

Te Kaupapa Here Ūruhitanga a
te Kaunihera ā-rohe o Waikato

**Waikato Regional Council
Enforcement Policy –
Biosecurity**

Waikato



REGIONAL COUNCIL
Te Kaunihera ā Rohe o Waikato

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Aronga matua

Purpose

The purpose of this policy is to provide Integrated Catchment Management staff, the wider council and the public with high level guidance on how to achieve our compliance and enforcement obligations, particularly regarding the Biosecurity Act (the Act).

This policy sets out the principles and purposes by which Waikato Regional Council (the Council) promotes and enforces compliance with the Act¹.

The Biosecurity team takes a comprehensive approach to encouraging compliance through developing understanding and encouraging behaviour change with the aim to avoid further non-compliance. The four components of this approach are referred to as the 4 Es: Engage, Educate, Enable and Enforce.

It is intended that this policy will encourage proactive compliance, accountability, consultation and cooperation with people who live, work and interact with nature in our region.



¹ This policy has been adapted from and is consistent with the 2016 Waikato Regional Council Enforcement Policy – Resource Management Act 1991. This Policy succeeds and replaces any previous guidance or standard operating procedures.

Te whānuitanga o tēnei kaupapa here

Defining the scope of this policy

Waikato Regional Council has a risk-based compliance and enforcement strategy to encourage positive behaviour change and ensure others achieve the highest levels of compliance possible.

The Council's approach to compliance with the Act includes the following:

- Promoting public support for pest management.
- Facilitating communication and cooperation among organisations with biosecurity responsibilities (to enhance effectiveness, efficiency and equity).
- Education for those people who are unaware of rules or need reminding of their obligations, and the reasons for those obligations.
- Enforcement for those who breach regulations. The Act provides a number of enforcement tools that can be applied to those who have committed breaches. One of those enforcement tools is prosecution.



Tirohanga whānui o te Ture Tiakitanga Taiao 1993

Overview of Biosecurity Act 1993

The Biosecurity Act 1993

Pests and unwanted organisms can cause harm to the environment, including ecosystems, people and their communities, natural and physical resources, amenity values, and the aesthetic, cultural, economic and social conditions in the environment.

The Act provides a legal framework for the exclusion, eradication and effective management of pests and unwanted organisms.

The purpose² of the Pest Management part of the Act (Part 5) is the eradication or effective management of harmful organisms by providing for the development of effective and efficient instruments and measures that prevent, reduce or eliminate the adverse effects of harmful organisms on economic wellbeing, the environment, human health, enjoyment of the natural environment and the relationship between Māori, their culture and their traditions, and their ancestral lands, waters, sites, wāhi tapu, and taonga, and for the appropriate distribution of costs associated with the instruments and measures.

Councils provide regional leadership in activities that prevent, reduce or eliminate adverse effects from harmful organisms (pest management) by:

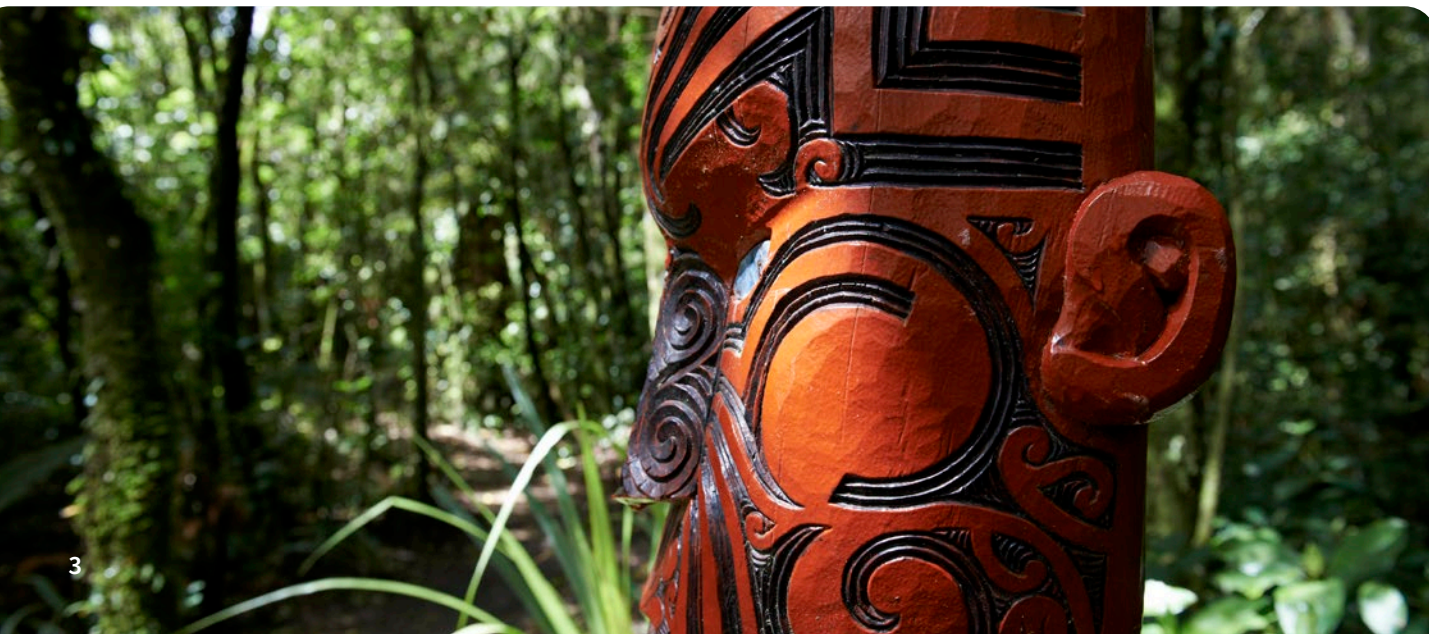
- (a) promoting the alignment of pest management in the region
- (b) facilitating the development and alignment of regional pest management plans and regional pathway management plans in the region
- (c) promoting public support for pest management
- (d) facilitating communication and co-operation among those involved in pest management to enhance effectiveness, efficiency, and equity of programmes
- (e) promoting co-ordination of pest management between regions.

Under the Act, regional councils have powers (and responsibilities) to carry out:

- monitoring for, and surveillance of pests, pest agents and unwanted organisms
- preparing regional pest management plans and regional pathway management plans
- providing for the assessment and eradication or management of pests, in accordance with the relevant pest management plan
- declare and implement small-scale management programmes
- gather information, keep records and undertake research.

Regional councils also have all the powers of territorial authorities, set out in section 14 of the Act.

² Section 54 Biosecurity Act 1993



Waikato Regional Council – Biosecurity

Waikato Regional Council has statutory obligations relating to compliance and enforcement of the Act. The Integrated Catchment Management Directorate (ICM) oversees the biosecurity functions of the Council.

Much of the biosecurity ‘business’ involves the notification and ongoing development of regional pest management plans and regional pathway management plans; promoting public support for pest management; facilitation communication and co-operation among organisations with biosecurity responsibilities (to enhance effectiveness, efficiency and equity); promoting coordination of pest management between regions and complaints from members of the public.

The Waikato Regional Pest Management Plan (RPMP) sets out objectives, methods, and rules that are specific to each of the plant and animal species declared to be ‘pests’.

One specific purpose of an RPMP under the Act is to provide for the protection of the relationship between Māori, as tangata whenua, and their ancestral lands, their waters, sites, wāhi tapu and taonga, and for the protection of those aspects from the adverse effects of pests. Māori involvement in biosecurity is an important part of exercising kaitiakitanga over their mana whenua. Māori also carry out significant pest management through their primary sector economic interests and as landowners and/or occupiers.

