



COMPLIANCE POLICIES

OCTOBER 2017

- ▶ Environment Southland Monitoring Policy
- ▶ Environment Southland Enforcement Policy
- ▶ Environment Southland Diversion Scheme

COMPLIANCE POLICIES

Environment Southland
Monitoring Policy

OCTOBER 2017



Environment Southland Monitoring Policy

Background

The compliance team at Environment Southland forms part of the Policy, Planning and Regulatory Services directorate. The team performs the monitoring and enforcement functions of the council.

With a desire to focus on the environment first, improving communications with consent holders, and assisting to fix the cause of a problem and not just the effects, has led to some impressive results .

To achieve these results, a large part of the compliance team's work is focused on the monitoring of resource consent conditions and permitted activities.

Resource consents granted by councils are seen as a licence to operate businesses. These consents have conditions which, when breached, Environment Southland has a statutory obligation to deal with under the Resource Management Act 1991.

Purpose

This policy aims to provide clarity on Environment Southland's compliance monitoring programme.

It outlines our approach to

- ▶ the risk-based monitoring programme
- ▶ encouraging compliance
- ▶ dealing with non-compliance

Environment Southland uses risk-based monitoring in order to meet the council's requirements under the Resource Management Act 1991. The compliance team also apply the 4E's approach in their monitoring programme.

This policy has been prepared with council's vision, goals and values in mind. The Regional Sector Strategic Compliance Framework and the Policy, Planning and Regulatory Services Directorate Strategy provide guiding principles.



Risk-based monitoring

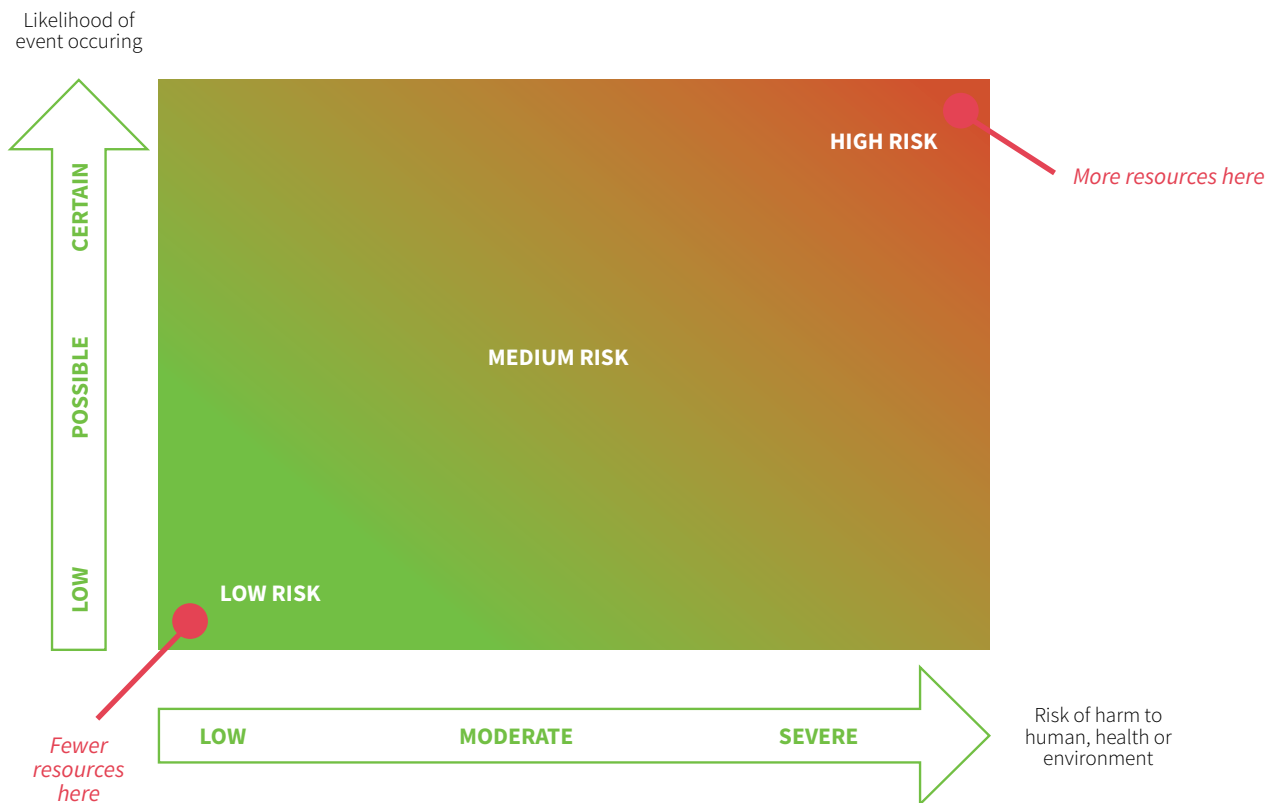
Southland has over 4000 consents, most of which require some kind of monitoring. Therefore prioritising the way the compliance team monitor these is particularly important to ensuring that risks to human health and the environment are minimised.

