

REPORT

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Prepared for: Compliance Committee
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Subject: Publication of the council enforcement activity details

1. Précis

The Compliance Committee meeting of 26 April 2005 requested a paper on policy considerations for the public naming of people and organisations on whom enforcement actions had been taken. This paper recommends that Council continue with a policy of not publicly naming except when the matters are directly in the public domain or that wider public interest will be served. It is noted that actions considered by the courts of law will be subject to court rulings. Natural justice principles are reported in the Council proceedings as they are in court proceedings.

2. Form of enforcement actions

According to the Resource Management Act 1991, enforcement actions may be taken by the Council for breaches of the Act. Enforcement actions can be taken through infringement notices, abatement notices, prosecution, enforcement orders and interim enforcement orders.

Infringement notices may be issued by Otago Regional Council for minor offences. The amount of an infringement is set by the RMA and varies from \$300 to \$1000 depending on the offence. Infringements may be appealed through the environment court, or if not paid are referred to the district court for recovery. Depending on the nature of the offence, if infringement notices are served to an offender on more than one occasion prosecution may be considered. Prosecution is considered for serious breaches and repeat offences. Prosecution action requires providing evidence at the Environment Court and if successful the offender is required to pay the Court fee and a fine. The court could fine up to \$200,000 or rule up to 2 years' imprisonment.

Abatement notices, which prescribe specific actions that must be taken to either prevent or remedy adverse effects on the environment, may be served separately or in conjunction with infringements. Abatement notices can be appealed by the offender for a 'stay' of proceedings.

An enforcement order is a serious form of an abatement notice and is served by the court. Any person, including the council, can request a court to serve an enforcement order. Evidence has to be provided in the court to convince the court to take this action and hence this process is time consuming and costly. An interim enforcement order could be served on serious offences requiring immediate action by the court. Whilst this form of action is costly it is very effective since court will direct the offender without any delay to avoid, remedy or mitigate adverse effects. Often very short hearings are held by the court to hear council's offender's views before any decisions on interim enforcement order.

3. Council's enforcement policy

Council has an enforcement policy that was introduced following a Council workshop on 30 March 2000 and adopted by the Policy Committee in April 2000.

The Council's enforcement policy is based on enforcement action being taken as deterrence rather than a retributive approach. When considering an enforcement action the questions should be asked whether the environment would be better off if the action is taken and stops the re-offending. Based on this philosophy the policy requires an Enforcement Decision Group (EDG) to consider each offence and consider appropriate action on a case by case basis.

Decisions regarding enforcement action are made by the Enforcement Decision Group, which consists of the officer recommending the enforcement action and any two of the Compliance Manager, Director Resource Management, and the Chief Executive. The investigating officer produces a memo outlining the situation, which is assessed and discussed by the EDG. This method ensures that there is a consistent approach to enforcement action and that the principles of equity and natural justice are being adhered to. In all cases the decision for enforcement action considers the option most likely to result in ongoing compliance and a positive environmental outcome. For backyard burning offences a decision from the EDG is not required and instant fines (\$300) may be issued by Council's delegated enforcement contractors and staff.

In 2003/2004 a total of 41 infringement notices were served by Otago Regional Council. Of these 32 were for discharge of a contaminant to the environment in contravention of Section 15 of the RM A. Approximately 20 infringements were served on share-milkers, farmhands or farm owners for discharges of effluent to water or to land in circumstances where it may enter water. There were 6 infringements served for backyard burning incidents, commonly at student rental properties. Other offences included breaches of consent conditions, disturbance to the beds of rivers or streams, or non-consented water takes.

Details of enforcement actions are available to the public under existing freedom of information provisions except where release of such information may prejudice judicial proceedings. Where court action is initiated by Otago Regional Council publicity of the details of the case will also naturally result. Additionally, complainants are in most cases informed where enforcement action has been taken as a result of their complaint although the nature of this action is not always stated due to respecting the rights of the alleged offenders to defend infringements, possibly resulting in court action.

4. Publicising Names of Offenders

Serious legal actions such as prosecutions or enforcement orders receive publicity without Council's active publication of the offences because the cases are heard at the Environment Court and the media have access to information on court cases. Therefore there is no need to actively publicise Council's prosecution and enforcement order actions. In cases of no publicity by media, such cases could be reported to the Compliance Committee.

Abatement notices require either abating an activity or requiring any mitigation works to be carried out by the offender. Publishing the name of an offender who is served with an abatement notice is considered to be controversial and possibly result in a refusal to undertake the work through 'stay on' request by the offender from the court. Therefore publicising the details of offenders who are served with abatement notices may be counterproductive in terms of swift actions to avoid, remedy or mitigate any adverse effects.

As for infringement offences, the names of the offenders could be reported to the Compliance Committee once the appeal period is lapsed. Several regional councils report full details of non-compliances and enforcement actions annually. Such a practice has to be considered carefully by ORC in terms of the purpose of taking this approach and any positive or negative outcomes of publishing offenders' identity.

Serving an infringement is a form of punishment and is considered as a deterrent. The Council's staff believe that in the majority of the cases the infringement notices have deterred repeat offences and hence this action has been considered as effective. The committee must consider whether serving the infringement notice is sufficient deterrent and that any further measures, such as publishing offenders' names, is required. In the case of traffic offences the NZ Police and the Land Transport New Zealand (LTNZ) have long argued that infringement notices have been an effective deterrent. Neither the NZ Police nor LTNZ took the additional step to publicise offenders' names.

It is considered that publishing offenders' identity is also another form of punishment and that for most one-off and non-recidivist offenders such an action is draconian and hence not necessary. Public reporting of the names of offenders who have been served with infringement notices has the potential to impact on reputation, and perhaps current and future employment, of individuals and companies who have been named.

The prospect of being publicly named may serve as a deterrent to future offending and/or may be perceived as a positive outcome by people who have reported incidents. This form of punishment has the potential to affect the perception the offender has of the Otago Regional Council and the future relationship between the offender and Council staff. Publicising details of infringements served also may affect the expectations of complainants as to the action that the Council will take in response to their reporting of incidents.

The existing Enforcement Policy does not include mention of public naming of people served with infringement notices as an enforcement option. Reporting of offenders' names would be a change in the philosophy of the Council as expressed in this policy.

5. Conclusions

It is clear that there is no need to publish details of offenders who have been prosecuted because prosecution is a public process. Prosecution decisions can be reported to the Committee if due publicity is not received. It is considered counterproductive to publish details of offenders served with abatement notices because of potential time delays in avoiding, remedying or mitigating adverse effects on the environment.

Publishing the names of offenders who have been served with infringements is considered as an additional form of punishment. The Compliance Committee must consider whether such an additional punishment is warranted when serving infringement notices has been an effective deterrent in the majority of cases. Reporting the identity of the offenders has the potential to impact on the reputation and employment of individuals or industries. Such publicity may affect the behaviour of offenders and their relationship with the Council and also influence the expectations of complainants.

6. Recommendations

1. That Council's enforcement policy be not altered and that reporting of offences and alleged offences should exclude the identity of the offenders except

- i. when public knowledge of identity already exists, or
 - ii. when environmental outcomes from the offence will be enhanced, or
 - iii. when protection of other individuals or organisations is appropriate.
2. That the first Committee meetings after 1 January and 1 July be provided with summary reports of all statutory enforcement actions undertaken in the preceding six months, such summary to be by locality, industry and offence type.

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