Attachment A: Ministry for the Environment Direct Referral Process: information for applicants

Ministry for the Environment
Manatū Mō Te Taiao

The direct referral process
– information for applicants

This information sheet is about the direct referral process under the Resource Management Act 1991 (RMA). It has been prepared to help applicants understand the process.

What is direct referral?

The direct referral process allows for you or your agent to make a request to a council that your notified resource consent, notice of requirement, or heritage order application[1] be decided by the Environment Court, rather than the relevant council.

When an application is notified (publicly notified or limited notified), it is open to written submissions from people who may be affected by it, and then usually proceeds to a council hearing for a decision. In the case of direct referral, while the council still notifies the application and receives written submissions, the application is then transferred to the Environment Court for a decision, bypassing the council hearing and decision stage.

The direct referral process streamlines decision-making for large scale and/or complex applications that are otherwise likely to end up in the Environment Court on appeal following the council hearing and decision. The direct referral process is intended to save time and costs for both applicants and submitters.

What type of applications does direct referral apply to?

The direct referral process only applies to **notified** applications, and only the following types:

- applications for resource consent
- applications for changes or cancellations to condition(s) of resource consent
- notices of requirement for a designation
- notices of requirement for a heritage order
- notices of requirement for an alteration to a designation or heritage order.

Examples of direct referral applications include projects such as: quarries (Winstone Aggregates, Road Metals Ltd, Brookby Quarries); wind farms (Mainpower NZ Ltd and Meridian Energy); large infrastructure (Mahia Beach wastewater scheme and Queenstown Airport expansion); large retail developments (Pak n Save Rodney and Jackson Street Retail Ltd); and international sports venues (Hagley Oval). The direct referral process is different from, and separate to, the consenting process for matters of national significance. Refer to the Resource management section on the Environmental Protection Authority's website for further information on the decision-making process for proposals of national significance.

1 'Application' is used throughout this information sheet and refers to an application for direct referral, whether that is for a resource consent application, or a notice of requirement for a designation or heritage order.

How to decide if an application is suitable for direct referral?

Direct referral could be suitable for your proposal if it is likely to be contentious and/or likely to end up before the Environment Court by appeal to the council decision. Deciding whether or not to seek to directly refer an application can be a complex decision and you should consider getting planning and/or legal advice to help you decide. The direct referral process can save time and costs. However, the decision to go down this track will be a judgement call for you to make with the assistance of your own legal and/or planning advice. You will need to weigh up factors.

- The number and complexity of submissions – if there are a large number of submissions and/or issues raised by submitters, you will need to consider if it might save time to have the council hearing first to help define the submitters' issues.
- Support/opposition to the application – if there are submitters that are strongly opposed and an Environment Court appeal is likely, then direct referral may save time and money. However, if the council is in support and there are only a few opposing submitters, direct referral may not be warranted.
- Information shortfalls – if there are significant information gaps highlighted by the council that are not addressed, the Court process could be lengthy and costly.
- Estimated costs – as discussed below, these can vary considerably.
- Timing – this will depend on the complexity of your application and when your application could be scheduled to be heard by the Court which will be influenced by the Court's workload. Note that there is no specific timeframe under the RMA in which a decision on a directly referred matter must be issued by the Environment Court.

What are the costs of direct referral?

Costs for applicants for direct referral include:

- preparation of the application
- council costs
- Environment Court costs
- presentation of your case at the Environment Court
- the costs of other parties, potentially.

Preparation of the application

As an applicant, your costs will include the costs of preparing your application for the council and its public notification, including any technical or legal input. These costs will vary widely depending on the nature and scale of the activity being applied for. You will also incur costs in preparing your application for the Court process, although much of the work will already have been done up front in preparing the application for the council.

Council costs

Before the application is referred to the Court, the council can use its usual powers under section 36 of the RMA to recover its costs from you. These costs can include the council application fee, notification costs, and any other costs incurred in receiving and processing the application up to the point of direct referral. This includes the cost of council preparing its planning report under section 87F for the Court (in the same way as a council would recover the costs for preparing its section 42A report for a council hearing if the

application had not been directly referred). The council can also seek to recover its costs from the applicant for their involvement in a direct referral application once it is before the Court. These include costs of assisting the Court in relation to its report (section 87F), appearing before the Court as a party, and giving evidence. There is a presumption that such costs are to be ordered against the applicant.