The risk-based monitoring approach has been inspired by the desire to:

- ▶ Encourage compliance with consent conditions
- ▶ Use appropriate outcomes to non-compliance
- ▶ Develop innovative solutions to assist compliance

A risk assessment matrix assists in identifying the kinds of activities that carry a higher risk and where the compliance team should concentrate their efforts.

Applying a risk based approach enables monitoring efforts to be focused on the higher risk activities to the environment and target areas where businesses and people are less likely to comply. This means the team can provide a more efficient and effective service, while meeting the legislative requirements.



Risk assessment process

A monitoring risk assessment is completed using an internal assessment. Staff consider:

- ▶ the scale of actual effects
- ▶ environmental performance
- ▶ national regulations
- ▶ regional plan and science priorities
- ▶ Long-term Plan priorities
- ▶ stakeholders and the local community

Risk monitoring programme

As a result of the risk assessment process, the activities the compliance team focus most of their monitoring on are identified, high-risk activities such as agricultural effluent, municipal wastewater systems, Intensive winter grazing and stormwater systems. This is reviewed every three years as part of the council's Long-term Plan, and then included in this document.

The colours from the risk assessment have been applied in a traffic light system which clearly sets out those activities that pose a higher or lower risk.

The monitoring programme runs throughout the year. There are busy seasonal periods that coincide with intensive winter grazing and high milk-producing periods when dairy farms are visited and compliance with consent conditions is assessed.

Southland's major industries are monitored throughout the year using a mixture of table top audits, sample assessments and site visits. Major industries often have several consents covering water quality, water abstraction quantity and air discharge monitoring.

Less structured but highly targeted monitoring can occur as a result of community reports or notifications. These reports or notifications, when collated, can highlight an issue associated with an industry, area or activity that will lead to an increase in monitoring with the view of reducing the impact to the environment.





Principles

Transparent

We will provide clear information and explanation to the regulated community about the standards and requirements for compliance. We will ensure that the community has access to information about industry environmental performance as well as actions taken by us to address environmental issues and non-compliance.

Consistent

Our actions will be consistent with the legislation and within our powers. Compliance and enforcement outcomes will be consistent and predictable for similar circumstances. We will ensure that our staff have the necessary skills and are appropriately trained, and that there are effective systems and policies in place to support them.

Fair, reasonable and proportional

We will apply regulatory interventions and actions appropriate for the situation. We will use our discretion justifiably and ensure our decisions are appropriate to the circumstances and that our interventions and actions will be proportionate to the risks posed to people and the environment and the seriousness of the non-compliance.

Evidence-based, informed

We will use an evidence-based approach to our decision-making. Our decisions will be informed by a range of sources, including sound science, information received from other regulators, members of the community, industry and interest groups.

Collaborative

We will work with and, where possible, share information with other regulators and stakeholders to ensure the best compliance outcomes for our regions. We will engage with the community and consider public interest, those we regulate, and government to explain and promote environmental requirements, and achieve better community and environmental outcomes.

Lawful, ethical and accountable

We will conduct ourselves lawfully and impartially and in accordance with these principles and relevant policies and guidance. We will document and take responsibility for our regulatory decisions and actions. We will measure and report on our regulatory performance.

Targeted

We will focus on the most important issues and problems to achieve the best environmental outcomes. We will target our regulatory intervention at poor performers and illegal activities that pose the greatest risk to the environment. We will apply the right tool for the right problem at the right time.

Responsive and effective

We will consider all alleged non-compliance to determine the necessary interventions and action to minimise impacts on the environment and the community and maximise deterrence. We will respond in an effective and timely manner in accordance with legislative and organisational obligations.



The 4 E's model

The 4E's model is outlined in the Regional Sector Strategic Compliance Framework and is used by the compliance team when dealing with customers while monitoring.

The 4E's: Engage, Educate, Enable and Enforce are not exclusive of each other. It is recognised that many components of the model may be used with one customer.

Engage – consult with monitored parties, stakeholders and the community on matters that may affect them. This will require maintaining relationships and communication until final outcomes have been reached. This will facilitate greater understanding of challenges and constraints, engender support and identify opportunities to work with others.

Educate – alert monitored parties to what is required to be compliant with consent conditions and where the onus lies to be compliant. Education should also be utilised to inform the community and stakeholders about what regulations are in place around them, so that they will better understand what is compliant and what is not.

Enable – provide opportunities for monitored parties to be exposed to industry best practice and regulatory requirements. Link monitored parties with appropriate industry advisors and promote examples of best practise.

Enforce – when breaches of regulation, or non-compliance, are identified then an array of enforcement tools are available to bring about positive behaviour change. Enforcement outcomes should be proportional to individual circumstances of the breach and culpability of the party.

