require an extension of time to apply for leave. The Crown does not oppose an extension of time and we grant one accordingly.

[20] The appellants also require leave to appeal under s 217(2)(b) of the Criminal Procedure Act 2011, the District Court judgment being a pre-trial decision in respect of the admissibility of evidence. The Crown does not oppose leave being granted and we grant leave accordingly, given the significance of the issues for the forthcoming trial.

Discussion

[21] There are two parts to the appellants' argument in this Court; the first is concerned with the legal test applied by the Judge, the second with his factual findings.

The legal test

[22] Mr Stevens argues that the Judge was wrong in his characterisation of the relationship between ss 332 and 334. Contrary to the Judge's finding, the Council

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7 DC judgment, above n 1, at [22].
8 At [22].

need not need reach "the point when prosecution action is decided upon" before the right to use s 332 to go on to the site is no longer available.[9] He submits that once enforcement officers know of offending in connection with the site, they must thereafter seek a s 334 warrant for further entries on to the land. To require that there be a commitment at the time to prosecute is to place a gloss on the warrant process which is illogical. Moreover, the purpose of s 334 is to ensure police supervision of any search and the collection of any evidence acquired. That control, and the scrutiny of the Search and Surveillance Act 2012, could be easily bypassed (and was bypassed in this case) if s 332 is read to authorise entry on to the land and allow for the collection of evidence in circumstances such as these.

[23] We agree with Mr Stevens that the issue is not, as the Judge characterises it in the passage we have set out at [16], whether the decision has been taken to prosecute. The issue is rather, as Venning J frames it in *Waikato*, just what the purpose of the visit is. That is because the authority to visit the site under s 332 is conditioned on the visit being for one of the purposes defined in s 332.

[24] It follows that if the purpose of the visit is to check compliance with a resource consent, the fact the enforcement officers know of a continuing offence onsite does not deprive them of authority under s 332. Even if they make repeated visits to the site after they know of offending, the issue as to whether the officers had authority to visit the site under s 332 will still turn upon the purpose of the visit. The District Court Judge was therefore correct to hold that s 332 allows enforcement officers to continue inspections under s 332 after they have knowledge of a continuing offence onsite, even if it is offending in respect of which they could obtain a s 334 warrant. The test is a subjective one, focused upon the intentions and purpose of the particular officer or officers.

[25] It may even be that the enforcement officers have, as a subsidiary purpose, keeping a proper record of the non-compliance in case prosecution is decided upon at a later point in time. If the primary or dominant purpose of the visit is to monitor

[9] DC judgment, above n 1, at [21].

compliance with the conditions of the consent, the entry on to the land will still be authorised under s 332.[10]

[26] There is nothing in the wording of s 334 that assists Mr Stevens' argument. Section 334 sets out the circumstances in which a warrant may be obtained but not when a warrant must be obtained. The fact that the officers could have obtained a warrant under s 334 does not mean that they were obliged to do so, provided they were acting within the scope of the authority conferred by s 332.

[27] However, enforcement officers may not go onto the land under the authority conferred by s 332 where the dominant purpose is the collection of evidence for the purposes of prosecution. It follows that had that been the officers' dominant purpose for subsequent visits in this case, the evidence obtained on those visits would have been obtained unlawfully. The relevance of the decision to bring a prosecution is not that it acts as some trigger, closing off the availability of s 332 as authority. It is that, when assessing the subjective intent of the officers, the decision to prosecute is seen as evidence that collection of evidence for that prosecution *was* the dominant purpose.

[28] We also note that s 332 allows authorised enforcement officers to enter upon land for one of the stipulated purposes, including to check for compliance with a resource consent. It does not permit searching. Although it allows the taking of samples, this is only if the taking of samples is for one of the inspection purposes. We do however consider it implicit in the authority conferred by s 332 that the officers may take a record of their visit, in the form of photographs and videos. That is an incident of the keeping of a proper record of the site inspection. If that record is relevant in later proceedings, it having been lawfully collected, then it is, at least prima facie, admissible evidence.