Environment Court costs

If a direct referral is lodged with the Environment Court there is a filing fee. The Court can advise the filing fee payable or you can access this information on the Environment Court's website.

Once the application is before the Court, section 285 applies and the Court is able to recover its costs and expenses from any party. There is a presumption that costs are to be ordered against the applicant. The Court will seek to recover the actual and reasonable costs associated with a direct referral case. The Court can be contacted to discuss their cost estimate for a particular case.

At the Environment Court, the costs are largely dependent on the number of days a hearing is estimated to take as the bulk of the costs are tied up in the Court hearing. A large number of submitters wishing to appear at the hearing can lengthen the hearing time and escalate costs. The length of the Court hearing will also be determined by things such as the complexity of the application and the need for experts.

Presentation of your case to the Environment Court

As an applicant, your costs will also include preparing and presenting your case at the Environment Court. This will include any legal or expert/technical input you choose. The costs will vary depending on the nature and scale of the activity and the extent to which you engage the assistance of experts.

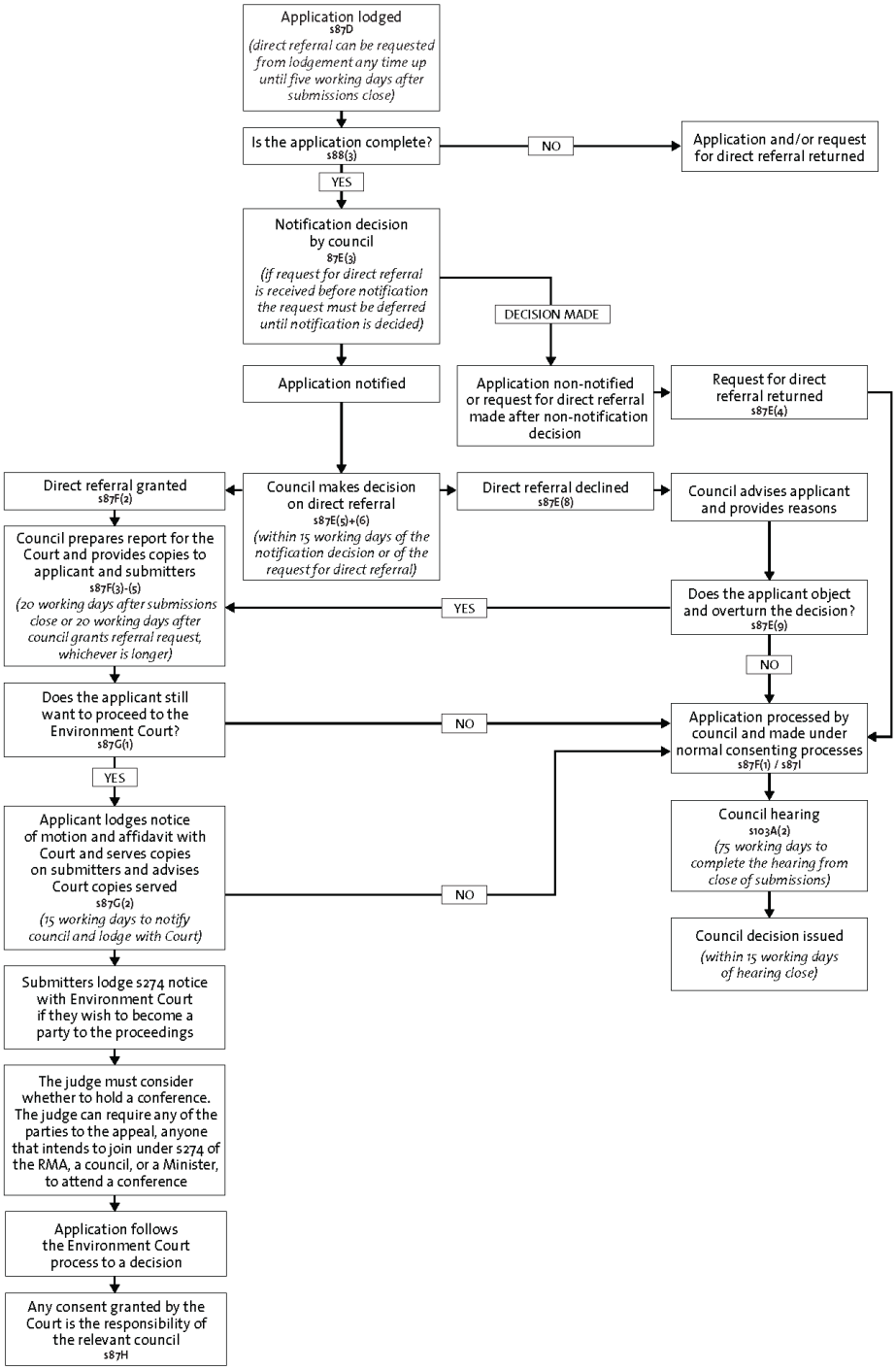
Costs of other parties

The Environment Court may order any party to pay money to any other party to help offset the expenses incurred during a hearing. Costs are not awarded automatically. The party seeking costs must apply to the Court. The Environment Court has the discretion to decide whether to award costs, and how much. There is a presumption under section 285(5) that costs will not be awarded against section 274 parties (submitters) for direct referral. Despite that presumption, as an applicant, you could be ordered to pay costs to section 274 parties.

Further information on costs is provided in the Environmental Court Practice Notice 2014, and in the Ministry for the Environment's booklet, The Environment Court: Awarding and Securing Costs.

What is the process for direct referral?

The diagram below summarises the direct referral process.



Who can request an application to be directly referred to the Environment Court?

Only you or your agent is able to make a request to a council that an application be directly referred to the Environment Court for a decision.

To ensure the council is aware of a pending request for direct referral and to allow councils to coordinate with each other where necessary, you should warn council(s) about the request and discuss the process with them. This will also help you clarify information requirements and understand the process. It is strongly suggested you consider engaging a resource management lawyer and/or planning consultant at this point to act on your behalf if you have not already done so.

