Environment Court of New Zealand

Practice Note 2014

This guide to practice in the Environment Court will come into effect on 1 December 2014 and replaces all earlier Practice Notes. It is not a set of inflexible rules, but is a guide to the practice of the Court and will be followed unless there is good reason to do otherwise. Legislative references are to the Resource Management Act 1991.

Contents

Note 1: The Court has a website at http://www.justice.govt.nz/courts/environment-court. It may be a useful additional resource, particularly for those unfamiliar with the Court's staff, locations and procedures. It contains contact names and addresses and it may be used for interactive purposes in particular cases. It also gives access to Court decisions which may be of particular interest.

Note 2: Prosecutions under the Resource Management Act are District Court proceedings and are not subject to this Practice Note – see further guidance at Part 9.

1 Communication

1.1 Communicating with the Court

(a) Where any party wishes to communicate with the Court on any matter relating to the merits of the case or its outcome - other than in open Court or at a judicial conference - such communication must be in writing addressed to the Registrar.

(b) Copies of all communications must be sent to all other parties, so that they may have the opportunity to respond.

(c) It is generally inappropriate to seek to communicate with the Court after a hearing has concluded and prior to the issue of the Court's decision.

(d) Communications may be electronic – see Appendix 1 for details.

1.2 Communication and co-operation amongst parties

(a) Counsel have a duty to the Court, at all stages of any proceeding, to work constructively together to ensure that case management objectives are achieved. This duty extends to treating each other respectfully and professionally. Counsel also have a duty to keep their clients informed of possible solutions to issues, and of alternatives to litigation that are reasonably available.

(b) All parties, whether or not represented by counsel, have a duty to the Court, at all stages of a proceeding, to work constructively to find solutions and narrow issues (whether of process or of substance). This duty extends to always treating other parties, their witnesses, and their representatives respectfully.

2 Lodging appeals and applications

2.1 Notices of Appeal and Applications to contain particulars

A Notice of Appeal, or a Notice of Application, must give full and clear particulars of the grounds of appeal, or the application, and clearly state the relief that is being sought.

2.2 Conditional acceptance of Notice of Appeal or Application

(a) If a Notice of Appeal, or an Application, does not comply with the requirements of the relevant legislation, the Registrar will record the document as having been received - subject to any error or omission being rectified. The Registrar will notify the person lodging the document of the amendment required and specify a date, being not more than 5 working days after the initial lodgement, for that to be done. The Registrar will notify all known parties of the date by which the amendment is required.

(b) If the required amendment(s) are not made within the specified time, the Court will consider whether to grant a further extension of time to do so, or whether to strike out the appeal or proceeding under s279(4).

2.3 Waiver of time limits for lodging appeals

(a) If it appears to the Registrar that an appeal has been presented for lodging after the time limit for appeals (see eg s121 - 15 working days for resource consent appeals; and cl14 of Schedule 1 - 30 working days for plan appeals) has expired, the Registrar will record the appeal as having been received subject to the time limit being waived, and will advise the proposed appellant and other known parties accordingly.

(b) In advising of the conditional receipt of such an appeal, the Registrar will notify a date by which any application for waiver of the time limit, and any opposition to the granting of a waiver, must be lodged. It should be noted that the ultimate test for granting a waiver is whether any party will be unduly prejudiced by doing so, see s281.

(c) If an intending appellant, is aware that a waiver of the time limit for lodging the appeal under s281 is required, an application should be lodged with the Notice of Appeal. The appropriate form is Form 38 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003. If written consents of the existing parties to the waiver are lodged with the Notice of Appeal, an extension of time for lodging and/or serving the appeal will normally be granted. In other cases, good grounds to waive the time limit will have to be made out, and the Court must be satisfied that no other party will be unduly prejudiced by granting a waiver. The Registrar and Deputy-Registrars have delegated authority to approve waivers of time for lodging appeals where the lodging is not more than 5 working days late, the known parties do not oppose the waiver, and no undue prejudice will arise.

2.4 Time Limits generally

Any statutory or Court-directed time limit for the lodging of documents or taking other steps in a proceeding will expire at 5:00pm on the working day in question, unless otherwise directed. Where any person fails to comply with a time limit, the Registrar will note that

failure and, subject to any other direction of the Court, require that person to lodge with the Court, and to serve on all other known parties, within a specified time, an application under s281 to waive the relevant time limit. The relevant form is Form 38 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003.

2.5 **Multiple consents and appeals**

(a) Where a development proposal requires more than one resource consent (eg a land use consent and a discharge permit), the Court will normally postpone processing an appeal in respect of a particular consent (or consents) until the Council's decision in respect of the other consent (or consents) has been given.