[29] This interpretation of the relationship between ss 332 and 334 is necessary to give effect to the purpose of the RMA, which is to "promote the sustainable management of natural and physical resources".[11] The RMA recognises both a

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[10] See *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [36].
[11] Resource Management Act, s 5.

public interest in development of the environment *and* in the sustainable management of resources. As the RMA makes clear, not every non-compliance is met with a prosecution — local authorities are given a variety of means by which they can compel compliance. Enforcement officers are authorised to enter on to land to check compliance with a resource consent. At the lowest level, the enforcement officer's response may be to record the non-compliance and require rectification. Failing that, the enforcement officer can issue an abatement notice placing a moratorium on onsite work until the non-compliance is addressed.[12] Again, it is apparent on the facts of this case that this course was considered. It is also possible for a council to obtain an enforcement order from the Environment Court, requiring compliance or cancelling the resource consent.[13]

[30] This statutory menu of possible responses allows the flexibility necessary to achieve compliance without undue compliance costs, whilst enabling developments to proceed without undue disruption. And if, in the end, compliance can be achieved without resort to formal legal mechanisms, the objectives of the RMA will in many cases have been met.

[31] The existence of a cross-over between these sections, in the way that we have described it, is, moreover, implicit in s 332. Section 332(1)(b) provides that one of the purposes for which entry is authorised is to check on compliance with enforcement orders or abatement notices. Enforcement orders and abatement notices can be issued in respect of conduct which constitutes offending for the purposes of the RMA. The interpretation Mr Stevens proposes is inconsistent with this statutory scheme and unworkable. It would, to take an example, mean that enforcement officers could not come back onsite to check compliance with an abatement notice without obtaining a search warrant.

The factual findings

[32] The second limb to Mr Stevens' argument is that the Judge should have found, on the evidence before him, that the visits to site after 28 March were for the

12 See Resource Management Act, ss 322–325B.
13 See ss 314–321.

primary purpose of collecting evidence. He argues that the purpose of entry on to private land should be judged objectively and from all of the circumstances. The evidence is that from the first visit the enforcement officers believed that there was offending of a nature punishable by imprisonment. After 28 March they knew the offending had not been remedied within the time stipulated. But they continued to inspect. Mr Stevens submits that objectively assessed, the documentary record shows that the purpose of the inspections was to gather evidence and, even if there was a mixed purpose, the substantive purpose was that of prosecution. Accordingly, the officers should have proceeded under s 334.

[33] The appellants' case faces the immediate difficulty that on the documentary record, the basis upon which the hearing in the District Court (and this Court) proceeded, there is no basis to find that the primary purpose of the visit was the collection of evidence for a prosecution. The documentary record of notices, correspondence and emails proves the contrary. These visits continued over many months. On each occasion, the report following the inspection narrated that the visits were inspection visits undertaken to determine compliance with the conditions of the resource consent. Each report identifies the infringements but also requires remedial action. Although there is reference in each report to the sanctions regime in the RMA, this is to be read in the context that the enforcement officers were allowing works to continue but attempting to obtain compliance from the appellants. That is what the reports say.

[34] If the appellants wished to contend for a different interpretation of events they had to provide evidence to challenge the record. This would have included cross-examining the enforcement officers in relation to the purpose for which they entered the site on each occasion. As Mr Pike QC submitted for the Crown, this is, at its heart, an allegation of bad faith. To accept Mr Stevens' argument the Judge would have to have been satisfied that the written record misstated the purpose of the visits and that the officers were hiding behind the s 332 purpose to cloak their real intent. There is no evidence to substantiate such an allegation.

[35] Our review of the material satisfies us that the Judge was correct to find that the purpose of the visits did fall within the scope of s 332(1). Mr Stevens placed

great weight upon the repetitive nature of the visits, but the very persistence of the enforcement officers in visiting the site supports the Judge's finding. If prosecution had been decided upon, why did the officers continue to visit rather than simply move to prosecute? The continuation of the visits is consistent with the officers trying to work with the consent holders to achieve compliance, avoiding a stop of work on the site or the need to prosecute.

[36] It follows that neither of the grounds upon which this appeal has been advanced is made out.

Result

[37] An extension of time to appeal is granted. Leave to appeal is granted. The appeal is dismissed.

[38] For fair trial reasons we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publically available database until final disposition of trial. Publication in law report or law digest permitted.

Solicitors:
Treadwell Gordon, Wanganui for Appellants
Crown Law Office, Wellington for Respondent

ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE SUPREME COURT OF NEW ZEALAND

SC 11/2017
[2017] NZSC 24

BETWEEN	LESLIE WILLIAM FUGLE First Applicant
	PACIFIC FARMS DEVELOPMENT LIMITED Second Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: C M Stevens for Applicants
J C Pike QC and F R J Sinclair for Respondent

Judgment: 8 March 2017

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publically available database until final disposition of trial. Publication in law report or law digest permitted.