When can a request for direct referral be made?

A request for direct referral can be made to a council any time from the day application is lodged, up until five working days after the closing date for submissions on the application.

While the council should be made aware of a pending request, you may choose to wait at least until the application has been notified before formally requesting direct referral. Furthermore, waiting until after the closing date for submissions to request direct referral allows you to analyse any submissions received and consider whether direct referral to the Environment Court is still the best route for your application. For example, opposition to the application may not be as great as expected and there may be a reasonable chance the matter could be resolved in a council hearing without appeal.

Conversely, if during the course of the submission period it is clear the matter would best be referred to the Environment Court for a decision, you may wish to proceed with the request for direct referral sooner, such as during the period for receiving submissions. An earlier request allows the council to prepare for and progress the matter more quickly. The timing of the direct referral request will be a judgement call made by you, ideally in discussion with the council.

How must a request for direct referral be made?

The request for direct referral must be made either electronically or in writing using the form in the Resource Management (Forms, Fees, and Procedure) Regulations 2003 (Form 7A for an application relating to a resource consent or change or cancellation of conditions of a resource consent and Form 27A for requests for confirmation of a requirement).

The following information needs to be provided to the council:

- the type of application sought to be directly referred (eg, resource consent application, application to change or cancel condition(s) of resource consent or confirmation of a requirement)
- a brief description of the application, including any consent reference number assigned by the council
- the reasons for the direct referral request and the factors for the council to consider in determining whether direct referral should be granted
- the date and signature of the applicant or person authorised to sign on behalf of the applicant and contact details. Note that a signature is not required if the application is made by electronic means.

Who decides if an application can be directly referred to the Environment Court?

The council decides on the direct referral request. The decision is made by a council officer, and/or a committee of elected council representatives or independent commissioners.