(b) If appeals are lodged in respect of more than one resource consent relating to the same proposal, or more than one appeal is lodged on the same issue(s) in a proposed policy statement or plan, the Court will normally manage and hear those appeals together.

3 Direct referrals

3.1 Parties to direct referrals

Applicants for notified resource consents, requiring authorities and heritage protection authorities, can apply to the Council for their application to be referred directly to the Environment Court for hearing and decision – see s87D. Where a Council grants such an application, it is required to prepare a report for the Court and the parties. There can also be direct referrals by the Minister for the Environment under Part 6AA. Section 274 applies to those proceedings, so persons or bodies, whether or not they previously made a submission to the Council, must follow the requirements of s274 if they wish to be a party to the proceedings in the Court. Submitters who do not give notice under s274 will receive no further communication from the Court, other than ultimately to receive a copy of the Decision(s) when issued. The form to be completed by persons wishing to become s274 parties is Form 33 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003.

3.2 Managing large numbers of parties

(a) Because the direct referral process leads to a first-instance hearing before the Court, there will generally be many more parties than in most appeals. The case-managing Judge may therefore impose further directions to move the proceeding forward efficiently. Included amongst these can be the appointment by the Court of Process Advisors to Submitters, to whom parties and intending parties can have access free of charge for advice about the Court's practice and procedures. These advisors are not able to give advice about the substantive law applicable to the proceedings, or areas of expertise that may be relevant to the issues of the case.

(b) As the applicant for the resource consent(s) will generally be required to meet the costs of appointing a Process Advisor, the Court will invite submissions from the applicant before any appointment is made.

(c) The managing Judge may take other steps to enhance the efficiency of the process, particularly where there are many parties registered, including directing communication by electronic means wherever possible, use of the Court's website in an interactive way for such things as the exchange of evidence, and other means.

3.3 Parties acting jointly

Where large numbers of parties are involved, the Court may take steps to encourage them to group together and act conjointly in the interests of efficiency and cost saving.

3.4 Recovery of costs of a directly referred application

There is a specific presumption that the Court will order that the applicant pay to the Crown the costs and expenses incurred by the Court in conducting the hearing of a directly referred application, see 285(5).

4 Case management

4.1 Objectives

The objectives of case management by the Court are to:

(a) ensure the just treatment of all parties;

(b) promote the prompt, efficient and cost-effective disposal of cases;

(c) improve the quality of the litigation process and its outcomes;

(d) maintain public confidence in the Court;

(e) efficiently use available judicial, legal, and administrative resources; and

(f) achieve the purpose of the relevant legislation.

4.2 The essential features of case management

The essential features of case management are:

(a) identification at an early stage of the issues in dispute and encouragement of settlement by negotiation, or the use of alternative dispute resolution (ADR) processes (principally mediation) under s268;

(b) planning the course of the proceedings soon after commencement so that the parties and counsel are better aware of the events that will occur, and the likely time and cost involved;

(c) reduction in the delay and expense of interlocutory processes;

(d) court supervision of more complex cases through directions and conferences, timed to occur at critical points in the progress of those cases. In consultation with counsel and the parties, the Court will settle pre-hearing steps and specify associated timetables to meet the needs of such cases;

(e) monitoring dates to ensure that events occur as timetabled, so that there is orderly progress towards conclusion; parties' preparation is facilitated; and prompt settlement is encouraged wherever possible; and

(f) requiring reports from parties on progress towards settlement or resolution of issues which are to:

  (i) be provided on or before a specified date, after proper consultation amongst all parties;

  (ii) be succinct, while containing sufficient information for the managing Judge to assess whether progress towards resolution is actually being made; and

  (iii) set out a precise draft timetable for any future steps to be taken towards the resolution of the proceeding, or any individual issues.

Should a party fail to comply with the Court's directions without reasonable excuse, sanctions such as costs orders, and other steps, will be invoked by the Court as appropriate.

4.3 **The concept of management tracks**

The Court's principal methods of case management are:

(a) Cases that do not require priority attention are assigned to a **Standard Track,** under which the Court issues standard directions for the management of each case. The directions may include that the case be managed through processes such as the timetabling of procedural steps; progress reporting to the Court; judicial conferences; and formal pre-hearing directions or rulings.

(b) Cases that the Court agrees require priority attention shall be assigned to a **Priority Track** and case-managed by the Court in accordance with steps expressly designed to produce an early result. Also, applications referred directly to the Court will usually be placed on this track, because of the intense management that will be required.

(c) Subject to the Court's agreement and for good cause, cases in which the parties agree that management might be deferred for a defined period are placed on a **Parties' Hold Track**, with case management being resumed (failing settlement or withdrawal of the proceedings) at the parties' request, or at the expiry of the deferral period, or otherwise at the Court's direction.

