

Marie A. Brown

Last Line of Defence

a summary of an evaluation of environmental enforcement in New Zealand

Introduction

In 2016 the Environmental Defence Society embarked on an analysis of compliance monitoring and enforcement of environmental law in New Zealand (Brown, 2017).¹ The responsibilities for ensuring that the aspirations of law and policy are met with respect to the environment are shared across a wide range of acts and several agencies. Different agencies operationalise compliance in different ways, affording it different priority and thus achieving different outcomes. This article summarises the key findings of the project and briefly canvasses the primary groups of solutions. New Zealand's environment would benefit from a far more robust approach to achieving regulatory outcomes and this requires injections of resourcing and capability into our enforcement agencies and dissolution of prevailing political influences.

Marie Brown is a Wellington-based environmental policy expert. She was employed as a senior policy analyst by the Environmental Defence Society between August 2013 and March 2017, during which time the research for this article was conducted. She can be contacted at marieabrown@outlook.com.

Non-compliance with environmental protections has wide-ranging impacts. Our fragile biodiversity and ecosystems have undergone rapid environmental change, and the compliance gap amplifies the impact of human activities on nature. Closing or at least narrowing the compliance gap is a crucial task if the aspirations of law and policy are to be achieved. However, such endeavours bump up against normative views that environmental offending is a 'victimless crime' and hence it can be a struggle to muster the resources necessary to mobilise solutions (De Prez, 2000).

A range of prior reports have highlighted regulatory failure in New Zealand and the factors that contribute to it (see, for example, Black, 2014). The agencies and regimes that formed the subject of the Environmental Defence Society analysis are set out in Table 1.

Some definitions

Compliance, monitoring and enforcement are not necessarily well-understood terms to the general public. For clarity, and for the purposes of this research, they were defined as follows: *Compliance* means adherence to the law.

Monitoring means the activities carried out by agencies to assess compliance with the law, and to respond to complaints from the public about potential breaches (i.e. compliance monitoring).

Enforcement means the actions taken by agencies to respond to non-compliance with the law (inclusive of formal and informal actions) with the aim of ensuring compliance (Ministry for the Environment, 2016).

The collective term for the function ‘compliance, monitoring and enforcement’ is abbreviated to CME henceforth.

The methodology

Assessing the effectiveness of environmental regulators from the outside is challenging: data are often limited and many agencies appear to give limited priority to the function, thus retaining minimal staff with appropriate expertise to engage with external researchers. The assessment was undertaken using a bespoke methodology that could be scaled to the amount of information available within any one regime. The methodology recognised that the effectiveness of an environmental compliance regime depends on three key factors:

- the robustness of the underlying regulatory provisions for the compliance, monitoring and enforcement function;
- the operationalisation of the function by the agency, including how it relates to other roles they may have; and
- the practical implementation of the role, including the history of enforcement action taken.

Information was sourced from all regimes on these three dimensions and used to build an overall picture of the approach and its outcomes for the public interest. Compiling the information was achieved through semi-structured interviews with staff, Official Information Act requests and, in the case of councils, a nationwide ten-question survey carried out in the middle of 2016.

Some regimes had a significant amount of information. For example, since the advent of the Resource Management Act 1991 the Ministry for the Environment has collected data every

Table 1: Agencies and regimes that formed the scope of the report

Agency	Regime
Ministry for the Environment and councils	Resource Management Act 1991
Department of Conservation	Conservation Act 1987, Wildlife Act 1953, Marine Mammals Protection Act 1978, Marine Reserves Act 1971, Native Plant Protection Act 1934
Queen Elizabeth II National Trust	Queen Elizabeth II National Trust Act 1977
Fish and Game New Zealand	Wildlife Act 1953, Conservation Act 1987
Environmental Protection Authority	Exclusive Economic Zone and Extended Continental Shelf (Environmental Effects) Act 2012
Land Information New Zealand – Crown Property	Crown Pastoral Land Act 1998 Land Act 1948
Overseas Investment Office	Overseas Investment Act 2005
Ministry for Primary Industries	Forests Act 1949 (Sustainable Forest Amendment Act 1993)

year from implementing agencies (councils). While the data are of varying quality and have limited comparative value over time due to changes in questions year to year, there is a voluminous amount. By contrast, many regimes carried comparatively scant data due to a lack of robust recording systems. The research was naturally limited by that and by how much could be obtained. As such, the methodology required assembling as much data as possible to establish an understanding of the regime and build a narrative from there.

The next section outlines key learning across these three areas of inquiry, albeit in only limited detail. Readers are referred to the main report for more substantial information.