The Local Government Act 2002 (LGA) requires Waikato Regional Council to recognise and respect the Crown’s responsibilities under Te Tiriti o Waitangi – Treaty of Waitangi. It also requires councils to maintain and improve opportunities for Māori to contribute to decision-making processes. This includes considering ways to help Māori to contribute.

The Biosecurity team is responsible for detection, investigation and enforcement of biosecurity breaches throughout the region.



Ngā tikanga me ngā rārangi tohutohu

Principles and guidelines

Waikato Regional Council applies and adheres to clearly established guidelines and principles³ when carrying out compliance and enforcement activities.

Transparency

The Council provides clear information to the community as to the standards and requirements for compliance. We ensure the community has access to information about biosecurity through information and fact sheets available on our website. The teams are actively involved in community group meetings, field days and public engagement through various mediums.

Consistency of process

The Council acts consistently with legislation and within our powers. Compliance and enforcement outcomes are consistent and predictable. We ensure our staff have the necessary skills and training and have effective systems and policies in place to support them.

Fair, reasonable and proportional approach

The Council applies regulatory interventions and actions appropriate for the situation. We use our discretion justifiably and ensure our decisions are appropriate to the circumstances, and that our interventions and actions are proportionate to the seriousness of the non-compliance and the risks posed to biosecurity.

Evidence-based, informed

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

Collaborative

We work with and, where appropriate, share information with other regulators and stakeholders to ensure the best compliance outcomes for our region. We engage with the community, those we regulate and government to explain and promote biosecurity and achieve better outcomes.

Lawful, ethical and accountable

We conduct ourselves lawfully, impartially and in accordance with these principles and relevant guidance. We document and take responsibility for our regulatory decisions and actions.

Targeted

We focus on the most important issues and problems to achieve the best outcomes. We target our regulatory intervention at areas where non-compliance with the RPMP poses a risk to biosecurity in the Waikato region.

Responsive and effective

We consider all alleged non-compliances to determine the necessary interventions and action to achieve the best outcomes for biosecurity. We respond in an effective and timely manner in accordance with legislative and organisational obligations.



³ Principles adapted from the CESIG Regional Sector Strategic Compliance Framework Document 2019-2024

Te kaha āki i te kirimana ā-ture

Encouraging compliance

The 4 Es model

The 4Es model is outlined in the Regional Sector Strategic Compliance Framework 2019-2024⁴ and has been adopted by the Council as it provides a comprehensive strategy for working with customers. The 4Es – Engage, Educate, Enable, and Enforce – are not exclusive of each other. It is recognised that different components of the model may be carried out by different parts of an organisation and that many components of the model may be used with one incident.

This model has been adapted by the Biosecurity team and this policy relates to the ‘educate’ and enforce aspects of the model.

Each of the ‘E’ components of the model are explained in more detail:

ENABLE – Provide opportunities for monitored parties to be exposed to industry best practice and regulatory requirements. Link regulated parties with appropriate industry advisors. Promote examples of best practice.

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

EDUCATE – Alert monitored parties to what is required to be compliant and where the onus lies to be compliant (i.e. with them). Education should also be utilised to inform community and stakeholders about what regulations are in place around them, so they will better understand what is compliant and what is not.

ENFORCE – Non-compliant activities, or regulatory breaches, are identified through surveying and proactive and reactive monitoring carried out by Biosecurity Officers. There are a number of enforcement tools available to bring about positive behaviour change. Enforcement decisions must be based on reliable and correct information so an informed decision can be made.