The Resource Management Amendment Act 2013 provides for an investment threshold to be prescribed, which councils will be required to use when deciding on a request for direct referral. If an application meets or exceeds the investment threshold, the council will not have the discretion to refuse a request for direct referral, unless there are exceptional circumstances.

The threshold amount and the matters a council will have regard to when determining if there are exceptional circumstances will be prescribed by regulations. These provisions will only apply once the regulations are made. A council will retain full discretion to agree or decline a request for direct referral for all applications that do not meet the investment threshold or if no such regulations are made. People who made written submissions to the council on the notified application do not have any ability to be involved in the council decision on direct referral.

The council must make its decision to grant or decline the request for direct referral within 15 working days. The 15 working day timeframe is calculated from either the day after the council makes the decision to notify the application (if the request for direct referral is made before notification of the application), or after the request for direct referral is received (if the request is received after the notification decision).

If a council grants an applicant's request for direct referral, the Environment Court must hear the application.

The council must return the request for direct referral to you without making a decision on it, when the council:

- determines the consent application is incomplete, or
- receives the request for direct referral after it has determined the application will not be notified, or
- decides not to notify the application.

What happens if your request for direct referral is declined by the council?

If your request for direct referral is declined by the council, you have a right to object to the council's decision. You can object under sections 357A(1)(e) or 357(8). An objection must be made in writing within 15 working days of the council's decision. For more information on the objection process, please contact your council.

Submitters do not have any ability to object or appeal the council's decision. If an objection is made, the council needs to reconsider its original decision and can either maintain the decision, or change its position and grant it. If your objection is successful and the original decision to decline the direct referral request is overturned, then the application proceeds as if direct referral was granted, ie, the council prepares a report for the Court.

If your objection is not successful, the council continues to process the application and it will proceed to a council hearing for a decision. The council will have 75 working days from the close of submissions to complete the hearing and then an additional 15 working days to issue the decision.

What happens if your request for direct referral is granted by the council?

If your request for direct referral is granted by the council, you can then lodge your application with the Environment Court. The Environment Court must hear and decide on the application.

The council is required to prepare a report on the application for the Court. This report must address the planning issues relevant to the application, suggest conditions that should be imposed if the Environment Court decides to grant the application, and provide a summary of written submissions received by the council. The council needs to produce this report within 20 working days after written submissions close, or 20 working days after it grants the direct referral request, whichever is longer.

The council must supply a copy of its report to you or your agent and all submitters, by post and/or email. It may also make the report available on its website or at council offices.

Can you still decide not to proceed to the Environment Court?

You can decide not to proceed to the Environment Court, even if your request for direct referral has been granted by the council and the council has prepared a report for the Court. In this instance, the council must decide on the application.

Similarly, if, after receiving the council report, you do not lodge a notice of motion (described below) with the Environment Court or within the time limit set by the Court, the council must decide the application.

The council hearing must be completed within 75 working days from the close of submissions and a decision issued within 15 working days of the close of hearing.

Where will the Court hearing be held?

The Court is required to hold the hearing as close to the locality of the application's subject matter as it considers convenient, unless the parties agree otherwise.

As the applicant, you may request a location for the hearing, but the final location is at the Court's discretion. Wherever possible, the Court will look to hold hearings in its own Court rooms.

The Environment Court process

Notice of motion

Once you have received the council report and you have decided to proceed with direct referral, you need to lodge a 'notice of motion' and 'affidavit(s)' with the Court within 15 working days of receiving the council report. Lodging the notice of motion effectively starts the Environment Court process.

The RMA does not expressly allow for the Court to grant waivers for notices of motion which are lodged late. Therefore, if the notice of motion is not lodged within 15 working days, the application will not proceed to the Court and will fall back to the council for a decision. The RMA also requires you to advise the council if you do not intend to lodge a notice of motion with the Court.