Dealing with non-compliance

In some cases, Environment Southland has to use one of the enforcement tools, outlined in the Resource Management Act, when monitoring discovers incidents that are serious or persistent in nature.

However success in achieving compliance with resource consent conditions often comes from using less formal methods than enforcement.

This philosophy stems from a desire to engage with consent holders, farm managers, land owners, iwi, the community and other stakeholders through open and honest communication, education, and by demonstrating a willingness to find innovative and workable solutions, while remaining within legislative boundaries.

Environment Southland's innovation in monitoring

To achieve a more outcome-focused result to their monitoring, the compliance team continues to identify areas where it can implement innovations in order to improve compliance with consents and communication with customers. Some of these programmes include:

Shed Talks: These talks are completed in a dairy shed with farm staff. It is designed to inform staff of Environment Southland's expectations, and identifies risk areas on farm such as tile drains and critical source areas that can easily transport effluent to waterways.

Contractor's Training: This training is specifically aimed at contractors employed to assist

farms to spread effluent. The training focuses on providing a better understanding of regional plan rules and how on-farm soil conditions may impact the spreading of effluent.

Southland Dairy Effluent Advisory Group: This group was set up in partnership with DairyNZ, Fonterra and Open Country Dairy. It has proved successful in dealing with potential significant non-compliance cases. Members of the group work together and with farmers to provide assistance to identify and remedy the cause of an issue and not the effect.

Health and Safety

Environment Southland takes the health and safety of its staff seriously.

Staff have been issued with the appropriate personal protection equipment for their role. In addition, staff carry personal locator beacons, mobile phones, the Get Home Safe mobile app, and self-inflating life jackets.

Where appropriate, staff have also received specialist communication training.

Along with Environment Southland's health and safety committee, new methods and equipment for meeting health and safety requirements are constantly being reviewed.

COMPLIANCE POLICIES

Environment Southland Enforcement Policy

OCTOBER 2017



Environment Southland Enforcement Policy

Background

The compliance team at Environment Southland forms part of the Policy, Planning and Regulatory Services directorate. The team performs the monitoring and enforcement functions of the council.

With a desire to focus on the environment first, improving communications with consent holders, and assisting to fix the cause of a problem and not just the effects, has led to some impressive outcomes .

To achieve these results, a large part of the compliance team's work is focused on the monitoring of resource consent conditions and permitted activities.

The Policy, Planning and Regulatory Services directorate are responsible for writing regional plans, issuing consents and ensuring compliance with the rules in the plan.

In a regional plan there are three major types of activities:

- ▶ Activities that do not require a consent, but have conditions that must be met (permitted)

- ▶ Activities that do require a resource consent (there are differing consent levels)

- ▶ Activities that cannot be undertaken (prohibited)

The compliance team monitor a range of activities that fall into each of these categories.

When a breach is confirmed, which can be the result of regular monitoring programme, from self-reported incidents, or publicly reported incidents Environment Southland has a statutory obligation to deal with under the Resource Management Act 1991.

Enforcement is a necessary, albeit often regrettable, part of the administration and implementation of the law. For the general public, enforcement is more closely associated with the police and law courts. However other organisations, including Environment Southland, have statutory roles and responsibilities with regard to the enforcement of specific laws.

Purpose

This policy aims to provide clarity on Environment Southland's compliance enforcement programme.

Environment Southland uses a broad approach to monitoring and enforcement in order to meet the council's requirements under the Resource Management Act 1991. The compliance team also apply the 4E's approach and 3 contact concept in their programs.

This policy has been prepared with council's vision, goals and values in mind. The Regional Sector Strategic Compliance Framework and the Policy, Planning and Regulatory Services Directorate Strategy provide guiding principles.

Principles

Transparent

We will provide clear information and explanation to the regulated community about the standards and requirements for compliance. We will ensure that the community has access to information about industry environmental performance as well as actions taken by us to address environmental issues and non-compliance.

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Our actions will be consistent with the legislation and within our powers. Compliance and enforcement outcomes will be consistent and predictable for similar circumstances. We will ensure that our staff have the necessary skills and are appropriately trained, and that there are effective systems and policies in place to support them.

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We will apply regulatory interventions and actions appropriate for the situation. We will use our discretion justifiably and ensure our decisions are appropriate to the circumstances and that our interventions and actions will be proportionate to the risks posed to people and the environment and the seriousness of the non-compliance.

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We will consider all alleged non-compliance to determine the necessary interventions and action to minimise impacts on the environment and the community and maximise deterrence. We will respond in an effective and timely manner in accordance with legislative and organisational obligations.





The 4 E's model

The 4E's model is outlined in the Regional Sector Strategic Compliance Framework and provides a comprehensive strategy for working with customers. The 4E's: Engage, Educate, Enable and Enforce are not exclusive of each other. It is recognised that different components of the model may be carried out by different parts of an organisation and that many components of the model may be used with one incident.

