2013

Enforcement Manual

Mandatory Directives

Mandatory Directives: Abatement notices, enforcement orders and water shortage directions

This guidance note is the third of seven guidance notes that make up the RMA Enforcement Manual. Mandatory directives under the Resource Management Act 1991 (RMA) direct the recipient to cease or take action. Failure to comply with a mandatory directive is an offence under the RMA.

Mandatory directives include abatement notices, enforcement orders (including interim enforcement orders), water shortage directions and excessive noise directions. The Managing Noise through Enforcement guidance note provides more information on excessive noise directions.

Abatement notices are frequently effective to urgently remedy a situation, particularly when prosecution follows any non-compliance. However, sometimes the sanction and protection of a Court order is desirable, especially in cases involving litigious or obstinate offenders. In this case an interim enforcement order is likely to be more effective.

Before using a mandatory directive, a local authority should usually conduct an investigation and provide an opportunity to the persons involved to explain the situation and offer a voluntary solution.

Guidance note

To access the guidance note scroll down or click the link above.

Abatement Notices

Abatement notices are served by enforcement officers on persons breaching a provision of the RMA, a rule in a RMA plan, any regulations, or a resource consent. Unlike enforcement orders they do not require an application to be made to the Environment Court first.

Section 4 (5) of the RMA sets out when an abatement notice can be served on the Crown.

Abatement notices are a very efficient mechanism for obtaining compliance with the RMA. Anecdotally, the majority of abatement notices issued are complied with, so it is usually the cheapest option and the enforcement officer's primary tool.

Only the enforcement officers of local authorities can issue abatement notices. The relevant sections relating to abatement notices are 322-325B of the RMA.

A restrictive approach was taken to the powers to issue abatement notices in the early decisions under the RMA, but a more relaxed approach has been followed since 1993 (see for example Zdrahal v Wellington CC [1995][1993] W010/93 and Lendich v Waitakere City Council [1999] A077/99).

An appeal can be lodged by the recipient of an abatement notice. Appeals operate as a 'stay' on some types of abatement notices, which means that they need not be complied with until the matter is resolved. A hearing of an appeal to the Environment Court against an abatement notice (depending on the issues) can be both expensive and time-consuming. Some local authorities choose to cancel an abatement notice which has been appealed, and apply for an enforcement order, rather than spend money and time defending a notice that has relatively limited scope.

Scope of an abatement notice - s322 of the RMA

Section 322 of the RMA sets out the scope of an abatement notice, provides for the service of an abatement notice by an enforcement officer, and requires the enforcement officer to have reasonable grounds for believing that the circumstances in s322(1) or (2) exist.

The abatement notice must specify the subsection of s322 that the enforcement officer relies on. Sometimes it is appropriate to rely on more than one subsection of s322.

In terms of scope, abatement notices can be categorised under the following three types:

1: Cease or not commence an action

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

A variation of this form of abatement notice is also provided for:

- Section 322(1)(a)(ii) - requires that person to cease, or prohibits 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, 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. Note that the High Court has held that the meaning of s322(1) was plain and was intended to apply to continuing effects and continuing activities (see Zdrahal v Wellington City Council [1995] 1 NZLR 700; [1995] NZRMA 289 (HC)).

2: Take an action

- Section 322(1)(b)(i) - requires 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 the RMA, any regulations made under the Act, a rule in a plan or a proposed plan, or a resource consent, and also necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person.

A variation of this form of abatement notice is also provided for:

- Section 322(1)(b)(ii) - applies the same grounds as s322(1)(b)(i), but relating to any land of which the person is the owner or occupier. This provision is particularly useful if the person who actually caused the effects cannot be identified.

3: Adopt the best practicable option to reduce noise

- One type of **abatement notice** is **for noise**. These notices, under section 322(1)(c) require that person, being an occupier of any land or a person carrying out any activity in, on, under or over a water body or the water within the coastal marine area, who is contravening s16 of the RMA (which relates to unreasonable noise) adopt the best practicable option to ensure that the emission of noise from that land or water does not exceed a reasonable level.

Abatement notices and proposed plans

Notice requiring an activity to cease/or prohibit an activity
Section 322(2)(a) - where any person is under a duty not to contravene a rule in a proposed plan, an abatement notice may be issued to require that person to cease, or prohibit that person from commencing anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer would do so (unless allowed by resource consent, s10 or s20A of the RMA).

