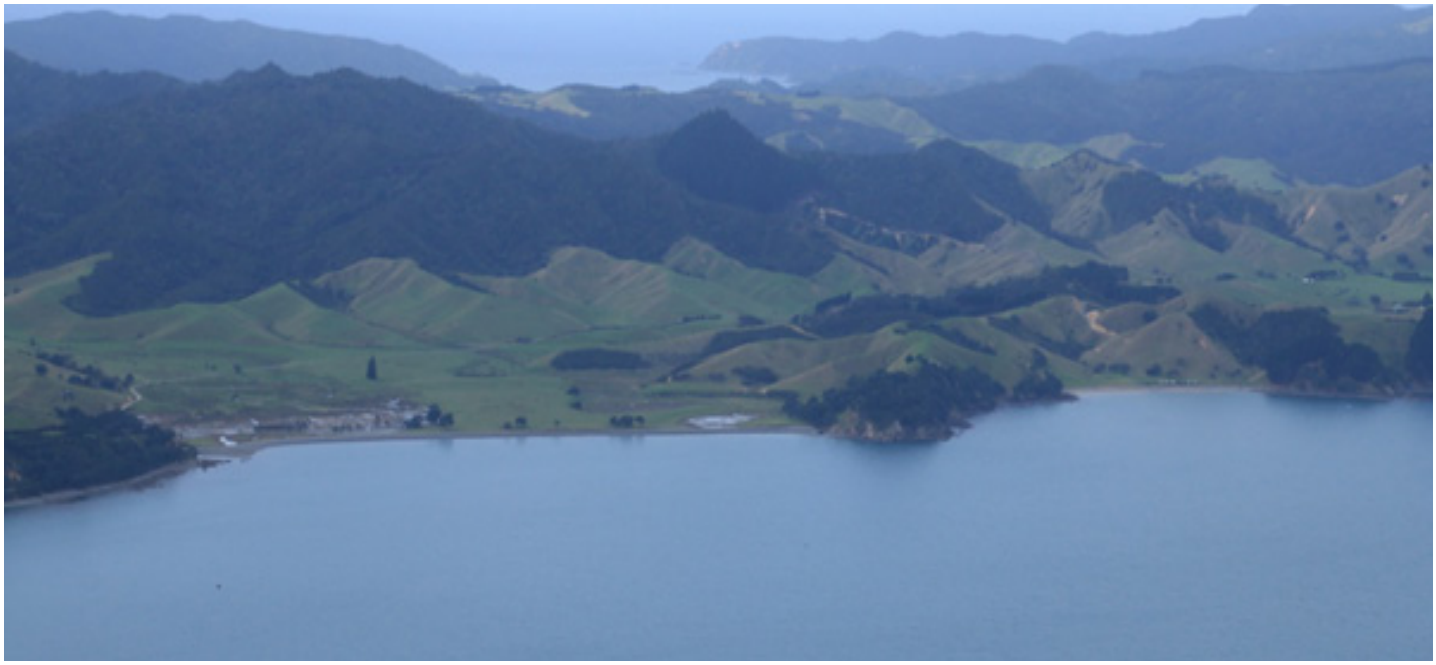
Ministry for the Environment
Manatū Mō Te Taiao



Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991

NOVEMBER 2016

New Zealand Government

Acknowledgements

Prepared with support from Hans Van Kregten and Kaha Consultancy.

The cover photo was taken by Wendy Bell, Waikato Regional Council.

Many thanks to the council, stakeholder and iwi representatives who assisted with this study.

Published in November 2016 by the
Ministry for the Environment
Manatū Mō Te Taiao
PO Box 10362, Wellington 6143, New Zealand

ISBN: 978-0-908339-48-8
Publication number: ME 1251

This document is available on the Ministry for the Environment's website: www.mfe.govt.nz

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Executive summary

This report provides a summary of local government (council) compliance, monitoring and enforcement (CME) under the Resource Management Act 1991 (RMA). The findings in this report are based on conversations with representatives from 13 councils[1] and nine stakeholders and iwi,[2] as well as data collected by the Ministry for the Environment.

The report does not make recommendations – it is intended to inform further analysis by the Ministry on what changes (if any) are needed to improve CME. The report is also intended to inform councils' CME activities, by providing examples of good CME practice by other councils.

The report is divided into three substantive sections:

- Part 2 explains the regulatory context behind CME, including the key statutory requirements and enforcement options available for penalising/deterring non-compliance
- Part 3 gives a summary of council CME activities and CME issues faced by councils
- Part 4 sets out opportunities for improving CME, raised by councils and stakeholders.

The report observes a number of key trends and issues, including:

- There is significant variation in the way councils carry out CME. Council approaches vary in terms of the priorities and resources given to CME activities, monitoring and investigation practice, enforcement decision-making processes and use of enforcement actions.
- Resources for CME activities are very limited in some councils. As a result, many activities which require monitoring are not able to be monitored. For example, most councils carry out very little or no monitoring of plan rules (permitted activities).
- There is a lack of data on council CME practices. As a result, it is difficult to assess the effect of CME on environmental outcomes.

Variations in council practices are acceptable where they reflect genuine regional/local differences. However variable/low-levels of CME can also lead to a lack of equity and public certainty, and impact negatively on environmental outcomes.

The report also observes examples of good CME practice, including:

- Most councils take a risk-based approach to monitoring (see part 3.1.2), an approach which has been endorsed by both Cabinet and the Productivity Commission[3]

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1 Four regional councils, three unitary authorities, four district councils and two city councils.

2 The stakeholders selected for this study represent environmental, community, Māori, business and governance interests.

3 CAB Min (13) 6/2B; New Zealand Productivity Commission, 2014.

- There are a number of voluntary industry, community and council initiatives which have been effective in lifting compliance (see part 3.2)
- The Compliance and Enforcement Special Interest Group have developed the Regional Sector Strategic Compliance Framework 2016–18, which aims to improve consistency in councils' CME practices.

Part 1: Introduction

1.1 Overview and purpose of report

This report provides an overview of research into compliance, monitoring and enforcement (**CME**) activities carried out by local authorities (councils) under the Resource Management Act 1991 (RMA). The report summarises key findings and insights from conversations with a range of regional, district, city and unitary councils throughout the country, as well as a range of stakeholders. The report does not provide analysis of the details of proceedings of RMA cases in the District Court (or appellate courts) or sentencing outcomes.[4]

This report and the research that sits behind it is intended to:

- provide a more comprehensive evidence base to enable the Ministry for the Environment (the Ministry) to assess whether the policy settings behind CME are fit for purpose
- inform councils' CME activities, by providing examples of other councils' activities and outlining the strengths and weaknesses of certain approaches
- help determine what data is requested from all councils annually through the national monitoring system (NMS)
- enable the public to better understand how councils carry out CME.

For the purposes of this report, and unless the context otherwise implies:

- **compliance** means adherence to the RMA, including the rules established under regional and district plans and meeting resource consent conditions
- **monitoring** means the activities carried out by councils to assess compliance with the RMA, and responding to complaints from the public about potential breaches
- **enforcement** is defined as the actions taken by councils to respond to non-compliance with the RMA.

Compliance, monitoring and enforcement are critical to effective implementation of the RMA

CME are critical to achieving the purpose of the RMA – the promotion of sustainable management of natural and physical resources. Investment in good plan, policy-making and resource consenting processes can be undermined if CME are done poorly.[5] CME are important for:

- demonstrating the consequences of non-compliance with the RMA and providing both general and specific deterrence to prevent future offending

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4 This was the subject of four studies on the use of prosecutions under the RMA. The latest report was released by the Ministry for the Environment (2012).

5 New Zealand Productivity Commission, 2013.

- educating the public about the level of environmental management required under the RMA and how to improve compliance, and giving assurance to the public that rules and policies are being upheld
- informing plan, policy and resource consent development processes so that they are enforceable and enforced, and effectively address relevant issues
- upholding Treaty of Waitangi obligations
- providing information on the state of the environment
- providing for good environmental outcomes.

This report focuses on activities where the environmental effects of non-compliance are significant or potentially significant. The adverse environmental effects of non-compliance with noise standards, for example, are minor and only temporary. For that reason, non-compliance with noise standards, despite making up the majority of complaints under the RMA,[6] is not discussed in detail in this report.

1.2 Background to this research

The Ministry's evidence base on compliance, monitoring and enforcement is limited

The Ministry, acting on behalf of the Minister for the Environment, has a duty under section 24(f) of the RMA to monitor the effect and implementation of the RMA, national policy statements and water conservation orders. The Ministry also has responsibility for ensuring the policy settings in the RMA are fit for purpose, and that any policy interventions are supported by robust evidence. As such, it is important that the Ministry has a good evidence base on CME, including on how councils approach their roles.

There are gaps and limitations in the Ministry's evidence base on CME. The Ministry's evidence on CME primarily consists of data from the RMA Survey of Local Authorities (until 2012/13), the NMS,[7] four reports on RMA prosecutions,[8] and ad hoc data and reports from other agencies[9] and councils. This does not, however, tell the full story of how councils carry out CME.

The Ministry's evidence base lacks information on council approaches to CME, including how monitoring is carried out, how enforcement decisions are made and the overall relationship between compliance promotion and enforcement. In addition, the previous data collected has the following limitations:

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6 Noise complaints make up 83 per cent of all complaints received by local authorities under the RMA.

