NEW ZEALAND
PETROLEUM & MINERALS

Our compliance approach

Crown Minerals Act/Petroleum and Minerals Regulatory System Operating Model

Who we are

The Ministry of Business Innovation & Employment (MBIE) administers the Crown Minerals Act 1991 (CMA) and the petroleum and minerals regulatory system. At MBIE, we perform this work using the New Zealand Petroleum & Minerals (NZP&M) brand.

Purpose of this document

The purpose of this document is to outline our regulatory operating model and includes information about how we make decisions on interventions and regulatory tools for responding to non-compliance under the CMA.

The purpose of the CMA is the efficient allocation of Crown minerals and a fair financial return (and a data return to extend our knowledge too). We are regulatory stewards of the petroleum and minerals regulatory system which is encapsulated in the CMA.

The petroleum and minerals regulatory system connects across other regulators and those within the system so,

- people have trust and confidence in the P&M system
- our information and insights are valued and shared, to act on opportunities and risk
- Te Tiriti o Waitangi/Treaty of Waitangi relationships and obligations are honoured.

This guidance supports us to be a credible regulator and act responsibly and proportionately to the risk posed. It does this by providing a pathway for staff to think about and respond to non-compliance.

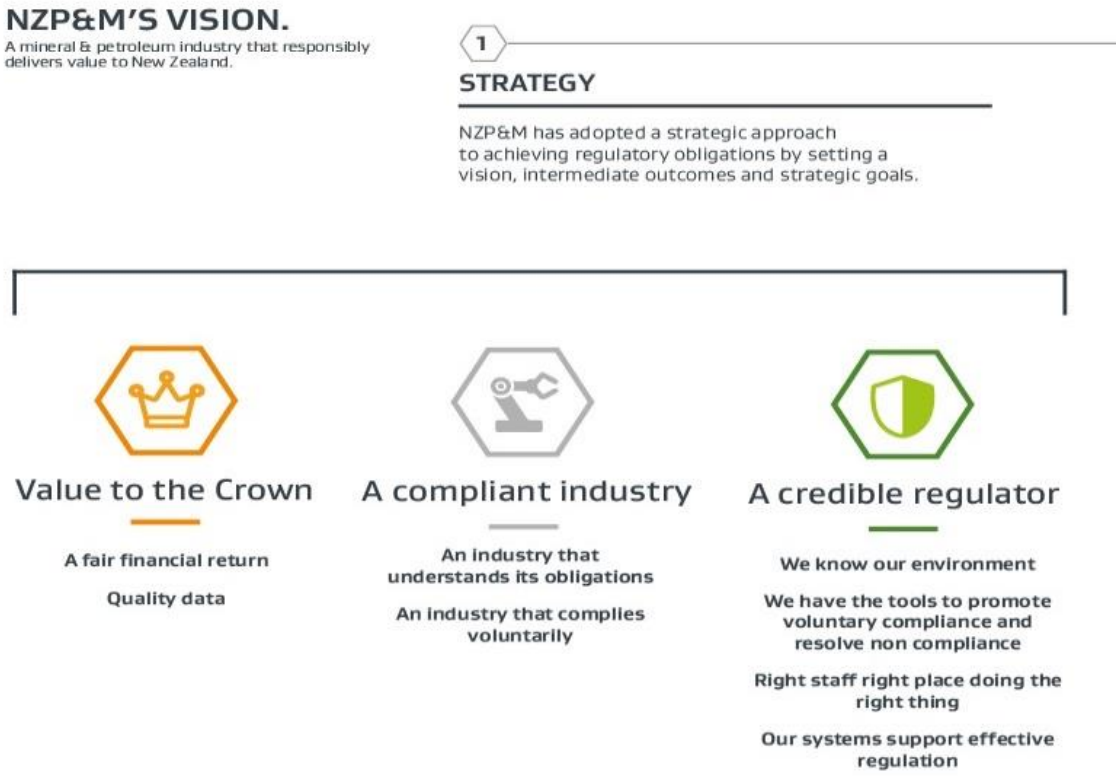
This guidance supports identification of the appropriate tool to achieve sustained compliance where non-compliance is evident and provides clarity about how the VADE model supports each compliance tool.

Our framework will evolve over time. The Crown Minerals (Decommissioning and Other Matters) Act 2021 introduced a number of new provisions for the petroleum industry. Our approach for monitoring, compliance, financial securities and enforcement for petroleum decommissioning is still being developed.