Gradual improvement evident

There is an observable general trajectory of improvement in all agencies towards better and more robust practice, even in the most politicised of contexts. Regional authorities have collaborated successfully in establishing a collective strategic direction towards risk-based compliance management (Compliance and Enforcement Special Interest Group, 2016). Central government innovations such as Crown Law’s Public Prosecutions Framework and the Government Regulatory Practice Initiative (G-Reg) led by the Ministry for Business, Innovation

and Employment also signal a wider appetite for continuous improvement of regulatory practice. This is consistent with international trends towards increasing professionalisation of environmental enforcement.

Agency overview

The ministry, the councils and the RMA

The Resource Management Act 1991 is the core legislation in New Zealand, not least because of the sheer breadth of the act and the number of agencies implementing it. The Ministry for the Environment has an oversight role and is charged with national-level reporting and thought leadership. It does not, however, take an operational role. That is left to the 78 councils dotted over the landscape, of which there are four main types: regional councils, charged with the majority of the protection of the natural environment; district and city councils which address vegetation controls and other more amenity-based aspects of local plans; and unitary authorities, which straddle both levels of policy. Seventy-eight different versions of RMA compliance practice have proliferated under the gaze of the Ministry for the Environment, who appear to have paid scant regard to the whole function of CME since the advent of the regime.

Councils afford CME varying priority, and encounter two key barriers in carrying

out this often adversarial function: resourcing and politics (which are, of course, interlinked). Councils are political entities, governed by a group of people elected by the local community to carry out their functions under the act and to further locally-based aspirations. Councillors sometimes take their place at the table thanks to the coordinated voting of vested interests, some of which may take umbrage at the council energetically carrying out its CME role. In the worst cases this creates an environment of politicised decision making, including the intentional underfunding of this crucial

been bestowed upon the Department of Conservation, and it is straining underneath it. More than 25 pieces of legislation are largely DOC's alone to enforce and it attempts this with minimal resourcing. It has a strong national compliance team and a decent in-house training course, but the dogged determination of a few has not been enough to contest the 'business-friendly' face of the partnership transition and the overall dearth of resourcing. Compliance at present is generally devolved to local offices, resources being distributed at the discretion of the local operations

formal enforcement appears rare. Part of the reason might be that MPI has only two tools at its disposal when uncovering non-compliance in indigenous forestry, non-statutory goading and prosecution. The former is often ineffective, and the latter usually very costly. The absence of a middle-ground tool to address lower-level offending is an issue faced not only by MPI, but also by the Environmental Protection Authority (EPA) and DOC. An infringement fine regime would help here.

The EPA and the deep, blue sea

Far beyond the horizon, the Exclusive Economic Zone and Extended Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) kicks in. The 12-nautical-mile limit marks the beginning of an area of burgeoning economic activity. The relatively newly minted EPA has it within its powers to implement the act. The act applies to oil and gas operations and newer areas of economic development, such as the controversial seabed mining such as that proposed off the Taranaki coast and on the Chatham Rise. It is early days for both the act and the regulator, so we make no substantive assessment of the EPA; that would be premature.

Much work is under way internally developing systems and training to prepare the officers and the organisation for their growing role, which is good to see. An annual compliance plan is publicly available, as is a prosecution policy (Environmental Protection Authority, 2017, 2013), although senior staff advise of constrained resourcing limiting that roll-out. The report points out that a weakly resourced regulator and a powerful and small regulated community are the ingredients of regulatory capture, and that time will tell how effective compliance will be. There is also strong evidence that public interest is high: an earlier instance in which the EPA elected not to prosecute an offending party drew an impressive 15,000 emails from Greenpeace supporters – much pressure for a fledgling regulator; let us hope they get it right.

The QEII Trust and private land conservation covenants

In the 1970s visionary Waikato farmer Gordon Stephenson and others estab-

The dramatic revelations in 2016 about fisheries enforcement put the public on notice that MPI may not be being entirely even-handed in its decision making ...

function lest it offend those who must not be offended.

Other conflicts exist. Councils are charged with an explicit economic development role; this too can see politicised decision making dribble down much further than the elected body and into the hearts and minds of management and staff, who have incentive to forget about concepts such as an appropriate separation of governance and operations. This separation is crucial for compliance: elected representatives should rightly set the policy and direction for CME through governance channels, and then they must stay out of day-to-day decision making. Unfortunately, our research found that separation to be a little murky in many councils: eight district councils need the approval of their elected representatives to prosecute; the majority of district and city councils do not have an enforcement policy (on what are they basing their decisions?); and there is strong evidence of informal political meddling in many regional councils. This simply cannot do.

DOC and wildlife enforcement

An enormous regulatory role has

manager. Given that three-quarters of its prosecutions arise from just 10% of its offices, it seems clear that compliance is afforded different priorities in different locations. Some of the legislation is enforced far more energetically than others too: take the Taupo trout fishery, Auckland marine reserve compliance and West Coast whitebaiting out of the picture and there are not a lot of prosecutions left to share around the remainder of the law. The effort is uneven and the strategy is unclear. To DOC's credit, a significant programme of improvement is under way, and hopefully a new era of more robust conservation law enforcement is imminent.