(d) All cases, when lodged, are assigned by a Judge or the Registrar to one of the case tracks, and the parties are notified of the assigned track.

(e) Cases may be transferred from one track to another where circumstances warrant, at the Court's initiative, or on the application of a party.

Proceedings which the Court decides require priority attention, including urgent applications for enforcement orders and declarations, will usually be placed in, or moved to, the Priority Track.

4.4 **The Standard Track**

This track accommodates the great majority of appeals, including resource consent appeals, some plan appeals, and non-urgent enforcement and other miscellaneous proceedings. The features of case management under the standard track are:

(a) identification by the parties of the issues in dispute at an early stage, and promptness in seeking to achieve resolution by direct negotiation or through ADR techniques (refer particularly to Appendix 2);

(b) giving the parties an opportunity to plan the course of the proceedings, so that they will be responsible for and aware of the events that will occur, and the likely time involved;

(c) minimising formal interlocutory applications and avoiding unnecessary appearances in Court for callovers or conferences;

(d) identification, as soon as practicable, of a firm date for hearing the proceedings;

(e) stipulation of particular requirements for the lodging and exchange of evidence if considered appropriate by the Court;

(f) a standard direction that a party to the proceedings (normally the respondent Council) is to lodge with the Court and serve on all parties an initial report (to include a programme for the proceedings), consequent upon consultation with other parties, within 40 working days or such other (generally shorter) period that the managing Judge may specify; and

(g) if any party fails to co-operate with the reporting party in the preparation of the report, the reporting party must still lodge the report in consultation with those parties who co-operate within the time prescribed.

4.5 **The Priority Track**

(a) This track is for the more urgent cases, such as urgent enforcement proceedings; also appeals that the Court considers require priority resolution, or matters for which more intense case management will be required.

(b) Matters referred directly to the Court may be complex and require priority attention. The likely large number of submitters, and the absence of prior hearing, indicate that intense case management could be required.

(c) These cases (or sets of related cases) will be managed on an individual programme as set by the managing Judge. Issues likely to require particular attention will include:

(i) directions on the definition and narrowing of issues, and separation or consolidation of proceedings;

(ii) determination of procedural and jurisdictional disputes, particularly those that may substantially affect the course or scope of the proceedings; and

(iii) periodic monitoring of progress to see that timetables are being followed.

(d) Except in the case of statutory or regulatory time limits (which, if not met, can only be extended by the Court granting a waiver under s281), time limits and other requirements will be fixed after consideration of parties' views, and will be revised when warranted by the circumstances. Having established a programme, however, the managing Judge will expect schedules to be met. Non-compliance or the use of dilatory tactics may be met by sanctions being imposed by the Court, such as the awarding of costs to disadvantaged parties irrespective of the eventual substantive outcome. In cases of serious default, the Court may strike out the defaulting party's case and award costs.

4.6 **The Parties' Hold Track**

Cases will be placed on the parties' hold track for a defined period when the parties are not actively seeking a hearing – for example, to allow an opportunity to negotiate and/or mediate, or where a plan variation or change is promoted by a local authority so as to meet an issue raised in an appeal. However, there will be judicial oversight to ensure that real progress occurs; and cases may be set down for a judicial conference at a Judge's direction or on the application of a party.

4.7 **Pre-hearing conferences and rulings – procedural issues**

(a) The Court expects the parties, and particularly their professional representatives, to take a proactive role in contacting, negotiating and settling with other parties before seeking the Court's assistance to determine procedural issues.

(b) If the parties cannot resolve issues between themselves then, at the request of any party or on the Court's initiative, a pre-hearing conference of the parties or their representatives

may be convened, as contemplated by s267. The purpose of a pre-hearing conference is to ensure proper preparation for the fair and efficient hearing of the proceedings. Directions may be given about the resolution of preliminary questions; timetables for the exchange of evidence; and the date and duration of the hearing. Any request for such a conference should state the particular matters to be considered at the conference, and give an indication of the ruling or direction sought. Any party who intends to take part in the substantive hearing must attend the conference, or be represented at it by someone who is thoroughly familiar with the party's position and the submissions and evidence to be given.

(c) The practical arrangements for such conferences will depend on the number of parties, their location (which may affect the practicality and cost of attendance in person) and the issues to be discussed. Alternatives to having all parties present at one venue are telephone conferences, audio visual links, or a combination of such means.

4.8 **Pre-hearing conferences for groups of cases**

Pre-hearing conferences involving a number of related proceedings are held from time to time, particularly for groups of plan appeals. The principal purpose is for the parties to inform the Court of the status of the proceedings and seek particular directions if necessary. This allows an opportunity for proceedings to be withdrawn, or following settlement of issues, for consent orders to be proposed to dispose of the proceedings in whole or in part. Also, directions may be sought and given in preparation for the substantive hearing of the proceedings, including resolution of preliminary questions, timetables for the exchange of evidence, and the time to be allocated for hearing the case.