7 The NMS replaced the Biennial RMA Survey of Local Authorities in 2014. The data request sent to councils through the NMS is currently being refined. The full set of 2014/15 data can be accessed at www.mfe.govt.nz/rma/rma-monitoring-and-reporting/reporting-201415

8 See the most recent report, Ministry for the Environment (2012).

9 Including some data from the Ministry of Justice on RMA prosecutions.

- the information collected by the RMA Survey of Local Authorities varied from year-to-year and is different to the NMS and as such, it is difficult to see temporal trends
- the NMS data focusses on the effectiveness of RMA processes (such as compliance with statutory timeframes for processing resource consents), but there is more limited data on the impact of these processes on the environment.

Addressing these information gaps and limitations is necessary to provide a more complete understanding of how councils are carrying out CME, and implementing the RMA. The NMS will address, in time, a number of these limitations (such as temporal consistency).

Stakeholders, through reports and commentary in the media, have provided insights into council approaches to CME, highlighting weaknesses in some cases. For example, the report *Towards Better Local Regulation* (Productivity Commission, 2013) identified the following issues:

- insufficient monitoring of RMA compliance by councils
- lack of council focus of monitoring and enforcement resources on high-risk activities
- insufficiency of penalties for deterring non-compliance
- absence of cost-recovery mechanisms to fund monitoring and enforcement activities.

Local Government New Zealand (LGNZ), in a draft 2015 position paper,[10] also highlighted a number of aspects of the RMA that are creating difficulties for CME staff in councils, such as the lack of cost recovery mechanisms for monitoring activities, especially permitted activities.

1.3 Methodology

This report is based on:

- publicly available information, and other documents provided by councils, stakeholders and the Ministry
- data collected through the Ministry's NMS and the RMA Survey of Local Authorities
- discussions with 27 representatives (executive managers, compliance managers and compliance staff) from 13 territorial authorities, unitary authorities and regional councils (see Table 1 for a full list of councils)
- discussions with 14 representatives from nine stakeholder and iwi organisations.

Councils were selected for this research based on the:

- size of the council – the research sought views from staff representing a range of small, medium and large councils, and the population of council areas ranged between 8,500 and 1.4 million

[10] Local Government New Zealand, 2015.

- nature of the activities addressed by the council – the research focused on activities that have significant environmental impacts, such as dairying, forestry and freshwater management
- degree of growth in the city/district/region – councils experiencing high, medium and low growth were spoken to, as well as areas with declining populations.

A range of stakeholders with a strong interest in CME, and representing community, environmental, iwi, governmental and business, were selected to be involved in this study. The stakeholders spoken to were DairyNZ, Forest and Bird, Environmental Defence Society, Environmental Protection Authority, New Zealand Productivity Commission and Local Government New Zealand. Federated Farmers and West Coast Regional Council also provided comments on a draft of this report.

Three iwi – Raukawa, Ngati Maniapoto and Waikato-Tainui – were consulted, to get an overview of iwi views on council CME activities in the Waikato Region.[11]

Table 1: Demographics of, and issues faced by, councils included in this study

Council	Resident population in 2013[12]	Population change 2006–13
Bay of Plenty Regional Council	267,714	+ 4 %
Canterbury Regional Council (Environment Canterbury)	539,433	+ 3.4 %
Waikato Regional Council	403,638	+ 5.5%
Otago Regional Council	202,470	+ 4.5 %
Unitary Authorities		
Auckland Council	1,415,550	+ 8.6 %
Gisborne District Council	43,653	– 1.8 %
Tasman District Council	47,154	+ 5.7 %
Territorial authorities		
Dunedin City Council	120,246	+ 1.3 %
Hamilton City Council	141,615	+ 9.6 %
Hutt City Council	98,238	+ 0.5 %
Selwyn District Council	44,595	+ 32.5 %
Opotiki District Council	8,436	– 6.0 %
Otorohanga District Council	9,141	+ 0.7 %

[11] Waikato iwi were interviewed due to an initial intention to examine CME activities (and stakeholder views on these activities) in the Waikato Region as a case study. Due to a change in the research approach, however, this case study is not included in this report. The views of Waikato iwi are nevertheless important to mention in this report, but they do not necessarily represent the views of iwi/hapū in other parts of New Zealand.

[12] Census data from Statistics New Zealand.

Council staff spoken to were encouraged to be open and frank, and to express their views on the effectiveness of CME activities by their council. For that reason, council responses in this report are not attributed to individual councils.

Part 2: Compliance, monitoring and enforcement regulatory settings

This part gives an overview of the regulatory environment in which council CME activities sit, including the statutory role of councils to carry out CME, the relationship between compliance promotion and enforcement activities, and the mechanisms that are available for achieving compliance.

Compliance monitoring and enforcement is devolved to councils

In New Zealand, CME activities under the RMA are devolved to councils. Councils are responsible for "the establishment, implementation and review of objectives, policies, and methods to achieve integrated management of natural and physical resources".[13] Section 35(2) also requires councils to monitor the state of the environment, and the efficiency and effectiveness of policies, rules and plans. CME are an important aspect of these statutory responsibilities.

The RMA allows for a graduated system of compliance and enforcement

The RMA does not prescribe how councils should carry out CME activities, and central government has not issued any comprehensive national direction or guidance on this.[14] Councils have considerable discretion to determine how to fulfil their statutory functions.

The RMA allows for a graduated response to compliance and enforcement – it is up to local authorities to determine the appropriate response to breaches of the RMA, plan rules and consents. Councils use education and awareness-raising as the preferred method for encouraging compliance, and when necessary, formal action to discourage and penalise non-compliance, and direct remediation of the damage. Formal enforcement actions are normally only taken when 'softer' measures of compliance promotion and coercion have failed, and/or the breach of the RMA is significant. This approach is shown in Figure 1.

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13 Resource Management Act 1991, sections 30(1) and 31(1).

14 Some national guidance is provided through the Quality Planning website – www.qualityplanning.co.nz.

Figure 1: Braithwaite Compliance Triangle[15]

The Compliance Triangle (Figure 1) assumes that most people are willing to comply and know what to do to comply, while progressively fewer people need stronger interventions to ensure compliance. Most regulatory action occurs at the base of the pyramid, where compliance is sought through persuasion, but escalated when compliance is not achieved.

This approach is endorsed in the Productivity Commission (2013) report, which states that:

> Most regulatory specialists now argue, on the basis of considerable evidence, that a judicious mix of compliance promotion and deterrence is likely to be the best enforcement strategy.

The Commission also explain that:

> The enforcement challenge is striking the right balance between persuasion and coercion in securing regulatory compliance. This balance may differ between regulatory regimes. Similarly, the ideal balance of persuasion and coercion may differ between local authorities due to differences in the populations being regulated.

Councils have discretion as to what enforcement action, if any, to take in response to non-compliance

A range of enforcement tools are available to councils to respond to non-compliance with the RMA, plan rules or resource consent conditions. The range of enforcement options allows councils to tailor their response to the nature and severity of offending. Most councils do not always take formal enforcement action in response to an offence being committed under the RMA – the majority of offending is resolved informally, as discussed previously.

The RMA provides enforcement tools that are both punitive (formal written warning, infringement notice, prosecution) and directive (letter of direction, abatement notice, enforcement order). Formal written warnings and letters of direction are non-statutory

[15] From New Zealand Productivity Commission (2013).

options available to councils to admonish offenders and direct restorative action. A full description of the enforcement mechanisms in the RMA is provided in Table 2.

Table 2: Non-statutory and statutory enforcement actions

Note: where a breach or contravention of the RMA is referred to in this report, this also includes breaches of derivative regulations, plan rules, resource consents and heritage orders.

Enforcement actions	Description	Maximum penalty available
Verbal or written direction	Advice that a breach of the RMA has occurred and that the offending party needs to take, or cease, a particular action. Directions are usually reserved for cooperating parties and where there is a likelihood that the breach will not continue. This is a non-statutory tool and directions are not legally enforceable.	None
Formal warning letter	A formal warning letter informs a person/company that they have breached the RMA. The letter forms part of the formal history of non-compliance, which can be used as evidence in court if a prosecution is later taken. This is a non-statutory tool.	None
Infringement notice	An infringement notice is a written notice and fine that informs a person that an offence has allegedly been committed against the RMA. No criminal convictions can be imposed through infringement notices. Infringement notices are only available for certain classes of non-compliance, prescribed in the Resource Management (Infringement Offences) Regulations 1999.	Fines currently range between $300 and $1,000, as set out in Schedule 1 of the Resource Management (Infringement Offences) Regulations 1999.
Abatement notice	An abatement notice is a formal written direction requiring certain actions to be taken or to cease within a specified time. Generally, abatement notices are used when non-compliance has been detected and the offender needs to 'avoid, remedy or mitigate' the damage to the environment.[16]	None
Enforcement order	An enforcement order is an order made by the Environment Court, which requires certain actions to be taken or activities to cease within a specified time, where the Environment Court believes the activity breaches or is likely to breach the RMA. An application for an enforcement order can be made by any person to the Environment Court.	The Environment Court may direct the offender to pay costs to 'avoid, remedy or mitigate' the damage to the environment.

[16] See the Resource Management Act 1991, section 322.

