



Ministry for the
Environment
Manatū Mō Te Taiao

**Enforcement Action under the Resource
Management Act 1991 to Deal with
Unauthorised Storage, Dumping and
Disposal of End-of-Life Tyres**

Acknowledgements

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Introduction

This guide provides advice on practical and effective enforcement action which can be taken by councils under the Resource Management Act 1991 (RMA) to deal with unauthorised storage, dumping and disposal of end-of-life tyres in the absence of adequate planning provisions and bylaws.

The problem

The situations of concern are:

- unauthorised storage or disposal of end-of-life tyres on land by the owner of that land
- unauthorised storage or disposal of end-of-life tyres on land by an individual who has direct control over that land
- the dumping of end-of-life tyres on public land
- the dumping of end-of-life tyres on private land without the direct permission of the owner.

Solution

The solution to the problem of unauthorised storage, dumping and disposal of end-of-life tyres is removal and proper disposal of the tyres and in some circumstances it is also necessary to take steps to ensure that no further tyres are brought on to the site.

Councils in most cases have the option to resolve the problem of unauthorised storage, dumping and disposal of end-of-life tyres by taking enforcement action under the RMA.

No adverse effects

In some circumstances, councils will not be able to resolve the problem of unauthorised storage, dumping and disposal of end-of-life tyres by taking enforcement action under the RMA. The circumstances will be where there is no contravention of section 15(1) or 13(1)(d) and where the council is not able to establish that the storage, dumping or disposal of the tyres is likely to be noxious, dangerous, offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.

Difficulties

There are also difficulties for enforcement where end-of-life tyres are dumped on to public land and on to private land without the direct permission of the owner:

- Enforcement action under the RMA cannot be taken for the dumping of end-of-life tyres on public land if the council cannot establish who is responsible for the dumping.
- In situations of dumping of end-of-life tyres on private land without the direct permission of the owner where the council cannot establish who is responsible for the dumping, enforcement action can only be taken by a regional council (and not by a territorial authority) against the owner or occupier to require removal of the tyres:
 - if there is a contravention of sections 15(1)(a), (b), (c) or (d) or 13(1)(d) of the RMA and
 - if removal of the tyres is necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment.

Enforcement is limited to an abatement notice and an application for enforcement order. However, other mechanisms can be used for follow-up action in the event of non-compliance with an abatement notice or an enforcement order.

Enforcement

Enforcement acts as a deterrent and encourages compliance with the RMA. There are two categories of enforcement:

- informal enforcement – this category of enforcement is the most commonly used by local authorities. Informal enforcement includes education and discussion with potential offenders and offenders
- formal enforcement – use of the formal mechanisms under Part XII of the RMA. The range of enforcement mechanisms includes abatement notices and infringement notices, which are the lowest level enforcement mechanisms, and prosecution, which is the highest-level mechanism. The mechanisms can be used where an offence has been committed. Some of the mechanisms can also be used where an offence is likely to be committed or an activity is likely to have an adverse effect on the environment.

This guide provides advice on formal enforcement, namely:

- how to select the appropriate enforcement mechanism under Part XII of the RMA to deal with unauthorised storage, dumping and disposal of end-of-life tyres,
- how to correctly use the mechanism selected.

Co-ordinated approach

In order to resolve the problem of unauthorised storage, dumping and disposal of end-of-life tyres, it is suggested that from the outset, the territorial authority liaises and communicates with the regional council and vice versa, and they work together.

When dealing with unauthorised storage, dumping and disposal of end-of-life tyres:

- If the criteria in section 17(3) of the RMA is met, territorial authorities and regional councils can take enforcement action to enforce the duty in section 17.
- If there is contravention of sections 15(1)(a) to (d) and 13(1)(d) of the RMA, regional councils can take enforcement action for this contravention.

Sections 13(1)(d), 15(1) and 17 RMA

This guide explains sections 13(1)(d), 15(1)(a) to (d) and 17 of the RMA and how these sections can be used by councils to take enforcement action to deal with unauthorised storage, dumping and disposal of end-of-life tyres. Each enforcement mechanism is explained firstly with reference to sections 13(1)(d) and 15(1)(a) to (d) of the RMA and then with reference to section 17 of the RMA.

Sections 13(1)(d) and 15(1) RMA

If the unauthorised storage, dumping and disposal of end-of-life tyres at a site contravenes sections 15(1)(a) to (d) and 13(1)(d) of the RMA, regional councils can take enforcement action for this contravention.

Territorial authorities cannot take enforcement action for contravention of sections 15(1)(a) to (d) and 13(1)(d) of the RMA when the factors in these sections are not within the functions of territorial authorities as specified in section 31 of the RMA.

Section 13(1)(d) RMA

13. Restriction on certain uses of beds of lakes and rivers
- (1) No person may, in relation to the bed of any lake or river, –
- ...
- (d) Deposit any substance in, on, or under the bed; or
-
- unless expressly allowed by a rule in a regional plan and in any relevant proposed regional plan or a resource consent.

Section 15(1) RMA

15. Discharge of contaminants into environment
- (1) No person may discharge any –
- (a) Contaminant or water into water; or
- (b) Contaminant on to or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or
- (c) Contaminant from any industrial or trade premises into air; or
- (d) Contaminant from any industrial or trade premises on to or into land –
- unless the discharge is expressly allowed by a rule in a regional plan and in any relevant proposed regional plan, a resource consent, or regulations.

Section 15(1) prohibits the discharge of contaminants unless there is some express authority for it. Section 13(1)(d) prohibits deposit of any substance in, on, or under the bed of a lake or river, unless there is some express authority for it.

The storage, dumping and disposal of end-of-life tyres may be in contravention of section 15(1) and/or section 13(1)(d) if:

- the regional plan or proposed regional plan does not expressly allow for storage, dumping and disposal of end-of-life tyres, and
- a resource consent does not expressly allow for storage, dumping and disposal of end-of-life tyres.

Are end-of-life tyres a contaminant?

Contaminant

The word 'contaminant' is defined in section 2 of the RMA.

'Contaminant includes any substance (including gas, odorous compounds, liquids, solids, and micro-organisms) or energy (excluding noise) or heat, that either by itself or in combination with the same, similar, or other substances, energy, or heat –

- (a) When discharged into water, changes or is likely to change the physical, chemical, or biological condition of water; or
- (b) When discharged on to or into land or into air, changes or is likely to change the physical, chemical, or biological condition of the land or air on to or into which it is discharged:'

Case law

The meaning of 'contaminant' was considered by the High Court in *Works Infrastructure Ltd v Taranaki Regional Council*.¹ The defendant appealed against a conviction under section 15(1)(d) RMA. The prosecution under section 15(1)(d) RMA concerned bitumen emulsion which had leaked from storage drums after being transported from the Works Infrastructure ('Works') industrial site and then dumped into a pit on farmland.