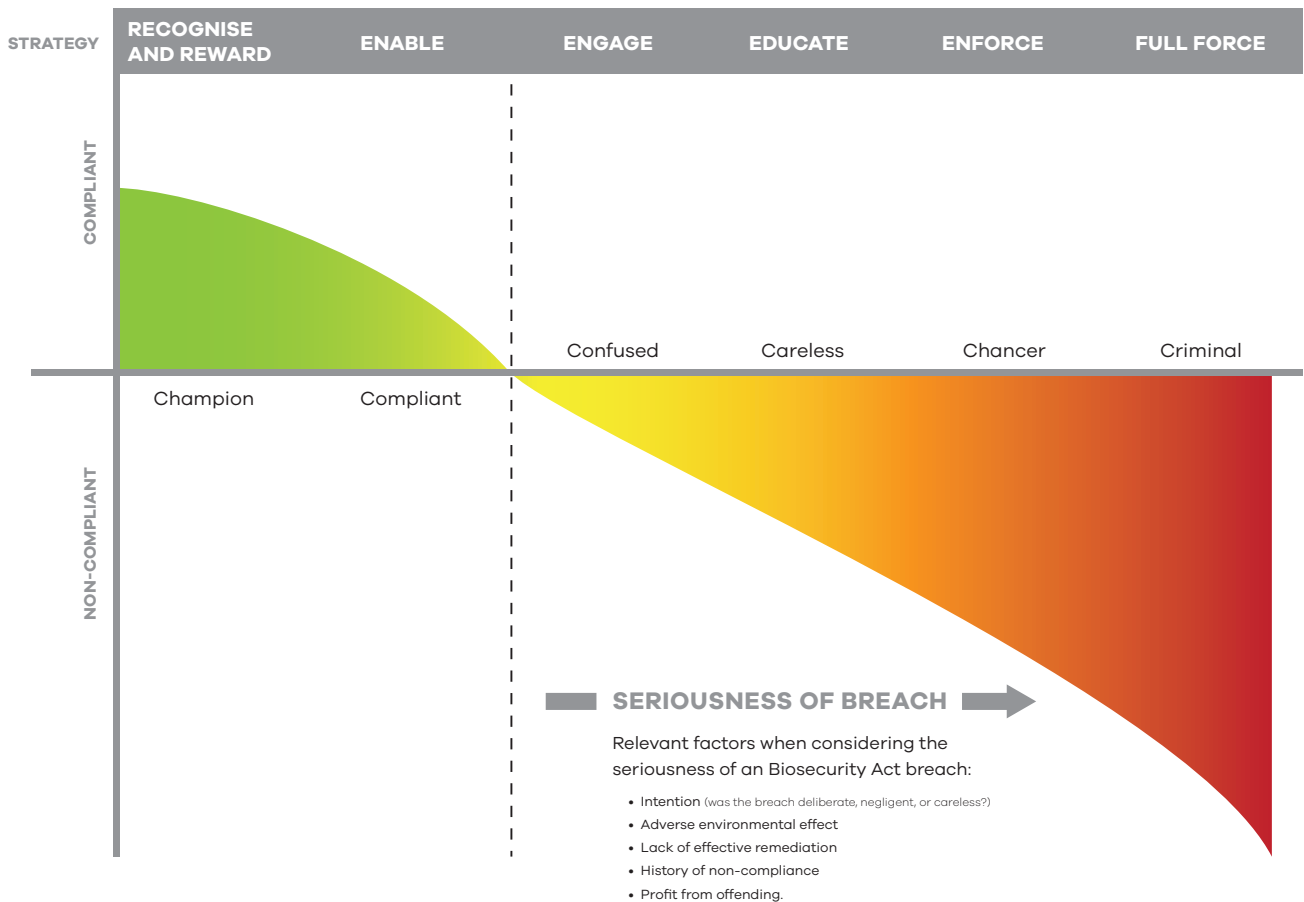


Influencing behaviour change

Biosecurity regulations and policies are designed to achieve positive biosecurity outcomes. However, that premise is based on an assumption that people will comply. To achieve the highest possible levels of compliance, a comprehensive and strategic 'spectrum' or system-wide approach is recommended.

This approach is designed to influence landowners and/or occupiers by encouraging positive behaviour, while also providing graduated deterrence tools to those who choose not to comply⁵.