Enforcement actions	Description	Maximum penalty available
Interim enforcement order	An interim enforcement order is similar to an enforcement order and is used in circumstances where the need for the order is urgent.	The Environment Court may direct the offender to pay costs to 'avoid, remedy or mitigate' the damage to the environment.
Prosecution	A prosecution is an action by an enforcement agency to refer the offender to the criminal court. Councils must consider the public interest and the evidential sufficiency when considering whether to take a prosecution. This process is administered within the criminal jurisdiction and offences carry criminal penalties. RMA prosecutions are considered in the District Court by District Court Judges who also hold office as an Environment Judge.[17] Charges must be filed in the District Court within six months "after the time when the contravention giving rise to the document first becomes known, or should have become known."[18] RMA offences are strict liability offences. This means that it is not necessary for the prosecutor to prove that the defendant intended to commit the offence.	Depending on which section of the RMA is breached there are varying levels of maximum fine available to be imposed by the District Court upon conviction: • The maximum penalty available for RMA offences[19] is a $300,000 fine for individuals or two years' imprisonment, and $600,000 for organisations.[20] • A maximum fine of $10,000, and a further fine of $1000 for every day during which the offence continues is available for contravention of section 338(2) of the RMA (including contravention of an abatement notice or excessive noise direction). • A maximum fine of $1,500 for breaches of section 338(3) of the RMA (including wilful obstruction of an enforcement officer from carrying out his/her duties).

Compliance, monitoring and enforcement responsibilities of councils differ

Territorial authorities (district and city councils) are responsible for managing:

- the effects of use, development or protection of land
- the emission of noise
- the effects of activities in relation to the surface of water in rivers and lakes.[21]

17 See Resource Management Act 1991, section 309(3).

18 Resource Management Act 1991, section 338(4).

19 Available for breaches of sections 338(1), (1A), or (1B) of the Resource Management Act 1991.

20 Note that prior to the enactment of the Resource Management (Simplifying and Streamlining) Amendment Act 2009, the maximum penalty for breaches of the RMA was a $200,000 fine for both individuals and organisations and up to two years' imprisonment for individuals.

21 Resource Management Act 1991, section 31(1).

This includes natural hazard management, protection of indigenous biodiversity, prevention and mitigation of the adverse effects of development and subdivision, and the use of contaminated land.

Regional councils control the:

- use of land for the purpose of water quality and quantity management
- avoidance of natural hazards
- soil conservation and storage
- use, disposal and transportation of hazardous substances
- activities in the coastal marine area.[22]

Regional councils' CME activities concentrate on activities which have or are likely to have significant environment impacts, such as discharges to fresh water and the marine environment, protection of biodiversity, earthworks and discharges into air.

Unitary authorities carry out the functions of both regional councils and territorial authorities.

All councils are responsible for plan-making, which involves setting rules to determine the status of certain activities and whether resource consent is needed. Where a council has granted a resource consent that is subject to conditions, then the local authority should monitor the activity to ensure that it complies with the relevant conditions (resource consent monitoring). Although not specifically required by the Act, it is good practice for councils to monitor for compliance with plan rules to check the rules are being complied with, and ensure that activities requiring resource consent are consented.

Regional councils and unitary authorities have more significant monitoring obligations than territorial authorities. The nature of these councils' activities means that the majority of resource consents require ongoing monitoring to check compliance (for example, to check compliance with a water take consent). In contrast, the majority of resource consents issued by territorial authorities are only checked once to ensure ongoing compliance (for example, to check compliance with a subdivision consent).

In certain circumstances councils must regulate their own RMA activities

Councils must regulate their own and other councils' activities under the RMA, as councils are land owners and resource users in their own right. Internal compliance by councils is important because of the scale and potential effects of their activities on the environment. Councils should also lead by example and hold themselves to the same (or higher) standard than the public in order to be credible as regulators. Internal compliance is particularly important for unitary councils, as there is no other council in their area to monitor compliance and hold them accountable for their decisions.

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[22] Resource Management Act 1992, section 30(1).

Part 3: Compliance and enforcement trends and issues

This section discusses key compliance, monitoring and enforcement (**CME**) trends and issues, drawing on conversations with councils and stakeholders as well as data from the National Monitoring System (NMS) for the 2014/15 financial year. A full set of this data can be viewed on the Ministry for the Environment website (Ministry for the Environment, 2016).

These trends and issues are grouped into two main themes:

- The variations in council approaches to CME (part 3.1).
- The effectiveness of CME by councils (part 3.2).

Due to variations in data collection methods between the RMA Survey of Local Authorities and the NMS, this section avoids drawing conclusions based on temporal data trends.

3.1 Variations in council approaches to compliance, monitoring and enforcement

The research found that council CME activities vary significantly throughout the country in terms of the:

- level of priority given to and resources available for CME activities
- approaches to monitoring
- level of coordination of CME activities
- enforcement actions used
- decision-making processes about enforcement actions.

Variation in council approaches to CME is partly a consequence of:

- discretion given to councils in carrying out CME under the RMA
- differing responsibilities of regional councils and territorial authorities under the Resource Management Act 1991 (RMA)
- lack of national direction, support and guidance provided on CME
- varying levels of resourcing of councils, affecting their ability to effectively carry out CME.

Variations between councils are not necessarily undesirable. The discretion given to councils to determine approaches to CME allows councils to have greater agility in implementing the RMA, and gives greater ownership of issues and solutions. This flexibility also allows councils to adopt approaches to CME within resource constraints, which vary considerably between councils.

However, differing approaches to CME can also lead to lack of public certainty on the rules and policies in place, and equity in how the rules are enforced. When different councils have different rules for the same activity, and different approaches to enforcing these rules, this can lead to confusion as to what the rules are, and resource users and the wider public feeling a sense of injustice. Variations in CME approaches, combined with a low level of monitoring and

enforcement, can lead to high levels of non-compliance, which has a negative impact on environmental outcomes.

Priorities and resources

Data collected for the 2014/15 financial year through the NMS shows that a total of 374 staff (Full Time Equivalent/FTE) are engaged in RMA CME functions across councils in New Zealand (see Table 3). This is approximately half the number of staff involved in resource consent processing. The total number of CME staff has dropped by 14 per cent from 436.7 FTE in 2012/13, as recorded in the RMA Survey of Local Authorities. In contrast, the total number of resource consent processing staff has grown by 7 per cent, from 704 FTE to 753 FTE.

Table 3: Numbers of compliance, monitoring, investigation and enforcement staff and resource consent processing staff per council type (2014/15)

	Territorial authorities	Regional councils	Unitary Authorities (excluding Auckland Council)[23]	Auckland Council[24]	All councils
Compliance, monitoring, enforcement and investigations staff (FTE) (total)	99	161	21	93	374
Compliance, monitoring, enforcement and investigations staff (FTE) (average)	1.6	14.6	4.2	93	4.8
Resource consent processing staff (FTE) (total)	340	147	44	222	753
Resource consent processing staff (FTE) (average)	5.6	13.4	8.8	222	9.7

The level of resources allocated to compliance monitoring and enforcement varies between councils

Given the significance of CME in implementing the RMA and providing for strong environmental outcomes, it is important that CME activities are adequately resourced. However, councils have limited resources and significant responsibilities under several different statutes. Councillors, upon advice from staff, are required to make trade-offs in determining the level of funding to allocate to different activities. As a result of differing levels of funding and priorities, resourcing for CME activities vary considerably between councils.

Regional councils and unitary authorities tend to place greater emphasis on CME than territorial authorities, partly because the differences in their core functions mean that more monitoring is required (as explained in 3.2).

[23] Note that the NMS does not make a distinction between staff dedicated to CME with regional functions and territorial authority functions for unitary authorities.

[24] See comment above.

While some staff spoken to believed CME activities were adequately funded in their council, the majority of council representatives said CME activities should be better resourced. With limited resources, their councils were not able to monitor all the resource consents that require monitoring, and they had limited capacity to proactively monitor for compliance with plan rules (permitted activities). Council staff observed that other activities, such as resource consenting and plan-making, were supported by more significant resources than CME.

The NMS data shows that some territorial authorities have very limited resources available for CME activities. For example, two councils included in this study had 0.1 FTE or less available for CME. Staff in territorial authorities (and some smaller regional councils and unitary authorities) are normally required to balance their CME responsibilities alongside a range of responsibilities under the RMA and other legislation. Council representatives explained that with limited resources, it is difficult for council staff to carry out their roles effectively.

There are a number of reasons, raised by council staff, for why CME activities may not be a key focus of councils. These include:

- lack of resources (operational expenditure) available to the council
- lack of political will to effectively implement the RMA and penalise non-compliance
- lack of understanding by the councillors (who make decisions on resources available for CME) and council staff of the importance of CME activities
- the stricter statutory requirements placed on other RMA and non-RMA activities and financial and reputational consequences associated with breaches of these requirements, thus resulting in these activities taking priority.

A number of stakeholders spoken to expressed concern about the limited resources available for CME in councils. Waikato-Tainui representatives believe CME activities are under-resourced, and think iwi could assist with these activities (see discussion in part 4).

Approaches to monitoring

Councils' monitoring activities generally focus on complaint response and ensuring compliance with resource consent conditions. Plan rule (permitted activity) monitoring is highly variable between councils – some councils do not carry out any monitoring of compliance with plan rules (outside of resource consent monitoring), unless a complaint is made. Council practices around giving prior warning of inspections also vary.