Notice requiring something to be done
Section 322(2)(b) - where any person is under a duty not to contravene a rule in a proposed plan, an abatement notice may be issued to require that person to do something that, in the opinion of the enforcement officer, is necessary in order to ensure compliance by or on behalf of that person with a rule in a proposed plan (unless allowed by resource consent, s10 or s20A of the RMA).

Onus of proof

The local authority has the onus of establishing the grounds to support its abatement notice. The courts have held that standard of proof is on the balance of probabilities. For example, in Amor v New Plymouth District Council [2001] NZRMA 221 (and also see CA9/01, AP34/02, NP335/99), the High Court said:

"On the question of the standard of proof it was submitted that something more than proof on the balance of probabilities should have been required given the seriousness of the allegation. While it may perhaps be arguable that the outcome of a s65(4) proceeding is so serious for an owner that something more than a balance of probabilities standard of proof should be contemplated, such is not necessarily the case."

The High Court has held that balance of probabilities is the correct standard. However, if a person asserts that they are acting in compliance with existing use rights or a resource consent, then it is for them to prove this rather than the local authority to prove that the person was not acting under a resource consent. (Britten v Auckland Council [2011] NZEnvc 357). Section 322(4) of the RMA does not prescribe the manner in which an enforcement officer should go about determining whether there are reasonable grounds for issuing an abatement notice (see for example Black v Southland Regional Council [1994] C104/94 and Britten v Auckland Council [2011] NZEnvc 357). However, enforcement officers who issue an abatement notice should:

- inspect the site
- form their own opinion as to whether there are reasonable grounds to issue the abatement notice.

An enforcement officer should also collect any evidence that proves each element of the offence. For example in Christchurch City Council v Blackett [1993] CRN 3009007407, the Court was convinced by the evidence that car repairs were being carried out on a rural site, but considered there was no evidence that proved the repairs were associated with a business. Such evidence was required to prove that the offender had not complied with an abatement notice to cease operating a car repair business on the site.

In Hanodi v Manukau City Council (a125/09) the Court was not prepared to confirm an abatement notice when the enforcement officer had failed to take the simple measurements required to determine whether a structure breached a yard requirement in the District Plan.

Effect of an abatement notice - s323 of the RMA

Section 323 of the RMA provides that:

- the recipient of the abatement notice must comply within the period specified in the notice, subject to the rights of appeal in s325 and, unless the notice directs otherwise, pay all costs and expenses of complying with the notice
- if the notice is made under s322(1)(c) to adopt the best practicable option to reduce noise and the recipient fails to comply, an enforcement officer may take reasonable steps to reduce the noise to a reasonable level and, when accompanied by a constable, to seize and impound the noise source.

Once a noise source is impounded, an owner may apply to have it returned (section 336 RMA). The impounding authority must return the noise source unless it considers that doing so would lead to a resumption of noise emissions beyond a reasonable level. If not claimed within 6 months (or if no application is made to the Court within 6 months under section 325), the impounding authority can dispose of the noise source (section 336(5) RMA).

Content and form of an abatement notice - s324 of the RMA

Section 324 of the RMA sets out the contents of an abatement notice and provides that the notice shall be in the prescribed form in the Resource Management (Forms, Fees and Procedure) Regulations 2003, (refer Form 48).

The following information is essential:

- **Location** - The recipient must be able to identify the locality to which the abatement notice relates. The most obvious way to identify the property is by including its physical address, but it may also be necessary to include the legal description and/or a New Zealand Map Series reference. The appropriate description depends on the circumstances. For example, if the recipients are undertaking the activity on a particular lot of land and they own a number of lots of land for which the physical address is the same, the lot number should be stated in the abatement notice.

- **Reasons for and requirements of the notice** - A clear explanation as to why the notice was issued must be given. The notice should also provide precise details of the actions required to be taken, ceased, or not commenced.

Defence to a notice - s325 of the RMA

Section 325 of the RMA provides for appeals against abatement notices and applications for a stay. Notices of appeal must be in the prescribed form under the Resource Management (Forms, Fees and Procedure) Regulations 2003 (refer, Form 49). Section 336, via reference to section 325, provides for the same appeal right against a refusal to return a noise source. Notice must be lodged with the Court within 6 months of the date of seizure of the noise source.