Engage – consult with monitored parties, stakeholders and the community on matters that may affect them. This will require maintaining relationships and communication until final outcomes have been reached. This will facilitate greater understanding of challenges and constraints, engender support and identify opportunities to work with others.

Educate – alert monitored parties to what is required to be compliant with consent conditions and where the onus lies to be compliant. Education should also be utilised to inform the community and stakeholders about what regulations are in place around them, so that they will better understand what is compliant and what is not.

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Enforce – when breaches of regulation, or non-compliance, are identified then an array of enforcement tools are available to bring about positive behaviour change. Enforcement outcomes should be proportional to individual circumstances of the breach and culpability of the party.

This policy covers the activities of the compliance team in the final 'enforce' part of the model.

The three contacts concept

Environment Southland is committed to keeping all parties as informed as possible. The compliance team has identified the three main areas of contact with the public and consent holders.

PRIOR: Making contact with the public and consent holders before there are issues. Projects such as Good Wood Schemes, Free Firewood Fridays, Southland Dairy Effluent Advisory Group, Shed Talks and Contractors workshops are all designed to encourage, educate and enable the public or consent holder to be compliant.

PRESENT: At the time of an incident, compliance officers will give advice on reducing the impact to the environment at the scene. Projects such as the Effluent Emergency poster (appendix 1) and emergency contacts pamphlet assist with reducing the impact on the environment

POST: If someone is being investigated they are made fully aware of the investigation process and possible outcomes that they may face. Projects such as the investigation process navigation bar (appendix 2) and this enforcement policy highlight the process for people. The compliance team also produces the Annual Compliance Monitoring report showing the results of compliance work.



Conflict of interest

Environment Southland will carry out all of its enforcement functions in accordance with the conflict of interest statement contained in the Environment Southland staff handbook.

The purpose of this statement is to:

- ▶ create a framework for decision making that avoids actual or perceived conflict of interest
- ▶ minimise the risks where a conflict of interest exists

- ▶ ensure staff are free from any personal, commercial, financial, political or other pressures that might affect their actual or perceived ability to make independent decisions.

This statement provides guidance for staff as to where a conflict of interest may arise (and therefore how to avoid a conflict of interest) and a mechanism for ensuring that any actual or potential conflict is disclosed and managed appropriately.

Steps in the enforcement programme

Step one: Investigation

Approximately one day to three months



Step two: Decision making

Approximately three months to five months



Step three: Enforcement

Five months onwards

*Please note: Timeframes for enforcement action can differ depending on the scale of the breach.

Step one: Investigation

If a breach or potential breach occurs, then information must be gathered on how and why the breach occurred. The purpose of an investigation is to establish the truth of what has occurred and enable informed decisions to be made.

The depth and scope of the investigation will depend on the seriousness of the incident.

Investigation activities may include:

- ▶ Visiting private property to collect information
- ▶ F.A.I.R discretion process
- ▶ Evidence collection (water and/or soil samples, photographs or measurements)
- ▶ Talking to people about what they know about the incident
- ▶ Initial interview with potentially liable parties or witnesses
- ▶ Initial assessment of incident
- ▶ Analysing samples and substances

Step two: Decision-making

Enforcement of the RMA can be complex. The Act provides potentially large penalties for those who breach, however does not offer any guidance as to determining what is serious and what is less so. For example, a single section of the Act can prohibit activities as diverse as emitting objectionable odour, discharging contaminants to a stream or burying toxic waste. These have vastly different environmental effects as well as different effects on the community.

The courts have provided helpful guidance as to the factors that are appropriate to consider in RMA cases to determine the seriousness of a breach. It is widely accepted across the regional sector that these are the appropriate factors to consider in enforcement decision making.

Environment Southland staff work through the questions in the acronym **F.A.I.R** when considering compliance or enforcement action.

F = Frequency. 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?

For serious matters, interviews of potentially liable parties are conducted under caution to ensure their rights are understood.

When visiting private property it is vital to respect the rights of the lawful owner or occupier. Council staff must ensure that all entry to private property is done so lawfully. Environment Southland's chief executive has the authority to issue staff with 'warrants of authority'.

A warranted enforcement officer has the ability to enter private property for the purpose of assessing compliance with environmental regulation. This can be completed without providing prior notice to the occupier or land owner.

However there are times when access to property has to be conducted with informed consent or search warrant. The High Court has given very clear direction as to when an officer can rely upon their warrant of authority and when they need to have informed consent or a search warrant.

All warranted staff must attend specific training and be familiar with all of their statutory obligations before carrying out any enforcement functions.

A = Attitude/Ability to remedy. 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? Was there any profit or benefit gained by alleged offender(s)? What efforts have been made to remedy or mitigate the adverse effects? What has been the effectiveness of those efforts? Is there a need for a wider general deterrence required in respect of this activity or industry? Is there a degree of specific deterrence required in relation to the alleged offender(s)?