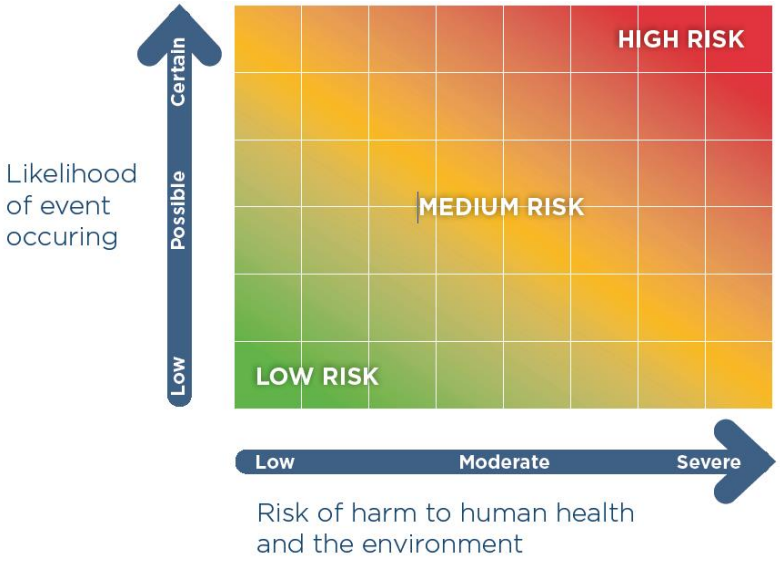
Council practices around giving prior warning before inspections vary

While some councils have a policy of pre-warning monitoring visits in all but extreme cases (for example, where the property owner or manager cannot be contacted and the risks of environmental damage are imminent and significant), others frequently carry out site visits by 'cold-calling'. Views on the ethics and effectiveness of cold-calling vary between councils and stakeholders. Some believe this is the only way to get an accurate assessment of compliance or non-compliance, while others believe cold-calling places unnecessary stress on the property owner or manager, and prefer a more 'cooperative' approach to assessing and encouraging compliance.

Many councils take a risk-based approach to monitoring

Most regional councils and unitary authorities spoken to, as well as some territorial authorities, have adopted a risk-based approach to monitoring. These councils assess incidences of non-compliance/possible non-compliance according to their risk, taking into account the likelihood of an event occurring and the risk of harm to human health and the environment. These two factors form a 'risk matrix', shown in Figure 2. The level of risk determines the appropriate response, including the frequency, type and scale of monitoring required.

Figure 2: Environmental Risk Matrix[25]



Bay of Plenty Regional Council uses a risk-based approach to monitoring, which is explained below.

[25] Compliance and Enforcement Special Interest Group, unpublished.

CASE STUDY: BAY OF PLENTY REGIONAL COUNCIL

The Bay of Plenty Regional Council, in its Pollution Prevention and Compliance Report 2014–2015,[26] states that 40 per cent of the 5,481 resource consents requiring monitoring were monitored that year, either through site visits or off-site assessments. The Council's approach to monitoring is explained in the report:

How often an activity is assessed depends on its environmental risk profile and the consent holder's compliance history. Environmental risk is determined by a number of factors, including the type of activity being undertaken (eg, large scale pulp and paper processing site compared to a lake structure), the sensitivity of the receiving environment (eg, discharge of a process wastewater to a waterway, compared to a storm-water discharge to land soakage) and site specific risks (eg, a dairy farm with effluent storage near a water way compared to one with no surface water near the storage ponds).

The risk-based approach to monitoring has been endorsed in Cabinet's *Initial Expectations for Regulatory Stewardship*[27] and by the Productivity Commission in their 2014 report on *Regulatory Institutions and Practices*[28] as an effective way of targeting certain incidences of non-compliance. The risk-based approach is effective in that it allows for incidences of non-compliance (or suspected non-compliance) to be assessed on a case-by-case basis and resolved efficiently. However, it is important that councils also consider the cumulative effects of non-compliance.

Complaint response

A significant number of complaints for non-compliance with the RMA are received by councils

The NMS shows that councils received a total of 169,518 RMA complaints in the 2014/15 financial year (see Table 4). The majority of these (83 per cent) were noise complaints. Regional councils received the majority (56 per cent) of all non-noise-related RMA complaints. Territorial authorities received only 13.7 per cent of all non-noise-related RMA complaints. Note that not all complaints amount to breaches of the RMA or plan rules.

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26 Bay of Plenty Regional Council, 2015.

27 CAB Min (13) 6/2B

28 New Zealand Productivity Commission, 2014.

Table 4: Noise and other RMA complaints by council type

	Territorial authorities	Regional councils	Unitary councils (excl Auckland Council)	Auckland Council	All councils
Noise complaints (total)	82,191	1,332[29]	4,773	52,431	140,727
Noise complaints (average)	1347.4	121.1	974.6	52,431	1804.2
Other RMA complaints (total)	3,937	16,135	3,144	5,575	28,791
Other RMA complaints (average)	64.5	1466.8	628.8	5,575	369.1

The types of non-noise complaints received vary between councils, depending on the types of issues that are prevalent in their areas. The majority of councils keep a register of complaints. Complaints common across most councils spoken to include:

- discharges of contaminants (such as dairy effluent or chemicals) into water
- discharges into air (such as from 'burn-offs' or smoky chimneys)
- indigenous vegetation clearance
- odour complaints
- industrial processing complaints.

All councils have procedures set up to receive complaints from the public. Some councils have 24-hour hotlines in place. Not all complaints require an investigation – some alleged breaches of the RMA or plan rules may be assessed without an inspection.

The majority of councils have adopted a risk-based approach to complaints response (explained above) and respond to complaints depending on their risk and priority. Most councils stated that they respond to most complaints within two to three days. Some councils reported, however, that due to a lack of resources and staff capacity, there is a backlog of complaints that had not been investigated.

One regional council asks complainants to assist with its CME activities by sending in photographs of the alleged breach, if it is appropriate and safe to do so. Given the large area of the region and limited capacity of council staff, this council is largely reliant on the cooperation of the community to support its CME activities. Using the photos provided, the council carries out a 'desktop assessment' to determine whether an investigation is required. In cases where the council is satisfied that a breach has occurred, in most cases the council contacts the alleged offender and asks them to remedy the breach without carrying out a site visit. Where the alleged breach is significant, the council will carry out a site visit.

[29] The West Coast Regional Council received all 1332 noise complaints, according to NMS data.

Resource consent monitoring

Councils have a significant number of resource consents to monitor

The NMS records the number of resource consents that councils have determined require monitoring, and the actual number of consents that were monitored for the 2014/15 financial year (see Table 5 below).

Table 5: Resource consents requiring monitoring by council type (source: NMS 2014/15 data)

	Territorial Authorities	Regional Councils	Unitary Authorities (excl Auckland Council)	Auckland Council	All councils
Resource consents requiring monitoring (total)	20,840	47,535	10,577	17,806	96,758
Resource consents requiring monitoring (average per council type)	341.6	4321.4	2115.4	17,806	1240.5
Resource consents monitored (total)	14,634	23,435	5,749	14,428	58,246
Resource consents monitored (average per council type)	239.9	2130.5	1149.8	14,428	746.7

The NMS data shows that councils actually monitor an average of 60 per cent of all resource consents that require monitoring. The rate of consents monitored to consents requiring monitoring varies significantly between councils.[30] Note that some councils did not correctly identify and record some resource consents as requiring monitoring, but subsequently monitored these.

Councils have discretion to determine what resource consents to monitor and how often. Although most resource consents require monitoring, due to limited resources available for CME and a significant number of resource consents to monitor, some councils need to prioritise which resource consents to monitor. Environment Canterbury, for example, has taken a targeted approach to monitoring resource consents, explained below.

[30] See the full NMS results for information on specific councils– Ministry for the Environment, 2016.

CASE STUDY: ENVIRONMENT CANTERBURY'S APPROACH TO RESOURCE CONSENT MONITORING[31]

Environment Canterbury Regional Council has recently altered its approach to monitoring to target high-risk resource consents that, if breached, could have significant environmental impacts. This is explained in the 2014/15 Compliance Monitoring Annual Report:

> *There are nearly 24,000 resource consents in Canterbury. This number has remained reasonably constant over the last eight years. With this many consents, we need to be very clear about our priorities. Most consents do not require monitoring every year; however, higher risk consents could require several monitoring events a year.*
>
> *Consents are scored according to the scale of the activity, environmental effect, mechanism of damage, compliance history and the quality of management. In the year to 30 June 2015 we monitored 3,990 consents (16%) and undertook 6,890 monitoring events. As part of a more focused approach, we concentrated on consent holders with a history of non-compliance as well as those activities that could have a greater impact on the environment (high-risk sites). This resulted in fewer consents monitored than last year (24% of consents were monitored in 2013–14), a reflection of a more targeted response. There has also been an increase in the number of larger, more complex consents which now include nutrient management provisions.*

Federated Farmers believe that for some councils, too many activities require resource consent when the activities should be permitted. Having a large number of resource consents to monitor carries the risk of councils "losing sight of the goal", as compliance with rules becomes the focus of monitoring, rather than providing for good environmental outcomes.

A number of territorial authorities check resource consent condition compliance related to new physical developments, and once compliance with the consent conditions is established, do not carry out further monitoring.

A number of stakeholders are concerned that not all resource consents requiring monitoring are monitored by councils, particularly territorial authorities. Waikato-Tainui and the Environmental Defence Society questioned the point of having conditions on resource consents if these are not being monitored.

Plan rule (permitted activity) monitoring

It is good practice for councils to proactively monitor for compliance with plan rules to ensure the conditions associated with permitted activities are being complied with. Councils can

[31] Environment Canterbury, 2015, 2016.

include procedures for monitoring the effectiveness of the rules and other methods in their regional and district plans.