The recipient of an abatement notice may apply for a stay (see Page v Wanganui District Council [2012] NZCA 324). An application for a stay must be in the prescribed form under the Resource Management (Forms, Fees and Procedure) Regulations 2003 (refer Form 50).

An appeal does not operate as a stay unless:

- the abatement notice is within the scope of s322(1)(a)(ii) and the recipient is complying with the RMA, any regulation, a rule in a plan, or a resource consent (relates to s17 RMA duty), or
- a stay is granted by an Environment Judge.

Before granting a stay, an Environment Judge must:

- consider the likely effect on the environment of granting a stay; and
- whether it is unreasonable for the person to comply pending the decision on the appeal; and
- whether to hear the applicant and/or the local authority before making the decision about the stay; and
- such other matters as the Judge thinks fit.

The Court has indicated that an application for stay should be based on the purpose of sustainable management, having regard to the consequences for the appellant of not granting a stay. In such an application, the court will weigh the adverse effects on the environment against the adverse effects on the appellant of complying. See for example, Warren Fowler Ltd v Manukau City Council [1998] AO71/98 and Waimakariri District Council v Canterbury Regional Council [2001] C30/2001.

The Environment Court must not confirm an abatement notice in the circumstances specified in s325(5) of the RMA, in particular where the recipient is acting in accordance with a rule in a plan, resource consent, or designation.

Amendment and cancellation of notice - s325A of the RMA

Section 325A of the RMA provides for the following:

- The local authority can cancel the abatement notice if it considers the notice is no longer required. Written notice of cancellation must be given. Refer to the form for the cancellation of an abatement notice for an example of how such a notice should be written.
- Any person directly affected by the abatement notice may apply in writing to the local authority to change or cancel the notice. The local authority must give written notice of its decision. Refer to the notice of decision regarding application to change or cancel an abatement notice for an example of how such a notice should be written.

If the local authority, after considering an application to change or cancel the abatement notice, confirms the abatement notice or changes it in a way other than that sought, the person who applied for the cancellation or change may appeal to the Environment Court in accordance with s325(2) of the RMA. Note that if the recipient has missed the deadline for appealing an abatement notice, this provision provides a fresh avenue for pursuing concerns about the notice in the Environment Court.

Enforcement Orders

An enforcement order is similar in some respects to an abatement notice in that it is used to require a person to cease doing something that contravenes a rule in a plan, requirement in the RMA, or that is dangerous, noxious or offensive. It can also be used to require and offender to do something necessary to ensure compliance or avoid, remedy or mitigate adverse effects.

Unlike abatement notices, enforcement orders are issued by the Environment Court (refer sections 314-319 and 321 of the RMA). As set out in s4(6) of the RMA, an application for an enforcement order can be made against an instrument of the Crown but only if:

a) it is a "Crown organisation"; and
b) a local authority applies for the order; and
c) the order is made against the Crown organisation in its own name.

Enforcement orders offer more options than an abatement notice, including the ability to recover clean-up costs incurred or likely to be incurred in avoiding, remedying or mitigating any adverse effect on the environment. The Court may also order restoration of a natural or physical resource. Where the offender has failed to comply with an order, the local authority, with the Court's consent, may go ahead and comply on the respondent's behalf (and recover the cost of doing so under s315 of the RMA).

It can be useful to begin enforcement order proceedings to alert offenders to the seriousness of their actions and make them more amenable to solutions. If a problem or the options to resolve it are complex, enforcement proceedings provide a Court-supervised procedure for bringing about a conclusion, and if problems are encountered during the implementation of the solution, the parties can return to Court for direction.

Scope of an enforcement order - s314 of the RMA

The permissible scope of an enforcement order is set out in s314 of the RMA. In summary, an enforcement order may require a person to:

- cease, or prohibit a person from commencing, anything which, in the opinion of the Environment Court, contravenes or is likely to contravene the RMA, any regulations under the RMA, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent, s10 (certain existing uses protected), or s20A (certain existing lawful activities allowed)
- cease, or prohibit a person from commencing, anything that, in the opinion of the Environment Court, 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
- do something necessary to comply with the RMA, any regulations under the RMA, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a esource consent
- do something necessary to avoid, remedy, or itigate any actual or likely adverse effect on the environment caused by or on behalf of that person

- remedy or mitigate any adverse effect on the environment caused by or on behalf of that person
- pay money to, or reimburse any other person for, actual and reasonable costs and expenses (refer s314(2) of the RMA) incurred or likely to be incurred in avoiding, remedying or mitigating any adverse effect on the environment, where the person against whom the order is sought fails to comply with an enforcement order, an abatement notice, a rule in a plan or proposed plan, a resource consent, or any of that person's other obligations under the RMA
- restore a natural or physical resource to its state before the occurrence of the adverse effect.