One of the grounds of appeal was that the District Court erred in finding that the bitumen emulsion was a 'contaminant'. The appellant argued that the discharge had produced a negligible effect on the land and did not constitute a change to the condition of the land as required by the definition of 'contaminant' under section 2 RMA. The Court held that the issue to be determined was the fact of change, not its extent or effect. Accordingly, the only assessment required was whether the bitumen emulsion changed the condition of the land.

As an alternative ground of appeal, the appellant argued that a de minimis defence was available as the environmental consequence of the discharge was so insignificant that the intervention of the criminal law was not justified. The Court held that the de minimis defence was unavailable for these reasons:

- The de minimis principle does not apply as a defence under criminal law.
- Admission of the defence would be contrary to public policy as it would:
 - allow the Court to second-guess the legislature where it has expressly provided for the intervention of the criminal law. The degree of change is only relevant to the decision on whether to prosecute or to penalty
 - open the door to variability in the way the RMA is interpreted.
- It is change of composition of the soil, which matters, not a qualitative view of effect.
- The offence is one of strict liability, therefore the prosecution does not have to prove fault. Introduction of the de minimis principle would cut across the underlying scheme of the RMA.

¹ 16/11/01, Judge Thompson, DC New Plymouth CRN 0043008470.

End-of-life tyres themselves and discharges from the tyres may be regarded as contaminants in some circumstances.

Industrial or trade premises

The term 'industrial or trade premises' is defined in section 2 of the RMA.

Industrial or trade premises means –

- (a) Any premises used for any industrial or trade purposes; or
- (b) Any premises used for the storage, transfer, treatment, or disposal of waste materials or for other waste-management purposes, or used for composting organic materials; or
- (c) Any other premises from which a contaminant is discharged in connection with any industrial or trade process –

... but does not include any production land.

Case law

The High Court in *Works Infrastructure* also considered the meaning of “any industrial premises on to or into land” in section 15(1)(d). The appellant argued that the discharge took place from the farm itself as the bitumen was transported ‘from’ the Works industrial site to the farm by truck. The Court held that in the plain words of section 15(1)(d), the bitumen emulsion had emanated ‘from’ the Works industrial premises and not ‘from’ the truck or the farm. It also held that the words “from the industrial premises onto or into land” in section 15(1)(d) do not require that the source premises and receiving land must be physically contiguous or adjacent.

End-of-life tyres that are stored, dumped and disposed without express authority at a site are likely to have come from industrial or trade premises. The *Works Infrastructure* case is authority that it is the original source of the contaminant that is relevant. The original source of end-of-life tyres will in most cases come within the definition of industrial or trade premises.

The site on which end-of-life tyres are stored may come within the definition of ‘industrial or trade premises’.

In what circumstances will there be a contravention of sections 15(1) and 13(1)(d)?

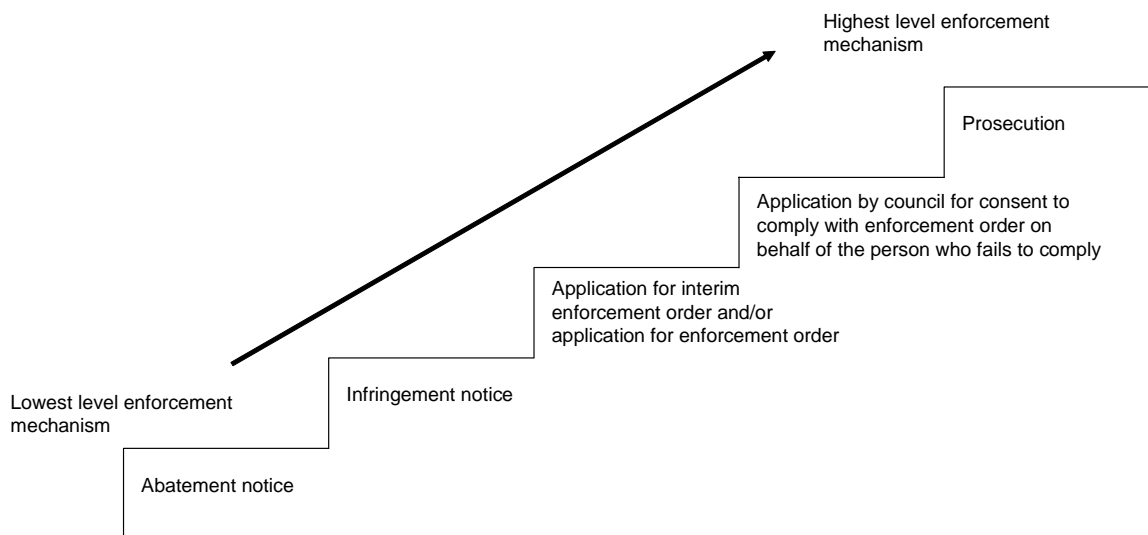
The following are examples of circumstances where there will be a contravention of sections 15(1)(a), (b), (c) or (d) or 13(1)(d), where the activity is not expressly allowed by a rule in a regional plan, a proposed regional plan or a resource consent:

- Tyres dumped in a stream is a contravention of section 15(1)(a) and is also a contravention of section 13(1)(d).
- Tyres dumped on land near water in circumstances which may result in contaminants emanating as a result of natural processes from the tyres entering water is a contravention of section 15(1)(b).
- A fire in a stockpile of tyres on a site that is industrial or trade premises is a contravention of section 15(1)(c).
- Tyres stored on land where the source of the tyres is industrial or trade premises is a contravention of section 15(1)(d).

Enforcement mechanisms

The diagram below sets out the enforcement mechanisms a regional council can use where there is a contravention of sections 15(1)(a), (b), (c) or (d) or 13(1)(d).

Figure 1: Enforcement options available to regional councils only – sections 13(1)(d), 15(1)(a), 15(1)(b), 15(1)(c) and 15(1)(d)



Section 17 RMA

Territorial authority position

If a territorial authority has a plan that does not have rules about storage, dumping and disposal of tyres then it cannot take enforcement action for contravention of section 9(1) of the RMA as there is no contravention.

The territorial authority can, however, enforce the duty imposed by section 17 if the criteria in section 17(3) of the RMA is met.