All regional council and unitary authorities spoken to carry out some (albeit limited) permitted activity monitoring. For example, most councils monitor dairy farming (although the frequency of monitoring visits varies between councils), due to the significant risks of environmental contamination from effluent and nutrient run-off. Some councils carry out monitoring of forestry sector compliance during specific high-risk periods, such as during forest harvesting. Other councils rely on complaints to detect non-compliance in the forestry sector.

Territorial authority representatives said their councils carry out very little or no permitted activity monitoring.

One council representative commented that permitted activity monitoring was limited in his area due to the lack of ability of the council to charge for this type of monitoring. While the costs of consent monitoring are covered by the consent holder, no cost recovery mechanisms are provided for plan rule monitoring.

Coordination of compliance, monitoring and enforcement activities

Staff in territorial authorities are not well-connected to national or regional networks

Regional and unitary councils have developed a network to support each other in carrying out CME. The Compliance and Enforcement Special Interest Group (CESIG), made up of compliance managers from regional councils and unitary authorities, provides a forum for information sharing and discussion of common issues.

CESIG is working to improve consistency in approaches to CME. The group has developed the Regional Sector Strategic Compliance Framework 2016–18 to improve consistency between councils in approaches to CME. The purpose of the CESIG framework is to:

> Assist councils in using a consistent approach to developing strategic compliance programmes and a range of interventions to fix important problems.

The Framework has been agreed by CESIG members, and members are in the process of getting support for implementation from their councils. CESIG intends to use the Framework to carry out audits of councils' CME approaches, and make recommendations on how councils can carry out CME more effectively.

Territorial authorities, however, are generally not well connected to each other or to regional councils. No similar national cooperation forum exists for territorial councils. A number of territorial authority staff stated they felt they lacked support for carrying out CME. Councils in some regions, such as the Waikato, have an informal arrangement where enforcement staff from regional councils and territorial authorities meet regularly to discuss issues. The majority of territorial authorities, however, are not linked into such networks.

The national Environmental Compliance Conference is held annually, which is attended primarily by council CME staff (as well as stakeholders and other organisations). This conference is open to all local government compliance staff, though it tends to be attended

primarily by regional council and unitary authority staff. This provides good networking opportunities and the ability to share resources.

One regional council provides technical and process advice to territorial authorities on aspects of compliance and enforcement work at an informal level. The staff member spoken to was concerned that smaller territorial councils were not well set up for CME work, as staff did not have appropriate warrants and evidence-recording procedures. Another regional council manager expected that territorial councils would seek help from his council if these were contemplating prosecutions, but there was no formal expertise-sharing arrangement.

The Society of Local Government Managers' list serve is a well-used discussion forum through which staff groups across the local government sector request support and information by email, and is used by some councils when questions around CME arise.

Non-compliance responses

Use of enforcement actions vary across the country

Table 6 shows the considerable variation in both the number and type of enforcement actions used by councils. While these differences can be explained in part by differing local activities and the rates of non-compliance in various districts and regions, a significant factor is how individual councils apply the various enforcement actions available.

Table 6: Number of formal enforcement actions by council type (source: NMS 2014/15 data)

	Territorial authorities	Regional councils	Unitary authorities (excl Auckland Council)	Auckland Council[32]	All councils
Infringement notices (total)	344	570	61	438	1,413
Infringement notices (average)	5.6	51.8	12.2	438	18.1
Abatement notices (total)	399	733	96	697	1,925
Abatement notices (average)	6.5	66.6	19.2	697	24.7
Enforcement order applications (including interim) (total)	8	11	0	1	20
Enforcement order applications (including interim) (average)	0.1	1	0	1	0.26
Prosecutions initiated (total)	31	48	12	6	97
Prosecutions initiated (average)	0.5	4.4	2.4	6	1.2
Total	782	1,362	169	1,143	3,456

[32] Note that the vast majority (89 per cent) of all enforcement actions taken by Auckland Council were for breaches of section 9 of the RMA – restrictions on use of land.

The majority (77.4 per cent) of all formal enforcement actions are taken by regional councils and unitary authorities (including Auckland Council). Territorial authorities take comparatively fewer enforcement actions. Territorial authority staff spoken to explained that they prefer to resolve non-compliance through 'softer' methods, such as explaining how the landowner can remedy the breach, rather than using formal enforcement actions.

The reasons for low numbers of enforcement actions taken by councils (as explained by council staff) include:

- the council's (either the staff or councillors, or both) focus on 'community service' and reluctance to take a more heavy-handed approach
- a lack of understanding of the enforcement tools and how they should be used
- a lack of experienced staff or legal expertise, or both, available to apply for more complicated enforcement actions – enforcement orders and prosecutions
- a lack of evidence and uncertainty about the risk of being unsuccessful (for prosecutions)
- a lack of resources to take enforcement orders or prosecutions (the costs incurred by councils as a result of taking a prosecution are significant – see discussion below).

Prosecutions

Prosecutions make up only a small proportion (around three per cent) of all abatement notices, infringement notices, enforcement orders and prosecutions. Regional councils and unitary authorities take more prosecutions than territorial authorities, largely due to the significant costs involved and the ability of the council to afford these. In the 2014/15 financial year, only 31 prosecutions were initiated by 62 territorial authorities.

Some councils take prosecutions only in the most serious cases of offending, resulting in few prosecutions being taken by these councils. This may explain, in part, the low number of prosecutions taken by territorial authorities. Other councils use prosecutions more readily, however, to penalise and deter offending. These councils (which are primarily regional councils and unitary authorities) file charges against an offender where it is considered necessary, taking into account:[33]

- the actual or potential adverse environmental effects
- the value or sensitivity of the receiving environment
- the toxicity of the discharge
- whether there was any profit or benefit gained by the alleged offender(s)
- whether the incident was a repeat non-compliance.

[33] List adapted from the Solicitor-General's Prosecution Guidelines (Crown Law, 2013).

Cost of prosecutions

The costs incurred by councils from taking prosecutions are significant

Currently councils are responsible for funding the costs of prosecution, which can be considerable. For example, a simple legal opinion prior to filing charging documents may cost around $3000–$5000. A case involving an early guilty plea by a single defendant facing a single charge may be resolved with legal expenses to council of less than $10,000. If charges are defended and the matter is particularly complex, however, then legal expenses can easily run to six figures.

Any fine imposed by the court is not paid directly to the prosecuting council. The Ministry of Justice is responsible for recovering the fine and forwarding it on to the council. Fines owing to council following RMA cases are only one of many fines that the Ministry of Justice is required to recover and some fine recovery takes many years. There are a number of substantial RMA fines that have never been recovered by the Ministry of Justice and the fines have been 'remitted', often due to a company going into liquidation or receivership, or the offender absconding.

Councils generally do not recover the full costs of taking a prosecution, as the fines awarded by the District Court (of which 90 per cent is generally ordered to be paid to councils) is normally less than the costs of an investigation and subsequent prosecution. In the decision of *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd*,[34] where the company was prosecuted for an oil spill into the Tauranga Harbour, the District Court recognised the difficulty placed on councils in taking prosecutions. While the company was fined $288,000, the council incurred over $350,000 in prosecution costs. The court stated that:

> There may need to be some *review* of the legislation in due course to take into account that these costs are otherwise borne by the rate payers through no cause of their own.

Most councils have caps on their enforcement budgets, which means they have to choose which prosecutions they take. Other councils take a more principled approach, taking the prosecution if it is warranted, regardless of potential costs to council or (partial) cost recovery through fines.

In many cases there are benefits from the prosecution process beyond the community that the council is responsible for, for example, when the prosecuted party is operating in more than one jurisdiction, or where the breach affects parties beyond the council's immediate community. Deterrent effects of a prosecution can also spread more widely than the council's immediate sphere of influence.

A number of councils stated that they use restorative justice as an alternative to a full court hearing and court-imposed penalty. Restorative justice involves community-based processes which offer a way of dealing with offenders and victims of crime through facilitated meetings. The process normally leads to councils recovering costs in full and ensures the offender carries out the necessary remediation works at their own cost.

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[34] Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd [2016] NZDC 8903.

Decision-making processes about enforcement actions

Decision-making processes on enforcement decision vary between councils

There are significant variations in council decision-making about enforcement actions. For most councils, delegation for decision-making on enforcement actions either sits with frontline compliance staff or frontline staff make recommendations to more senior staff or a panel of senior staff, who make the final decision based upon agreed council policy. Some councils have mechanisms set up for an independent legal (either in-house or external) review of decisions to issue/apply for abatement notices, infringement notices, enforcement actions and prosecutions.

For some territorial authorities, however, decisions about whether to take an enforcement action are made by councillors, despite the existence of guidelines condemning such practice (explained below). While it is appropriate for councillors to be involved in decision-making about compliance policy or operation expenditure for CME activities, involvement in day-to-day decisions on enforcement actions carries significant risk of the perception of politicised compliance or decisions being skewed in favour of certain groups/individuals.

The need for independence decision-making on enforcement actions

The 2013 Solicitor General Prosecution Guidelines stress the need for independence in taking prosecutions:[35]

> *In practice in New Zealand, the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise. All government agencies should ensure the necessary processes are in place to protect the independence of the initial prosecution decision.*

In an earlier report[36] on freshwater management, the Auditor-General also recommended councils review their delegations and procedures for prosecuting to ensure that any decision about prosecution is free from actual or perceived political bias.

Not all councils have amended their procedures to be consistent with these directions.