REASONS

[1] The applicants face charges under the Resource Management Act 1991 which relate to non-compliance with the conditions of a resource consent. It is a condition

LESLIE WILLIAM FUGLE v R [2017] NZSC 24 [8 March 2017]

WAIKATO REGIONAL COUNCIL

of the resource consent that the site be subject to a weekly monitoring programme to assess compliance with the consent. As well s 332 of the RMA authorises local authority enforcement officers to inspect land and buildings (but not dwellinghouses) for compliance.

[2] Prior to charges being laid, enforcement officers made 13 visits to the site. The applicants say that after the second of the visits it must have been apparent that offences were being committed and that, from that point, there was no longer power to carry out inspections under s 332. Rather, a search warrant under s 334 should have been sought.

[3] This argument was fully addressed in the District Court by Judge Thompson and in the Court of Appeal.[1] Both Judge Thompson and the Court of Appeal concluded that on all occasions, the primary purpose of the visits was to monitor compliance and that they were accordingly within the scope of s 332(1). This finding of fact does not appear to be specifically challenged by the applicants and if it were, such challenge would not warrant the grant of leave to appeal. In light of the finding of fact, we see no arguable basis for the contention that the inspections were unlawful.

[4] Accordingly, the application for leave to appeal is dismissed. For fair trial reasons we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publically available database until final disposition of trial. Publication in law report or law digest permitted.

Solicitors:
Treadwell Gordon, Wanganui for Applicants
Crown Law Office, Wellington for Respondent

[1] *R v Fugle* DC Palmerston North CRI-2014-054-3231, 18 April 2016 (Judge Thompson); and *Fugle v R* [2016] NZCA 619 (Miller, Winkelmann and Asher JJ).

APPENDIX C

Please note this interview plan is NOT part of the file. The plan is merely a guide for the interviewer.

Interview Plan

Introduction:
Introduction of self. Name and designation.
Time
Date
Place

Introduction of interviewee.

Introduction of anyone else present (Other staff or lawyer etc)

Confirm personal details of interviewee:
- -Full name
- -Date of birth
- -Occupation
- -Employer
- -Work contact details
- -Home Address
- -Home contact details.

Advice and Caution:

The purpose of this interview is to seek your explanation, or your version of events, in respect of the apparent unlawful discharge of dairy effluent at the XXXXXX property located on SH2 at Netherton.

Such matters may constitute an offence or offences under the Resource Management Act 1991 s**uch as the discharge of contaminant, namely dairy effluent, into water or onto land where it may enter water.**

I advice you that you are not obliged to say anything and anything you do say may be recorded and used in evidence.

Though you have been asked to attend this interview I must stress that you are here of your own free will and you are not detained nor have you been charged in respect of this matter.

I also advise you that you have the right to consult and instruct a lawyer without delay and in private.

Do you understand this advice?

(If lawyer present)

Should you wish to confer with _____________ during this interview please just let me know and a facility to speak in private will be provided.

Questions:

General Background:

I would like to start by confirming the location of where we are talking about.

What is the actual:

- Supply number?
- Actual address?

Can you please explain what your role is in respect of this property?

How long have you held that position?

How long have you been involved in dairy farming?

In what roles?

What is the structure of company / trust /partnership?

Who are there directors? (If relevant)

What is the total acreage used for dairy farming on that property?

On how many titles?

How long have you / company etc. owned this farm?

How many cows are milked on that property?

How many other stock?

What staff are employed to work that property?

What is the structure in respect of ownership, share milking and labouring?

How often are the sharemilkers, owners on the property?

Who is responsible for the management of dairy effluent on the property?

Please describe the dairy effluent management system?

What instructions are given in respect of the management of the dairy effluent system?

What discussions have you had with farm worker, sharemilker, farm owner about the dairy effluent management?

What concerns has the sharemilker raised with you over the effluent system?

What permitted activity rules are you relying upon to manage your dairy effluent?

What is your understanding of PA rules?

What was the state of the dairy effluent management system when you commenced work there or purchased the property?

On 18 September 2006 helicopter monitoring was carried out. As a result there was an inspection at your property.

Resource Officers observed the following things:

- **A significant quantity of effluent from the first barrier ditch (now being used as holding pond) was overflowing to drain.**

- Where does the farm drainage network flow to?
- What is your explanation for this overflow?
- How often does such an overflow occur?
- How long has this been like this?
- When did you become aware of this?
- Do you consider that the dairy effluent management system is adequate to deal with the amount of effluent produced?
- What has Mr XXXXX advice been in respect of the effluent?
- When did he first become aware?(and how?)