What we want to achieve

Our regulatory activity is aimed at achieving the vision 'A mineral and petroleum industry that responsibly delivers value to New Zealand', when we consider a regulatory response, the main questions are:

- 'Is the operator behaving responsibly?' and
- 'Is the operator delivering value?'



Improving industry compliance is one of the action areas outlined in *Responsibly Delivering Value - A Minerals and Petroleum Resource Strategy for Aotearoa New Zealand: 2019–2029*. This strategy is a roadmap towards achieving a world-leading environmentally and socially responsible minerals and petroleum sector that delivers affordable and secure resources, for the benefit of current and future New Zealanders.

As a regulator, the majority of our day-to-day regulatory activities focus on facilitating industry compliance with their obligations by providing information, guidelines and educational material. We also collect data to monitor compliance and identify non-compliance. Any data we collect is treated in accordance with the Privacy Act 2020 and MBIE's data protection and security procedures.

As the Crown's regulator under the CMA, associated regulations and other legislation[1] our decisions are subject to scrutiny by the New Zealand public. Our decisions must be transparent, reasonable, proportionate and consistent.

[1] The Petroleum Act 1937, the Mining Act 1971 and the Coal Mines Act 1979.

Where potential non-compliance is identified, we must consider whether regulatory intervention is required. We use the VADE model to guide our thinking when considering appropriate regulatory responses. VADE stands for Voluntary, Assisted, Directed and Enforced and it provides a measured and graduated approach to achieve resolution of non-compliance. This means our responses are targeted.

Regulators demonstrate regulatory stewardship by using all available tools to work constructively, where appropriate, with regulated parties so that they can achieve compliance.

These guidelines frame our compliance decision-making and activities. They are a guide on the factors we consider. Our decision-making is transparent and consistent. This means that similar incidents of non-compliance should lead to similar enforcement outcomes. This approach does not necessarily mean uniformity. We carefully consider the specific circumstances of each case.

How we work

PRINCIPLES

From these principles we draw the factors for determining which of the escalating interventions or regulatory tools (as set out in the VADE model) is appropriate to the specific circumstances of the case and the risk or harm posed.

Factors or criteria to help us in our compliance decision-making are especially important because the minerals and petroleum industry is so diverse in scale of operation and capability.

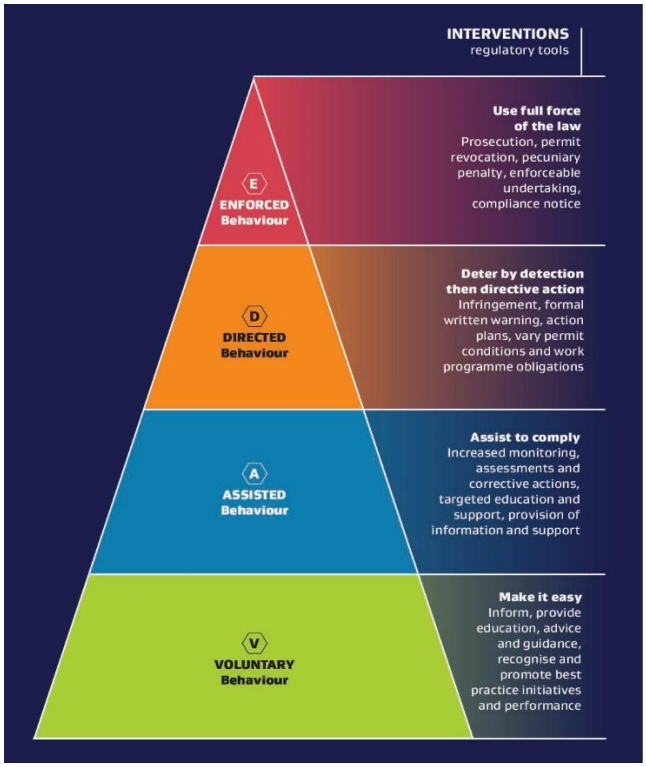
These principles and the factors discussed in this document are worked through in our compliance decision-making in addition to the statutory requirements relating to specific decisions under the CMA (including having regard to the principles of Te Tiriti o Waitangi/the Treaty of Waitangi as set out in Section 4).

Our approach

Recent changes to the CMA strengthen the compliance regime by effectively and efficiently supporting the three prongs of compliance activity – detection, investigation and incentivising compliance.

THE VADE MODEL

Here is the VADE[2] model as it has been adapted for use by MBIE.