There is political influence in the enforcement processes in some councils

The importance of independence of political influence in day-to-day CME activities was recognised by most council representatives spoken to. Despite this, political involvement seems to be an issue for some councils.

While most regional councils and unitary authorities appear to have good written policies and processes that are free of political input, the procedures in some councils (particularly

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35 Crown Law, 2013.

36 Controller and Auditor-General, 2011.

territorial authorities) have not been amended in accordance with the Auditor-General's recommendations.

A number of council representatives gave examples of what they saw to be incidences of political interference with enforcement decision-making. For several council staff members spoken to, incidences of councillors placing pressure on enforcement staff when deciding how to respond to non-compliance were common. Some councils reported incidences of direct involvement of councillors in investigations and enforcement decisions. For example, in one council, decisions on enforcement actions are made by councillors themselves, on advice from enforcement staff. These councils explained that the councillors were involved in decision-making due the significant costs involved with prosecuting. Many staff commented that councillors were often reluctant to take prosecutions due to the costs involved and a reluctance to prosecute their constituents.

In one regional council, councillors have significantly influenced the council's CME procedures. In this council, some councillors have stated that they stood for council to amend the council's enforcement practices upon election/re-election.

As a result of the political pressure, inspection practices in this council have changed – the council is no longer able to use certain modes of monitoring and the staff are required to give prior warning before inspecting sites. Unannounced inspection visits are now only authorised under specific circumstances, such as when there have been complaints about a specific property, contact information is unknown, or access cannot be reasonably negotiated with the farmer. Staff at this council stated that data on incidences of non-compliance can no longer be confidently confirmed as accurate as a result of the change in approach to monitoring, and have the potential to mislead the community.

One council has taken formal steps to ensure that there is no direct political influence over operational compliance issues. Compliance staff communicate with councillors on CME through an intermediary, and staff are not permitted to talk directly to councillors. This reduces the risk of direct political influence.

The Environmental Defence Society expressed concern about the level of councillor involvement in enforcement approaches and decision-making. The Society states that dominant interests often influence focus areas for council CME functions. They believe that this is inappropriate.

A number of councils reported that they will inform councillors about proposed decisions to prosecute as a form of courtesy. The councillors will ask questions about the decisions, but not directly influence this decision.

Close community links affect the independence of enforcement officers in small councils

CME staff in small councils (most of which are territorial authorities) are normally closely connected to their communities and often know the people responsible for RMA non-compliance. This affects the independence of council staff as there may be pressure to take a more informal approach to CME and give more favourable treatment to familiar people. One

representative said: “you will run into people who are breaking rules in the supermarket, pub, or sportsfield and you are aware of your community relations with them.”

One territorial authority representative stated that her council’s key priority was supporting the community. If non-compliance is detected, this council works with the community to resolve issues. The staff member spoken to thought that this is the most effective way of achieving compliance. This council has never issued infringement notices, or taken a prosecution.

Another council representative said that enforcement doesn’t sit well with councillors and their aspirations to have a helpful, positive council culture. Some councillors don’t seem to understand the importance of CME activities in ensuring that policies and rules are being adhered to. This can result in councillors giving insufficient funding to CME activities.

There can be tension between wider compliance (eg, through education and advocacy activities) and enforcement roles. Many council representatives agreed that both roles are necessary, but the emphasis of approaches varies across the country and some council staff believed that it is difficult for the same staff members to carry out both roles.

However, other councils said that community relations do not affect the approach of enforcement officers, and council staff understand the importance of acting independently. One territorial authority representative stated “many of our compliance staff are former Police officers, and they know how to separate the personal from the professional in their work.” Another council emphasised the importance of ‘depersonalising’ compliance approaches, for example by emphasising that the council is taking an enforcement action, not the particular enforcement officer. Subtle changes in language as well as training can help to achieve this purpose.

Councils should hold themselves to the same standard as the public

Councils are often criticised in the media for failure to take an enforcement action against themselves, or other councils, in response to non-compliance.[37] For example, Horizons and Greater Wellington Regional Councils at various times have come under media and political pressure as a result of compliance of wastewater plants in their regions.

Most council staff stated they are prepared to hold themselves or other councils accountable for non-compliance. Several examples of council responses to their own non-compliance were provided. One council issued an infringement notice to a council contractor for non-compliance in respect of earthworks. A staff member from another council explained that council works and asset management departments historically may have got away with RMA breaches, but emphasised that expectations have changed and requirements to comply are now clearer.

However, stakeholders expressed concerns that often the council may not hold themselves accountable for non-compliance to the same standard as the public. Federated Farmers

[37] See for example Stuff.co.nz, 2016b.

emphasised the importance of councils taking enforcement actions in response to their own or other councils' non-compliance as failure to do so creates an "uneven playing field" between councils and other resource users.

3.2 Effectiveness of council compliance, monitoring and enforcement

The purpose of CME activities, as stated in Part 1, is to achieve the purpose of the RMA – sustainable management of natural and physical resources. The effectiveness of CME depends on the extent to which the purpose of the legislation is met.

The effectiveness of CME is very difficult to measure due to:

- the lack of baseline data (for example, only 22 out of 78 councils monitor the state of the environment, according to NMS data)
- the lack of data on overall rates of non-compliance, and temporal trends in non-compliance
- difficulties in measuring the overall effect of non-compliance incidents on environmental outcomes
- environmental lag times, which mean that the impact of activities on the environment cannot be measured immediately.

The NMS collects data on rates of non-compliance detected through resource consent monitoring. The 2014/15 data shows that of the 60 per cent of resource consents requiring monitoring that were monitored, 21 per cent were determined to be non-compliant. However, the rate of non-compliance with resource consents only gives an indication on rates of non-compliance overall. This figure does not take into account non-compliance detected outside of resource consent monitoring (through permitted activity monitoring, for example). Further, the interpretation of 'non-compliance' varies from council to council.

Some council representatives believe compliance is improving in their areas

When asked about the effectiveness of CME activities, around half of the councils spoken to stated that they believed compliance was improving in their areas. The reasons cited for this were:

- a stronger focus by councils on 'softer' measures for achieving compliance, such as education, advocacy and on-site support
- increased support for compliance by some industries (see the case study below on compliance in the dairy sector, for example)
- compliance promotion initiatives by council and communities (see the case study below on the Taranaki Riparian Management Programme, for example).

Other councils spoken were unsure as to whether compliance was improving, primarily due to lack of monitoring and data on rates of non-compliance. Two councils spoken to suspected

compliance may be decreasing, due to significant development in the area and lack of staff capacity to carry out CME.

A number of councils spoken to explained that they have changed their approach to CME in recent years, by focussing more on compliance promotion, such as education and environmental enhancement programmes. Those councils stated that the 'stick' provided by enforcement actions is necessary as a deterrent, but they believed that often 'softer', non-regulatory measures are more effective in achieving compliance. An example of effective use of non-regulatory measures to improve compliance is shown below, in the case study on the Taranaki Riparian Planting Programme.

CASE STUDY: IMPROVEMENTS IN DAIRY FARM COMPLIANCE

Rates of non-compliance in the dairy industry have decreased in recent years, due to increased industry support, increased farmer awareness of RMA responsibilities, and considerable farmer investment in effluent management infrastructure. DairyNZ explained that significant non-compliance had progressively decreased from around 11 per cent in 2010/11 to 5.8 per cent in 2014/15. However, DairyNZ and councils commented that there is still significant work to be done to improve compliance in the sector.

The Sustainable Dairying: Water Accord was established in 2013,[38] to improve the management of risks to waterways posed by dairying. It established national good management practice benchmarks, and set a target for all stock to be excluded from waterways (through fencing or other means) by 2017. Ninety-six per cent of the waterways on New Zealand dairy farms are now excluded from dairy cattle (DairyNZ, 2016).

Farmers have invested heavily in effluent infrastructure. A 2015 nationwide survey of dairy farmers by Federated Farmers and DairyNZ found that the collective expenditure on environmental initiatives by dairy farmers was more than one billion dollars over the last five years (Dairy NZ, 2016). Dairy NZ have also established a 'warrant of fitness' programme to check farmers' effluent management systems are compliant with the RMA.

In 2007, DairyNZ, unitary authorities and regional councils agreed on consistent criteria for defining significant non-compliance in dealing with dairy effluent. Councils have initiated regular peer audits to determine whether they are assigning compliance ratings consistent with the criteria.

Despite the existence of the criteria, there is still considerable variation in council monitoring of the dairy industry, as explained by DairyNZ. For example, some councils visit all dairy farms at least once a year, while others determine visit frequency depending on the risk of non-compliance of a particular farm (referring to a farm's record of non-compliance). Approaches to prior notification of inspections also vary.

[38] Established by the Dairy Environment Leadership Group, a group made up of farmers, dairy companies, local and central government and the Federation of Māori Authorities.

CASE STUDY: TARANAKI RIPARIAN PLANTING PROGRAMME

The Taranaki Regional Council is working with land owners and resource users to ensure Taranaki stream are protected by riparian fencing and planting in Taranaki.[39] The Programme is voluntary – the Council encourages land owners to participate through preparing property-specific riparian plans, providing access to low-cost riparian plants, and providing ongoing advice and assistance.

The Programme has progressed to a stage where, for many land owners, the cost of establishing and maintaining their riparian zone is a normal part of the farm budgeting, alongside other essential costs. Council also provide financial support for the Programme (around $1 million of rates each year) in recognition of the wider public benefits derived from efforts to maintain or improve the region's water quality.