The applicant for an enforcement order has to prove, on the balance of probabilities, that an enforcement order is required. In applying this standard of proof, consideration must be given to the seriousness of the consequences of making an enforcement order. If there is cause for doubt, the Court will give benefit of doubt to those against whom orders are sought.

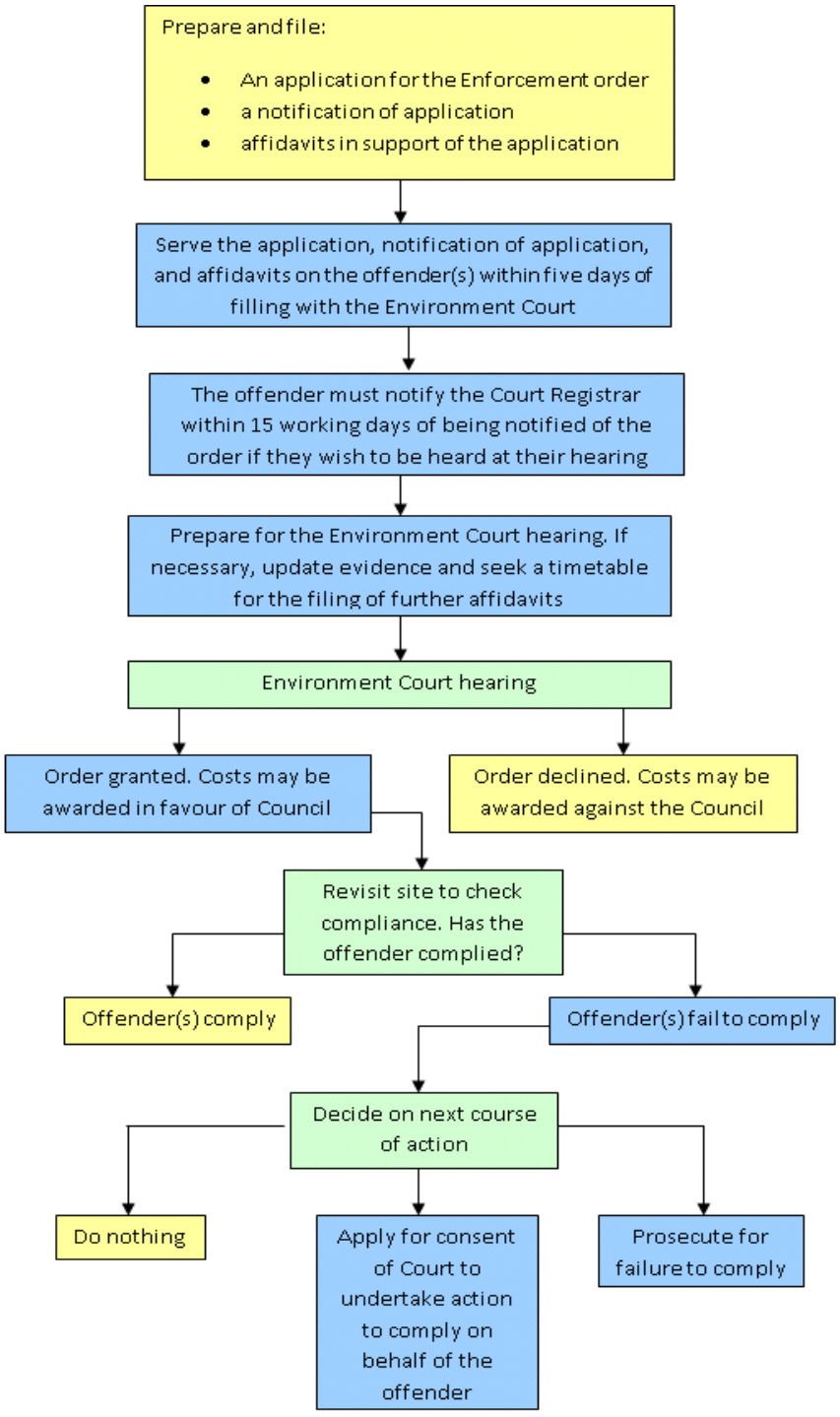
Whether an activity is objectionable or offensive enough to warrant an enforcement order under section 314(1)(a)(ii) of the RMA should be tested objectively. For example, in Zdrahal v Wellington City Council [1995] 1 NZLR 700) the High Court held that the following factors are relevant:

- Is the assertion of the person seeking an enforcement order honestly made?
- If so, is the activity noxious, dangerous, offensive or objectionable, or likely to be so?
- If so, is it of such extent that it is likely to have an adverse effect on the environment?
- In all the circumstances, should the Court's discretion be exercised and an enforcement order made?

Further information about recovering costs relating to enforcement action, is contained in the guidance note Enforcing Plans and Consents.

Procedure for enforcement order application - s316-318 of the RMA

The procedure for making an enforcement order application is set out in s316 to 318 of the RMA. This procedure is summarised the diagram below and the text following the diagram provides an explanation of the stages.



Preparing and Hearing an Application

An application for an enforcement order must be made in the prescribed form under the Resource Management (Forms, Fees and Procedure) Regulations 2003 and be lodged with the Environment Court (refer Form 43). The applicant must also serve notice of the application in the prescribed form (refer Form 44 of the Resource Management (Forms, Fees and Procedure) Regulations 2003) on every person directly affected by the application within five working days after the application is made.

Before deciding an application for an enforcement order, the Environment Court must hear the applicant and any person against whom the order is sought who wishes to be heard, provided that person has given the Court 15 working days notice of their intention to be heard.

Enforcement orders must be written in precise terms that are capable of enforcement and should not contain information that is debateable or conjectural.

Decision on application including defences - s319 of the RMA

Section 319 of the RMA provides that, after hearing an application, the Court can refuse the application or make any of the orders outlined in s314 of the RMA. The Court has discretion to refuse an order even when the grounds are made out.

For the Court to have jurisdiction on an enforcement order, there does not need to be a high degree of adverse effects on the environment. For example, in AMP v Gum Sarn Property Ltd [1992] 2 NZRMA 119, the Planning Tribunal dealt with a private application for an enforcement order. The Tribunal held that if the local authority does not enforce its plan and a member of the public seeks an order, the fact that the applicant is not officially responsible does not affect the Court's discretion. On the question of whether an application for an enforcement order is weakened by the fact that the local authority has been slow or otherwise remiss in enforcing the breach of a Plan, the Planning Tribunal held the following:

- There is significant public interest in the consistent and even-handed enforcement of plans. Respondents are required to abide by the law regardless of whether the council was vigilant.
- Property owners who fail to observe the relevant planning provisions should not be permitted to continue to profit from that failure.
- Even if a council official misleads the respondent as to what is required to comply, the obligation to do so remains. However, if a person reasonably relied on misleading information from a council official, this might influence the Court to defer an order requiring compliance.
- The state of mind and conduct of the respondent is relevant to the discretion of the Court when it comes to the timing and the issue of whether to defer enforcement action.

The principles from this decision were upheld in Manukau City Council v Murray [2002] A084/2002 and in Wainui Environmental Protection Society Incorporated v Redvale Lime Company Limited (A90/08).

Similar questions were dealt with by the Planning Tribunal in Canterbury Regional Council v Canterbury Frozen Meat Co Ltd [1994] A14/94. The Tribunal held as follows:

- To refuse an enforcement order altogether when there have been illegal contraventions would, in the absence of unusual circumstances, tend to diminish public confidence in the statutory control over the discharge of contaminants, and in the perception that administration of this control is even-handed.
- Immediate compliance with an enforcement order is usually required, although there is a discretion to postpone the coming into force of an order. The circumstances supporting the deferral of an enforcement order are:
  i. absence of evidence of environmental harm from excessive concentrations of contaminant in the discharge
  ii. no flagrant or reckless contravention of the law
  iii. the technical difficulty of ensuring that the effluent will constantly meet the stipulated limits without exception.