RESPONSE TO NON-COMPLIANCE: ENFORCEMENT DECISION MODEL

This document guides our enforcement decision-makers, at all levels, to identify the most appropriate compliance tool to achieve behaviour change. Appropriate tools will be used, depending on the circumstances including the level of risk, the clarity of guidance available, and the willingness of the regulated party to comply with the law and harm (or potential harm).

Enforcement responses are specific and proportionate to the situation and the potential consequences of inaction. Therefore, enforcement decisions may not necessarily be progressive in response (moving from a low-level response to the use of a stronger enforcement response later).

Compliance issues are often complex and require careful consideration. These guidelines are intended to assist in decisions where we use our discretion under the CMA in deciding how to respond to compliance issues. We make the best decisions when we apply our collected expertise and experience as we consider the factors and weigh up which compliance tool or tools might be the most applicable.

[2] The VADE model is a regulatory tool developed by the Ministry for Primary Industries and is commonly used by other regulatory agencies.

A TWO-PART RESPONSE

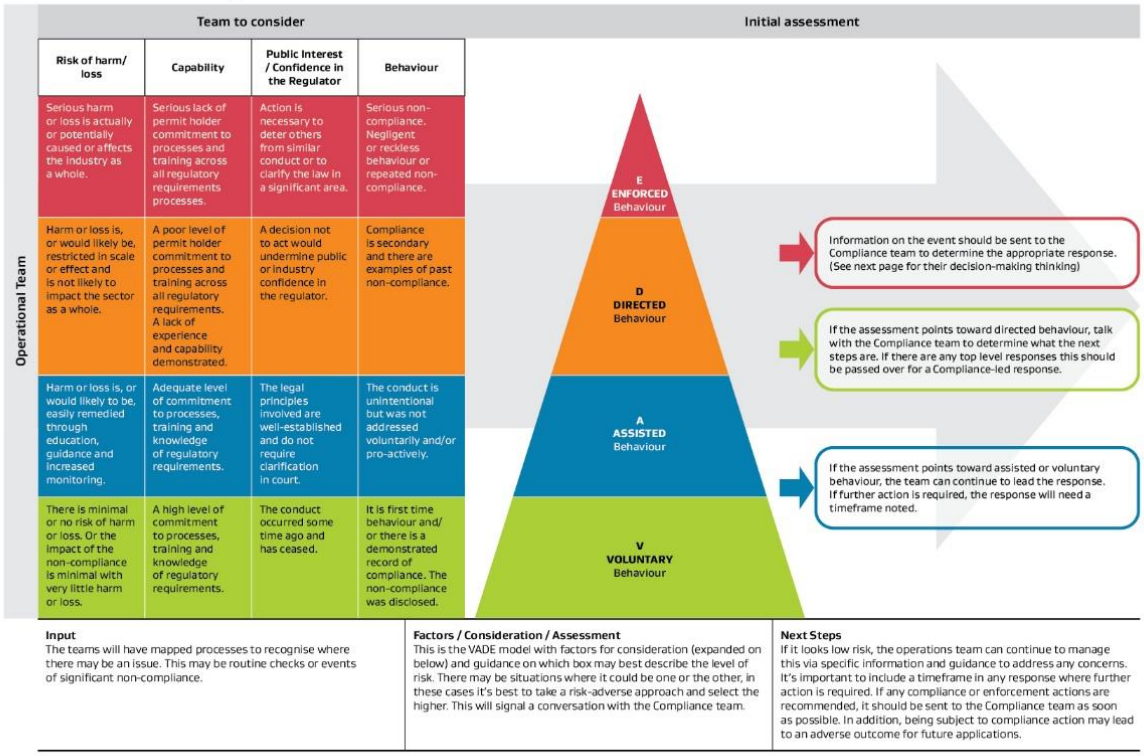
There are two parts to how we think about our compliance and enforcement response:

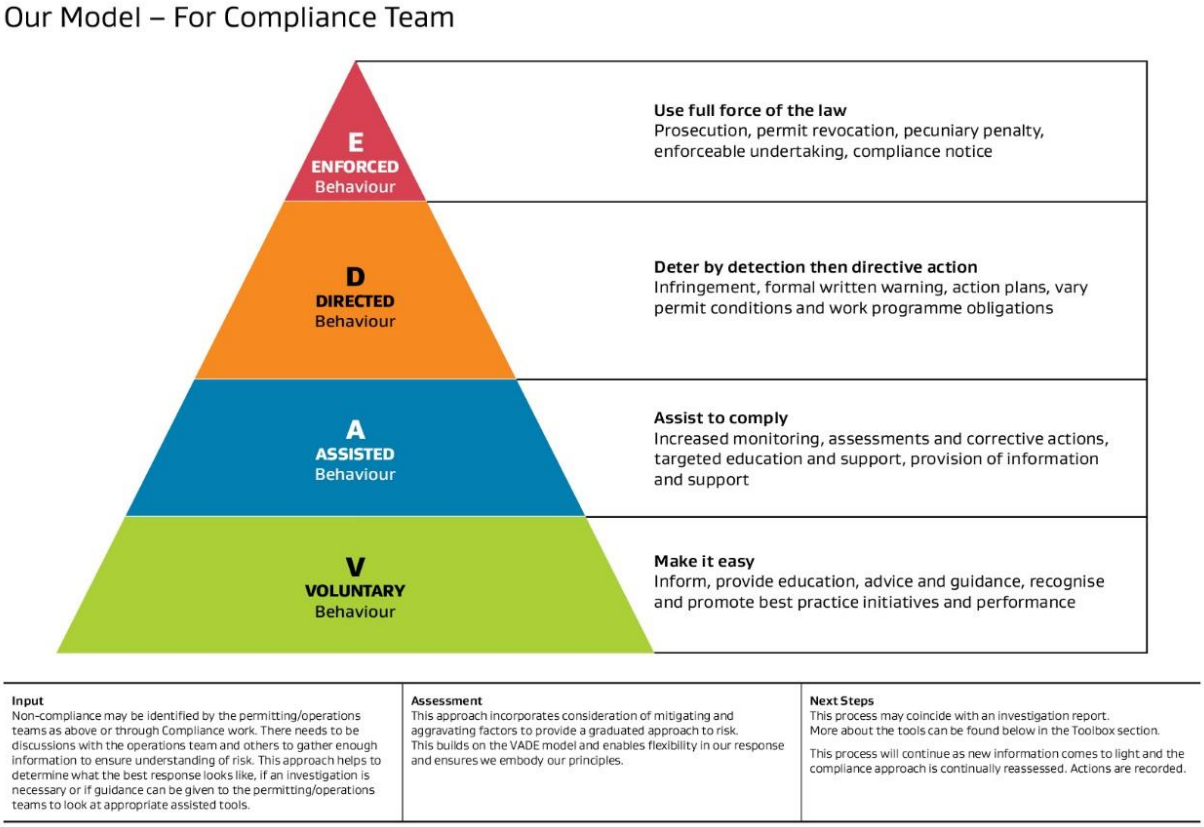
- The first part is where some sort of non-compliance has been suspected or identified by an operations team, whether as a result of monitoring or when considering a permit application. The VADE model and guidelines will assist in determining whether to continue with education and information or to work with the Compliance team and utilise our enforcement tools.
- The second part is where the Compliance team gathers more information to address a compliance issue, or an investigation progresses. Our compliance approach provides a more in-depth risk framework to assess whether the original course of action is still appropriate. The Compliance Team will carry out both parts of the assessment when the issue is initially identified by them.

An appropriate enforcement response is identified through use of the VADE model, followed by a more-in-depth Risk Framework. High risk issues will generally result in a more serious enforcement outcome which will be led by the Compliance team.

OUR MODEL – FOR OPERATIONS TEAM INITIAL ASSESSMENT

Our Model – For Operations' Teams Initial Assessment





Part 1: The VADE Model factors - Operations[3] team initial assessment

The VADE model is based on risk factors. Risk relates to potential future events with a negative impact or effect on achieving the vision and objectives of the CMA Regulatory System. Risk includes two elements:

- The magnitude of the consequences that would eventuate should an event occur
- The likelihood of the event occurring.

Non-compliance with permit conditions is a significant risk because the Crown will often ultimately bear the financial cost and practical consequences of a permit holder's failure to comply. In other words, the ultimate financial return to the Crown from royalties is reduced by any costs associated with a permit holder's failure to comply with the conditions of its permit including the decommissioning obligations.

To understand the risk level that applies to each situation, you can find more guidance on each column below.

1. RISKS TO ACHIEVING OUR VISION

Royalties ensure the Crown receives a fair financial return for the development of its minerals and petroleum to the benefit of New Zealand. This is one of the purposes of the Crown Minerals regulatory regime and is fundamental to achieving our vision. Accordingly, unpaid or underpaid royalties are a significant loss or harm.

[3] Operations teams include Permitting teams and Information Services as they are undertaking monitoring/compliance assessments on incoming data and in relation to permit boundaries/plotting/overlaps

Mismanagement, making inefficient use of resources, damaging future use of resources or, where relevant, failure to complete restoration work are other issues that may lead to the loss or harm of the Crown not receiving a fair financial return.