What entitled you to discharge dairy effluent in this way?

Mitigation

What steps have you taken to mitigate or remedy the effects of these discharges?

When was this work completed?

At what expense?

History

What is the history of non-compliance with dairy effluent permitted activity rules on this property?

APPENDIX D

IN THE DISTRICT COURT
IN HAMILTON (ex-MORRINSVILLE)

BETWEEN	**WAIKATO REGIONAL COUNCIL**
	Prosecutor
AND	**James Ryan Smith**
	Defendant

SUMMARY OF FACTS

DATED: 30 JULY 2015

The defendant faces:

3 charges of:

Discharge of contaminants into environment
Sections 338(1)(a) and 15(1)(b)
Resource Management Act 1991

Penalty
Section 339(1)
Resource Management Act 1991
2 years imprisonment /$300,000 fine

Introduction

1. This summary relates to a 113 hectare dairy farm located at 333 William Road, Morrinsville ("the property"), refer Maps 1 and 2, Photograph & Map Booklet.

2. The property is owned by the JR & BA Smith Family Trust ("Trust"). The defendant, James Ryan Smith and his wife, Barbara Smith are trustees and the property has been owned by them since 1 June 2008.

3. Mr Smith is responsible for the day to day running of the farm and makes the decisions regarding the operation of the effluent system.

4. On 1 November 2013 the Trust employed a farm manager, Brian Jones, who subsequently became a lower order sharemilker in June 2014.

5. In September 2014 the property was milking approximately 265 cows, twice daily.

Waikato Regional Plan/Relevant Legislation

6. The property falls within the boundary of the Waikato Region and, as such is bound by the terms and conditions of the Waikato Regional Plan ("the Plan").

7. The discharge of farm animal effluent from dairy farming activities is an offence against s 15 RMA unless expressly permitted by a rule in a Regional Plan or resource consent. Refer Appendix A for a copy of the relevant rule in full.

8. Discharges described in this summary specifically breach condition (a) and (f) of the permitted activity rule.

9. Farm animal effluent is a contaminant pursuant to s 2 of the RMA.

10. There are no national environmental standards or other regulations, rules in a regional plan or a resource consent that expressly allow for the discharges described in this summary.

Effluent system

11. The property's effluent system comprises two storage holding ponds ("ponds"). Effluent is gravity fed directly from the dairy yard via a sandtrap to the ponds, refer Map 3 and figure 1.

12. Since 1995 the effluent system on the property has been operating under the permitted activity rules. There was no effluent irrigation system in place when the property was sold.

13. No changes to this system were made after the Smith's purchased the property.

14. The ponds are located in a paddock adjacent to, and below, the cow shed. The first pond is approximately 100 metres from the cow shed, the second pond 120 metres from the shed. The ponds are visible from the cow shed, refer figure 1.

15. In 2010 a 1125 m^2 sealed feedpad was installed. Solids from the feedpad are regularly scraped off the feedpad to a purpose built lined holding bunker, adjacent to the feedpad. The feed pad has its own "wedge" (similar to a sand trap) **at the bottom of the feed** pad, which traps solids. That wedge is accessed by a tractor which removes the solids and places that into the bunker. **Liquid effluent then flows through to the holding ponds** , refer Map 3.

16. The Trust hires a muck spreader, which enables them to spread the effluent solids to ten hectares of the property that was previously inaccessible for irrigation.

17. Since owning the property no changes have been made to the ponds to increase their capacity to allow for the extra effluent generated by use of the feedpad.

18. At the time of the offending, there was no stormwater diversion in place and all rain and washdown water from the yard, and rain water from the feedpad, flowed to the ponds.

19. There is no travelling irrigation system set up on the property and as such effluent has been and is required to be pumped from the ponds to the paddocks by an effluent spreading contractor.

Offending:
CRNs: ending xxxx / xxxx/ xxxx – Discharge of contaminants into environment contrary to s 15 RMA

20. At about 2.35pm on 23 September 2014 Council staff visited the property to determine compliance with the rules in the Plan.

21. Mr Smith was present during the inspection and when questioned about the effluent system he advised that they regularly had the ponds pumped by a contractor at least twice per year. Mr Smith was co-operative with Council staff.

22. At the dairy shed Council staff were shown paperwork from contractors who had pumped out the ponds and they also noted a map of farm paddocks with the relevant paddock sizes was pinned to the wall, refer figure 2.