The discretion to grant or refuse an order is subject to the restrictions or **defences** in s319(2) of the RMA:

2. Except as provided in subsection (3), the Environment Court must not make an enforcement order under s314(1)(a)(ii), (b)(ii), (c), (d)(iv), or (da) against a person if-
   a. that person is acting in accordance with-
      i. a rule in a plan; or
      ii. a resource consent; or
      iii. a designation; and
   b. the adverse effects in respect of which the order is sought were expressly recognised by the person who approved the plan, or granted the resource consent, or approved the designation, at the time of the approval or granting, as the case may be.
3. The Environment Court may make an enforcement order if-

   a. the Court considers it appropriate after having regard to the time that has elapsed and any change in circumstances since the approval or granting, as the case may be; or
   b. the person was acting in accordance with a resource consent that has been changed or cancelled under s314(1)(e).

In Balfour v Central Hawkes Bay District Council [2006] CA174/06, the Court of Appeal noted that s10 of the RMA (existing use rights) provided an exception to the requirement to comply with district plan rules, but did not override the general duty in s16 of the RMA to avoid unreasonable noise. In this case, use of s319 of the RMA as an alternative defence failed as the Court stated that s319 does not explicitly provide for a defence based on existing use rights, but only for compliance with current rules or resource consents where adverse effects, in respect of which the order was sought, were recognised by the plan.

Interim Enforcement Orders

Application for an interim enforcement order - s320 of the RMA

Interim enforcement orders allow for urgent action, and applications are usually dealt with by the Court without a hearing and without serving notice on the other party, although a substantive hearing is scheduled for a later date. A local authority might seek and obtain an interim enforcement order in as little as two or three days, depending on the availability of evidence (by affidavit) and an Environment Judge.

An application for an interim enforcement order is made under s320 of the RMA. The provisions of s314-319 of the RMA apply to an interim order, except to the extent varied by s320. The scope of an interim enforcement order is therefore the same as that for an enforcement order pursuant to s314 of the RMA.

Section 320(3) provides that before making an interim enforcement order, the Judge shall consider:

- what the effect of not making the order would be on the environment; and
- whether the applicant has given an appropriate undertaking as to damages; and
- whether the Judge should hear the applicant or any person against whom the interim order is sought; and
- other matters as the Judge thinks fit.

Guidance about when applications for interim enforcement orders may be appropriate was provided in Walden v Auckland City Council [1992] A03/92. In this case, the Planning Tribunal observed:

"It is the normal course for applications for interim injunctions that the applicants are expected to give undertakings as to damages. That would normally be expected by the Tribunal in the case of applications for interim enforcement orders as well. The reasons for that practice are summarised in Spry on Equitable Remedies. Nevertheless, the absence of an undertaking as to damages will not always be decisive against an applicant, and it may be that this Tribunal will be more relaxed about that expectation than the general courts are in the case of interim injunctions; particularly where applicants seek not so much to protect private rights, but to seek that the public law is observed."

As such, an undertaking to pay damages is generally relevant but not decisive in determining an application.

For example, in Manawatu-Wanganui Regional Council v Fugle [2011] NZEnvc 314 the Court determined that it is not necessary for the Council to provide an undertaking as to damages. The interim enforcement orders related to an apparent longstanding breach of conditions of resource consents having significant adverse effects on the environment. The Council sought to enforce compliance with the conditions as part of its functions pursuant to s30 RMA. In that respect, the Court considered that the Council is undertaking a public law function and need not necessarily be required to provide security for costs.

If an interim enforcement order is made, the Court will direct the applicant to serve a copy on the respondent. The order takes effect from when it is served, or any later date the order directs.

An interim enforcement order stays in force until an application for an enforcement order under s316 is determined, or until the order is cancelled either under s320(5) or under s321 of the RMA.

Amend or cancel an enforcement order - s321 of the RMA

Section 321 of the RMA provides that anyone directly affected by an enforcement order may at any time apply to the Court to change or cancel the order. This provision provides an obvious route for the recipient of an interim enforcement order, who was not heard at the time, to address the effect of that interim order upon them. The application is made in accordance with the Resource Management (Forms, Fees and Procedure) Regulations 2003 (refer Form 46).