Harm also results from the non-payment of the fees charged to meet the cost of regulating the petroleum and minerals regulatory sector because it undermines the regulatory system and is unfair on other regulated parties.

Missing or low-quality data also has the potential to negatively affect the value the permit holder is delivering and can be characterised as a loss or harm.

Extent of harm/loss or risk of harm/loss	
• Serious harm or loss is actually or potentially caused or affects the industry as a whole. • Harm or loss is, or would likely be, restricted in scale or effect and is not likely to impact the sector as a whole. • Harm or loss is, or would likely to be, easily remedied through education, guidance and increased monitoring. • There is minimal or no risk of harm or loss. Or the impact of the non-compliance is minimal with very little harm or loss.	

2. CAPABILITY

When a permit is granted, the applicant is assessed on their financial and technical capability and the likelihood of meeting these obligations. The scale and complexity of the proposed work programme determines the level of financial and technical capability expected to be achieved.

There is an expectation that the permit holder has training, knowledge, and processes to meet appropriate regulatory requirements.

When considering any non-compliance on the permit we will also look at the scale and complexity of the work programme and what level of sophistication and capability is expected for this operation.

Capability	
• Serious lack of permit holder commitment to processes and training across all regulatory requirements and processes. • A poor level of permit holder commitment to processes and training across all regulatory requirements. A lack of experience and capability demonstrated. • Adequate level of commitment to processes, training and knowledge of regulatory requirements. • A high level of commitment to processes, training and knowledge of regulatory requirements.	

3. PUBLIC INTEREST / CONFIDENCE IN THE REGULATOR

Public interest can be described as being the interest of the wider public or of public importance in the context of the Crown Minerals regulatory regime. It is more than simply interest from the public or expectation from the public of action. Considerations include the need to clarify the law and whether it is a widespread problem that can be usefully addressed by highlighting the need for compliance.

The credibility of the regulator and public trust in the regulator is fundamental to fostering New Zealanders' and the regulated parties' trust and confidence in the public service.

Public Interest	
• Action is necessary to deter others from similar conduct or to clarify the law in a significant area. • A decision not to act would undermine public or industry confidence in the regulator. • The legal principles involved are well-established and do not require clarification in court. • The conduct occurred some time ago and has ceased.	

4. BEHAVIOUR AND ATTITUDE TO COMPLIANCE

Typically, the nature of regulatory intervention will be informed by, and tailored to, the attitude of individuals or groups involved towards compliance. This helps ensure that the intervention chosen will have the desired effect. This does not prevent significant actions being taken for other reasons, even when there is a good attitude to compliance.

In general, intentional non-compliance to avoid costs or for financial gain would be considered more serious non-compliance than accidental or unintentional non-compliance.

Our credibility as a regulator also has an impact on the behaviour of the minerals and petroleum industry and is another important factor to consider when deciding what regulatory tool or intervention is appropriate.

Behaviour and Attitude to Compliance	
• Serious non-compliance. Negligent or reckless behaviour or repeated non-compliance. • Compliance is secondary and there are examples of past non-compliance. • The conduct was unintentional but was not addressed voluntarily and/or proactively. • It is first time behaviour and/or there is a demonstrated record of compliance. The non-compliance was disclosed.	

Part 2: A more in-depth risk analysis

Once an initial assessment of risk is undertaken, the second part of the model provides a further framework for the Compliance team to work through what an appropriate response looks like. The evidence-based findings and knowledge gathered during an investigation may highlight broader factors that require attention or lessen our concerns and may influence our response.

We then overlay the hierarchy of enforcement responses and the VADE model to give confidence in a graduated approach to the risk identified.

The following table provides some examples of low risk and high-risk behaviours for each of the factors we consider.