MPI and indigenous forestry

The Ministry for Primary Industries is a super-ministry, juggling innumerable functions and inherent conflicts. The dramatic revelations in 2016 about fisheries enforcement put the public on notice that MPI may not be being entirely even-handed in its decision making (Heron, 2016). There is not a great deal of data around the administration of indigenous forestry on private land, and

lished the Queen Elizabeth II National Trust, with legislation of the same name being passed by Cabinet in 1977. The trust now has oversight of nearly 200,000 hectares of covenanted private land, protected for its open space and conservation values. An important role for the trust is ensuring that the conditions set out within covenant agreements are adhered to. These conditions vary, but include requirement to do pest control and maintain fencing, and avoid grazing all or some areas. Field officers check the compliance of conditions and, while compliance rates are high, sometimes more serious enforcement action is needed. This demands that the Trust step back from a partnership approach and instead adopt a more stringent regulatory manner. Successful litigation against the errant Netherland Holdings in 2015 demonstrated its willingness to play this card, and it will need to do it more often over time to maintain that credibility.

Fish and Game New Zealand

The exotic species dimensions of the Wildlife and Conservation acts are primarily enforced by Fish and Game officers and their team of honorary rangers nationwide. The enforcement role of both acts is of course shared with the Department of Conservation, although the vast majority of prosecutions are carried out by Fish and Game. Fish and Game is a statutory entity, but is not a public prosecution agency like most of its peers in central government (as is the QEII Trust). Like MPI, Fish and Game and DOC struggle with the absence of a proper range of tools to carry out enforcement effectively. While DOC makes wide use of diversion processes through the courts, Fish and Game devised its own workaround: the national reparations policy (2016).

Land Information New Zealand

Housing both Crown Property and the Overseas Investment Office among other sub-entities, Land Information New Zealand is a less prominent environment regulator compared to many others. But its role in protecting our fragile high country and special values on land subject to overseas purchase is significant. What

is not significant, however, is the degree of transparency as to how the CME function is managed in respect of both of these areas. Most compliance monitoring appears reliant on self-reporting, and the capacity from random and front-line audit is sparse.

The relevant regimes themselves are also highly discretionary. For example, in the event that appropriate permission is not sought prior to purchase, pursuant to the Overseas Investment Act 2005, the Overseas Investment Office can impose an 'administrative penalty' of up to \$20,000 on the applicant – a large sum when

organisation priority; nor has Parliament afforded priority to said changes. Recent improvements to the Wildlife Act 1953 – and there are more in the pipeline – demonstrate the kind of changes needed to help the agencies do their job properly.

Modern and fit-for-purpose law is what is needed and this means much of our legislation is ripe for a makeover. The solutions set out in Last Line of Defence also include stronger national guidance on CME, most particularly from the Ministry for the Environment to the 78 councils operating nationally. While local determinism is acceptable on some fronts,

Compliance officers are usually born, not made: certain personality traits make for good officers, in addition to training that prepares them for the technical aspects of their role.

compared with any other penalty an agency can unilaterally impose – and process approval retrospectively. Do these regimes strike an appropriate balance between regulator discretion and transparency for the public?

Unpacking the key issues

Casting one's eye across such a range of regulators and regimes, one might expect to find different key issues with each. But in fact there is remarkable convergence. Four recurring themes stood out and they are canvassed briefly here, along with some of the solutions proposed in the report.

Robust underlying law makes CME more effective and efficient

Much of our environmental law is old, out of date and lacking in the tools that enable behaviour change to be achieved at least cost in the shortest amount of time. This applies not just to the old acts either: the relatively new EEZ Act is also without an infringement regime, for example. Interestingly, many of the flaws in the legislation have also been long understood but just lain unaddressed, partly because compliance just hasn't seemed like an

there are areas where greater alignment and consistency could easily be achieved, and where statutory limits could be better clarified (e.g. cost recovery, thresholds for escalation, evidentiary tests, etc).

Boots on the ground, and the right kind of boots

Compliance officers are usually born, not made: certain personality traits make for good officers, in addition to training that prepares them for the technical aspects of their role. It is clear from many agencies that ensuring that the right person wears those boots is a relatively low priority. In fact, having such people at all seems low priority. For example, ten district councils report zero resources for CME, and more than 40 have fewer than one full-time equivalent to do the job (often shared with other tasks). Meanwhile, consents are issued and permitted activity standards are included in district and regional plans, pinning hope on people who simply don't exist to ensure that the behaviour change the policy aims for occurs.