Since the beginning of the Programme in the mid-1990s, the Council has prepared more than 2360 riparian plans for farmers, covering the region's most intensively farmed land. The Council's latest state of the environment report (2015) shows that freshwater quality has improved at most of the monitored sites since the mid-1990s.

Approaches to compliance monitoring and enforcement are often not transparent

There is limited publicly available information on councils' CME activities.[40] Most councils do not publish CME strategies, information on CME priorities or objectives, or CME reports. There is no specific requirement in the RMA for councils to report on CME, however section 35 of the RMA for councils to make information on the monitoring of the "efficiency and effectiveness" of policies, rules and plans (which CME activities is part of) publicly available.

Some councils, such as Tasman District Council,[41] have published CME strategies and guidelines on their websites. These strategies provide information to the community about how councils approach CME activities, including when a council may investigate a site, what circumstances justify an enforcement action and when a prosecution may be taken. Such a document gives greater certainty to the public on how a council is likely to respond to non-compliance. It may also help the public to better understand what they can do to comply.

Some regional councils and unitary authorities publish regular CME reports that give an overview of, for example, approaches to monitoring, how many enforcement actions have been taken, and common non-compliant activities.[42] These documents allow the public to scrutinise council approaches to CME, enabling greater transparency and accountability of

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39 Taranaki Regional Council, 2016.

40 Very limited information on CME activities (including budget allocated to these activities) is provided through annual plans and reports, and long term plans.

41 Tasman District Council, 2011.

42 For example, Environment Canterbury, 2015.

council activities. In most councils included in this study, council staff provide regular updates to councillors on CME activities, and this information is made publicly available.

The NMS provides publicly available data on CME. The NMS collects data annually on:

- Numbers of enforcement actions taking by councils for RMA breaches
- Levels of monitoring of resource consents, and non-compliance with resource consents
- Levels of CME staff

However, improvements need to be made to the NMS for the Ministry to be able to better assess council CME performance.

It is important that plan rules and resource consent conditions can be monitored and enforced

To achieve the purpose of the RMA, it is essential that any rules and conditions in plans and resource consents are clear, measurable and enforceable. Councils and stakeholders expressed concerns about plan rules and resource consent conditions that were difficult to measure and enforce. Forest and Bird were also concerned about the difficulties of ensuring compliance with plans, when the rules are highly complex and difficult to understand.

Most council staff spoken to recognised the relevance of feedback from CME into RMA policy and plan development, and reviews of policies and plans. Staff stated that feedback from CME staff is being used by consenting staff so that relevant and workable conditions are being included in consents. In some councils, resource consent processing staff and CME staff often work in the same section or department, and council representatives say there are good informal and formal links between the consenting and compliance activities.

Information sharing between resource consent, planning and CME teams appears to be stronger in smaller councils than larger ones, primarily due to the physical separation of staff into different departments in larger councils. In smaller councils, all three functions are sometimes performed by the same team or staff members, resulting in strong communication.

DairyNZ, however, expressed concerns about silo issues. Their spokesperson is concerned about the operation of internal council feedback loops and that compliance, consenting and plan-making staff often do not appear to communicate effectively with each other.

Council representatives also stated that a lack of plan agility meant that some rules in plans cannot easily be amended upon the advice of CME staff. Plan reviews often take a long time, and sub-optimal rules may remain in district and regional plans for a long time depending on review programmes and priorities.

Regional councils and unitary authorities are undergoing voluntary audits of their compliance monitoring and enforcement practice

The CESIG network recently agreed to carry out audits of other councils' CME activities, to identify opportunities for strengthening practice at a national level. These audits would be initiated voluntarily, on the part of the council being audited, and carried out by council staff in

the CESIG network (from regional and unitary councils). It is anticipated that all regional and unitary councils will take advantage of this review opportunity over the next three years.

This idea of auditing council CME practices was sparked by an independent review in 2015 of the Waikato Regional Council's enforcement practices. The review panel concluded the Council's practices are "appropriate, robust, lawful and up to date", and made a number of recommendations for technical amendments to be made to the Council's CME practice. The council staff involved in this investigation agreed that the process was helpful, and they have now implemented all of the panel's recommendations. This process has been seen as a helpful benchmark for others to gauge their practices on.

Part 4: Looking forward – opportunities for improvement

This section outlines opportunities for improvement to CME, as suggested by councils and stakeholders.

4.1 Coordination of compliance activities

Councils and stakeholders recognised the potential for greater coordination of compliance monitoring and enforcement

While some council staff supported the idea of having a national network of CME staff that meets annually or biannually, a number of staff rejected this idea as being impractical. Staff in small territorial authorities often balance a number of different roles, and may not have time available for networking meetings.

An alternative suggested by a number of council staff is regional CME networks, in which experiences and information could be shared between territorial authorities and regional councils. This type of arrangement exists informally in a number of regions, such as Waikato. A regional grouping would also provide opportunities for councils to share staff with particular specialist skills, including preparing prosecutions. Representatives of such groups could also co-ordinate activities at a national level.

4.2 Community and iwi involvement

Iwi representatives signalled an interest in being more involved with compliance monitoring and enforcement

Waikato-Tainui, Ngati Raukawa and Ngati Maniapoto have Joint Management Agreements (JMAs) with the regional and territorial authorities in their rohe, which require the councils to meet with them on a regular basis and discuss CME.

All three iwi authorities stated they are keen to become more directly involved in CME. They said iwi, with knowledge of local areas developed over many years, are invaluable in the RMA context. Raukawa explained that they don't want the iwi to carry out CME work themselves, but they would like to see matauranga Māori techniques used for monitoring.

Waikato-Tainui would like communities to be more involved in monitoring and suggested that councils use section 33 of the RMA to delegate some CME functions to iwi. No council has done this yet, but Waikato-Tainui believe such a delegation would empower local people to monitor in their communities. Federated Farmers disagrees with this suggestion. They believe it is inappropriate for councils to delegate CME functions to community or iwi groups. In their view, the opportunity for community and iwi interests is best taken into account during plan-making.

4.3 Role of central government

National direction and guidance

Some councils and stakeholders expressed support for national direction

National direction could focus on CME generally, or be focused on activities such as quarrying, stock access to waterways and gravel extraction.

Others did not believe there was a need for increased central government direction. One council rejected the idea of an NES/NPS on CME or specific activities, due to possible inflexibilities of such policies/standards and adapting them to local circumstances. A territorial authority staff member said a 'one size fit all' approach to CME will not work.

A number of council staff and stakeholders expressed support for national guidance or best practice to be developed. In lieu of a national guidance document, some councils use the Waikato Regional Council (2016) guidance manual on *Basic Investigative Skills for Local Government.*[43] Others refer to the Quality Planning website for guidance on CME.[44] This guidance has not been updated since 2013, however, and contains some gaps.[45]

National enforcement agency

There were mixed views on the efficacy of a national enforcement agency

The potential for council RMA enforcement functions to be transferred to a national agency (such as the Environment Protection Authority, Ministry for the Environment, or another new agency) was raised by stakeholders and council representatives. Enforcement work is carried out by a central government agency in a number of other countries, such as the United Kingdom[46] and Sweden. Support was expressed for such an approach by a number of council staff and stakeholders. For example, Waikato-Tainui believes a national agency would take away the political element from enforcement decisions, insuring greater independence and consistency in decision-making across the country.

Others were sceptical about the effectiveness of such a model. Some council representatives thought that staff in a national enforcement agency would lack local knowledge and an understanding of local context. Others were concerned about the costs of such a model, and raised questions around how it could be funded. The Productivity Commission stated that a clear case to justify shifting monitoring functions to a central agency would be required, and the Commission is not convinced there is sufficient evidence to support this.

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43 Waikato Regional Council, 2016.

44 www.qualityplanning.org.nz.

45 For example, it does not reflect the Solicitor-General's recommendations about enforcement actions and removing political involvement from decision-making.

46 In respect of environmental CME activities only; councils in the UK are responsible for CME activities relating to planning.

The Environmental Defence Society acknowledged that a national agency could provide greater consistency in decision-making about enforcement, but noted there was a balance that needed to be struck as some aspects of compliance (proactive education) may be best delivered locally.

Training, funding and support

Councils and stakeholders identified opportunities for greater training, funding and support

An alternative to a national enforcement agency, suggested by one council representative, is a national support unit that provides guidance to councils on CME. A national support unit could be operated by experienced CME staff who are able to give targeted guidance to CME staff about appropriate courses of action in certain circumstances via phone, or site visit, where necessary. These staff could also provide a national training programme for CME staff. There are a number of models which could be drawn upon, such as the programmes for training of Department of Conservation and Fish & Game rangers. Another council representative disagreed with this approach, however, as it would be difficult to find people with appropriate experience and knowledge of local circumstances.

One council suggested the Ministry for the Environment organise forums on CME to help raise skills, increase national consistency, and to assist with removing political elements from CME work. The Environmental Defence Society suggested the Ministry or another organisation provide training for all new CME staff in councils. This could help these staff to be successful in this area of work, which is highly specialised, with complex processes requiring accurate and precise approaches.

Specific New Zealand Qualifications Authority compliance training modules are currently being developed by the Ministry of Business, Innovation and Employment, with support from other central government agencies and local government. The standards will help to lift the capability of staff working in CME, and increase the status with which the work is regarded. A challenge will be finding a provider and assessor to support the qualifications.

A CME training course is currently provided on an ad hoc and voluntary basis by the Waikato Regional Council. This course is designed for frontline CME staff, and gives an overview of investigation best practice, exhibit handling, witness interviews and statements and use of enforcement options. Council staff suggested this programme could be better supported or funded by central government.

