

# **EPA DIVISION COMPLIANCE POLICY**

## **Introduction**

One of the most important functions of the EPA Division is its regulatory function which involves seeking to achieve community compliance with the Environmental Management and Pollution Control Act (EMPCA), Pollution of Waters by Oil and Noxious Substances Act (PWONSA) and Litter Act (LA). The powers to achieve compliance are typically vested in the Director EPA and the authorised public officers appointed by the Director. This policy statement describes the manner in which the EPA Division goes about this regulatory function. The policy has been determined by the Director EPA and General Manager EPA Division for use by public officers authorised by him and operates alongside the *DPIPWE Legislation Compliance Policy*.

## **Regulatory approach**

The purpose of achieving compliance with the legislation is to further the objectives of that legislation. The objective of our regulatory effort therefore is to seek to motivate and inform people so that they meet their obligations under the legislation and so further these legislated objectives.

We allocate our energies how and where we will do the most good and this means we adopt a risk based approach to regulation.

We act without fear or favour and adopt a consistent and proportionate approach to achieving compliance and our environmental outcomes with the minimum regulatory burden upon society.

We collaborate with other regulators and use the full range of regulatory tools available to us and this includes informing, advising, supporting and encouraging people, setting standards, monitoring compliance and enforcing the law.

## **Outcomes focus**

We focus on achieving outcomes which serve to advance the environmental, social and economic objectives of the Resource Management and Planning System (RMPS) and the specific environmental objectives in our legislation. We use many tools as we strive to meet those objectives but we do not see the tools as ends in themselves.

## **Efficiency**

We recognise that environmental management measures may impose social and economic costs upon society. We understand that meeting our RMPS obligations requires us to consider the environmental, social and economic costs and benefits of what we require of people. We aim to minimise the regulatory burden we impose upon society as far as is practicable and that includes ensuring that our own regulatory activities are as efficient as possible. We adapt our regulatory approach to best suit the circumstances to get the maximum impact from our investment.

## **Risk based Regulation**

We allocate our resources to those risk areas which yield the best possible reduction in risk to the environment. This means that we consider both the risk presented to the environment and our capacity to influence that risk by reducing the likelihood and/or consequence of any impacts.

In our consideration of the consequence of an event, we have regard to the community's perception of environmental impacts and we seek to inform the community's understanding of those impacts. We also have regard for the risks to our effectiveness if the community perceives regulatory failure, particularly in terms of our response to complaints. Our resource allocation and regulatory decision making is not driven by considerations of media or lobbyist interest or the social standing of the polluter or complainant.

## **Consistent and proportionate**

While we adapt our approach to the circumstances at hand we also strive to be consistent in our approach to the extent that similar circumstances result in similar regulatory outcomes. This means that we take particular care to ensure that our regulatory response is proportionate to the nature of the problem we are presented with.

We recognise that consistency over the range of situations facing us may not always be achieved to the satisfaction of all observers. In these case we will have a sound basis for treating different situations differently and explain why we have done so.

## **Collaboration**

We recognise that our jurisdiction intersects with other regulators and we endeavour to work collaboratively with those regulators in a way which improves each of our effectiveness and efficiency, avoids duplication and ensures adequate coverage of regulatory oversight.

## **Regulatory tools**

### **Inform and educate**

We seek to prevent environmental harm from occurring and a key element of that endeavour is to ensure as far as is practicable that the community understands how to prevent that harm and appreciates its legislated duty to do so. We inform the community by working with stakeholders to provide information through targeted community engagement programs (eg litter, waste reduction and domestic wood smoke).

### **Advise and support**

We use our professional judgement to provide guidance and support to those who are managing environmental issues and seeking to comply with their environmental duty or specific environmental standards. We provide documented guidelines and direct advice on what the requirements are and, where practicable, ideas about how those requirements might be met but we do not adopt the role of environmental consultants.

### **Set standards**

We set standards through formal policy or regulatory instruments which serve to inform the community and individual operators of the limits or targets that we must work to in order to avoid environmental harm. In the setting of those standards we draw upon the scientific evidence available to us and we have regard to community aspirations, experience elsewhere and local circumstances. An Environment Protection Notice (EPN) is commonly used for setting standards for the environmental performance of an individual operator.

### **Monitor compliance**

We monitor compliance with environmental standards to inform us about how well we are avoiding harm and where we need to allocate our energies to further reduce the risk of harm. We also monitor to maintain an adequate probability of detection of those who might otherwise not meet the standards required of them.

### **Encourage**

We would prefer to encourage compliance rather than enforce it and so we allocate energies to working with people to identify their compliance risks and failures and encourage them to rectify those issues before they present a risk to the environment which warrants enforcement action. We also draw upon our professional experience and relationship with the community to encourage environmental performance which goes beyond that which is required by law.

### **Enforce**

There will be occasions when we do not succeed in our aim of preventing compliance failures and in those instances we respond to each such failure with a form of enforcement response. In all cases our priority is to prevent or mitigate as far as possible the harm caused by that breach or any subsequent breach. In some cases that response may simply be to revisit one of

the tools discussed above but it may be necessary to go beyond that and employ some form of sanction.