I = Intensity. What type of discharged contaminant? What is the toxicity of discharge?

R = Receiving environment. 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?



Step three: Enforcement

Taking any kind of enforcement action can have a profound impact on the alleged offender and is never taken lightly. Decisions on enforcement action must be based on reliable and correctly obtained information.

A warranted officer cannot make an enforcement decision in isolation. For low level breaches, the compliance team leader and manager can authorise sanctions.

If a matter is either complex, has a high public profile, requires specific guidance or there is no precedent, then the matter is elevated to an enforcement panel which is convened to make the decision to advance the matter for a legal opinion.

The enforcement panel is comprised of three Environment Southland managers. The panel's main task is to assess the public interest or risk test.

Once a decision has been reached the matter is either re-evaluated or subjected to independent legal review. (Appendix 3)

Once the matter has a legal decision, the entire file is reviewed by the chief executive who makes the ultimate decision to proceed.

Enforcement tools

The RMA provides a number of tools to deal with non-compliance actions. These can be categorised into two outcomes: Directive Actions and Punitive Actions.

Directive Actions include:

Letter of direction: A letter of direction is used in a minor to moderate situation with a cooperative, motivated party. It is designed to prevent further breaches, or to remedy or mitigate the effects of non-compliance. Normally the letter will give timelines and what action should be taken or ceased. Such a direction is not legally enforceable.

It may however be taken into future decision making should the matter not be resolved within the timeframes given.

Abatement notice: An abatement notice is a formal, written directive. The form, content and scope of an abatement notice are prescribed in the RMA. It is written by a warranted officer and will instruct an individual or company to cease an activity, prohibit them from commencing an activity or requiring them to take action. An abatement notice is legally enforceable.

An abatement notice may be appropriate any time there is a risk of further breaches of environmental regulation, or remediation or mitigation is required as a result of non-compliance.

Enforcement order: An enforcement order is similar in some respects to an abatement notice as it can direct an individual or company to take the same actions contained in the abatement notice. However an enforcement order is granted by the courts so the options can be far in excess of the scope of an abatement notice. An enforcement order is legally enforceable.

An application can be made to recover all reasonable costs of an enforcement order from the offending party.

Enforcement orders can be sought as an individual action or as part of sentencing after being found guilty of an offence. Environment Southland will normally seek an enforcement order as part of sentencing.

Punitive Actions include:

Formal warning: A formal warning is a written warning to a person or company that has committed an offence. No further action will be taken in respect of the breach, but it will form part of the history of non-compliance. Normally a formal warning will be given in a minor to moderate incident.

Infringement notice: An infringement notice can be issued to an individual or company that has committed an RMA offence. The infringement fine is \$300, \$500, \$750 or \$1000, and if not paid in certain timeframes, will be sent to the Ministry of Justice for fine collection (where further fees are likely to be added).

Infringements can be appealed. Information on how to make an appeal is found on the back of each infringement notice, and can be explained by staff.

Prosecution: A prosecution is a process for taking a breach through the criminal courts. The matter is presided over by a District Court judge who specialises in Environment Court matters. The hearing is held in the District Court.

People or companies who face prosecution will be served with a summons, which will provide information regarding dates and location of the court hearing.

Alternative action: Alternative action such as diversion or restorative justice may be considered in some circumstances. See Environment Southland's Diversion Policy.

EFFLUENT EMERGENCY

Response guide

If you find effluent running overland or entering a waterway, follow these steps.

1 TURN OFF THE IRRIGATOR



Turn off the power to the effluent irrigator.



2 CALL THE RIGHT PEOPLE



Call the farm manager or consent holder.
Call Environment Southland to report the problem.

EMERGENCY CONTACTS

Farm manager or owner
Farm consultant
Environment Southland	0800 76 88 45

3 ACT NOW



DO NOT wait for Environment Southland staff to arrive.

It is **your** responsibility to prevent the problem getting worse.

- ▶ Dig a pit for the effluent to run into.
- ▶ Create a barrier or bund.

If effluent gets into a waterway, stop it spreading.

- ▶ Create a makeshift dam – baleage works well or use large piles of soil.

Once you have prevented further spread, start removing the effluent.

- ▶ Pump it back into the effluent pond.
- ▶ Use a sucker truck.



▶ A pit will collect spilled effluent.



▶ A bund provides a barrier to effluent entering a waterway.



▶ A large pile of soil can provide a temporary measure to prevent effluent spreading in a waterway.