Failure to comply with an enforcement order - s 315(2) of the RMA

If the respondent fails to comply with the enforcement order, any person may, with the consent of the Environment Court under s315(2) of the RMA:

a. comply with the order on behalf of the respondent, and for this purpose, enter upon any land or enter any structure (with a constable if the structure is a dwelling house)
b. sell or otherwise dispose of any structure or materials salvaged in complying with the order
c. after allowing for any moneys received under paragraph (b), if any, recover the costs and expenses of doing so as a debt due from that person.

Section 338(1)(b) of the RMA provides that it is an offence to contravene, or permit the contravention of, an enforcement order. In the case of a natural person the maximum penalty is two years imprisonment or a fine not exceeding $300,000. For a person other than a natural person the maximum penalty is a fine not exceeding $600,000. 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.

Where an offence has been committed that involves a breach of a resource consent, the Court may also make an order that requires a consent authority to review a resource consent under s128(2) of the RMA. As a result of this review, if the authority finds that there are significant adverse effects on the environment resulting from the exercise of the consent, the consent authority may cancel the consent and recover any costs associated with this review from the consent holder under s132(4) of the RMA.

The Crown can be served with an enforcement order and can be prosecuted by a local authority under s4(6) of the RMA. However, the Court may not sentence a Crown organisation to pay a fine in respect of an offence as s4(10) sets out that as s4(8) and 4(9) are subject to the Crown Organisations (Criminal Liability) Act 2002.

Contempt proceedings may be brought under the District Court Act 1947 for deliberate breach of a Court order.

A Judge of the Environment Court may evoke section 79(2) of the District Courts Act 1947 to enforce the orders he or she makes under the RMA. Councils should not ask the District Court to enforce such an order of the Environment Court because the District Court lacks the power to make such an order (Conway v Auckland Regional Council [2007] NZRMA 252).

Water Shortage Directions

Scope and procedure for issuing a water shortage direction

Under s329 of the RMA, regional councils and unitary authorities can issue water shortage directions at any time there is a serious temporary shortage of water in its region or any part of its region. The direction may apportion, restrict, or suspend:

a. the taking, use, damming, or diversion of water, and/or
b. the discharge of any contaminant into water.

The direction should set out the extent and manner of the apportionment, restriction or suspension associated with water shortage direction. Newspapers should be used to notify the direction in accordance with s329(6) of the RMA. Where practicable, as a matter of good public relations, a copy of the notice should be personally delivered by council staff to each affected household.

As good practice, the following information should be included in a water shortage direction:

- clear identification of the area to which the notice applies
- the reasons for the notice
- a clear statement of the extent and manner of the apportionment, restriction or suspension
- the period during which the direction applies, including the number of days and the dates involved.

Duration of direction

Section 329(3) of the RMA provides that a direction may not last for more than **14 days** but may be amended, revoked or renewed by subsequent direction. If the direction is required for more than 14 days, the council must therefore renew the direction by giving a subsequent direction.

Failure to comply with a water shortage direction

Section 338(1)(d) of the RMA provides that it is an offence to contravene a water shortage direction. In the case of a natural person the maximum penalty is two years imprisonment or a fine not exceeding $300,000. For other persons, the maximum penalty is a fine not exceeding $600,000. The maximum fine for a continuing offence is $10,000 per day or part of a day during which the offence continues.

Contravention of a water shortage direction is not a strict liability offence. This means that it is necessary to prove beyond reasonable doubt that the defendant intended to commit the offence. Proving knowledge of the direction will usually be sufficient but it important that the direction is clear to reduce the potential for confusion, which is a relevant consideration in proving beyond reasonable doubt.

Abatement notices

Scenario 1: Work on a tree

Jenny Jones makes a number of complaints about her neighbour Sammy Smith. Mrs Jones tells the Council that Mr Smith is damaging a 10-metre-high oak tree on his property. The tree is a scheduled protected tree in the Council Operative Plan. Harry investigates and finds that there is no sign of any damage to the tree.

Harry speaks to Mr Smith, who tells Harry that he has not 'touched ' the tree and Mrs Jones is insane. Mrs Jones continues to complain and Harry inspects the property again and finds that there is no sign of damage. Mrs Jones asks Harry to issue an abatement notice.

Q1: What should Harry do?