4.9 **Setting down for hearing**

The Court has a statutory duty to hear and determine all proceedings *as soon as practicable* after the date of lodgement. Consequently, the Registrar may, with or without prior reference to the parties, issue a notice of hearing as soon as the parties' preparation is scheduled to be completed and the Court's schedule allows. Therefore, if there are reasons why the hearing of a proceeding should be deferred, the Registrar should be informed as soon as those circumstances arise. The Court will not usually defer the hearing of an appeal against the grant of a resource consent if the successful applicant for that consent opposes the deferment.

4.10 **Priority hearings**

As far as is practicable, the Court hears proceedings in the order in which they were commenced and are ready for hearing. If a party seeks priority (where the case has not been managed in the priority track), an application for a priority fixture may be made. The application should show reasons (supported by an affidavit, if appropriate) why the proceeding should be heard in priority to other proceedings – whether in the public interest, or because of the circumstances of the particular case (for instance, where awaiting the case's normal turn would negate the point of the proceedings). The

application should state when the case is expected to be ready for hearing and the likely duration of the hearing. Unless the other parties join the application and signify consent or non-opposition, the application should be served on them in the normal way. Where there are competing applications for the same resource, the Court will usually hear and decide appeals against resource consent decisions in the same order as did the Council.

4.11 **Adjournments**

If, after a notice of hearing has been issued by the Court, any party wants an adjournment, they should communicate with the Registrar immediately, stating the grounds for the adjournment application, and simultaneously advising the other parties. An adjournment request, even if all other parties consent, may not necessarily be granted. If an adjournment is sought at a late stage, and after the Court has incurred direct expenses in hearing arrangements, etc, the Court may grant the application but order payment to the Crown of the costs incurred by the Court - see s285.

4.12 **Withdrawals and Consent Orders**

(a) Where any proceeding is to be withdrawn (in whole or in part), or resolved by a Consent Order, the parties must notify the Registrar as soon as that course of action is reasonably certain.

(b) Proceedings resolved by agreement between the parties before a hearing will frequently be referred to a Judge with a request to issue a Consent Order. In considering draft Consent Orders, Judges must have regard to the limitations imposed by the legislation, and the scope of the proceedings. It may be that a Judge will not be able to approve the terms sought by parties and may require amendments to the draft Consent Order, whether to correct mistakes or ambiguities, to bring the Order within jurisdiction, or to meet any other point of legitimate concern. Consent Orders may include advice notes for the purpose of alerting parties, monitoring personnel, and others, to related matters. Reference should also be made to clause 5.1 of this Practice Note, and the "Settlement" section of Appendix 2.

(c) From time to time, the Principal Environment Judge may issue a Direction as to the form in which parties should present draft Consent Orders to the Court. The Directions will be posted on the Court's website.

4.13 **Witness summonses**

(a) To avoid the late summonsing of witnesses, and to allow reasonable opportunity for statements of evidence to be prepared, the Court expects witness summonses to be served no later than 15 working days before the date of hearing. Except when a witness is agreeable to attend the hearing in circumstances where the issue of a summons is effectively a matter of form, the Court will not normally issue a witness summons less than 10 working days before the hearing.

(b) Any person served with a witness summons is expected to prepare a written statement of evidence, if only to produce a previously prepared report or similar document.

4.14 **Co-operation in the preparation of evidence**

In preparing for the hearing, parties are expected to co-operate in ensuring that the proceedings are dealt with in a focussed way. With that in mind, parties are expected to, and may be expressly directed to, provide before or at the hearing, a statement of agreed facts and issues, and an agreed dossier or folder containing copies of relevant provisions of planning documents, and any other documents common to the parties. Succinctness and the avoidance of repetition aided by efficient cross-referencing, tabulation and indexing, are required by the Court. For resource consent appeals, direct referrals and private plan change appeal hearings, the applicant will generally be required to provide that documentation to the Court and the other parties. For other plan change appeals, the Council will be required to do so, as will the requiring authority in proceedings concerning designations.

4.15 **Statements of evidence**

(a) In bringing a proceeding to hearing, the importance of thorough preparation of evidence, exhibits and submissions cannot be over-emphasised. The Court will almost always pre-read the written statements of evidence, and the hearing of witnesses will usually proceed straight to the questioning of them. There will be very limited opportunity for a witness to insert matters omitted from his or her written statement or to correct substantive errors, other than to address matters that have newly emerged after the exchange of evidence statements, or at the hearing.