The Mark II Model – Strategic compliance with the Biosecurity Act



⁵ Adapted from Regional Sector Strategic Compliance Framework, WRC doc 14839461

He rongorua te tū

Conflicts of interest

Waikato Regional Council will carry out all of its enforcement functions in accordance with the conflict of interest (COI) policy.



Ngā mahi whakatewhatewha

Gathering the information (investigation)

If a breach, or potential breach, of the Act occurs then enquiries must be carried out into the surrounding circumstances so that an informed decision can be made as to how to respond. In the investigation stage participation by those involved is important, as the quality of evidence gathered will enable decision making based on all relevant information.

Notification of potential non-compliance or offending may be detected through surveying, monitoring or a complaint.

The depth and scope of the investigation completed is dependent on the seriousness of the incident.

Investigation activities may include:

- visiting private property to collect information or potential evidence like samples, photographs, measurements, surveys or ecological assessments
- conducting interviews and taking written or recorded statements from people as to their version of events
 - the people interviewed may be witnesses to an incident or potentially liable parties
 - interviews of potentially liable parties are conducted under caution to ensure their rights are understood.



When visiting private property, it is vital to respect the rights of the lawful owner or occupier. Council staff must ensure that all entry to private property is done so lawfully. The Chief Executive Officer of the Council has the authority to issue staff with warrants of authority.⁶

Council staff and authorised contractors must comply with a number of obligations, including those under the following legislation and standards:

- Biosecurity Act 1993
- Search and Surveillance Act 2012
- Privacy Act 1993, in terms of what information is collected, how it is collected and managed
- Evidence Act 2006
- Victim's Rights Act 2002
- Crown Law Victims of Crime Guidance for Prosecutors
- New Zealand Bill of Rights Act 1990
- State Services Commission's Model Standards for Information gathering and public trust, associated with regulatory compliances – <https://ssc.govt.nz/assets/Legacy/Information-Gathering-and-Public-Trust-Model-Standards.pdf>
- the Code of Conduct for State Servants – <https://ssc.govt.nz/assets/Legacy/resources/Code-of-conduct-StateServices.pdf>.

A warranted authorised person has the ability to enter private property for the purpose of confirming the presence, former presence, or absence of any pest, pest agent or unwanted organism or eradicating or managing any pest, pest agent or unwanted organism. An authorised person may also enter and inspect any place for the purpose of determining whether or not any person is complying with biosecurity law. Staff must attend specific training⁷ and be familiar with all of their statutory obligations.

⁶ Section 103(3) Biosecurity Act 1993

⁷ Waikato Regional Council authorised persons will gather information in keeping with regulatory best practice and attend biosecurity training.

Whakauruhi i te tikanga Enforcement decision making

The Council uses the full range of tools available to ensure the most appropriate and fit-for-purpose regulatory response achieves the desired outcome.

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

Examples of factors to consider when deciding whether to take enforcement action are:

the existence of and degree/severity of harmful organisms, the eradication or effective management of harmful organisms by providing for the development of effective and efficient instruments and measures that prevent, reduce or eliminate the adverse effects of harmful organisms on economic wellbeing, the environment, human health, enjoyment of the natural environment and the relationship between Māori, their culture and their traditions, and their ancestral lands, waters, sites, wāhi tapu and taonga, and for the appropriate distribution of costs associated with the instruments and measures.

We take into account a variety of factors in deciding whether to take an enforcement action, and what type. These include factors referred to in the Solicitor-General's guidelines and by the courts in environmental cases. What factors are relevant depend on the facts of the case. The types of factors relevant may include:

- What were/are the actual or potential effects (or adverse effects from harmful organisms) on New Zealand's biosecurity?
- What were/are the actual or potential impacts on the environment?
- Seriousness of the offence(s) or breach(es)?
- What are the risks posed by the actions?
- What were/are the actual or potential economic consequences?
- What is the value or sensitivity of the environment or area affected?
- Was the breach a result of deliberate, negligent or careless action or omission?
- How foreseeable was the incident?
- What efforts were made to remedy or mitigate the adverse effects of the breach? (Mitigating factors.) What has been the effectiveness of those efforts?