Forest and Bird emphasised the need for greater national funding and support for councils to undertake CME functions, considering the national benefits of this work. Funding and support could be targeted at matters such as biodiversity and water quality, where the benefits of CME activities spread beyond the immediate local communities. Council representatives also suggested a national fund be set up for councils to take prosecutions, where the circumstances

justify a prosecution[47] and the council would otherwise struggle to afford it. Federated Farmers do not believe there is a need for national funding – the requirement on councils to use their own funds ensures the money is used efficiently and effectively.

4.4 Consequences of non-compliance

Enforcement options

Councils and stakeholders suggested some changes to enforcement options

Council representatives and stakeholders spoken to were generally satisfied with the range of enforcement tools available. However, some changes were suggested.

Infringement fines are seen as effective and efficient instruments. These fines can help to deter non-compliance and penalise offending without the need for the council to apply to a court or other body for approval. However, a number of councils and stakeholders believe the maximum level of infringement fines ($1000) is too low. There is currently a significant difference in the maximum fines available through infringement notices and prosecutions.

Some suggested the fines available through infringement notices should be greater for companies – this would be consistent with the penalties available through prosecutions and would provide a more effective deterrent for companies. The Productivity Commission noted in its 2013 report that the "low level of fines that have not been reviewed for many years, are reducing the effectiveness of enforcement strategies".[48] The level of infringement fines have not been reviewed since 1999.

Federated Farmers expressed concern that RMA offences are strict liability offences, and that a low threshold is required in order for an offence that is subject to the prosecutions regime to be committed. RMA offences are classified as Category 3 criminal offences which are ranked alongside other very serious offences. They have suggested that a civil penalties regime be introduced, which could be administered by local authorities, with the criminal prosecutions regime changed to require intent to be demonstrated before a criminal offence is committed, and prosecutions being able to be brought only by an independent authority, such as the Police or the EPA.

Insurance against RMA fines

Some suggested removing the ability to insure against RMA fines

A number of council representatives expressed frustration over the ability of individuals and companies to insure against fines imposed by the court in prosecutions taken by councils. The ability to insure is seen as reducing the seriousness of RMA offending, and undermining the

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47 Refer to Crown Law, 2013.

48 New Zealand Productivity Commission, 2013

deterrent effect of enforcement. There is also concern over the principle of insuring against criminal activity, which is inconsistent with other legislation imposing criminal penalties.

Many councils spoken to, as well as Forest and Bird and Local Government New Zealand, would like to see the ability to insure against RMA fines removed. Such a prohibition could mirror a similar provision in Health and Safety legislation.[49]

One council manager noted that although insurance against RMA fines reduces the punitive element of enforcement actions, fines and council costs are often paid more promptly. When there is no insurance, it can take a long time for fines to be paid and for councils to recover costs. If the insurance option is closed off, legislative amendments to allow faster recovering of fines and costs may need to be considered.

Cost-recovery mechanisms

Councils and stakeholders suggested improvements to cost recovery mechanisms

Local Government New Zealand suggested a legislation change be considered to provide for cost recovery by councils for monitoring activities that do not require consent (such as permitted activities), as councils currently recover only a part of the cost of CME activities from resource users.[50]

A council representative suggested that where an abatement notice is issued and compliance is not achieved by a certain specified date, councils should be able to undertake necessary remediation works, and reclaim the costs from the person/company issued with the notice. This would avoid further costs (such as the costs of applying to the Environment Court for an enforcement order) being incurred by councils as a result of the non-compliance The RMA currently allows councils to undertake works in their jurisdiction in cases where an immediate measure is needed to prevent or remediate adverse environmental affects,[51] but there is currently no mechanism for recovering the costs of this work.

Resource consent applications

The Environmental Defence Society and Local Government New Zealand suggested introducing mechanisms in the RMA to allow for applications for resource consent or renewals to be declined where the applicant has a history of offences against the RMA. One regional council expressed frustration that they had received an application from a local intensive farmer and were not able to consider his lengthy history of RMA non-compliance, including convictions, when considering his application.

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49 Section 29 of the Health and Safety at Work Act 2015 makes insurance against fines issued under that Act unlawful.

50 Note that the Resource Legislation Amendment Bill includes a clause allowing for cost recovery for monitoring activities in respect of national environmental standards.

51 See Resource Management Act 1991, section 330.

4.5 Monitoring approaches

Changes to monitoring practice were suggested

The Productivity Commission recognised that changes to monitoring could be made by:

- providing greater stability in monitoring staff – the Commission acknowledged that staff turnover in CME is high, and councils should put greater efforts into retaining CME staff and training new staff
- making closer links between policy and monitoring staff – the Commission observes the importance of strong links between CME and policy/planning staff, and recommends that some monitoring responsibilities are formally allocated to relevant policy teams within departments to ensure better integration
- adopting risk-based monitoring (for the councils that do not already use such an approach).[52]

Many councils and stakeholders believed that monitoring practices need to be more consistent throughout the country – to provide greater consistency in data collection (some representatives noted the difficulty comparing rates of non-compliance across different areas, when monitoring practices are different) and greater certainty for the public.

Transparency and accountability

Many stakeholders believe council compliance monitoring and enforcement should be more transparent

Stakeholders were particularly concerned with council inspection practices and decision-making on enforcement actions. These representatives believe greater transparency would provide certainty to resource users on when to expect monitoring visits or what level of non-compliance is likely to result in a prosecution, for example. Councils could make their CME strategies publicly available, and provide annual reports on CME activities.

Waikato-Tainui believes that councils (or the Ministry) need to be more proactive in making CME data publicly available. If details of non-compliance were made publicly available, stakeholders and the wider public could play a greater role in the prevention of reoffending.

One council representative suggested councils be required to publish an annual report that sets out the council's objectives and priorities in terms of compliance. Such a document could outline the reasons for these priorities and how performance would be assessed. This would allow councils to focus their limited resources on certain activities in order to 'lift' compliance in these areas. It would also enable communities and stakeholders to better support compliance activities (for example, through carrying out related awareness raising projects), and hold councils accountable to their objectives.

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[52] New Zealand Productivity Commission, 2014, pp 360–363.

A number of councils and stakeholders commented on the need for improvements in data collection and reporting for greater transparency.

Part 5: Conclusions

Approaches to compliance, monitoring and enforcement (CME) activities vary significantly between councils. This is partly a result of the discretion given to councils to determine how or to what extent they carry out CME under the Resource Management Act 1991 (RMA), as well as the lack of national and regional direction, coordination, guidance and support on CME.

This report explains the key variations in council approaches to CME:

- The level of priority and resources – regional councils and unitary authorities place greater emphasis on CME activities and have more significant resources and expertise to draw upon than territorial authorities.
- Approaches to complaint response, resource consent monitoring and permitted activity monitoring – while most councils have complaint response and resource consent monitoring systems in place, plan rule (permitted activity) monitoring is limited.
- Coordination of CME activities – national coordination of CME activities is limited. While regional councils and unitary authorities have a national network set up to share approaches to and information on CME, territorial authorities are generally not well connected.
- Non-compliance responses – use of enforcement actions varies significantly between councils. Most territorial authorities take few enforcement actions. Use of prosecutions is variable, with some councils taking a 'tougher stance' on non-compliance than others. Councils' decisions to prosecute are often influenced by the costs of taking prosecutions, which are significant, and often not recovered completely through fines.
- Decision-making processes about enforcement actions and the level of political involvement in decision-making – not all councils appear to have amended their decision-making processes in accordance with the Auditor-General's recommendations.[53]

There is limited data collected by councils and the Ministry for the Environment on CME. Publicly available data on CME is *very* limited– some councils publish CME reports and their procedures for handling non-compliance, but the majority do not. As a result, it is difficult to assess the effect of CME on environmental outcomes, and for the public and the Ministry to hold councils accountable for their actions and decisions.

A number of opportunities for changes to the CME regime were suggested by councils and stakeholders. These changes are both regulatory and non-regulatory:

- Increased national (or regional) direction, guidance, support and training – this could take the form of a national policy statement (NPS) (or national environmental standard (NES), in respect of particular activities), a guidance or best practice document or national

[53] Controller and Auditor-General, 2011.

support unit, for example. The Ministry of Business, Innovation and Employment is currently developing New Zealand Qualifications Authority standards on CME for regulatory staff across all of government – these standards will be helpful in increasing the level of knowledge and expertise of CME staff nationally if implementation for local government is pursued.

- Changes to increase the consequences for RMA non-compliance. Some councils and stakeholders advocated for removing the ability to insure against RMA fines, commenting that the ability to insure reduces the effectiveness of prosecutions as a deterrent and punitive measure. Many councils and stakeholders also suggested the level of infringement fines be increased. Some suggested that infringement fines be greater for companies than individuals, to reflect the differing maximum fines for prosecutions.
- Changes to data collection, monitoring and reporting approaches to increase transparency, accountability and community involvement. Many stakeholders spoken to suggested that reporting on CME be mandatory for councils. Stakeholder also raised the possibility of greater community/iwi involvement in CME, which could be carried out through a RMA section 33 delegation.

This report is intended as a platform for discussion about council CME activities and how possible improvements could be made, and not as a proposal for reform. This report and the research behind it contribute to wider policy work by the Ministry and other government agencies in assessing the effectiveness of resource management legislation. The research will also inform the request for data sent to all councils annually through the national monitoring system.

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