The notice of motion must be lodged in the prescribed form specifying the orders sought and the grounds upon which the application is made. Refer to Form 31A Notice of Motion. A supporting affidavit(s) about the matters giving rise to the application also needs to be included with the notice. Your legal adviser will generally format the affidavit(s). You must lodge the original and one copy of the notice and supporting

affidavit(s) with the Court. However, you are encouraged to liaise with the Hearing Manager (also known as the Courtroom Registrar) to see whether additional copies would help the Court, ie, if commissioners are also appointed by the Judge, extra copies of the documentation would be beneficial to the Court. The Court can advise the filing fee payable or you can access this information on the Environment Court's website.

At this stage it is advisable to indicate to the Court whether you are interested in mediation. As soon as reasonably practicable after lodging the notice with the Court, you must serve a copy of the notice and affidavit(s) on the council(s) that granted the direct referral request and every person who made a submission to the council on the application. You must also tell the Hearing Manager when these copies have been served on these parties. The Court will work with you to remedy any issues with the format of the notice.

Once the notice of motion is lodged an Environment Judge will be assigned to the case and a Hearing Manager from the Court will be formally appointed. The Hearing Manager plans the course of the proceedings in consultation with the parties and counsel so the parties are aware of the events that will occur, and the likely time involved. They also seek to identify the issues in dispute early in the process and encourage settlement by negotiation (if appropriate) or the use of alternative dispute resolution such as mediation. The Court can also appoint a Court member as a process advisor, particularly when there are a number of parties representing themselves. The role of the process advisor is to help submitters understand the Court process to better prepare for the hearing of the application. However, process advisors cannot give legal advice.

The Environment Court's Environmental Court Practice Notice 2014 contains more detailed information on case management.

Pre-hearing conferences, expert witness conferencing, and mediation

The Court will encourage you to try and resolve issues before the hearing. If the issues cannot be resolved, the Court may hold a pre-hearing conference. The pre-hearing conference enables the Court to ensure proper preparations are made for the hearing of the proceedings at a later date. If the Judge requires you to participate in such a process you must participate unless the Court grants leave otherwise. You may be represented by other people, but only if at least one of those people is authorised to make decisions on your behalf about any matters reasonably expected to arise in the conference.

You can call expert witnesses to participate in conferencing. Expert witness conferencing occurs before a hearing generally as a matter of course and is the process by which expert witnesses confer and attempt to reach agreement on issues, or at least to identify the issues of disagreement. For more information refer to the Environmental Court Practice Notice 2014.

The Court may require you to proceed to mediation. Mediation can help parties identify common ground and define, narrow and even resolve issues, which may avoid the need for a hearing, or at least narrow issues to reduce the hearing time. If the Judge requires you to participate in such a process you must participate unless the Court grants leave otherwise. You may be represented by other people, but only if at least one of those people is authorised to make decisions on your behalf about any matters reasonably expected to arise in the meditation. For further information on mediation refer to the Ministry for the Environment's booklet, You, Mediation and the Environment Court.

Mediations are facilitated by an Environment Court Commissioner and are completely separate from the decision-making role of the Court (ie, the Commissioner who conducts the mediation will not be involved in any hearing unless the parties agree). There is also some general guidance on the hearings process and protocol in the Ministry for the Environment's booklet, Your Guide to the Environment Court.

‘Submissions’, evidence and witnesses

A case consists of two key elements – submissions and evidence. ‘Court submissions’ should not be confused with written submissions made to the council in the earlier part of this process when the application is notified. All parties (the applicant, the council and section 274 parties) can make submissions to the Court.

At the Environment Court, submissions mean a statement (usually written but can be oral) at the Court hearing outlining the law and suggesting why the Court should take a particular course of action. Submissions may also give reasons why the evidence of one group of witnesses should be preferred to that of another. This is the parties’ opportunity to state their position. If a party is represented by a lawyer, the lawyer will ordinarily present submissions for that party. The Court may ask questions, but other parties may not cross-examine submissions.

Submissions are not evidence. Evidence is given by witnesses, under an oath or an affirmation to tell the truth. Most evidence is evidence of fact, but it can also include opinion. For the Court to give weight to opinion evidence, the person giving it must be qualified to do so. Evidence is subject to cross examination from other parties and to questions from the Court. If you do give evidence, it must be in writing and exchanged in advance (refer to the section below on evidence exchange).