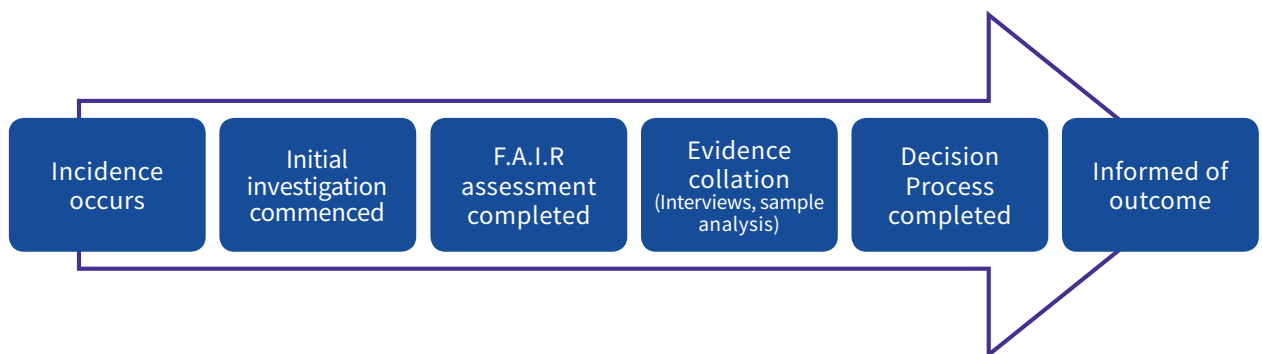
▶ A sucker truck should be used to remove effluent.

Appendix 2

Keeping people informed

Environment Southland understands that enforcement action can bring stress on whoever is the subject of the enforcement action.

Should a company or person find themselves in a situation where they are the subject of enforcement action, all correspondence will contain a navigation bar to highlight where they are in the process.



Appendix 3

Independent Legal Review

The independent legal review considers the matter in its entirety. The review applies two tests: the evidential test and public interest test. These tests are separately considered and must both be satisfied before a prosecution is initiated.

The Evidential Test

The first part of the test is the evidential test and requires a legal assessment of whether:

- ▶ The evidence relates to an identifiable person or organisation
- ▶ The evidence is credible
- ▶ The council can produce the evidence before the court and it is likely it will be admitted by the court
- ▶ The evidence can reasonably be expected to satisfy an impartial jury (or Judge) beyond a reasonable doubt that the individual has committed a criminal offence; the individual has given any explanations and, if so, whether the court is likely to find the explanations credible in light of the evidence as a whole
- ▶ There is any other evidence the council should seek out which may support or detract from the case

The public interest test

Once it has been established that there is sufficient evidence to provide a reasonable prospect of conviction, the test for prosecution requires a consideration of whether the public interest requires a criminal prosecution.

The public interest test is important for ensuring that only the most serious cases are considered for further action and that the discretion to prosecute is exercised to ensure that limited resources are not consumed on offences which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest.

This considers many factors such as:

- ▶ the seriousness of the offence,
- ▶ the impact on the environment,
- ▶ premeditation of the offending party
- ▶ Financial gain from offending on potential enforcement matters

Who should conduct this review?

Environment Southland uses well established independent legal representatives to conduct reviews

COMPLIANCE POLICIES

Environment Southland Diversion Scheme

OCTOBER 2017



Environment Southland Diversion Scheme

1. Introduction

1.1 What is Diversion?

The Environment Southland Diversion Scheme (Diversion) is a lawful way for the Council to exercise its prosecutorial discretion. Diversion enables eligible defendants to complete specified requirements within a given timeframe to avoid the continuation of a prosecution and the possibility of receiving a conviction.

1.2 Purposes of Diversion

Diversion has three primary purposes: (1) rehabilitation; (2) reparation and restoration; and (3) ensuring that the Council's statutory objectives are better met.

1.2.1 Rehabilitation

Steps that can be taken to achieve this purpose include:

- ▶ Encouraging defendants to take responsibility and show remorse for their actions;
- ▶ Encouraging defendants to reflect on the environmental impact of their offending;
- ▶ Requiring defendants to undergo training or education, thereby decreasing the risk of reoffending; and
- ▶ Addressing other factors which may put defendants at risk of reoffending (such as improving inadequate systems).

1.2.2 Restoration and reparation

Steps that can be taken to achieve this purpose include:

- ▶ Carrying out works to remediate the effects of the offending and to restore the environment, as near as possible, to its natural state;
- ▶ Carrying out or contributing to works that enhance the wider environment;
- ▶ Making a financial or other donation to an approved fund or community group; and
- ▶ Reimbursement of costs incurred by the Council (including investigation, legal and remedial costs).

1.2.3 Achieving statutory objectives

The Council's statutory objectives, as expressed in the Environment Southland Long-term Plan, include:

- ▶ Maintaining and improving water quality;
- ▶ Biodiversity enhancement; and
- ▶ Improving air quality.

Diversion outcomes will be tailored to better achieve these (and related) objectives.