Regional council position

If the unauthorised storage, dumping and disposal of end-of-life tyres at a site does not contravene sections 15(1) or 13(1)(d) of the RMA, a regional council cannot take enforcement action for contravention of those sections.

If a regional council has a plan that does not have rules about storage, dumping and disposal of tyres then it cannot take enforcement action for contravention of section 9(3) of the RMA as there is no contravention.

The regional council can, however, enforce the duty imposed by section 17 if the criteria in section 17(3) of the RMA is met.

17. Duty to avoid, remedy, or mitigate adverse effects

- (1) Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of that person, whether or not the activity is in accordance with a rule in a plan, a resource consent, a designation, section 10, section 10A, or section 20A.
- (2) The duty referred to in subsection (1) is not of itself enforceable against any person, and no person is liable to any other person for a breach of that duty.
- (3) Notwithstanding subsection (2), an enforcement order or abatement notice may be made or served under Part XII to –
 - (a) Require a person to cease, or prohibit a person from commencing, anything that, in the opinion of the Environment Court or an enforcement officer, is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or
 - (b) Require a person to do something that, in the opinion of the Environment Court or an enforcement officer, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by, or on behalf of, that person.
- (4) Subsection (3) is subject to section 319(2) (which specifies when an Environment Court shall not make an enforcement order).

The duty in section 17 is enforceable by an enforcement order or an abatement notice requiring a person to:

- cease, or prohibit a person from commencing, anything that, in the opinion of the Environment Court or an enforcement officer, is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or
- do something that, in the opinion of the Environment Court or an enforcement officer, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by, or on behalf of, that person.

Section 17(4) provides that section 17(3) is subject to section 319(2) which specifies when an Environment Court shall not make an enforcement order. Section 319(2) provides that the Environment Court must not make an enforcement order if the adverse effects in respect of which the enforcement order is sought were expressly recognised by the person who approved the plan, or granted the resource consent, at the time of the approval or granting, as the case may be.

Criteria in section 17 RMA

Section 17 can only be relied on by councils if the criteria in section 17(3) is met.

Section 17(3)(a)

Section 17(3)(a) has two limbs. In order to require a person to cease bringing further tyres on to a site, both limbs have to be established.

First limb

The council has to establish that the storage, dumping or disposal of the tyres is likely to be one or more of the following:

- noxious
- dangerous
- offensive
- objectionable.

Second limb

The council has to establish that the aspects are noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.

Section 17(3)(b)

Section 17(3)(b) has two limbs. In order to require a person to remove tyres from a site, both limbs have to be established.

First limb

The council has to establish that removal of the tyres is necessary in order to:

- avoid and/or
- remedy and/or
- mitigate

any actual or likely adverse effect on the environment.

Second limb

The council has to establish that the actual or likely adverse effect on the environment is caused by, or on behalf of that person. This requirement means that a council cannot take action to enforce the duty in section 17:

- for the dumping of end-of-life tyres on public land if the council cannot establish who is responsible for the dumping
- for the dumping of end-of-life tyres on private land without the direct permission of the owner where the council cannot establish who is responsible for the dumping.

Evidence required to meet the criteria in section 17 RMA

Actual adverse effects

The council will be able to obtain evidence to establish the criteria in section 17(3) where there are actual adverse effects that are noxious, dangerous, offensive, or objectionable. Examples are:

- a fire in a large stockpile of tyres at a site where people in neighbouring properties are adversely affected by the smoke from the fire
- the stockpile of tyres is a breeding ground for mosquitoes, the numbers of mosquitoes are extremely high and neighbours are adversely affected by the mosquitoes
- the stockpile of tyres is a habitat for rats and there is an orchard nearby that provides a food source for the rats. The people in neighbouring properties and the orchard are adversely affected by the rats.

Likely adverse effects

The council may be concerned about the possibility of a tyre fire. The threshold for taking enforcement action under section 17 is 'likely'. This means that the council, to establish the criteria in section 17(3), has to establish:

- that the risk of fire is 'likely'; and
- if there is a fire it is likely that the fire will have an adverse effect on the environment.

In order to establish that the risk of fire is 'likely', the council should consider the following:

- The Hamilton Fire District has "Recommendations for the storage of used vehicle tyres" (see appendix). The topics in these recommendations are a potential guide to establishing whether the risk of fire is likely and include the following:
 - separation distances
 - water supply for fire fighting
 - emergency access roads.
- Site security and visibility – can a vandal enter and light a fire?
- Whether the site or locality has a history of arson.
- Size of the stockpile of tyres.
- Other activity that occurs at the site and near the site and whether this activity increases the risk of fire; eg, are any fires being deliberately lit at the site or on neighbouring properties?
- Whether there is native bush, other vegetation, or forest nearby that could catch on fire and spread to the tyre stockpile.

In order to establish that if there is a fire then it is likely that the fire will have an adverse effect on the environment, the council should consider the following:

- Size of the stockpile of tyres.
- Proximity of the neighbours.
- Who the neighbours are and how sensitive they or their businesses are to the effects of fire; eg, retirement home, food processing activity.
- Whether the neighbours can be evacuated quickly in the event of a tyre fire.
- Whether there is a waterway on the site or nearby that contaminants from the fire could enter.
- Whether there is native bush, other vegetation, forest nearby that could catch on fire.

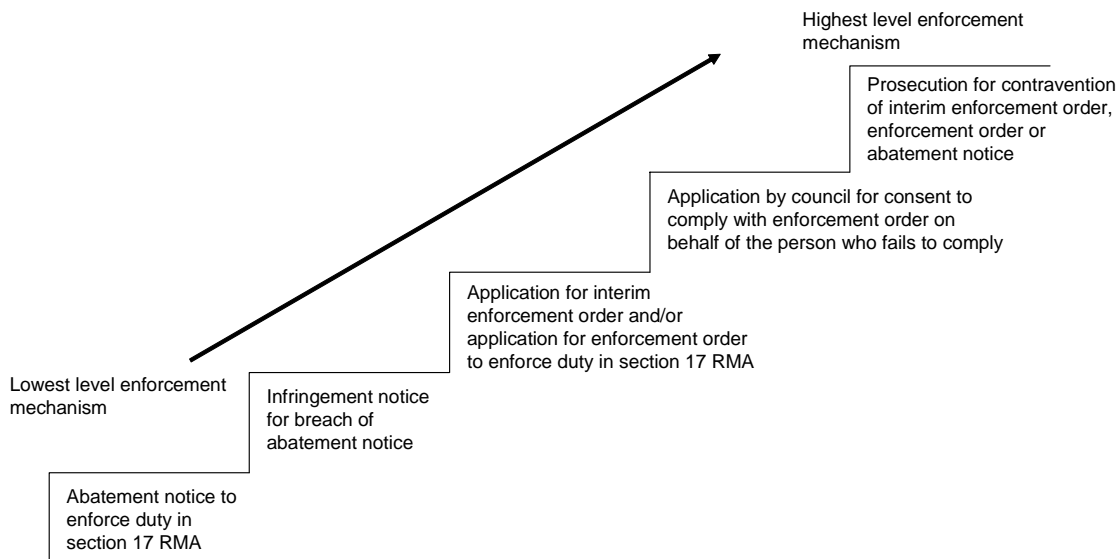
Enforcement Mechanisms

The diagram below sets out the enforcement mechanisms a council can use where the criteria in section 17(3) can be established.