(b) The Court requires that copies of a witness's statement of evidence (including photographs and other visual presentations other than models) are to be provided by the party calling the witness to all other parties, prior to the hearing. In most cases, timetable directions will specify the times when statements of evidence are to be delivered to the other parties. Where no special direction has been given, statements of evidence are to be delivered not less than 5 working days before the hearing is to start. (Refer also to Appendix 1 to this Practice Note concerning delivery by electronic means.) If there is significant delay in delivering copies of a statement of evidence, leave of the Court will be required to call the witness, and the failure to comply will need to be explained. Failing adequate explanation, leave to call the witness may be refused, or the party in default may be ordered to pay the costs incurred by other parties, and by the Court, if an adjournment is necessary.

(c) The Court may direct, either generally or in a particular proceeding, that the length of any statement of evidence, from any witness, shall not exceed a set number of A4 pages of print not smaller than font size 11 and line spacing not less than 1.5. That page limit may be exceeded only on an exemption granted after exceptional reasons have been established by the party wishing to do so.

4.16 **Rebuttal evidence**

(a) Rebuttal evidence should be confined to a response to matters raised by a witness called by another party, on topics not addressed in the evidence of the party seeking to call the rebuttal evidence, and which could not reasonably have been foreseen before the other party called that witness or produced his or her statement of evidence. The admission of rebuttal evidence is a matter for the Court's discretion, to be exercised in the interests of fairness to the parties and the Court being as fully informed of the issues as is reasonably possible.

(b) For further requirements about the evidence statements of expert witnesses, see part 7 and Appendix 3 of this Practice Note.

4.17 **Exhibits**

(a) All parties should confer well in advance of the hearing and, wherever possible, produce one agreed set of documents, photographs or other similar exhibits. All exhibits, including photographs and other visual presentations, are to be presented in a practical and manageable form, and should be of sufficient scale to be clearly legible. Individual documents or photographs should be separately identified. A bundle of documents, or a series of photographs, should be presented in a paginated and indexed folder or binder with protruding tabs. Aerial photographs with, where relevant, contour lines endorsed, can be useful exhibits.

(b) In exceptional circumstances, if a photograph or other visual presentation is of a size or kind that is impractical to provide to other parties, it will suffice for the party intending to produce it at the hearing to notify the other parties at the time it is due for exchange as to where it may conveniently be inspected.

4.18 **Planning documents, maps, etc**

In any proceeding, if it is not practicable to access them electronically at a particular venue, the Council involved should bring to the hearing sufficient copies of the relevant regional and district plan(s) for the use of members of the Court during the hearing. (This may particularly apply to maps, plans and other large graphics.) The Court may need to retain a copy for reference in its deliberations and in the preparation of its decision. It is recognised that increasing numbers of planning documents may be updated in an electronic format only, and the necessary arrangements will have to be made for those to be accessible. Where that is done, the version supplied should be dated, to ensure that it is the applicable version.

4.19 **Citation of Court decisions**

(a) A considered and discerning approach to the citation of cases should be adopted, with particular emphasis on:

(i) citation of only the most recent or authoritative statement on a point, rather than a number of cases saying more or less the same thing;

(ii) identification of relevant passages by paragraph and/or page number;

(iii) identification of official report citations where such exist; and

(iv) succinctness and the avoidance of needless repetition.

(b) The Court does not expect bundles or casebooks of authorities to be provided beyond those cases that are to be specifically drawn to the Court's attention and relied upon. Where reasonably accessible, electronic copies of authorities are acceptable.

5 Alternative Dispute Resolution (ADR)

5.1 The ADR process generally

(a) Section 268 empowers the Court to arrange mediation and other forms of ADR. The Court actively encourages ADR and offers a mediation service facilitated by its Commissioners. The Commissioners receive comprehensive professional training for the purpose, and bring other professional skills and specialist knowledge to the task.

(b) Other types of ADR can also be offered, such as conciliation, conferences of expert witnesses, arbitration, expert determination and judicial settlement conferences. These may be facilitated by Judges, Commissioners, or other persons appointed for the purpose.

(c) Mediation and other forms of ADR are particularly well-suited to resolve many environmental disputes. ADR techniques are often highly cost-effective compared to proceeding to a full hearing before the Court, and outcomes may also be reached beyond the jurisdiction of the Court in a hearing by way of side agreements that will not be part of an Order made by the Court - see (i) below. To have reasonable prospects of success, sound preparation and input are important. The protocol at Appendix 2 of this Practice Note is intended to provide guidance and encouragement to that end.

(d) The Court is not required by statute to, and does not, make ADR processes mandatory, but Judges may direct that ADR processes be attempted because issues of public interest are present in most environment cases. If ADR processes are declined by parties, or if a co-operative approach is resisted, the case is likely to be set down for hearing at the earliest possible time. It is widely recognised that ADR processes offer the most value when they are constructively embraced, as they offer flexibility, an interests-based approach, ownership of resolution of the dispute, and are often more conducive to the preservation of inter-party relationships.