FACTORS	EXAMPLES
Attitude to Compliance	
Low Risk:	Compliance is integrated into everything the operator does
High Risk	There is evidence that the permit holder/operator has knowingly tried to mislead the regulators
Compliance History	
Low Risk:	A good compliance history – for example, meeting obligations on time
High Risk	There has been previous intervention by the Compliance Team – particularly recent enforcement action
Environmental/Health and Safety Factors	
Low Risk:	There are no wider potential risks identified (such as to the environment)
High Risk	There is evidence of an imminent risk to the environment/health and safety of workers
Operator/Permit Type	
Low Risk:	Hobby permits
High Risk	Larger Tier one operators
Seriousness of the non-compliance	
Low Risk:	Minor first-time breaches such as late reporting
High Risk	The evidence threshold is met for the most serious offences (like illegal mining)
Public Interest	
Low Risk:	There is low public interest – for example, the conduct occurred some time ago and has now ceased

High Risk	Action is necessary to deter others or to clarify the law in a significant area
Financial Risk to Crown	
Low Risk:	Where there is no risk of financial loss to the Crown for example, where the operator does not meet the threshold to pay royalties
High Risk	Significant cost will be incurred by the Crown to manage the issue

The regulatory toolbox

We use a range of regulatory tools to achieve our outcomes for the Crown Minerals regulatory regime.

Some of our tools are proactive and help avoid non-compliance and harm and others respond to non-compliance and areas of concern. Our choice of tool or combination of tools is influenced by informed and considered assessments of the factors described earlier in this document. This allows us to best achieve a minerals and petroleum industry that responsibly delivers value to New Zealand and promote compliance.

This is not a full list of all of the ways that we manage compliance, but it provides a good overview of the breadth of tools we have available to fulfil our regulatory obligations and attain our outcomes.

VOLUNTARY TOOLS

Providing information, guidance and support to permit holders

It is important that permit holders have good quality information and guidance on the requirements of the law and how they might comply. Information can take many forms including web-based information, FAQs, conferences, presentations, forums, alerts, newsletters, targeted emails and posters.

Broad-based education and information resources, such as the above, are particularly suitable where the risk is low, and the capability and attitude of the regulated party is good.

Simplifying compliance and promoting responsibility

We want permit holders to take responsibility for ensuring their own regulatory compliance. We are working to make our systems and processes straightforward and effective to support this.

Actively monitoring and detecting non-compliance and risk

We monitor our regulated industry to detect non-compliance, potential opportunities for promoting compliance and other emerging risks. We use this information to inform our planning and to effectively target and focus our efforts.

ASSISTED TOOLS

Encouraging early and open disclosure of errors or mistakes

Mistakes and errors happen. We may be more understanding when genuine mistakes or errors are voluntarily disclosed to us early. When we find out about issues, we may be able to offer help and assistance to permit holders that have made open and early disclosures.

We may take firmer enforcement action against mistakes or errors where there has been no disclosure or a deliberate effort to hide the error or mistake from us.

Powers to require information, inspecting and auditing compliance

We have powers to require information and to conduct announced and unannounced inspections to check whether a permit holder is compliant with the CMA, regulations or permit conditions. We can also conduct more in-depth audits to determine compliance. We have powers to appoint an independent auditor and require the payment of those costs in some circumstances.

Investigations

We investigate alleged breaches of the law. These investigations will usually be undertaken in response to non-compliance or alleged non-compliance that may be serious or significant.

DIRECTED TOOLS

Formal Written Warning

Following an investigation, we may issue a formal written warning as an alternative to prosecution or other enforcement actions. We do this when we consider that we have strong evidence of an alleged breach or likely breach of the law, and the matter can be satisfactorily resolved without legal proceedings. The purpose of the formal written warning is to prompt a change in behaviour and to encourage future compliance.

The recipient is advised that the formal written warning letter is held on record as part of the compliance history and may be provided to the court as context for a history of non-compliance in any relevant future criminal proceedings. At the time we issue the formal written warning we consider whether it is appropriate or desirable to publicise the action.

Proposals to change work programmes

In some circumstances the CMA allows non-compliance to be remedied, with the agreement of the permit holder, by imposing new work programme obligations.

ENFORCEMENT TOOLS

Revocation of permits

We have the ability to revoke permits (cancel permits) where, after following the correct legal process, we are satisfied that the permit holder has breached:

- a condition of the permit
- the CMA
- its regulations or
- any payment has not been made within 90 days after the due date and remains unpaid.

In rare circumstances the revocation may take the form of a transfer of the permit to the Minister responsible for administration of the CMA(in replacement for the permit holder).

We would consider pursuing a revocation for the most serious breaches of the CMA, regulations or a condition of a permit, or when other possible means to achieve compliance have been exhausted. The Minerals Programmes[4] provide guidance on when revocation is unlikely or likely to occur. In the minerals' context, non-payment of annual fees is an example where revocation is likely to occur where invoices remain unpaid more than 90 days after the due date.