We will keep a record of every case or report of compliance failure we are aware of and our response to that report or failure. The extent to which we investigate such failures will be guided by an early assessment of the nature of the offence, the evidence we believe we will be able to secure, likely culpability of the offender and the value of such an investigation in addressing risk or harm to the environment. Our primary objective will be to allocate our investigative resources to those investigations where we assess there is likely to be the best return in terms of reducing ongoing risk to the environment and furthering the RMPS objectives.

## **Decisions about enforcement responses**

We take care to ensure that our enforcement approach and the sanctions employed are proportionate to the seriousness of the breach. The primary consideration involves regard for the legislated offence provision itself and the nature of the liability and penalty prescribed for that offence. However in determining the seriousness of the breach we also have regard to three major considerations around the circumstances of that offence –

- 1. Impact on relevant legislative objectives.**

The magnitude, nature, extent, duration and reversibility of the impact on the environment and the prejudice to the RMPS objectives;

- 2. The culpability of the offender and aggravating or mitigating circumstances.**

Was it a wilful, reckless, knowing or negligent act or was it a consequence of inadequate management of risk. Considerations may include motives and financial benefit, the extent to which the risk was foreseeable or previously identified, the extent to which the incident was practicably preventable and how management in this case compared to accepted industry practice, past environmental performance, past compliance history and the nature and timeliness of the offender's response when alerted to the breach. There may also be particular aggravating or extenuating circumstances to take account of (eg capacity of the offender, role of others, other proceedings); and

- 3. Deterrence**

The extent to which broader community deterrence is necessary for an offence of this nature in order to prevent broader environmental harm. Deterrence considerations can result in an offence which, in isolation, would otherwise be of relatively modest environmental consequence being treated as a more serious offence because of its prevalence in the community and the need for broader community deterrence to prevent the environmental harm which might otherwise occur (eg litter offences).

## **Types of enforcement responses**

### **Warnings**

A warning may be as simple as noting during conversation that a breach has occurred and must not be allowed to occur again. In such conversations the discussion typically then turns to what is to be done to remedy the matter and the offender is then expected to resolve the matter accordingly. An informal warning is appropriate in cases where the compliance failure involves little risk to the environment and there is low culpability but, even in these cases, we will produce and keep a written record that such a conversation has occurred.

A formal written warning issued to the offender is a more robust response and will be seen by many offenders as a sanction. Such formal warnings are appropriate for low level compliance failures where informal warnings have been issued in the past or there is concern that an informal warning may not be sufficient to ensure the failure is remedied and does not occur again.

### **Directions**

The legislation provides the Director with powers to direct a person to take such measures as the Director believes necessary to manage environmental harm or risk of harm (eg issue of an EPN). While such directions are not sanctions, they will often be perceived as such because compliance with directions generally comes at a cost (whether in terms of dented pride, reputation, money or inconvenience). A direction is issued when it is considered to be necessary to specify what, how and when measures are to be taken to remedy environmental risk or harm in an enforceable manner. Such directions may be appropriate for a wide range of compliance failures but are generally only warranted where there is significant risk to the environment or where there is apparent reluctance by the offender to remedy the situation adequately.

### **Civil Enforcement**

Civil enforcement procedures involve seeking an order from the Resource Management And Planning Appeals Tribunal (RMPAT) to give effect to a strategy which is not attainable by other means, such as injunctive relief. In practice there are few circumstances where such civil enforcement provisions are called upon because the same effect can generally be achieved by using more certain and less costly means.

### **Prosecution by Environment or Litter Infringement Notice (IN)**

The major attraction of taking the IN approach as a sanction in response to a compliance failure is that it is often considerably less costly on public resources than court proceedings and this is a major consideration. That does not mean however that it can be seen as an easy, half hearted or weak regulatory response. The evidentiary basis upon which to issue an IN must be of such a standard that there is prima facie evidence that an offence has been committed and we must be confident that we can present the evidence to demonstrate that upon examination by a Court.

The penalties provided for under INs are typically lower than those which might be expected as a consequence of Court proceedings but for lower level offences, it is often the determination of a breach and the imposition of a sanction and the reputational risks that go with that which is more meaningful to the offender than the quantum of any monetary penalty.

The issue of an IN is appropriate in breaches involving relatively low level environmental impact or culpability where warnings and directions have perhaps not been heeded. An IN is also indicated in cases where broad community deterrence is required for relatively low impact individual offences, eg litter.

A decision to issue an IN will generally involve a decision by a Branch Manager unless established procedures have been determined for the particular circumstances at hand.

We do not actively advertise the identity of the offender to whom an IN is issued unless the matter has already attracted broad public interest. We do however advise the complainants involved in any such case of the outcome and we report lists of recipients of INs annually.

### **Prosecution by Court Action**

Prosecution by Court action is pursued in cases where offences involve higher levels of environmental impact and culpability and where it is necessary to establish individual and/or broader community deterrence to ensure better environmental outcomes.

Decisions to embark upon Court action are not taken lightly because of the very substantial allocation of public resources required. Decisions to embark upon a course of Court action involve the Director and relevant managers who will consider the evidentiary merit of the case, the likely public benefit and the usual issues relevant to the exercise of prosecutorial discretion prior to referral to the DPP. We seek to make such decisions as early as possible in the course of an investigation.

If we do take a matter to Court, we strive to accurately and comprehensively present a case to allow for a proper consideration of the merits of that case by the Court.

We comment upon such court proceedings when they are finalised and we inform the community about the identity of the offender if found guilty or if the matter is already the subject of broad public interest.