The duty in section 17 can only be enforced by two of the enforcement mechanisms in the RMA: an enforcement order or an abatement notice. However, other mechanisms can be used for follow-up action in the event of non-compliance with an enforcement order or an abatement notice:

- An infringement notice can be issued for breach of an abatement notice.
- A council can prosecute for contravention of an enforcement order and an interim enforcement order.
- A council can prosecute for contravention of an abatement notice.
- If a person against whom an enforcement order is made fails to comply with the order, the council may apply to the Environment Court under section 315 to comply with the order on behalf of the person who failed to comply.

Figure 2: Enforcement options – section 17



Abatement Notice

Abatement notices can only be issued by council enforcement officers. An abatement notice is a warning to the recipient that he/she is contravening the provisions of the RMA. The relevant sections of the Act are sections 322 to 325A.

Section 324 sets out the contents of an abatement notice and provides that the notice shall be in the prescribed form. The form for abatement notices was changed in August 2003.² The new form should be used.

Section 322(4) provides that an abatement notice shall not be served unless the enforcement officer has reasonable grounds for believing that the circumstances in section 322(1) or (2) exist.

Abatement notice for contravention of sections 15(1)(a)–(d) and 13(1)(d)

An abatement notice can be issued for contravention of sections 15(1)(a), (b), (c) and (d) and 13(1)(d) requiring the recipient to remove the tyres and to cease importation of further tyres on to the site:

- The period within which the action must be taken or cease must be a reasonable period and can be less than seven days.
- If an appeal is filed, the appeal does not act as a stay.
- The recipient can apply to the Court for a stay.
- The abatement notice must specify the subsection of section 322 which is relied upon by the enforcement officer – in this case (1)(a)(i), (1)(b)(i) and (1)(b)(ii).

Abatement notice to enforce the duty in section 17 RMA

An abatement notice can be issued to enforce the duty in section 17 RMA requiring the recipient to remove the tyres and to cease importation of further tyres on to the site:

- The recipient must be given at least seven days to comply.
- If the recipient files an appeal, the appeal acts as a stay.
- The abatement notice must specify the subsection of section 322 that is relied upon by the enforcement officer – in this case (1)(a)(ii).

² Form 48 in Schedule 1 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003.

Explanation of how an abatement notice can be issued under section 322(1)(a)(ii) to require the recipient to remove tyres

The wording of 322(1)(a) and 322(1)(b) is different:

- Section 322(1)(a) allows for issue of an abatement notice to require “ a person to cease, or prohibiting that person from commencing ...”.
- Section 322(1)(b) allows for issue of an abatement notice to require a “person to do something ...”.

Case law

A decision of the High Court, *Zdrahal v Wellington City Council*³ is authority that an abatement notice can be issued under section 322(1)(a)(ii) to require a person to take steps to cease an activity.

An abatement notice was issued to Mr Zdrahal and Ms Moffatt under section 322(1)(a)(ii), requiring them to remove or to paint out on a wall and to remove from a window two swastikas on the grounds that these swastikas were offensive and objectionable in that they were likely to have an adverse effect on the environment.

On appeal to the High Court one of the grounds of the appeal to the High Court was that:

- the wording of section 322(1)(a) meant that an abatement notice can only be issued to stop something that is being done or to prohibit something from being commenced
- because the swastikas had already been painted there was nothing that the enforcement officer could require the appellants to cease or to prohibit from commencing. The action which was alleged to be offensive was completed and so the words of the Act were no ‘longer applicable’. Nothing remained to be prohibited or that in the ordinary use of the English language could cease.

The High Court rejected this argument and held that section 17(3) and section 322 should be read together to enlarge the application of section 322 to include a requirement to cease an activity which may have an adverse effect or which may be offensive to that extent. The Court held that:

“The provisions of s 322 are to be given a fair, large and liberal construction to ensure the object and the purposes of the Act as a whole and are not to be narrowly construed as by a pedantic grammarian.”

³ [1995] 1 NZLR 700; (1994) 2 HRNZ 196; [1995] NZRMA 289 (HC).

When the owner or occupier of the site is not responsible for the storage, dumping or disposal of the tyres

Section 322(1)(b)(ii) allows an enforcement officer to issue an abatement notice against an owner or occupier of a site requiring the owner or occupier to remove the tyres even if the owner or occupier was not responsible for the storage, dumping and disposal of end-of-life tyres if removal of the tyres is necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment.

Detail required for an abatement notice

An abatement notice must include the following detail:

- action required to be taken or ceased or not undertaken – precise details should be given
- location – the description of the location must be given with sufficient accuracy so that the recipient knows the locality to which the abatement notice is intended to relate
- reasons for the notice – the reasons should be explained clearly and information should be provided that covers the elements of the subsection of section 322 that the notice is issued under.

Examples of abatement notices are provided in Appendix 2A and 2C on pages 28, 29 and 32.

Case law

Waikato RC v Huntly Quarries⁴

The defendants were charged with contravention of an abatement notice issued in respect of stormwater discharge from a quarry. The notice was issued under section 322(1)(b). Judge McElrea found that the notice was invalid because it did not state reasons that cover both elements of section 322(1)(b). As a result the charges against the defendants were dismissed.

⁴ [2004] NZRMA 32.

Infringement Notice

Infringement notices can only be issued by council enforcement officers. The relevant sections of the RMA are sections 343A to 343D. The infringement fees and the form for an infringement notice are in the schedules to the Resource Management (Infringement Offences) Regulations 1999 (the Regulations).

Examples of infringement notices are provided on at Appendix 2B and 2D on pages 30, 31 and 33.

A conviction is not imposed for an infringement offence and the only penalty is the infringement fee. The council retains all infringement fees received for notices issued by its enforcement officers.