- Was there any profit or benefit gained, or costs saved by the breach or the omissions/actions leading to it?
- Is there a history of non-compliance and/or enforcement actions? Was there a failure to act on prior instructions, warnings, advice or notice?
- Is there a degree of specific deterrence required in relation to the alleged offender(s)?
- Is there a need for a wider general deterrence required in respect of this location, activity or industry?
- Were the circumstances of particular significance to iwi or to other groups?
- How does the unlawful activity align with the purposes and principles of the Biosecurity Act?

If being considered for prosecution, consider the matters set out in the Solicitor-General's Prosecution Guidelines (a summary of these guidelines can be found in Appendix A).



Who can make the decision?

Decisions on enforcement action must be based on reliable and properly obtained information so that an informed decision can be made.

An authorised person cannot make a decision as to how to deal with non-compliance in isolation.

For lower level breaches, designated staff, team leaders and managers within ICM can authorise the issuing of formal warnings, notices of direction, notices of intention to act on default, restricted place notices and compliance orders⁸ to ensure consistency of approach.

If a matter is complex, has a high public profile, requires specific guidance, or there is limited precedent, then an Enforcement Decision Group (EDG) can be formed to consider the matter and authorise an action. The EDG is comprised of delegated supervisors within ICM. Depending on the circumstances there may be a combination of responses.

However, if the matter is being considered for prosecution then it must be authorised by a Prosecution Decision Group (PDG). Even then the authority is conditional on the matter being subjected to independent legal review.

Independence of the decision maker(s) is paramount.

“In practice in New Zealand the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise.”

Independent legal review for when a matter is referred to consider prosecution

Before commencing a prosecution, the Council obtains an external legal review. Prosecutions will only be initiated where the decision-maker is satisfied that the test for prosecution, as set out in the Solicitor-General’s Prosecution Guidelines, is met:

- (a) The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction (the evidential sufficiency test).
- (b) Prosecution is required in the public interest (the public interest test).

Each aspect of the test must be separately considered and satisfied before a decision to prosecute is made. The evidential sufficiency test must be considered before the public interest test is considered.

The public interest test

The Solicitor-General’s Prosecutions Guidelines include a non-exhaustive list of factors that may be taken into account in determining whether the public interest test has been met (refer Appendix A). Specific to the biosecurity context, this includes but is not limited to the types of factors referred to below:

- (a) The regional council’s statutory functions, objectives and enforcement priorities.
- (b) The seriousness of the offence.
- (c) Impact or potential for impact from the non-compliance, on the exclusion, eradication, and effective management of pests and unwanted organisms.
- (d) The history of non-compliance or repeat non-compliant conduct, which may have not necessarily resulted in convictions, diversions or cautions (e.g. warnings or repeated failure to comply with reporting and monitoring obligations).
- (e) The degree of non-compliance, such as the extent of harm or any impact on the regulatory system.
- (f) The potential or actual impact of the non-compliance on the relationship between Māori and the environment, mātauranga or tikanga Māori.
- (g) Where the non-compliance involved premeditation.
- (h) The extent of loss or harm.
- (i) Where the non-compliance has resulted in serious financial loss to an individual or organisation.
- (j) Attempts made by the defendant to rectify the loss or harm caused.
- (k) Defendant’s age, health and history of compliance.
- (l) Whether any steps have been taken and the availability of alternatives to prosecution that will effectively achieve a desired compliance outcome.

Factors that must not be taken into account include: race, colour, ethnicity, sex, gender identity, family status, religious, ethical or political beliefs; personal knowledge of the offender; or political, personal or professional advantage or disadvantage to the regional council or people linked to it, including the potential to cause embarrassment.