A1: Harry cannot issue an abatement notice. Before Harry can issue an abatement notice he must have reasonable grounds under s322(4) of the RMA to believe that any of the circumstances in s322(1) or (2) exist. Harry has inspected the tree and there is no evidence of damage, and it is therefore not appropriate for Harry to issue an abatement notice.

Scenario 2: Offensive symbols in public view

The Council receives complaints about a swastika that has been painted on the side of a house and is clearly visible. The complainants say that the swastika is extremely offensive. The swastika is in breach of the rules on signs in the Council Operative Plan. Harry decides to issue an abatement notice.

Q1: Which subsection(s) of s322 of the RMA should Harry rely on?

A1: Subsection (1)(a)(i).

The facts in this scenario are taken from the Zdrahal v Wellington City Council). In that case an abatement notice was issued under s322(1)(a)(ii), but the. Planning Tribunal queried whether the Council should have instead proceeded under s322(1)(a)(i). This was because the relevant transitional plan for managing signs was clear and would not have required a subjective assessment as to whether the swastika was or was not objectionable. The case highlights the importance of considering all the options available and pursuing the most straightforward of them.

Note: In this case, Zdrahal 's appeal failed and the abatement notice was upheld. The High Court held that the swastika was offensive and objectionable.

Scenario 3: Earthworks and change of circumstances through rainfall

Earthworks have been carried out at a property owned by Mr Smith and his neighbour, Mr White, has complained to the council about the earthworks. Harry investigates and

discovers that Mr Smith is not in breach of the RMA, any regulations, a rule in a plan or a resource consent. However as a result of the earthworks Mr Smith has carried out on his property, earth may slide onto the property of Mr White. Harry issues an abatement notice to Mr Smith under s322(1)(a)(ii) of the RMA.

Mr Smith appeals the abatement notice.

Following a heavy rainfall, some earth then slides from Smith 's property onto the neighbouring property owned by Mr White.

Q1: What should Harry do?

A1: The abatement notice is issued under s322(1)(a)(ii) and therefore the appeal filed operates as a stay of the notice. The situation is now urgent.

Harry should investigate further with an engineer, talk to Mr Smith and ask him to take steps to stop further earth sliding onto his neighbour's property. Harry should also speak to Mr Smith's neighbour Mr White.

If Mr Smith refuses to take action, an application for an interim enforcement order should be filed. The application should be supported by an affidavit from Harry exhibiting photographs of Mr Smith's property, and of the neighbouring property showing the adverse effect to date. The application should also be supported by an affidavit from the engineer.

An application should be filed simultaneously seeking leave from the Court to cancel the abatement notice without prejudice to the Council taking other enforcement action on the grounds that:

- Mr Smith has not complied
- an appeal has been filed and this stays the notice
- the circumstances have changed
- the situation is now urgent.

Water shortage directions

Scenario 1: Operation of a pump during period of water shortage direction

A water shortage direction is advertised by a regional council in the local newspaper. Council staff receive a complaint about Gary Reedy from his neighbour, Mrs Fair. Mrs Fair alleges that Mr Reedy has been operating a pump in the stream above her property during the period of the water shortage direction.

Council staff (Harry Helpful and Harriet Happy) immediately inspect the property and find a submersible pump in the stream on Mr Reedy's property. The pump is operating at the time of the inspection. The submersible pump has been positioned in the stream to gain the most benefit from a large spring and is pumping water about 150 metres to a large dam upstream, which is the legal point from which Mr Reedy takes water.

Mr Helpful and Ms Happy speak to Mr Reedy and point out to him that he is in breach of the water shortage direction. Mr Reedy's reply is: "I was not aware of the water shortage direction".

Mr Helpful informs Mr Reedy that the water shortage direction was advertised in the local newspaper. Mr Reedy tells Mr Helpful that he does receive the newspaper but he does not look at the public notices. In fact when he is very busy he often does not read the newspaper at all. When he does read the newspaper, he will only read the first couple of pages.

Q1: Does the Council have sufficient evidence to prosecute?

In this case the Council does not have sufficient evidence to prosecute. To succeed in a prosecution the Council has to prove http://qualityplanning.org.nz/index.php/manual/terms-definitions-forms-and-checklists that Mr Reedy intended to commit the offence. Mr Reedy claims that he did not see the advertisement in the newspaper.

Relevant case law

For a list of relevant case law refer to the Enforcement Manual case summaries when appropriate.