Section 21 of the Summary Proceedings Act specifies the various options for initiating infringement offence proceedings and sets out the steps that may be taken, after issue of an infringement notice by a council and by the person served with a notice.

A separate infringement notice can be issued for each day the offence is committed.

Infringement notice for contravention of sections 15(1)(a)–(d) and 13(1)(d)

A regional council can issue an infringement notice for unauthorised storage, dumping and disposal of end-of-life tyres if there is contravention of sections 15(1)(a)–(d) or 13(1)(d). The infringement fee set by the Regulations for contravention of:

- section 15(1)(a) is \$750.00
- section 15(1)(b) is \$750.00
- section 15(1)(c) is \$1000.00
- section 15(1)(d) is \$1000.00
- section 13(1)(d) is \$500.00.

Infringement notice for contravention of an abatement notice

If a council issues an abatement notice to enforce the duty in section 17 of the RMA requiring a person to remove end-of-life tyres and/or to stop dumping further tyres at the site and the recipient fails to comply with the abatement notice, the council can issue an infringement notice for contravention of the abatement notice. The infringement fee set by the Regulations for contravention of an abatement notice is \$750.00.

Application for Enforcement Order

The relevant sections of the RMA are sections 314 to 319 and 321. The scope of an enforcement order is set out in section 314.

An application for enforcement order should be prepared by the lawyer acting for council. The application should be supported by evidence in the form of affidavits.

The standard of proof is on the balance of probabilities.

Application for enforcement order for contravention of sections 15(1)(a)–(d) and 13(1)(d)

A council can apply to the Environment Court for an enforcement order if there is a contravention of sections 15(1)(a), (b), (c), (d) or 13(1)(d) requiring the person responsible for the storage, dumping and disposal of end-of-life tyres to:

- stop bringing further tyres on to the site – section 314(1)(a)(i)
- remove the tyres – section 314(1)(b)(i).

Application for enforcement order to enforce the duty in section 17 RMA

A council can apply to the Environment Court for an enforcement order to enforce the duty in section 17 RMA requiring the person responsible for the storage, dumping and disposal of end-of-life tyres to:

- stop bringing further tyres onto the site – section 314(1)(a)(ii)
- remove the tyres – section 314(1)(b)(ii).

When the owner or occupier of the site is not responsible for the storage, dumping or disposal of the tyres

A council can apply to the Environment Court for an enforcement order pursuant to section 314(1)(da) if there is a contravention of sections 15(1)(a), (b), (c), (d) or 13(1)(d) requiring the owner or occupier of the site to remove the tyres even if the owner or occupier was not responsible for the storage, dumping and disposal of the tyres if removal of the tyres is necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment.

Case law

The Court of Appeal in *Watercare Services Ltd v Minihinnick*⁵ sets out four steps for establishing whether an enforcement order should be made under section 314(1)(a)(ii) – whether an activity is noxious, dangerous, offensive or objectionable. In summary these are:

1. that the Court must be satisfied that the applicant's assertion is honestly made;
2. that the subject matter of the application is or is likely to be noxious, dangerous, offensive or objectionable; and
3. if it is that it is of such an extent that it is likely to have an adverse effect on the environment;
4. if the first three steps are established, whether in all the circumstances the Court's discretion should be exercised in favour of making the enforcement order sought or otherwise.

The Court held that at the second and third steps the Court is acting as the representative of the community at large. It must weigh all the relevant competing considerations and ultimately make a value judgement on behalf of the community as a whole.

⁵ [1998] 1 NZLR 294; (1997) 3 ELRNZ 511; [1998] NZRMA 113 (CA).

Application for Interim Enforcement Order

Where an enforcement order is an option, an application for an interim enforcement order should be filed:

- where urgent action is required
- where the emergency provision in section 330 cannot be used, and/or
- “... where the sanction and protection of Court order is desirable”.⁶

An application for interim enforcement order is made pursuant to section 320 of the RMA. Section 320 provides that the provisions of applications for enforcement orders, sections 314 to 319, apply to an application for, and determination of, an interim enforcement order, except as provided in section 320.

An application for interim enforcement order should be prepared by the lawyer acting for council. The application should be supported by evidence in the form of affidavits.

An interim enforcement order can be made by an Environment Judge or a District Court Judge without service of notice to affected parties and without a hearing.

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

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

The interim enforcement order stays in force until the application for an enforcement order is determined or until the order is cancelled either under section 320(5) or under section 321.

The scope of an interim enforcement order is the same as that for an enforcement order and is prescribed by section 314, refer to the explanation on application for an enforcement order on pages 17 and 18.

⁶ Philip Milne, Overview of the enforcement regime, Brooker’s Resource Management.

Failure to Comply with an Enforcement Order

If the respondent to an enforcement order or an interim enforcement order fails to comply with the order, the council can apply for the Environment Court's consent under section 315(2) of the RMA to:

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

Prosecution

Section 338 specifies offences against the RMA. Section 339 specifies the penalties.

The maximum penalties for contravention of sections 13(1)(d), 15(1)(a) to (d), contravention of an enforcement order and an abatement notice are imprisonment for two years, or a fine of \$200,000, and, if the offence is a continuing one, to a further fine of \$10,000 for each day the offence continues.

The two principal purposes of prosecution are to punish the offender and deter.

The standard of proof is the criminal standard which is 'beyond reasonable doubt'.

Whether a defence is available under section 340 and/or section 341 should be considered.

The standard of proof which is required of the defendant to establish the statutory defences provided in section 340 and section 341 is 'on the balance of probabilities'.

In criminal cases the burden of proof is on the prosecution to prove every essential ingredient of the offence.

An information may be laid up to six months from the time when the contravention first became known, or should have become known, to the local authority.

Prosecution for contravention of sections 15(1)(a)–(d) and 13(1)(d)

A regional council can prosecute for unauthorised storage, dumping and disposal of end-of-life tyres if there is contravention of sections 15(1)(a) to (d) and 13(1)(d).

Prosecution for contravention of an abatement notice or an enforcement order

If a council issues an abatement notice to enforce the duty in section 17 RMA requiring a person to remove end-of-life tyres and/or to stop dumping further tyres at the site and the recipient fails to comply with the abatement notice, the council can prosecute for contravention of the abatement notice.

If the council obtains an enforcement order or an interim enforcement order to enforce the duty in section 17 RMA requiring a person to remove end-of-life tyres and/or to stop dumping further tyres at the site and the respondent fails to comply with the enforcement order, the council can prosecute for contravention of the enforcement order.