Before a decision to revoke a permit is made, written notice of the intention to revoke the permit must be served on the regulated party setting out the grounds for the revocation. This provides an opportunity for

[4] The Minerals Programme for Minerals (Excluding Petroleum) 2013 and the Minerals Programme for Petroleum 2013

the regulated party to remove the grounds or provide reasons why the permit should not be revoked. This information must be considered by the regulator before a final decision is made on the revocation.

Prosecution

Following an investigation where there is sufficient evidence to establish that an offence has been committed prosecution is an option. We must consider whether a prosecution is in the public interest and may also consider our regulatory system objectives and enforcement priorities when deciding whether a prosecution may be commenced. The *Solicitor General's Prosecution Guidelines*[5] provide information on the conduct of public prosecutions.

New Tools: an in-depth look

ENFORCEABLE UNDERTAKING

What is an enforceable undertaking?

An enforceable undertaking is a legally binding document between the regulated party and the regulator. The document outlines, in writing, what action the regulated party will undertake to rectify a breach or alleged breach of the CMA or regulations made under the CMA. It may also outline actions to prevent similar breaches in the future. The undertaking is entered into voluntarily on the part of the regulated party although it becomes mandatory once accepted (or at a later date specified by the regulator).

The operational objectives of an enforceable undertaking are to support progressively higher standards of sector compliance by:

- remedying the breach or alleged breach (for example by paying an overdue fee or royalty or providing required data or reports)
- modifying practices, procedures or behaviours to ensure compliance with the law now and in the future (for example stopping the practice that led to the breach or alleged breach and putting systems in place so that it doesn't happen again)
- promoting the benefits of compliance (for example by sharing best practice) within the sector
- providing a more cost-effective enforcement response and therefore providing an incentive to comply with the enforceable undertaking.

Why would we use an enforceable undertaking?

An enforceable undertaking is triggered by a registration of interest or application from the regulated party using forms and processes established by the regulator.

An enforceable undertaking is generally used as an alternative to prosecution for a breach of the CMA. However, any investigation into the breach is completed and charges may be filed if it is not possible to make a decision on a proposed enforceable undertaking within the 12-month timeframe for filing charges.

The regulated party may apply to either withdraw from the enforceable undertaking or to vary it with the agreement of the regulator.

When wouldn't an enforceable undertaking be appropriate?

An enforceable undertaking will not be used when it is not a proportionate enforcement outcome or if the regulated party denies responsibility for the breach. The regulator may identify other circumstances in which it would not be appropriate to consider an enforceable undertaking.

More guidance about when enforceable undertakings will be used is found in our operational policy on enforceable undertakings.

[5] http://www.crownlaw.govt.nz/publications/prosecution-guidelines/

What are the penalties for breaching an enforceable undertaking?

Failing to comply with an enforceable undertaking is an offence with a maximum fine, on conviction in the District Course, not exceeding $200,000. The regulator may also, or as an alternative, apply to the District Court for an order directing the regulated party to comply with the undertaking or discharging the undertaking.

Criminal proceedings may be taken, or continued, for the original breach or offence if the enforceable undertaking is breached or no longer in force.

Further guidance on enforceable undertakings can be found in our operational policy. This is available on request to nzpam@mbie.govt.nz.

COMPLIANCE NOTICE

What is a compliance notice?

A compliance notice is a direction from the regulator to a regulated party to remedy or prevent a breach of the CMA or regulations within a specified period.

Why would we use a compliance notice?

A compliance notice is an adaptable enforcement tool that focusses on rectifying or preventing the breach of the CMA or regulations. It will state what provision the regulator believes is being, or is likely to be, breached, how it is being or is likely to be breached, and when the breach or likely breach must be remedied. The compliance notice may also contain recommendations concerning measures that could be taken to remedy the breach or likely breach.

The regulator may extend the specified period for compliance, if the period has not passed, and vary or cancel the notice.

When wouldn't a compliance notice be appropriate?

A compliance notice alone is unlikely to be used for the most serious breaches of the CMA or regulations. In these circumstances, a prosecution may be pursued in addition to the compliance notice being issued.

What are the penalties for breaching a compliance notice?

Breaching a compliance notice is an offence and the regulated party is liable on conviction to a fine not exceeding $200,000. The regulator may also, or as an alternative, apply to the District Court for an order directing the regulated party to comply with the compliance notice.

Criminal proceedings for the original breach or offence may be pursued in addition to a compliance notice being issued.

Further guidance about on compliance notices can be found in our operational policy. This is available on request to nzpam@mbie.govt.nz.

INFRINGEMENT NOTICE

What is an infringement notice?