(e) While participation in ADR is not mandatory, it should be noted that if a party declines to participate, and the other parties to the proceeding reach a settlement among themselves, the non-participating party may face consequences in costs if that party cannot persuade the Court that the appropriate outcome is materially different from that agreed by the others.

(f) During all stages of a proceeding, the Court expects parties to continue to address the possibility of ADR on an objective basis, and to employ it constructively. Even in cases where ADR processes might not produce a complete settlement, they may be used as a means to narrow and settle issues.

(g) Proceedings in which ADR has been successful will often be referred to a Judge with a request for the making of a Consent Order. The “Settlement” section of Appendix 2 outlines the matters which must be considered before a draft Consent Order can be approved, and these should be considered in recording any agreement, and in drafting the proposed Consent Order.

(h) All parties at ADR sessions are to be represented throughout by a person or persons holding authority from the party to settle the dispute. Any party desiring not to be so represented shall give not less than seven days written notice to the Court and all other

parties to the ADR session. The case-managing Judge, or the Commissioner facilitating the mediation, will have discretion as to whether the party may participate other than on the basis of its representative having authority to settle, and this will depend on whether there are special reasons in the context of the particular session.

(i) Mediation and other ADR processes can sometimes produce, in addition to resolution of the proceeding actually before the Court, outcomes that are beyond the jurisdiction of the Court. Such additional matters should not be included in a draft Consent Order, but should instead be recorded in a separate agreement that may be enforceable in other forums.

(j) Where parties agree to undertake ADR, the proceeding may either be placed in the Parties' Hold Track or, if directed by a Judge, the parties may be required to continue preparation for a hearing in parallel with the ADR process.

(k) The protocol in Appendix 2 is for use in mediations because that is the most common form of ADR offered by the Court. If parties seek the Court's assistance in using some other ADR process, application should be made to a Judge who will confer with them and make directions, or otherwise assist if possible.

(l) Direct negotiation, whether formal or informal, as long as it is constructively focussed, should also be considered by the parties at all times.

6 Procedure at hearings

6.1 Order of parties

(a) The Court usually conducts an appeal against a decision on an application for a resource consent or a permit as a completely fresh hearing. In the case of a directly referred application, the hearing will be the first occasion on which the evidence has been heard and been available for challenge by opposing parties. The Court will normally hear first the person who applied for the consent or permit – followed by the parties who support the grant. Then the Court will hear the parties who oppose the grant of the consent or permit.

(b) The order of parties in complex cases can vary, and is a matter for the hearing Judge. Wherever possible, the order of parties should be discussed at a pre-hearing conference, or made the subject of prior directions. If, in respect of a particular appeal or group of appeals, it appears that it will be helpful for the Court first to hear the Council before the applicants or other parties who would ordinarily commence, the Court may so direct. This will often occur in hearings on plan or policy statement appeals.

(c) In proceedings where there is a burden of proof upon a particular party, for instance enforcement proceedings, the Court will usually hear that party first.

6.2 Opening and closing submissions

(a) The Court expects that when parties open their cases, they will list the outstanding issues to be resolved by the Court, outline the circumstances and the nature of the evidence to be called, state the resource management factors relevant to their case, and state the legal principles upon which they rely.

(b) The Court does not normally allow parties who have heard all the evidence of opposing parties prior to opening their cases to make further or closing submissions in reply. After all the evidence has been heard, the parties who opened their cases, and called their evidence first, may have an opportunity to address the Court in reply. That opportunity will be confined strictly to replying to those cases, and is not an opportunity simply to repeat that party's case. Persons who appear solely in support of a principal party are not normally allowed a separate opportunity to reply.

6.3 Presentation of evidence

(a) Subject to the possible use of electronic versions of documents (see Appendix 1), four copies of all statements of evidence and attachments are to be made available for the use of the Court, and additional copies are to be supplied to all other parties. Four copies of exhibits and graphic presentations, such as documents or photographs, should be produced where practicable. Each party will be responsible for preparing the sets of evidence to be called in support of its case, unless the Court directs otherwise.

(b) Section 276(1A)(b) empowers the Court, whether or not the parties consent, to direct how evidence is to be given to the Court. Usually, the Court will direct that evidence be given by the witnesses being sworn or making an affirmation, and then confirming their written briefs.

(c) Normally, the Court will pre-read the statement of evidence prior to the notified hearing date. (Less commonly, evidence may be received by the witness reading the statement of evidence to the Court.) Another possibility, when the members of the Court have not been able to pre-read the evidence, is to hear an opening submission in Court and then retire to read the evidence. The Court will endeavour to give parties notice when this is likely to occur.