A regional council can prosecute for contravention of an abatement notice or an enforcement order issued for contravention of sections 15(1)(a) to (d) and 13(1)(d).

Section 330 RMA

If there is a tyre fire at a site, a council, pursuant to section 330 of the RMA, can enter a property and take action, or direct the occupier to take such action, as is immediately necessary and sufficient to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency.

Before taking any action for a tyre fire, it is suggested that the territorial authority and the regional council work together. The councils should ask for assistance from:

- the Fire Service; and
- the Department of Conservation if it has jurisdiction for the site under the Forest and Rural Fires Act 1977.

Matters to be considered before action under section 330 is taken

The matters that were identified in *Auckland City Council v Minister for the Environment* should be considered by a council to determine whether it is appropriate to take action under section 330 and to determine what action should be taken. These matters are set out in the flowchart on page 23.

Case law

Auckland City Council v Minister for the Environment and others⁷

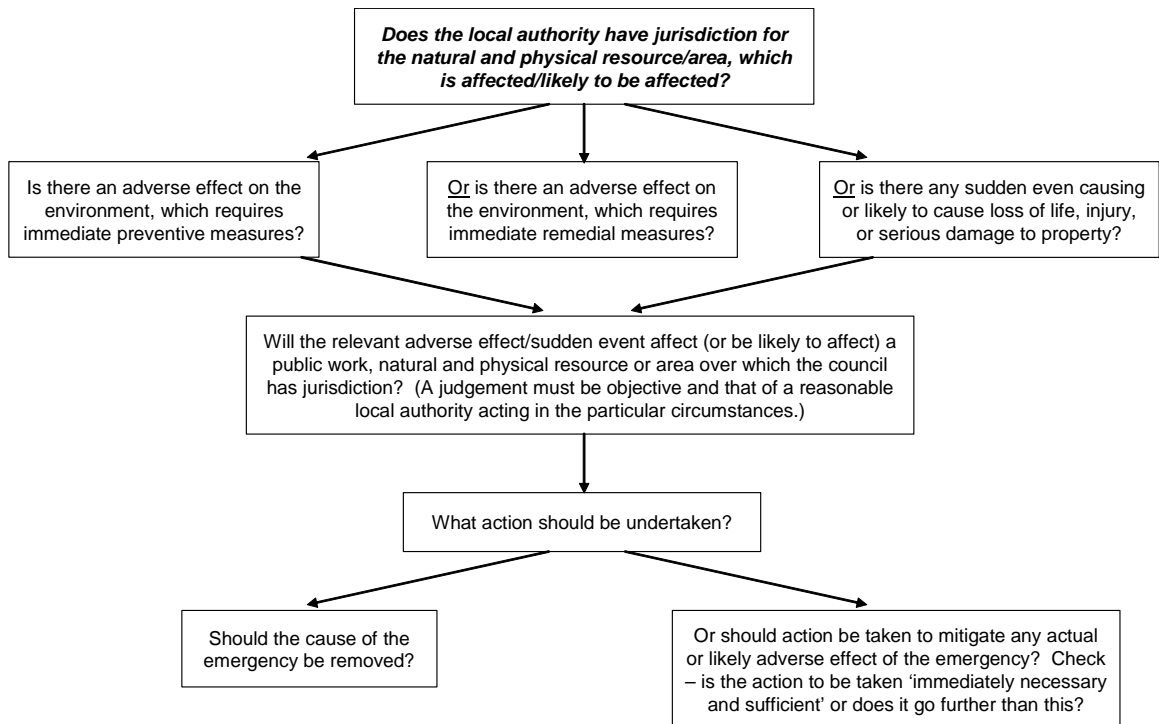
The Auckland City Council applied for a declaration to clarify the emergency powers in section 330. The Court held that:

- section 330(1) specifies a set of interrelating circumstances. In summary, three areas of assessment should be applied:
 - (1) whether there is a situation under paras (d), (e) or (f) of section 330(1)
 - (d) an adverse effect on the environment which requires immediate preventive measures; or
 - (e) an adverse effect on the environment which requires immediate remedial measures; or
 - (f) any sudden event causing or likely to cause loss of life, injury, or serious damage to property –
 - (2) the formation of an opinion of effect or likely effect upon the public work, natural and physical resource or area, or project or work or network utility operation
 - (3) a decision as to the action to be taken; that is, whether to remove the cause of the emergency or to mitigate any actual or likely adverse effect of it

⁷ (1998) 5 ELRNZ 1; [1999] NZRMA 49 (EnvC).

- the judgements of the person/body considering taking action must be objective and that of a reasonable person/body acting in the particular circumstance
- the action to be taken must be "immediately necessary and sufficient" for the relevant purpose (immediate response). When section 330 is properly invoked the authority acting in accordance with section 330 is entitled to claim immunity from prosecution under section 18(2)
- local authorities when acting pursuant to section 330 must act responsibly within the bounds of the section.

Figure 3: Emergency action – section 330 RMA



Hypothetical Scenarios

Scenario 1

The landowner at a rural site has stored about 10,000 end-of-life tyres and further tyres are being brought to the site. The local Fire Service has issued guidelines for storage of end-of-life tyres that are similar to the recommendations issued by the Hamilton Fire District (refer to the appendix). These guidelines have not been followed. The site and the neighbouring area have a history of incidents of arson and attempted arson. There is a primary school and a number of residential houses within one kilometre of the tyre stockpile. There is no water supply at the site. The district council receives complaints from neighbours. There are no rules in the District Plan about storage of tyres. There are no rules in the Regional Plan about storage of tyres.

The district council should work together with the regional council. In this scenario, the criteria in section 17(3) can be established:

- that the risk of fire is 'likely', and
- if there is a fire it is likely that the fire will have an adverse effect on the environment.

The district council and the regional council should meet with the landowner and discuss the risk of fire with him and ask him to co-operate and remove the tyres. If the landowner does not agree to move the tyres, the councils have enforcement options as set out in the diagram on page 12.

The tyres stored at the site may also be a contravention of section 15(1)(d) (refer page 6 and 7) and if it is the regional council also has the enforcement options as set out in the diagram on the same page.

An example of an abatement notice for this scenario to enforce the duty in section 17 is Appendix 2A. An example of an infringement notice for breach of the abatement notice is Appendix 2B.

Scenario 2

About 20,000 end-of-life tyres have been dumped at a park owned by the regional council. The regional council has made extensive enquiries but has not been able to obtain any evidence to establish who dumped the tyres at the park. There are mosquitoes and rats in the tyre stockpile.