The lack of resourcing is in part due to the politically unpalatable nature of the function, and the chronic underfunding of many public agencies, full stop. But the

lack of training and the limited recognition of compliance as a career choice are important too. High turnover and a predominance of weakly trained front-line officers are a major risk to a regulator. Our report recommends the development of far more effective training and express recognition of officers and agencies that demonstrate competence in this important field. We suggest a programme of agency accreditation (similar to that for consenting already in place) and a professional network to recognise and support this important career path, not unlike those already available for planners, lawyers and engineers.

Independent decision making

New Zealand has few pure regulators; most agencies carry regulatory roles alongside others. MPI juggles trade facilitation and trade regulation roles, DOC wrestles with partnership ambitions alongside its significant environmental enforcement role, and councils too have to reconcile economic development and environmental protection mandates with little guidance. The role of governance is to set strategy and policy directions, and the day-to-day decisions are not to be interfered with. A credible regulator makes individual enforcement-related decisions based on facts, and there is no room for politics. This is often not the case and this must urgently change.

Whether such change can be brought about by adjusting the people and the practice remains to be seen. Or are we asking too much and do we need to consider much bigger shifts in our

institutional arrangements? At the very least it starts with making it crystal clear that such behaviour is inappropriate, and, further along, that there is a significant risk of sanction for those indulging in this deeply unfair meddling. All agencies should have clear and appropriate prosecution and enforcement policies that are publicly available and subject to quality control. The next challenge is to ensure that they are adhered to.

Audit and oversight

Part of the reason political interference in decision making can persist is that there exists a serious lack of oversight of the activities of environmental enforcement agencies. As a result, the public has little idea of what is happening and little assurance that this crucial role is being performed effectively. In one regime, voluminous data have been collected over an extended period of time (the RMA), and yet the Ministry for the Environment has not chosen to use that information in an evaluative way. Over and over, the same councils have reported zero prosecutions, zero fines and zero staff for CME, and nobody appears to have thought to question why. Is that a fair reflection of public expectations?

To facilitate greater transparency we recommend investment in information technology systems that track and validate compliance approaches. Many agencies do not record much information about their CME roles – some do not even have the IT infrastructure to do so (e.g. DOC) – and many annual reports barely mention the function. Without any data, laggards

can prosper while good performers are ignored. But which data, and why?

The quality and relevance of that which is collected is highly variable. Often annual reports include one or two random figures that pertain to CME, but lack any context. It would seem that we have a limited notion of what success even looks like. As such, a major recommendation of our report is for the ministry (or another entity) to develop thought leadership on appropriate evaluation of environmental regulators, and to then establish a reporting framework around this. Making it common across environmental regulators would enable easy comparison, compared to the challenge of benchmarking that exists at present.

Summary

The difficulty of achieving the desired outcomes of environmental law due to the ever-present compliance gap is by no means unique to New Zealand. Globally, environmental offending struggles to attract the attention and resources needed to be effectively combatted. The evidence suggests that while our environmental regulators are on a trajectory of improvement, there are also some big issues to be sorted out. The resources poured into the promulgation of law and policy are enormous, and unless that energy is matched with the dogged process of driving the need for behaviour change home, it is simply wasted investment.

¹ This research was supported by the New Zealand Law Foundation, the Ministry for the Environment and FoundationFootprint Ltd and was published by the Environmental Defence Society in February 2017.

References

- Black, J. (2014) 'Learning from regulatory disasters' (Sir Frank Holmes Memorial Lecture 2014), *Policy Quarterly*, 10 (3), pp.3-11
- Brown, M.A. (2017) *Last Line of Defence: compliance, monitoring and enforcement of New Zealand's environmental laws*, Auckland: Environmental Defence Society
- Compliance and Enforcement Special Interest Group (2016) 'Regional sector strategic compliance framework 2016–2018', Compliance and Enforcement Special Interest Group, Greater Wellington Regional Council
- De Prez, P. (2000) 'Excuses, excuses: the ritual trivialisation of environmental prosecutions', *Journal of Environmental Law*, 12 (1), pp.65-78
- Environmental Protection Authority (2013) EPA prosecution policy, available at http://www.epa.govt.nz/Publications/EPA_Prosecution_Policy.pdf
- Environmental Protection Authority (2017) Compliance and enforcement programme, available at http://www.epa.govt.nz/Publications/EEZ_Compliance_and_Enforcement_Programme.pdf
- Heron, M. (2016) 'Independent review of MPI/MFish prosecution decisions Operations Achilles, Hippocamp and Overdue', available at <https://mpi.govt.nz/protection-and-response/environment-and-natural-resources/sustainable-fisheries/independent-review-of-prosecution-decisions/>
- Ministry for the Environment (2016) *Compliance, Monitoring and Enforcement by Local Authorities under the Resource Management Act 1991*, available at <http://www.mfe.govt.nz/publications/rma/compliance-monitoring-and-enforcement-local-authorities-under-resource-management>