Witnesses who give evidence may be either experts or lay witnesses. Lay witnesses may only give evidence of fact – for example, how a proposal may impact them. Expert witnesses may give evidence that is a mixture of both fact and opinion. To give ‘expert evidence’ you must be skilled or qualified in the matter on which you are giving your opinion. The test is whether something is within the general knowledge of an average person, or whether to validly offer an opinion or interpretation, the witness must have specialised knowledge. An expert witness may be a person with specialised knowledge on matters such as planning, noise, Maori cultural matters, or geology. Environmental Court Practice Notice 2014 sets out a code of conduct for expert witnesses.

Evidence exchange

Evidence in an Environment Court hearing is circulated to the parties in advance of the hearing. Parties may agree on an evidence exchange timetable or the Court will direct one. A date is set for you to file your evidence in chief (the documents, affidavits, and annexures used in making your case). Then a further date is set for the section 274 parties and the respondent(s) to file their evidence in chief. All evidence must be served on all other parties. The Court will advise of the parties involved and the number of copies required. The evidence must be in writing (preferably typed) and may include visual material such as photographs, maps and plans.

What happens at the Court hearing?

If an agreement is not reached through mediation then the application will proceed to a hearing before the Environment Court. The Court consists of a Judge and usually two Commissioners. Commissioners are specialist members of the Court who can help evaluate expert evidence.

The usual course of events at the hearing is as below.

1. The applicant presents their case. This may include legal submissions and/or expert witnesses presenting evidence.

2. The council presents its report. This may also include legal submissions and/or expert witnesses presenting evidence.

3. Submitters present their case. This may include legal submissions and evidence – both from experts and lay witnesses.

4. The applicant makes their final submission.

On the first day of the hearing, the Courtroom Registrar will 'call' the matter. All parties (or their legal counsel) will stand, and state their name and who they represent. At the start of the hearing, each party presents its opening legal submissions. Opening legal submissions usually outline the evidence that will be called (if any), state the resource management issues of relevance, and state any legal principles that will be relied on.

In most cases, the Court will have pre-read all the evidence that has been filed and expects all parties to also have read it. Generally, a witness will take the oath or affirmation, be asked to confirm qualifications (if relevant) and confirm the evidence is true, and then proceed straight to questions on it. Alternatively, the Court may ask parties to read their evidence in Court or they might adjourn so the Court can read the evidence. The order of the proceedings is generally as above, or as agreed by parties at a pre-hearing conference, or as directed by the Court. Nobody can be precluded from cross-examination; however, the Judge will keep an order to proceedings to ensure the hearing is run efficiently and to avoid repetitive questions. Re-examination of witnesses (by their own legal counsel) is also available.

There are points of etiquette to be aware of when you appear before the Court, including rising when the Judge enters, addressing the Judge as "Your Honour" or "Ma'am" and addressing other parties by their formal names, even if you know their first name. For more information about Environment Court protocol, refer to the Ministry's booklet, Your Guide to the Environment Court.

Role of the council and submitters at the Court hearing

Potentially, councils can have a role as an applicant, and/or submitter and/or provider of expert witnesses/ technical advisers, or any combination of those roles at the Court. It is important the council convey which 'hat' they are wearing in the various documents they submit to the Court and other parties.

The council must provide reasonable assistance to the Court in relation to any matters raised in the council's report. It must also be available to discuss, clarify, or give evidence about its report, discuss submissions received and any issues raised by the submissions and provide any other relevant information requested by the Court. The role of the council is very important in providing an assessment of the submissions and issues raised for the Court.

The council will transfer all original written submissions to the Court and they will be considered as part of the case. The written submissions are also summarised in the council report. Submitters do not have an automatic right to participate in the Court proceedings, including speaking at the hearing, unless they become what is known as a 'section 274 party' or 'party to the Court proceedings'.

The Environment Court decision

Once a decision has been made, the Environment Court will issue a copy of the decision to you or your agent, the council, and all submitters by post. The Court may include supporting information with the decision and may refer to the relevant parts of the Court website.