The regional council cannot take enforcement action under the RMA as the council cannot establish who is responsible for the dumping. The council should remove the tyres promptly.

Scenario 3

The owner of a lifestyle block on the outskirts of a city has dumped about 1,000 end-of-life tyres in a stream at his property. Some of the tyres have been partially shredded. The stream is a tributary to a river that is a habitat for trout and other fish. The regional council has collected samples downstream of the tyres and has a report from a chemist that confirms that the analyses of the samples shows that there has been leachate from the tyres and this is likely to have an adverse effect on fish. The landowner has told regional and district council staff that he will not move the tyres and he can do what he likes on his own land.

The tyres dumped in the stream are a contravention of section 15(1)(a) and also a contravention of section 13(1)(d).

The regional council has the enforcement options as set out in the diagram on page 7.

An example of an abatement notice for contravention of section 15(1)(a) is Appendix 2C. An example of an infringement notice for contravention of section 15(1)(a) is Appendix 2D.

Appendix 1: Hamilton Fire District Recommendations for the Storage of Used Vehicle Tyres

The following recommendations have been taken from the *NFPA Guidelines*, Appendix G “Guidelines for Outdoor Storage of Scrap Tyres” and information based from *Fire Safety Assessment of the Scrap Tyre Storage Methods* by Williamson and Schroeder.

Piles should be sorted vertically and in an orderly manner and should include:

2. Tyres should not be stored on wetlands, flood plains, ravines or steep graded surfaces. Flat level ground is preferred.
2. The preferred surface for storage is concrete or hard packed clay but not asphalt or grass.
3. A three-metre high wire fence should secure the pile area with six-metre wide opening gates. These gates should remain unobstructed at all times and at least one on each side of the storage site.
4. Piles should not be accumulated under power structures or lines.
5. The storage area or piles should be provided with an emergency vehicle access road so that there is no area of the piles further than 45 metres from the road. This road should be able to carry the weight of a standard pumping appliance of 13 tonne.
6. Piles should be 15 metres from fences or boundary lines.
7. Area within 61 metres of a tyre pile should be void of trees, plants or other vegetation.
8. All ignition sources should be kept out of the cleared area around and within the tyre piles.
9. Separation between tyre storage and buildings, vehicles, other combustibles should be a minimum of 61 metres.
10. Pile height should not exceed six metres maximum, 15 metres in width and 80 metres in length.
11. If the clear space between piles or other exposures cannot be achieved a dirt bund wall should be constructed 1½ times the height of the tyre piles between the exposures.
12. The following table is a guideline for the storage of used tyres.

Table 1: Minimum exposure separation distances for used tyre piles

Tyre storage pile height (m)							
Exposed pile face length (m)	2.5	3	4	4.5	5	5.5	6
8	17	19	21	22	24	25	26
16	23	26	29	30	33	35	37
30	30	36	40	43	45	48	50
48	30	36	40	43	45	48	50
64	30	36	40	43	45	48	50
80	30	36	40	43	45	48	50

Water supplies

Where the storage capacity for tyres is less than 20,000 tyres (1500m³) a water supply capable of delivering 75 l/s for 6 hours should be provided within 60 m of the storage area. This supply should be increased to 150 l/s for six hours duration if storage capacity exceeds 20,000 tyres (1500m³). If there is a lake, pond, stream, river or other static water supply equal or greater than above an access must be provided within three metres to it for a standard pumping appliance of 13 tonne.

Martin Berryman
Deputy Chief Fire Officer
Hamilton Fire District

14 March 2002

Appendix 2A: Abatement Notice

Abatement Notice under Section 322 of the Resource Management Act 1991

To: Martin Jason Cavanagh

1. The XXX District Council gives notice that you must take the following action:

Cease storing tyres at your Morris Road property by:

- (a) removing all of the tyres that are stored at your Morris Road property and taking the tyres to a site that is authorised to accept the tyres; and
- (b) not importing any further tyres for storage at your Morris Road property.

2. The location to which this abatement notice applies is:

The property owned by you of 10.34 hectares at RD 1, Morris Road, Smalltown legally described as Lot 1 DPS. 2333, South Auckland Land Registration District (referred to in this notice as “your Morris Road property”).

3. You must comply with this abatement notice within the following period:

Within one month of service of this abatement notice on you, namely by 3 June 2004.

4. This notice imposes the following further conditions:

Three days prior to removing the tyres from your Morris Road property, you are to give the XXX District Council written notice of the site that you propose to take the tyres to.

5. This notice is issued under:

Section 322 (1)(a)(ii) and section 17(3) of the Resource Management Act 1991.

6. The reasons for this notice are:

You have stored tyres at your Morris Road property and this is likely to be noxious, dangerous, offensive, and objectionable to such an extent that it is likely to have an adverse effect on the environment. The reason the tyres stored at your Morris Road property are likely to be noxious, dangerous, offensive, and objectionable is because it is likely that there will be a tyre fire and if there is a tyre fire, it is likely that the fire will have an adverse effect on the environment.

(a) There is likely to be a tyre fire because:

- (i) there have been a number of incidents of attempted arson and arson reported at your Morris Road property and at properties within five kilometres of your Morris Road property since September 2002
- (ii) the area in which the tyres are stored has not been fenced and can be accessed from Morris Road, State Highway 1 and also from Pepper Road

- (iii) the Chief Fire Officer of the Smalltown Fire District has inspected the tyres stored at your Morris Road property and has prepared a written report on the likelihood of a tyre fire at your Morris Road property. The view of the Chief Fire Officer is that no precautions have been taken to avoid a fire and the manner in which the tyres have been stored is such that the risk of fire is likely. A copy of the Chief Fire Officer's report is attached to this abatement notice.
- (b) If there is a tyre fire at your Morris Road property it is likely that the fire will have an adverse effect on the environment because:
 - (i) the smoke from the tyre fire is likely to be noxious, dangerous, offensive, and objectionable
 - (ii) the view of the Chief Fire Officer as recorded in his report is that the smoke from a tyre fire at your Morris Road property is likely to adversely affect those within a radius of at least one kilometre of the tyre stockpile. There is a primary school and 10 residences within one kilometre of the tyre stockpile
 - (iii) the view of the Chief Fire Officer as recorded in his report is that the number of tyres stored and the manner in which the tyres have been stored and the lack of a water supply at the site is such that if there was a tyre fire, the fire would be difficult to extinguish and is likely to burn for a number of weeks.

If you do not comply with this notice, you may be prosecuted under section 338 of the Resource Management Act 1991 (unless you appeal and the notice is stayed as explained below).