23. An inspection of the first pond revealed it was near capacity with a crusted layer of effluent solids present on the surface, refer figure 3.

24. The baffle between the two ponds was submerged under the effluent, indicating that liquid effluent was flowing to the second pond, refer figure 3.

25. Council staff observed cracks and erosion in the sides and pond walls indicating that it may not be sealed.

26. The second pond was also at capacity, effluent was observed flowing from a low corner in the pond, refer figures 4, 5 & 6.

27. A constant flow of dark green effluent flowed over the pond wall and down a depression in the bank to a watercourse below. There was grey coloured sewage fungus growing in the depression, which indicated that the discharge had been occurring for a considerable period of time, refer figures 7-10.

28. Samples were taken from the watercourse below the ponds and later analysed by RJ Hill Laboratories, refer Map 4 and Appendix B.

29. When spoken to about this Mr Smith stated "*well we have had a lot of rain*."

30. He explained that he was under the impression that they were permitted to discharge treated effluent to water and that the permitted activity allowed him to discharge from the ponds.

31. Mr Smith also stated that heavy rain had sped up the discharge and was a regular occurrence.

32. At the end of the inspection Mr Smith was told that he needed to cease the unlawful discharge immediately.

33. As a result, Mr Smith contacted Effluent Services ("ES") who went to the property the following day.

34. Both ponds were full and dark coloured. The first pond was full of effluent solids. The second pond was mostly non-existent, due to being full of effluent solids overflowing from the first pond over a period of years.

35. Ponds that are found in this condition either have not been emptied or have not been pumped out or properly maintained for a period of time.

36. An ES staff member advised that they first pumped effluent at the property in March 2014. A month later in April a follow up letter was sent by them to Mr Smith informing him that bookings were being taken for May 2014. No response was received from Mr Smith.

Investigation

37. The Council's subsequent investigation, included interviews with:

- Effluent contractors engaged by Mr Smith
- Mr Jones, lower order sharemilker

38. The investigation revealed that five different effluent contractors were used by Mr Smith between 1 June 2008 and 23 September 2014 and the ponds were emptied a total of seven times on the following dates:

	Date	Contractor
1.	9-10 February 2009	Pumping Mobile Services
2.	11-18 May 2009	Eastern Partnership
3.	15 April 2010	Pumping Mobile Services
4.	16 December 2011	Press Products
5.	2 February 2013	Press Products
6.	31 October 2013	Crikeytech
7.	18-19 March 2014	Effluent Services

39. The frequency of this pumping was insufficient to deal with the effluent volumes being generated from the feedpad and farm dairy yard.

40. Mr Jones understood that effluent flowed from the dairy yard to the ponds were it ran out over the wall and they were permitted to do that. He advised that because they are under the Maikai Ranges and they got rain on a regular basis, stating that "*they don't go two weeks without rain.*"

41. He advised the installation of the feedpad resulted in *'catching'* more effluent that they used to.

42. Council rainfall records at a nearby met station for 2014 showed an average monthly rainfall of 82.1 millimetres.

Remediation

43. Mr Smith immediately carried out work on the second holding pond to cease the discharge and raise the level of the pond to ensure the capacity was increased, refer figure 11.

44. Between 24 September 2014 (the day after the Council's initial inspection) and 4 February 2015 (a five month period) the ponds have been emptied five times:

1.	24 September 2014	Effluent Services
2.	13 October 2014	Effluent Services
3.	24 November 2014	Effluent Services
4.	23 December 2014	Crikeytech
5.	4 February 2015	Effluent Services

45. A stormwater diversion has also been installed at the dairy yard, refer figure 12.

46. Mr Smith had also made enquiries with a number of suppliers regarding storage holding tanks and upgrading their effluent system.

47. On 23 March 2015 Council received further information advising that an Effluent Plan had been implemented since October 2014.

Environmental Effect

48. Effluent from the ponds discharged directly into an unnamed tributary of the Waihou River, which then flowed in a westerly direction for a distance of approximately 2.7 kilometres to the Waihou River, refer Unnamed tributary of Waihou River Map 5.

49. Sample results located in Appendix B should be read in conjunction with the appendix written by William Vant (refer Appendix C) outlining the significance of these results and their relevance to environmental effect.

50. The samples taken and analysed all confirmed levels of contaminants known to cause adverse effects on the environment, as per the Vant appendix attached.

Explanation

51. On 5 February 2015 the defendant Mr Smith was formally interviewed and also provided further information to the Council on 23 March 2015.