An infringement notice is an enforcement tool that requires the recipient to pay a fee for specific failures to meet their obligations required under the CMA regulations.

Why would we use an infringement notice?

Infringement notices may be issued when the regulator believes on reasonable grounds that an infringement offence is being or has been committed.

Infringement notices are a way of dealing with simple breaches of the law.

In addition to paying the infringement fee, the regulated party must also remedy the breach.

When wouldn't an infringement notice be appropriate?

Infringement notices can only be used when the permit holder has failed to do a specific action that is listed in the regulations. The infringement offences relate to failures to:

- submit information, records and reports within the time specified or by the due date
- provide a royalty return or pay a royalty by the due date
- make required payments, such as annual fees, within the time specified or by the due date

The fees associated with these offences are a maximum of $1,000 for an individual and $3,000 for a body corporate, as provided for under the CMA.

What are the penalties for breaching an infringement notice?

Failure to pay the infringement fee may result in a fine being imposed by the courts – this fine will be higher than the original infringement fee.

PECUNIARY PENALTIES

Pecuniary penalties are available for breaches or other specified actions in relation to requirements for:

- decommissioning of petroleum infrastructure
- plugging and abandoning of wells, and
- establishment and maintenance of an adequate financial security.

What is a pecuniary penalty?

A pecuniary penalty is a fine imposed by the Court on application by the regulator for breaches or other specified actions in relation to the requirements to decommission petroleum infrastructure, plugging and abandoning of wells, and establishment and maintenance of an adequate financial security. The court must be satisfied on the balance of probabilities that the breaches have occurred.

Why would we seek a pecuniary penalty?

The regulator may choose to pursue a pecuniary penalty where the level of proof of a breach has not reached that required for criminal liability, or if the limitation period for filing criminal charges has lapsed.

The amount of the pecuniary penalty for each act or omission must not exceed $500,000 for an individual or, in the case of a body corporate the greater of $10,000,000 or if the commercial gain can be readily ascertained, three times the commercial gain, or if the commercial gain cannot be readily ascertained, 10% of the turnover of the person and all its interconnected bodies corporate in each accounting period that the breach occurred.

A criminal proceeding for an offence may also be commenced in relation to the same parties and the same conduct.

When wouldn't pecuniary penalty be appropriate?

A pecuniary penalty will not be sought when it is not a proportionate enforcement outcome.

What are the penalties for breaching a pecuniary penalty?

A pecuniary penalty is a Court ordered penalty and non-payment falls within the jurisdiction of the courts.

Further guidance on pecuniary penalties can be found in our operational policy. This is available on request to nzpam@mbie.govt.nz.

What else we can do

PUBLICISING ACTIONS

We may choose to publicise enforcement action that we are taking, or have taken. Publicising can promote a greater understanding of the consequences of non-compliance and can deter individuals and organisations from engaging in non-compliant activity.

A decision by the Court is generally a matter of public record, but in the case of other enforcement outcomes we must consider the Privacy Act 2020 (this may include publishing information about the breach and the enforcement outcome without identifying individuals).

LEARNING AS WE GO

We use our experiences to help inform our future work. We systematically review and learn from our actions to identify what worked and where we might make changes. We understand evolving case law. Lessons learned are identified for improvements in information provided, regulatory practice or possible policy and legislative change.

RAISING AWARENESS

It is in our interest as a regulator to ensure interested and affected parties know their rights and know what to expect when dealing with the minerals and petroleum regulatory regime. This makes it easier for them to know when they are exposed to non-compliance or unlawful actions.

ACTIVELY SUPPORTING COMPLAINTS AND FEEDBACK

Well-informed interested and affected parties can be an effective source of information about non-compliance through the complaints they make when things go wrong.

The public need to have clear expectations of the industry—that is why raising awareness of compliance is an important part of our overall strategy. To encourage this, we maintain effective and easy-to-use complaints and feedback mechanisms to help inform our work.

When we receive complaints and concerns about alleged non-compliance outside our jurisdiction, we forward them to the appropriate regulator and advise the complainants accordingly.

RECOGNISING EXCELLENCE AND RESPONSIBILITY

We recognise excellence and responsibility particularly where it contributes effectively to better levels of compliance and helps achieve our outcomes of a mineral and petroleum industry that responsibly delivers value to New Zealand. We raise awareness of good practices that we believe could be adopted more widely within the industry.

COLLABORATING WITH OTHER REGULATORS

We maintain active links with other local and international regulatory and law enforcement agencies. This collaboration involves sharing information and intelligence as well as participating in coordinated operations.