You have the right to appeal to the Environment Court against the whole or any part of this notice. If you wish to appeal, you must lodge a notice of appeal in form 49 with the Environment Court within 15 working days of being served with this notice.

Lodging an appeal will automatically stay this notice as long as you are complying with the Resource Management Act 1991, any regulations made under that Act, a rule in a plan, or a resource consent.

You also have the right to apply in writing to the XXX District Council to change or cancel this notice in accordance with section 325A of the Resource Management Act 1991.

The XXX District Council authorised the enforcement officer who issued this notice. The XXX District Council address is: XXX.

The enforcement officer is acting under the following authorisation: A warrant of authority issued by the XXX District Council, pursuant to section 38 of the Resource Management Act 1991, authorising the officer to carry out all of the functions and powers as an enforcement officer under the Resource Management Act 1991.

.....
Signature of enforcement officer

3 May 2004

Appendix 2B: Infringement Notice

Notice number 22

(Issued under the authority of section 343c of the Resource Management Act 1991)

Enforcement authority

XXX District Council

Enforcement officer identification

Mary-Jane Jones

To: Martin Jason Cavanagh of
RD 1, Morris Road, Smalltown

You are alleged to have committed an infringement offence against the Resource Management Act 1991, as follows:

Details of alleged infringement offence

Section of Resource Management Act 1991 contravened Section 338(1)(c), being contravention of an abatement notice.

Nature of infringement

You have contravened an abatement notice issued to you on 3 May 2004 by an enforcement officer of the XXX District Council by failing to remove the tyres stored at your Morris Road property by 3 June 2004 as required by the abatement notice.

Location: RD 1, Morris Road, Smalltown

Date: 7 June 2004

Approximate time: 4 pm

The fee for this infringement is \$750.00.

Payment of infringement fee

The infringement fee is payable to the enforcement authority within 28 days after 7 June 2004.

The infringement fee is payable to the enforcement authority at: XXX.

Payments by cheque should be crossed “Not Transferable”.

.....
Signature of enforcement officer

IMPORTANT: PLEASE READ SUMMARY OF RIGHTS PRINTED OVERLEAF.

Appendix 2C: Abatement Notice

Abatement Notice Under Section 322 of the Resource Management Act 1991

To: Joseph Smith, State Highway 1, Lemon Road, Punchville

1. **The XXX Regional Council gives notice that you must take the following action:**

You are required to remove all of the tyres that you have dumped in the Orangewood Stream at your Lemon Road property and take the tyres to a site that is authorised to accept the tyres.

2. **The location to which this abatement notice applies is:**

The property of 30 hectares owned by you at State Highway 1, Lemon Road, Punchville legally described as Lot 2 DPS 296, North Auckland Land Registration District (referred to in this notice as “your Lemon Road property”).

3. **You must comply with this abatement notice within the following period:**

Within one month of service of this abatement notice on you, namely by 3 June 2004.

4. **This notice imposes the following further conditions:**

Three days prior to removing the tyres from your Lemon Road property, you are to give the Regional Council written notice of the site that you propose to take the tyres to.

5. **This notice is issued under:**

Section 322(1)(b)(i) of the Resource Management Act 1991.

6. **The reasons for this notice are:**

This abatement notice is issued under section 322(1)(b)(i) of the Resource Management Act 1991 to require you to remove the tyres that you have dumped in the Orangewood Stream as this is necessary to:

- (a) ensure that you comply with section 15(1)(a) of the Resource Management Act 1991; and
- (b) avoid any likely adverse effect on the environment.

You have contravened section 15(1)(a) of the Resource Management Act 1991, by discharging a contaminant, namely tyres into water, namely the Orangewood Stream, when the discharge is not expressly allowed by a rule in a regional plan and in any relevant proposed regional plan, a resource consent, or regulations.

Regional Council officers have collected samples downstream of the tyres that you have dumped in the Oranewood Stream. The Oranewood Stream is a tributary to the Passion River. The Regional Council has a report from a chemist on the analyses of the samples collected and this report confirms that there has been leachate from the tyres and this is likely to have an adverse effect on the trout and other fish in the Passion River.

If you do not comply with this notice, you may be prosecuted under section 338 of the Resource Management Act 1991 (unless you appeal and the notice is stayed as explained below).

You have the right to appeal to the Environment Court against the whole or any part of this notice. If you wish to appeal, you must lodge a notice of appeal in form 49 with the Environment Court within 15 working days of being served with this notice.

An appeal does not automatically stay the notice and so you must continue to comply with it unless you also apply for a stay from an Environment Judge under section 325(3A) of the Resource Management Act 1991 (see form 50). To obtain a stay, you must lodge both an appeal and an application for a stay with the Environment Court.

You also have the right to apply in writing to the XXX Regional Council to change or cancel this notice in accordance with section 325A of the Resource Management Act 1991.

The XXX Regional Council authorised the enforcement officer who issued this notice. The XXX Regional Council address is: XXX.

The enforcement officer is acting under the following authorisation: A warrant of authority issued by the XXX Regional Council, pursuant to section 38 of the Resource Management Act 1991, authorising the officer to carry out all of the functions and powers as an enforcement officer under the Resource Management Act 1991.

.....
Signature of enforcement officer

3 May 2004

Appendix 2D: Infringement Notice

Notice number 56

(Issued under the authority of section 343c of the Resource Management Act 1991)

Enforcement authority

XXX Regional Council

Enforcement officer identification

Jeremy John Brown

To: Joseph Smith of
State Highway 1, Lemon Road, Punchville

You are alleged to have committed an infringement offence against the Resource Management Act 1991, as follows:

Details of alleged infringement offence

Section of Resource Management Act 1991 contravened: Section 338(1)(c)

Nature of infringement

You have contravened section 15(1)(a) of the Resource Management Act 1991, by discharging a contaminant, namely tyres into water, namely the Orangewood Stream, when the discharge is not expressly allowed by a rule in a regional plan and in any relevant proposed regional plan, a resource consent, or regulations.

Location: State Highway 1, Lemon Road, Punchville

Date: 3 May 2004

Approximate time: 11 am

The fee for this infringement is \$750.00.

Payment of infringement fee

The infringement fee is payable to the enforcement authority within 28 days after 3 May 2004.

The infringement fee is payable to the enforcement authority at: XXX.

Payments by cheque should be crossed "Not Transferable".

.....
Signature of enforcement officer

IMPORTANT: PLEASE READ SUMMARY OF RIGHTS PRINTED OVERLEAF.