(d) Where matters of disputed primary fact are in issue, the Court may require evidence-in-chief to be given orally, by question and answer. This issue should be clarified at a pre-hearing conference or in prior directions. Where the evidence of any witness has been pre-read, the witness, when called at the hearing, will make any necessary corrections required, confirm the statement(s) of evidence as correct, and answer supplementary questions (if any) concerning matters that have arisen during the hearing, after which cross-examination, re-examination and questions from the Court will follow.

(e) The preceding paragraphs outline the Court's general practice. However, the Court has the power to regulate its procedure as it sees fit, and it may therefore modify its procedure in particular cases if the orderly and logical presentation of evidence, and the timely and effective conduct of the proceeding, so require.

6.4 **Visiting the site and locality at issue**

(a) In many cases, it is helpful for the members of the Court to view the site and locality at issue. In general, the taking of a view assists the Court to better understand the evidence presented in Court. The Court will normally confer with the parties about visiting the site, timing, a suggested itinerary, and other relevant details that the parties or the Court may raise.

(b) If the taking of a view presents the Court with additional or different information to that provided in Court, or information that has not been correctly or accurately addressed in evidence, and the Court considers that the information might influence it in making its decision, the parties will be consulted to ensure that they have an opportunity to explain or comment upon the information concerned before the case is determined.

6.5 **Release of decisions**

(a) The Court’s decisions are forwarded to all parties at the same time – by mailed hard copy, by email, or both. Copies are not released to the media until, usually, three working days after release to the parties. This allows the parties to read and consider the decision before it becomes public knowledge. Once the Court forwards the decision to the parties it can no longer control distribution of it and, if any party releases a copy to the media or discloses the result within that period, the Court will release it also.

(b) The Court aspires to issuing its decisions within 3 months of the making or lodging of the final submissions from the parties. There may be occasions when that cannot be achieved, for instance because of the pressure of other matters having to be heard and decided.

6.6 **Costs**

The following issues are relevant to the practice of the Court in considering costs issues:

(a) Where an appeal is withdrawn after being set down for hearing, the Court will normally award costs against the appellant in favour of the other parties in respect of their preparation for hearing.

(b) Where an appeal against a proposed policy statement, plan, or plan change under Schedule 1 to the RMA has proceeded to a hearing, costs will not normally be awarded to any party.

(c) If the decision appealed against would have imposed an unusual restriction upon the appellant's rights, and the restriction is not upheld, costs may be awarded against the respondent Council. On other appeals, the Court will not normally award costs against the public body whose decision is the subject of the appeal unless it has failed to perform its duties properly or has acted unreasonably.

(d) In considering whether to award costs, and the quantum of any award, the following factors are commonly referred to and given weight, if they are present in the particular case:

  (i) the arguments advanced by the party were without substance;

  (ii) the party has not met procedural requirements or directions;

  (iii) the party has conducted its case in a way that unnecessarily lengthened the hearing;

  (iv) the party has failed to explore reasonably available options for settlement; or

  (v) the party has taken a technical or unmeritorious point and failed.

(e) A relevant factor in considering whether to order payment of costs, and in fixing the amount of an award, will be whether any party has been required to prove disputed facts which, in the Court's opinion, should have been admitted by other parties. In particular, a party may avoid liability for the costs of other parties proving facts by lodging and serving a statement specifying which of the statements or findings of fact contained or referred to in the respondent's decision the party admits, and which of them the party requires to be proved at the appeal hearing.

(f) If no timetable for dealing with costs is set in the substantive decision, the default position, which applies whether or not costs are expressly reserved, is that:

  (i) any party claiming costs should lodge with the Court, and serve on all other parties, a claim supported by particulars, within 10 working days of the date of issue of the decision; and

  (ii) any party from whom costs are sought should lodge a reply and serve it on all other parties, within a further 10 working days; and

  (iii) the applicant for costs may respond within a further 5 working days to any relevant matter raised for the first time in the reply, and serve all other parties; and

  (iv) an application should include invoices or other proof of costs incurred.

(g) Costs incurred in the hearing before a Council, or in Court-assisted mediation, are not awarded by the Court and cannot be claimed.

(h) There is a presumption that an applicant will be required to meet the expenses incurred by the Court in hearing a matter that is directly referred to the Court – see Part 3.4.

(i) If a party fails, in a significant way, to comply with procedural directions, or otherwise behaves in a way that requires additional expenditure by the Court itself, such as for travel and accommodation, the party may be required to meet those costs, in addition to any claim by other parties.

7 Expert witnesses

7.1 Code of Conduct

(a) A party who engages an expert witness must either give the expert witness a copy of this Code of Conduct, or be satisfied that the expert witness has seen the Code of Conduct and is familiar with it.