52. Mr Smith admitted the facts as outlined and in explanation stated that the ponds had intermittently overflowed since they purchased the property.

53. However, due to winter and a very wet spring he was unable to get the ponds emptied until the 9/10 February 2009.

54. Mr Smith explained that he had been in the dairy industry for 32 years and on the Waikato farm he previously worked on they had operated under the permitted activity rule. He acknowledged that when irrigating effluent he knew that it was not allowed to flow into waterways.

55. Initially, a contractor would be engaged to come in and empty the ponds once per year and after the feedpad was installed he had the ponds emptied two or three times per year.

56. He stated "*I've always been under the impression that I have had a resource consent to discharge.... from the second pond*."

57. Mr Smith also explained he had received a generic letter from the Council dated 15 July 2013 that he believed meant that the discharge of effluent was a permitted activity and stated "*I had always looked at and thought that gave us the right to discharge*."

58. He further explained that the system's emergency contingency now was to rely on the water diverter and to make sure that the ponds are regularly emptied.

59. The Defendant has not previously appeared before the Court.

APPENDIX A

3.5.5.1 Permitted Activity Rule – Discharge of Farm Animal Effluent onto Land

The discharge of contaminants onto land outside the Lake Taupo Catchment from the application of farm animal effluent, (excluding pig farm effluent), and the subsequent discharge of contaminants into air or water, is a **permitted activity** subject to the following conditions:

a. No discharge of effluent to water shall occur from any effluent holding facilities.
b. Storage facilities and associated facilities shall be installed to ensure compliance with condition a).
c. All effluent treatment or storage facilities (e.g. sumps or ponds) shall be sealed so as to restrict seepage of effluent. The permeability of the sealing layer shall not exceed $1x10^{-9}$ metres per second.
d. The total effluent loading shall not exceed the limit as specified in Table 3-8, including any loading made under Rules 3.5.5.2 and 3.5.5.3, 3.5.6.2, 3.5.6.3 or 3.5.6.4.
e. The maximum loading rate of effluent onto any part of the irrigated land shall not exceed 25 millimetres depth per application.
f. Effluent shall not enter surface water by way of overland flow, or pond on the land surface following the application.
g. Any discharge of contaminants into air arising from this activity shall comply with permitted activity conditions in Section 6.1.8 of this Plan.
h. The discharger shall provide information to show how the requirements of conditions a) to g) are being met, if requested by the Waikato Regional Council.
i. The discharge does not occur within 20 metres of a Significant Geothermal Feature*.
j. Where fertiliser is applied onto the same land on which farm animal effluent has been disposed of in the preceding 12 months, the application must be in accordance with Rule 3.9.4.11.

APPENDIX B

Sample Type: Aqueous						
Sample Name:		Discharge Point (A) 23-Sep-2014 3:15 pm	Discharge Point (B) 23-Sep-2014 3:16 pm	Upstream (C) 23-Sep-2014 3:20 pm	Upstream (D) 23-Sep-2014 3:21 pm	Downstream (E) 23-Sep-2014 3:25 pm
Lab Number:		1329796.1	1329796.2	1329796.3	1329796.4	1329796.5
Individual Tests						
pH	pH Units	7.8	-	7.2	-	7.3
Total Suspended Solids	g/m³	500	-	8	-	10
Total Nitrogen	g/m³	188	-	1.39	-	4.5
Total Ammoniacal-N	g/m³	137	-	< 0.010	-	1.7
Nitrate-N + Nitrite-N	g/m³	0.021	-	1.21	-	2.3
Total Kjeldahl Nitrogen (TKN)	g/m³	188	-	0.18	-	2.2
Dissolved Reactive Phosphorus	g/m³	18.1	-	0.004	-	0.22
Total Phosphorus	g/m³	26	-	0.008	-	0.32
Carbonaceous Biochemical Oxygen Demand ($cBOD_5$)	g O_2/m³	300	-	< 2	-	4
Faecal Coliforms and E. coli profile						
Faecal Coliforms	cfu / 100mL	-	3,600,000	-	95 #1	-
Escherichia coli	cfu / 100mL	-	2,800,000	-	80 #1	-

Sample Name:		Downstream (F) 23-Sep-2014 3:26 pm				
Lab Number:		1329796.6				
Faecal Coliforms and E. coli profile						
Faecal Coliforms	cfu / 100mL	32,000	-	-	-	-
Escherichia coli	cfu / 100mL	27,000	-	-	-	-

APPENDIX C

Potential adverse effects of dairy shed effluent in rivers in the Waikato Region

1. My name is William Nisbet Vant. I am a Water Quality Scientist with the Waikato Regional Council, a position I have held since 1997. I have worked in environmental science since 1978 and was previously a research scientist with the National Institute of Water and Atmospheric Research (and its various predecessors). I hold the degrees of MSc (First Class) in Biochemistry from the University of Auckland and MSc in Ecology from the University of Wales.