1.3 Relationship with the criminal justice system

Diversion is an alternative means of processing some offences and defendants through the Courts. It enables the Council to address certain types and levels of offending proactively. It provides an outlet for prosecutions to be diverted from the formal criminal justice system and ensures that only cases which require the full intervention of the criminal law proceed before the Courts. Diversion is not applied to allow a defendant to avoid prosecution simply by paying compensation.

When pursued effectively, Diversion can result in positive environmental outcomes and promote a more cohesive ongoing relationship between the defendant party, the Council, and the wider community. A key advantage of Diversion is that a charging document has been filed and a Court proceeding is underway. If a defendant fails to promptly comply with the terms of Diversion, the criminal justice process continues.

2. The Diversion process

2.1 Overview

Organisational responsibility for Diversion sits with the Chief Executive, who will assess whether a case is eligible for Diversion or not. The Chief Executive's decision is final and no right of review exists, other than in exceptional circumstances. Such circumstances will only generally arise when significant factors relating to the offence or the defendant come to the attention of the Council after the original decision regarding Diversion has been made.

Once a decision has been made by the Chief Executive that Diversion is appropriate, the Council's Compliance division will run the Diversion process and report back to the Chief Executive on milestone achievements (or lack thereof).

2.2 Stages of the Diversion process

The Diversion process can be divided into the following five stages:

2.2.1 Commencement of a prosecution

The need for Diversion only arises if a prosecution has been commenced. Charges will only be filed against a defendant if the Test for Prosecution under the Solicitor-General's Prosecution Guidelines is met. If the Test for Prosecution is not met, charges will not be filed simply for the purpose of commencing a Diversion process.

2.2.2 Evaluation of eligibility for Diversion

To ensure consistency and fairness, the Council will consider every defendant's eligibility for Diversion by reference to the Diversion criteria detailed at section 3 below. In cases involving serious, persistent, deliberate, or repeat offending, it may be readily apparent that Diversion is not appropriate.

A defendant may make a direct request to the Council for consideration of Diversion. The request should be in writing and should include:

- ▶ Reasons why the defendant considers they should be considered for Diversion; and
- ▶ Steps they would be willing to take in order to remediate their offending and otherwise achieve the purposes of Diversion.

2.2.3 Offer of Diversion

If the Chief Executive decides to offer Diversion to a defendant, the offer will include conditions. Guidance on the imposition of conditions is provided at section 4 below.

The defendant must agree to all proposed Diversion conditions. If the defendant accepts the offer of Diversion, written confirmation must be provided. The Council will then seek an adjournment from the Court to provide time for any conditions to be complied with. Typically this would occur before any plea is entered.

2.2.4 Monitoring compliance

The Council's Compliance division will liaise with a defendant to monitor progress with Diversion conditions. A defendant must provide the Compliance division with proof of completion of all Diversion conditions no later than five working days before the next Court appearance.

Diversion conditions will need to be completed within a specified timeframe, typically before the next Court date. A further adjournment may be sought from the Court where there is an early indication from the defendant that the conditions cannot be completed within the specified timeframe, and where there is a proper basis for an extension of time.

A defendant may withdraw from Diversion at any stage of the process. The Council also reserves the right to cease the Diversion process at any time if milestones or timeframes are not adhered to by the defendant. In either case the prosecution would then proceed through the Court process as normal.

2.2.5 Completion of Diversion

When Diversion has been completed to the Chief Executive's satisfaction, the Council's solicitor will notify the Court that the defendant has completed Diversion (section 148 of the Criminal Procedure Act 2011). Once notification is given, the Court or Registrar will be invited to dismiss the charge (section 147 of the Criminal Procedure Act 2011).



3 Diversion criteria

3.1 Overview

In assessing eligibility for Diversion, the Chief Executive will consider:

- Offender-based criteria; and
- Offence-based criteria.

The weight given to particular criteria will be a matter for the Chief Executive's discretion. Ultimately the Chief Executive will determine whether the public interest is best served by the continuation of a prosecution or by an offer of Diversion.

3.2 Offender-based criteria

3.2.1 First offender

A key purpose of Diversion is to allow a defendant who has no prior convictions and a good compliance history the opportunity to avoid a conviction, whilst still addressing the causes and consequences of their offending. In most cases a defendant who has prior convictions, has previously received Diversion, or has previously been served an abatement notice, infringement notice, or enforcement order, will not be eligible for Diversion.

The Chief Executive may consider exceptions to this general rule where:

- ▶ The direct or indirect consequences of a conviction would be out of all proportion to the gravity of the offending; or
- ▶ The defendant's previous outcomes (Diversion, conviction etc) are for quite dissimilar offences or were over five years prior.

A defendant who has previously received Diversion is very unlikely to be considered for Diversion again for a similar offence.

3.2.2 Acceptance of responsibility

To be eligible for Diversion a defendant must accept full responsibility for their offending and show remorse for their actions. It is desirable, though not a prerequisite, that a defendant intimates a guilty plea to the charge(s) faced.