Whakauruhi i te kōpeka

Enforcement options

There are a number of enforcement tools available to deal with breaches of the Act. It is important to ensure these tools are applied appropriately and consistently across the activities across the region.

Enforcement tools can be categorised into two main functions: directive actions which are forward looking and give direction to ‘right the wrong’; and punitive actions which hold parties accountable for past actions/omissions. Both directive and punitive actions available are set out in further detail in the following tables.

Education and incentive

Action	Description of action	When might this action be appropriate?
Pest Control Non Programme Letter – community education, publications, discussions	Provide information or advice around the RPMP and provide assistance to enable parties to achieve compliance.	Education is appropriate for cooperative parties who are motivated to do the right thing. E.g. they might not have been aware that they are required to control a pest plant and lack the knowledge and skills to achieve and maintain compliance.



Directive actions

Action	Description of action	When might this action be appropriate?
Written Pest Control Programme Letter	Non regulatory 'advice notice' issued after a site inspection to give advice and consult with the landowner regarding timeframes and method of control.	Generally, after consultation; advice is given and methods of control negotiated and agreed where appropriate.
Notice of Direction	Issued under s 122 of the Act, the notice outlines remedial action required to be undertaken with a minimum 10 working day timeframe given to comply.	Formally reminds and directs the landowner of their obligations under the RPMP.
Notice of Intention to Act on Default	Issued under s 128 of the Act, the Council authorises contractors to enter land and carry out work required.	<p>Formal direction that clearly sets out the Council's intervention, the costs involved and that all costs are recoverable.</p> <p>Timing of the control work is at the discretion of the management agency.</p> <p>The council may seek to recover the costs and expenses reasonably incurred in issuing the notice and carrying out the work, pursuant to s 128(3). As provided for by s 129, the costs and expenses recoverable under s 128(3) will take a form of a charge against the land concerned.</p>
Compliance Order	A compliance order is a formal, written directive. It is drafted and served by an authorised person instructing an individual or company to cease an activity/prohibit them from commencing an activity. The form, content and scope of a compliance order are prescribed in statute.	<p>A compliance order may be appropriate any time that there is a risk of further breaches of the Act or if remediation or mitigation is required as a result of non-compliance.</p> <p>The council may seek to recover the costs and expenses reasonably incurred in issuing the notice and carrying out the work, pursuant to s 128(3). As provided for by s 129, the costs and expenses recoverable under s 128(3) will take a form of a charge against the land concerned.</p>
Declaration of a Restricted Place Notice	Issued to prevent the spread of a pest. During the restricted place declaration an authorised person may direct occupiers to isolate, confine or store in a certain way the organism, organic material, risk goods as they see fit and have the above articles identified in an appropriate manner.	When other intervention measures have not had the required behaviour change and the notice is required to manage the spread and reduce the risk of the organisms establishing in new areas.
Controlled Area Notice	Issued to declare an area as a controlled area, to establish movement controls, and specify conditions and procedures to enable the limitation of the spread of any pest or unwanted organism; or minimise the damage caused by any pest or unwanted organism; or protect any area from the incursion of pests or unwanted organisms; or facilitate the access of New Zealand products to overseas markets; or monitor risks associated with the movement of organisms from parts of New Zealand the pest status of which is unknown.	When intervention measures, including treatment and procedures, are required to enable the institution of movement and other controls in relation to pests, unwanted organisms, organisms, organic material, risk goods or other goods.

