



Report **03.63**
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Committee Environment
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Advisory Notices - a new regulatory tool

1. Purpose

To advise the Committee of our intention to introduce Advisory Notices for use by Greater Wellington's Enforcement Officers, to improve their operational effectiveness and efficiency.

2. Background

Enforcement Officers from the Pollution Control Team routinely encounter non-compliance with permitted activities under the five Regional Plans, and selecting an appropriate regulatory response depends upon factors such as the severity of environmental impact, compliance history, availability of remedies and likelihood of compliance. The Environment Division's Enforcement Procedures and Guidelines Manual (EPG Manual) currently specifies the following tools to address non-compliance:

- verbal or written advice
- verbal warning
- written warning
- infringement notice
- abatement notice
- enforcement order
- prosecution

Instances of minor non-compliance with our permitted activity rules are normally dealt with using verbal warnings, written warnings or 'please explain' letters. However, there are some shortfalls using this suite of tools, which significantly undermine the operational effectiveness of the Pollution Control Team. These are:

- Sending out letters is often delayed by several days during periods of heavy workload, undermining their intended impact.

- Verbal warnings are not normally noted on the hard copy file, and so recurring non-compliance may not be detected.
- The recipient has no formal record of verbal warnings or verbal advice, and so the action they take may differ from that intended by the Enforcement Officer.

All these shortfalls could be addressed if it were possible to deliver a written message on the spot, defining the non-compliance and specifying improvement objectives and timelines. The Advisory Notice has been developed to meet these requirements.

3. Implementation

The format and content of the Advisory Notice is presented in Attachment 1.

When issuing an Advisory Notice, the Enforcement Officer will enter details of the recipient, the alleged non-compliance, and the required action. The original will then be issued to the recipient, with copies retained by the Enforcement Officer.

The likely benefits of using Advisory Notices are:

- It provides Enforcement Officers with a means of instantly relaying their message to an alleged offender.
- It significantly reduces the administrative workload associated with minor issues.
- It avoids the risk of mis-interpretation or omission (typically associated with verbal advice).
- It may encourage prompt intervention, which may avoid situations deteriorating to a point where more formal proceedings would be required.
- It does not preclude the use of other regulatory options if requirements are not complied with.
- It provides a file record of information or instructions given that may be used as evidence.

Possible disadvantages with using Advisory Notices are that:

- There is potential to incur liability if inappropriate actions or outcomes are specified by the Enforcement Officer.
- Technical or grammatical errors by Enforcement Officers may undermine the credibility of both the Advisory Notice and the Enforcement Officer.

4. Issuing Advisory Notices

It is proposed that Advisory Notices would be issued where all of the following conditions are satisfied:

- There is clear non-compliance with permitted activity rule(s) in the Regional Plans, or there are minor or moderate adverse environmental effects that can be easily remedied.
- The responsible party is present or available.
- There is a need to provide a written record of the non-compliance and advice given to address the non-compliance.
- A Field Notice would be more appropriate than a Written Notice, Verbal Notice or Please Explain Letter.

Advisory Notices would not be issued in the following situations:

- Where there are significant environmental effects.
- Where the incident was the result of an emergency situation.
- Where the incident was beyond reasonable control.
- Where the incident was a genuine accident or error, and the responsible party has taken (or will take) all reasonable steps to remedy or mitigate the impacts.
- Where the situation justifies a more serious response at this stage (Infringement Notice, Abatement Notice, Enforcement Order or prosecution).

Enforcement Officers will be required to discuss the content of any Advisory Notice with the recipient at the time of issue, to ensure that they understand it's content and the actions required of them. In the event that the responsible party refuses to receive an Advisory Notice, the Enforcement Officer will present the contents verbally, and leave the recipient's copy in a prominent position at the site.

Procedures for writing and issuing Advisory Notices will be written into the EPG Manual and operational instructions, to ensure that investigating officers issue Advisory Notices as intended.

5. Experiences elsewhere

There are several examples in New Zealand of organisations using (or proposing to use) regulatory tools similar to the Advisory Notice. These are as follows:

- Environment Canterbury's incident response officers use a 'Notice of Alleged Offence'. This is written and issued by its investigating officers

in the field when they encounter minor non-compliance. It was modelled on a notice originally developed by the NZ Wildlife Service, and has been used by Environment Canterbury for over 14 years.

- Auckland Regional Council's investigating officers issue 'Pollution Incident Field Letters' where they encounter unauthorised discharges during their routine incident response and industry audit work. They have been used for several years, and have proven effective in resolving minor non-compliance.
- Otago Regional Council has an 'Offence Notice', which can be written and issued in the field by investigating officers and identifies alleged non-compliance. However, as it does not specify necessary remedial action, it is not widely used.
- The Department of Conservation and Fish & Game NZ are currently co-operating on the development of an Infringement Notice, to be issued in the field by Rangers for alleged non-compliance.
- Taranaki Regional Council officers have issued on-the-spot Infringement Notices where they consider that an offence has been committed.
- The Department of Labour is currently proposing to enable Health and Safety Officers to issue Infringement Notices and fines in the field. This is proposed via an amendment to the Health and Safety in Employment Act 1992.

6. Legal context

The Environment Division submitted the proposed Advisory Notice and implementation guideline to Philips Fox for a legal review of their content and proposed application. They supported the use of Advisory Notices, provided that they did not imply compliance was compulsory. They also noted that there may be some liability in the event of wrongful interpretation of a Regional Plan, or where inappropriate works are specified. However, this is also the case for all other regulatory tools currently used. It was not considered necessary to include appeal provisions, as the notice will not be a statutory instrument.

7. Communication

No further public communication is necessary for this report.

8. Recommendations

It is recommended that the Committee:

1. *receive the report;*
2. *note the contents; and*
3. *support the introduction and use of Advisory Notices for use by Greater Wellington's enforcement officers.*

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Attachment 1: Proposed Advisory Notice