A defendant who has pleaded not guilty is not barred from consideration for Diversion, provided they subsequently accept responsibility and meet other Diversion criteria.

3.2.3 Other personal mitigating circumstances

The Chief Executive will also consider other personal mitigating circumstances that are known to the Council. Such circumstances may include the direct or indirect consequences of a conviction being entered against the defendant.

If a defendant seeks to have personal mitigating circumstances considered as part of a request for Diversion, appropriate supporting documentation should be included with the written Diversion request.

3.3 Offence-based criteria

The key offence-based consideration is the seriousness of the offending. The criteria to be assessed in considering the seriousness of the offending include the following:

3.3.1 Offence type

Certain types of offences require particular care when considering Diversion because of the public interest. This is particularly so when offending of a particular type is prevalent or where it falls within the Council's enforcement priorities. However, there are no hard and fast rules on particular offence types and every case will be examined individually and considered on its merits.

3.3.2 Impact on the environment

The greater the environmental impact, the more serious the offence will be regarded. Diversion is less likely to

be offered where there has been significant, long-term, or irreversible harm to the environment. Diversion may be appropriate where environmental effects can be remedied as part of the conditions imposed.

3.3.3 Culpability

The defendant's culpability will be a key consideration in assessing eligibility for Diversion. Diversion is less likely to be offered where offending is persistent, deliberate, or characterised by a high degree of recklessness. Diversion may be appropriate for offending that was genuinely careless or that involved a minor degree of negligence (e.g. an unexpected system failure).

The motivation underlying offending will also be important. Diversion is less likely to be offered where offending is undertaken for financial gain (including the saving of expenditure). Diversion may be appropriate where the conduct was undertaken for an altruistic purpose (e.g. a charitable project or a genuine but misguided attempt to benefit the environment).

3.3.4 Views expressed by identified victims

It is not practical for consultation with all potentially affected or interested parties to occur. However, in deciding whether to offer Diversion the Chief Executive will consider any views expressed by identified victims of the offending.



4. Diversion conditions

4.1 Guiding principles

In imposing conditions of Diversion, the Council will consider three guiding principles:

4.1.1 Proportionality

Any conditions imposed must be proportionate to the offending in question. The conditions should not be more onerous than the sentence likely to be imposed by the Court following a conviction.

4.1.2 Achievability

All conditions must be realistically capable of completion within the adjournment period (or any reasonable extension that may be granted to that period). It will not normally be appropriate to impose Diversion conditions which require lengthy or repeated Court adjournments.

4.1.3 Appropriateness

Any conditions imposed should be appropriate to meet the purposes of Diversion (as outlined at section 1.2 above).

4.2 Examples of Diversion conditions

The following are examples of suitable Diversion conditions:

4.2.1 Acceptance of responsibility

A defendant may be required to formally acknowledge their wrongdoing and show they understand the implications of the offending.

4.2.2 Cost recovery

A defendant will normally be required to reimburse the Council for costs incurred (including investigation, legal, and remedial costs). If a defendant cannot reimburse the Council's costs or disputes the amount involved, this may well result in Diversion being declined.

In exceptional circumstances it may be possible for a defendant to pay the required amount by instalments. This option is offered at the discretion of the Chief Executive and is not available as of right.

4.2.3 Effective remediation

It will normally be appropriate for a condition that requires any environmental effects to be remedied and for the environment to be returned, as near as possible, to its natural state.

4.2.4 Environmental enhancements

In some instances it may be appropriate to impose conditions designed to enhance the environment or prevent further environmental impact. Examples include riparian planting and the fencing of waterways.

4.2.5 Infrastructure improvements

A defendant may be required to undertake infrastructure improvements so as to address issues that may have caused or contributed to the offending.

4.2.6 Training and education

A defendant may be required to undertake specific training or education in order to minimise the risk of reoffending.

4.2.7 Donation

A defendant may be required to pay a donation to a specified enhancement fund or approved community group. Where possible the fund or group should be operating within the local environment where the offending occurred. The extent of any donation required will take into account the financial burden of other Diversion conditions imposed.

In certain circumstances the Council may approve the donation of services in lieu of a financial donation.

4.2.8 Restorative Justice

A defendant may be required or invited to participate in a Restorative Justice conference involving representatives from the Council, any identified victim(s), and other interested groups or parties. The outcomes of a Restorative Justice conference may include conditions to be complied with in order for Diversion to be completed.

5. Disclosing Diversion information

Pursuant to the Privacy Act 1993, a person may request from the Council any personal information that can be readily retrieved, including records relating to Diversion held electronically or in a current or archived file. The person also has the right to request correction of that information.

If a request for information is received from someone other than the person to whom the Diversion decision relates, the request will be considered in accordance

with the provisions of the Local Government Official Information and Meetings Act 1987. Where the information relates to a matter that is proceeding through the Diversion process, the request for information may be refused under section 6(a) of that Act.