2. I have been asked to provide information that can be used to compare the concentrations of various water quality contaminants that are found in dairy shed effluent with (1) the concentrations that can have adverse effects in rivers and streams, and (2) the concentrations that are typically found in rivers and streams in the Waikato Region.

3. The table below shows the levels of some important water quality contaminants that are typically found in dairy shed effluent. The values in the table are "medians": by definition, half of all measurements are lower than the median, and half are higher. By way of comparison, I have also included information on contaminant levels in municipal sewage.

4. The table also includes contaminant levels at which adverse effects on river and stream water quality can occur, as follows:
   - BOD > 4 g/m^3, at concentrations greater than this, the resulting low levels of dissolved oxygen in the water can stress—and may kill—sensitive fish and other aquatic animals;
   - SS > 10 g/m^3, at concentrations greater than this the water can be too murky for people swimming to see and avoid underwater hazards (e.g. snags), and too murky for the healthy functioning of aquatic ecosystems; furthermore sensitive bottom-dwelling organisms can be smothered by a layer of fine silt;

- Ecoli > 550 cfu/100 mL,[1] this is the national guideline value for contact recreation in freshwaters: at concentrations greater than this there is an unacceptable risk of people becoming sick after being in contact with the water (e.g. by swimming or playing in it);
- TN, it is not possible to give generally-applicable guidance on concentrations of total nitrogen, as the sensitivity of different waterbodies can vary widely;
- NH4-N > 1 g/m^3, at concentrations greater than this, ammonia can stress—and may kill—trout and other sensitive aquatic organisms. (Note that ammonia is most toxic at elevated levels of pH, but is less so at more normal conditions.)

5. It is clear that the contaminant levels in dairy shed effluent (and sewage) are many times higher than those at which adverse effects can occur in rivers and streams. As a result, unless an input of effluent is very highly diluted after it enters a river, it can cause a variety of adverse effects there.

6. Waikato Regional Council operates a major routine river water quality monitoring programme. This involves the sampling of a wide range of water quality parameters at many river sites across the region at monthly intervals. The programme includes monitoring at ten sites on the Waikato River, and at more than 100 sites on other rivers and streams in the region.

7. Water quality varies from river-to-river. In some rivers, water quality can be described as "good", while in others it may be "poor". Water quality can also vary in different parts of the same river, with conditions typically being better near the headwaters and poorer further downstream. Furthermore, water quality at any given location typically varies over time. For example, water quality can vary seasonally, with lower water temperatures and higher nitrogen levels during winter months; it can also vary during a 24-hour day, with dissolved oxygen levels often being highest in the afternoon and lowest overnight.

[1] Note that the species *Escherichia coli* (Ecoli) is an important member of the group of bacteria known as "faecal coliforms". In many waterbodies in the Waikato Region, Ecoli is the dominant type of faecal coliform; for example, in the Waikato River Ecoli make up about 70% of the faecal coliforms on average. In the absence of other information, I therefore consider that Ecoli concentrations can be approximately estimated by multiplying the faecal coliform concentration by 0.7.

8. An important factor that determines water quality in many rivers and streams in the Waikato Region is the type and intensity of land use that occurs in the river catchments. Broadly-speaking, water quality tends to be better in rivers in forested parts of the region, and to be poorer in areas of intensive pastoral farming. So, for example, water quality is mostly good in streams draining the forested areas of the Coromandel Peninsula, while it is often poor in intensively-farmed parts of the Hamilton Basin.

9. As a result, I have divided the Waikato Region up into several distinct "water zones". Within these zones, rivers tend to have more-or-less similar water quality, which can be different from that in other zones. The table below shows the levels of contaminants that are typically found in rivers in different parts of the region.

Table 1: Median concentrations of water quality contaminants in dairy effluent and sewage. Contaminant levels at which adverse effects can occur in rivers and streams are also shown, as are median values found in rivers and streams in different parts of the Waikato Region during 2001–2005. "BOD", biochemical oxygen demand; "SS", suspended solids; "Ecoli", *Escherichia coli*; "TN", total nitrogen; "NH4-N", ammoniacal nitrogen. Concentrations are in grams per cubic metre, except for Ecoli which are colony forming units per 100 millilitres.