Appeals on the Environment Court decision

Appeals on the Environment Court decision can be made to the High Court by you, the council and any section 274 party, but only on points of law and not on findings of fact. If you are considering an appeal, you should seek legal advice about whether an appeal has merit.

Monitoring and enforcement of the decision

If the Environment Court grants the application, the council is responsible for monitoring and enforcing the decision, including all conditions.

Relevant publications and information

The direct referral process – information for submitters

An Everyday Guide to the Resource Management Act:

- Your Guide to the Environment Court
- You, Mediation and the Environment Court
- The Environment Court: Awarding and Securing Costs Environmental Court Practice Notice 2014

Glossary

Affidavit – a voluntary declaration of facts which is written down and sworn before an authorised officer.

Affirmation – in giving evidence to the Court, if a witness does not wish to swear on a bible and to God, they may affirm that they will speak the truth. See also 'Oath'.

Applicant – a party who requests something, or makes an application to the Court. May also refer to the party that made a resource consent application to the council.

Brief of evidence – a statement of evidence completed by a witness. See also 'Expert evidence' and 'Witness'.

Closing legal submission – a summary of the main points of your case, which is given orally and/or in writing.

Costs – when the Environment Court orders any party to pay money to another party, to help offset expenses incurred in a hearing.

Court brief – a written set of the evidence that has been filed on a case and provided to the Court.

Courtroom Registrar – the Environment Court staff member allocated to manage the case from filing through to the hearing of a matter. They will liaise between the Court/Judge and the parties, organise the hearing, administer directions in relation to the hearing, record and log the hearing for transcript purposes, swear in witnesses, and provide assistance to the Court and parties during the hearing process.

Cross examination – the questioning of a witness at a hearing by a party opposed to the party who has called the witness.

Evidence – statements of fact made by a witness. Evidence can be two kinds – evidence of fact and evidence of opinion. Evidence of opinion may only be given by expert witnesses – someone who has qualifications and experience. See also 'Expert evidence'.

Evidence in chief – the documents, affidavits, and annexures used in making your case. It does not include information obtained under cross-examination.

Exhibits – documents such as photographs, maps or plans that are included in evidence.

Expert evidence – evidence about a scientific, technical, professional, or other specialised issue given by a person qualified to testify because of familiarity with a subject or special training.

Expert witness conferencing – the process by which expert witnesses confer and attempt to reach agreement on issues, or to identify the issues on which they cannot agree, and the reasons for disagreement. Expert witness conferencing normally occurs before a hearing. Also known as expert witness caucusing.

Hearing Manager – see Courtroom Registrar.

Legal submission – written or oral arguments presented to the Court to persuade the Court your case is valid. This is different to evidence, but relies on the evidence that has been produced to support the submission. (Note: this is different to a 'written submission' made to the council on a notified resource consent application.)

Mediation – a process to resolve disputes using an independent person.

Notice of motion – a written document informing the Court and other parties that you have lodged a request with the Court.

Oath – a spoken promise that you will be truthful and honest. See also 'Affirmation'.

Points of law – questions (or an appeal) about how the law was interpreted or applied.

Pre-hearing conference – a conference held in Court with all relevant parties to sort out any pre-hearing matters. These matters may include the filing of evidence, attendance at mediations and caucusing, the order of parties at a hearing, and witness availability. No substantive issues are addressed at a pre-hearing conference.

Rebuttal evidence – further evidence in reply to cover points raised in other witnesses' evidence in chief.

Section 274 party – a party to an Environment Court proceeding who has registered their interest under section 274 of the RMA.

Submitter – person or group who has made a written submission to the council on a notified resource consent application.

Witness – a person called to give evidence in Court because they have knowledge or information about a relevant factual point in the case. See also 'Expert witness'.

Witness statements – written statements of evidence produced by a witness.

Written submission – a written submission made to the council on a notified resource consent application. It is different from a 'legal submission' made to the Court.

Disclaimer

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Find out more

Contact the Ministry for the Environment by emailing info@mfe.govt.nz or visit: www.mfe.govt.nz

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Making Aotearoa New Zealand the most liveable place in the world

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