Punitive actions

Action	Description of action	When might this action be appropriate?
Formal warning	A formal warning is documented by way of a letter to a person setting out the facts and informing them that in Council's view their conduct may amount to an offence against the Act.	<p>A formal warning may be given when:</p> <ul style="list-style-type: none"> • An administrative, minor or technical incident has occurred; and • the environmental effect, or a potential effect, is minor or trivial in nature; and • the subject does not have a history of non-compliance; and • the matter is one which can be quickly and simply put right; or • a written warning would be appropriate in the circumstances. <p>Refer to the <i>Solicitor-General's Guidance for Use of Warnings</i>.</p>
Prosecution	A legal proceeding in respect of a criminal charge.	The test for prosecution is met if the evidence that can be adduced in court is sufficient to provide a reasonable prospect of conviction and a prosecution is in the public interest. Factors relevant are set out in the Solicitor-General's Prosecution Guidelines and in this Policy.



Tāpiritanga A (kāore rānei lol)

Appendix A

Summary of Solicitor-General's Prosecution Guidelines (2013)

The Council will adhere to the standards of good criminal prosecution practice expressed in the Solicitor-General's Prosecution Guidelines (2013). The Council's criminal prosecutions are conducted by external lawyers, on the Council's behalf, and the Solicitor-General's Prosecution Guidelines and the Media Protocol for Prosecutors (Crown Law, 2013), while not binding on local authorities, represent best practice.

The list, based on the Solicitor-General's Prosecution Guidelines, is illustrative only and not a comprehensive list of the matters to be considered as the matters will vary in each case according to the particular facts.



Under the Solicitor-General's Prosecution Guidelines a prosecution is more likely if:

- a conviction is likely to result in a significant sentence
- the offence caused significant harm or created a risk of significant harm
- the offence was committed against a person serving the public for example, a police officer or Council officer
- the individual was in a position of authority or trust
- the evidence shows that the individual was a ringleader or an organiser of the offence
- there is evidence that the offence was premeditated
- there is evidence that the offence was carried out by a group
- the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance
- the offence was committed in the presence of, or in close proximity to, a child
- there is an element of corruption
- the individual's previous convictions or cautions are relevant to the present offence
- there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct
- the offence, although not serious in itself, is widespread in the area where it was committed
- a prosecution would have a significant positive impact on maintaining community confidence
- the individual is alleged to have committed the offence while subject to an order of the court
- a confiscation or some other order is required and a conviction is a pre-requisite.

Under the Solicitor-General's Prosecution Guidelines, a prosecution is less likely if:

- the court is likely to impose a nominal penalty
- the individual has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order
- the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence)
- the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement
- there has been a long delay between the offence taking place and the date of the trial, unless:
 - the offence is serious
 - the delay has been caused in part by the individual
 - the offence has only recently come to light
 - the complexity of the offence has meant that there has been a long investigation
- a prosecution is likely to have a bad effect on the physical or mental health of a victim or witness, always bearing in mind the seriousness of the offence
- the individual is elderly or very young or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence was serious or there is real possibility that it may be repeated
- the individual has put right the loss or harm that was caused (but individuals must not avoid prosecution or diversion solely because they pay compensation)
- where other proper alternatives to prosecution are available (including disciplinary or other proceedings).

These considerations are not intended to be comprehensive or exhaustive. The public interest considerations that may properly be taken into account when deciding whether the public interest requires prosecution will vary from case to case.



“... where a regulated entity deliberately or persistently fails to comply, it is vital that the agency take swift and firm enforcement action. Failing to do this will:

- *unfairly advantage those who are non-compliant, as against those who comply voluntarily*
- *undermine incentives for voluntary compliance*
- *damage the agency's credibility with the regulatory sector and the wider public, who will perceived that the agency allows deliberate offenders to 'get away with it'*
- *undermine the agency's own internal morale”*

CCCP: Achieving Compliance – A Guide for Compliance Agencies in New Zealand June 2011; page 181



He taiao mauriora ▲ **Healthy environment**

He hapori hihiri ▲ **Vibrant communities**

He ōhanga pakari ▲ **Strong economy**

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Private Bag 3038, Waikato Mail Centre,
Hamilton 3240, New Zealand
0800 800 401 waikatoregion.govt.nz