	BOD	SS	Ecoli	TN	NH4-N
Effluent water quality					
Dairy effluent, raw	no data	4800	no data	360	130
Dairy effluent, 1st pond	160	430	500,000	190	150
Sewage, raw	250	300	1,000,000	35	20
Sewage, basic treatment	30	30	10,000	30	20
Receiving water guidelines					
Satisfactory water quality	<4	<10	<550	–	<1
Excellent water quality	<1	<2	<55	<0.2	<0.1
River water quality					
Upper Waikato River	0.5	(1)	5	0.2	<0.01
Lower Waikato River	1.0	(5)	80	0.5	0.01
Inflows to Lake Taupo	(1)	(1)	36	0.3	<0.01
Coromandel streams	(1)	(2)	136	0.2	<0.01
Tributaries of the Upper Waikato River	(1)	(3)	140	0.8	0.01
Hauraki streams	(2)	(5)	290	1.1	0.02
Waipa River and tributaries	(2)	(5)	244	0.8	0.02
West Coast streams	(1)	(6)	300	0.5	<0.01
Tributaries of the Lower Waikato River	(2)	(11)	550	1.6	0.03

Notes

1. The information for dairy effluent is from a survey undertaken by Waikato Regional Council during 1993–96 and reported by Selvarajah, N. 1996: Dairy farm effluent treatment pond performance in the Waikato Region: a preliminary review of the regional survey.
2. The information for sewage is from the 2002 New Zealand Municipal Wastewater Monitoring Guidelines (NZ Water Environment Research Foundation, Wellington).
3. The receiving water guidelines are derived from a variety of national, overseas and local sources, together with my own judgement.

4. Waikato Regional Council only measures BOD levels at the ten sites on the Waikato River. For the 100 sites on other rivers and streams I have estimated likely levels based on my general experience. The values for these sites are shown in brackets.
5. Waikato Regional Council does not routinely measure SS levels at river water quality monitoring sites. However, measurements are made of a related parameter, namely turbidity. I have estimated SS levels from the measured turbidity, assuming that the ratio of SS to turbidity is 1 (i.e. 1 g SS/m^3 = 1 turbidity unit), a ratio that is known to broadly-apply to many waterbodies. The estimated values are shown in brackets.

W N Vant, 23 November 2006

APPENDIX E

Template to use for a victim impact statement

(Not to be retained unless authorised. Return this copy/original and all other copies to the Court)

VICTIM IMPACT STATEMENT

For use in prosecutions taken by Waikato Regional Council

Name:

The victim must be informed:

- *that the information is being ascertained for submission to the judicial officer sentencing the offender if the accused is found guilty or pleads guilty*
- *that the information must be true*
- *that the information must be recorded and may be verified in the manner set out at the bottom of this form*
- *who may properly see, make or keep copies of the information ascertained, and about the orders, directions, and conditions relating to disclosure and distribution of it, that may be made.*

Statement is to take narrative form and to cover the following: **Victim's details, if appropriate:** e.g. age, occupation, gender, relationship to offender (if any). **Physical injuries or illness:** include type and extent of injuries/illness, long/short term effects, whether treatment/absence from work/hospitalisation required, medical/dental reports. **Financial costs:** include costs of treatment, replacement/repair costs, loss of wages/income, incidental costs. **Emotional harm:** include changes in behaviour, lifestyle, personal reaction, details of treatment, counselling as appropriate. Attach any relevant reports. **Any other effects:** e.g. observed effects of offending on children.	

	OR (if it is impracticable for the victim to sign)
I have given the information in this Victim Impact Statement knowing that it is for submission to the judicial officer sentencing the offender, and know that the information must be true. The information is true to the best of my knowledge and belief.	*I have advised the victim that the information in this Victim Impact Statement is for submission to the judicial officer sentencing the offender, and that the information must be true. I have read it to the victim and am satisfied that the victim approves of it.*
Signature: ________________ **(Victim)**	**Signature:** ____________ **Designation:**______________
Date: ____________________________	**Name:**________________ **Date:**____________________

HE TAIAO MAURIORA	HEALTHY ENVIRONMENT
HE ŌHANGA PAKARI	STRONG ECONOMY
HE HAPORI HIHIRI	VIBRANT COMMUNITIES

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