(b) An expert witness must comply with the Code of Conduct in preparing any affidavit or brief of evidence, or in giving any oral evidence to the Court.

(c) The evidence of any expert witness who has not read, or does not agree to comply with, the Code of Conduct may be adduced only with leave of the Court.

7.2 Duty to the Court

(a) An expert witness has an overriding duty to impartially assist the Court on matters within the expert's area of expertise.

(b) An expert witness is not, and must not behave as, an advocate for the party who engages the witness. Expert witnesses must declare any relationship with the parties calling them or any interest they may have in the outcome of the proceeding.

(c) Every expert witness is expected to treat the evidence of experts called by other parties with the respect due to the opinions of a professional colleague, even if there is fundamental disagreement between the views each expresses. Any criticism should be moderate in tone and directed to the evidence, and not to the person.

7.3 Evidence of an expert witness

(a) In any evidence given by an expert witness, that person must, in the witness's statement or affidavit (if the evidence is in writing) or orally (if the evidence is being given orally):

(i) acknowledge that he or she has read this Code of Conduct and agrees to comply with it;

(ii) state the witness's qualifications as an expert;

(iii) describe the ambit of the evidence given and state either that the evidence is within her or his area of expertise, or that the witness is relying on some other (identified) evidence;

(iv) identify the data, information, facts, and assumptions considered in forming the witness's opinions;

(v) state the reasons for the opinions expressed;

(vi) state that he or she has not omitted to consider material facts known to the witness that might alter or detract from the opinions expressed;

(vii) specify any literature or other material used or relied upon in support of the opinions expressed;

(viii) describe any examinations, tests, or other investigations on which she or he has relied, and identify, and give details of, the qualifications of any person who carried them out; and

(ix) if quoting from statutory instruments (including policy statements and plans), do so sparingly. A schedule of relevant quotations may be attached to the statement of

evidence, or a folder containing relevant excerpts may be produced. If the statutory instrument is included in a common bundle of documents, a cross-reference to the bundle will suffice.

(b) If an expert witness believes that his or her evidence, or any part of it, may be incomplete or inaccurate without some qualification, that qualification must be stated in the evidence.

(c) If an expert witness believes that her or his opinions are not firm or concluded because of insufficient research or data, or for any other reason, that must be stated in the evidence.

(d) If after the exchange of a brief of evidence has occurred, an expert witness changes any of his or her opinions or conclusions, that must be communicated without delay to all parties to the proceeding.

8 Access to Court Records

8.1 Records maintained

(a) The Environment Court maintains files of records that comprise both the formal Court Record and materials created by or for Judges and Commissioners. The former may be accessed (see below for detail) but the latter may not.

(b) Reference should be made to Rule 3.1 of the District Courts Rules 2014 as to what constitutes the formal Court Record (noting that there may be differences of terminology between the District Court and the Environment Court).

(c) Any material lodged with the Court by parties must (subject to any Confidentiality Orders) be simultaneously copied to other parties in the case, and will become part of the formal Court Record.

8.2 Access

(a) Notes, research materials and the like made by or for Judges and Commissioners do not constitute part of the formal Court Record, and will not be searchable by, or accessible to, any other person.

(b) Reference should be made to Rules 3.2 to 3.12 of the District Courts Rules 2014 concerning rights of access, persons who may search, and procedures, again noting possible differences of terminology.

9 Criminal Proceedings

(a) Prosecutions under the Resource Management Act are heard in the District Court by District Court Judges who are also Environment Judges or Alternative Environment Judges or, in rare cases, by District Court Judges specially authorised by the Chief District Court Judge.

(b) Processes for those proceedings are contained in the Criminal Procedure Act 2011, the Criminal Disclosure Act 2008, and the Sentencing Act 2002, and this Practice Note does not apply to them.

(c) Almost all Resource Management offences are Category 3 offences in terms of the Criminal Procedure Act. For the preparation and presentation of submissions by both the prosecutor and the defendant on sentencing for those offences, the provisions of the 2014 Practice Note: Sentencing in the High and District Courts (HCPN 2014/(crim) DCPN 2014/1) will apply. That Sentencing Practice Note can be found at:

http://www.courtsofnz.govt.nz/business/practice-directions-1/2013-Sentencing-in-the-High-and-District-Courts.pdf

10 Glossary of terms used in this Practice Note

Consent Order: an Order presented to the Court for approval containing the terms on which the parties have agreed to resolve a proceeding, or part of a proceeding, already before the Court.

Counsel: a lawyer engaged to advise and represent a party in a proceeding before the Court.

Direct referral: an application for resource consent(s) or other application, eg for a Notice of Requirement, directly referred to the Court for decision, rather than being decided by a Council first.

Managing Judge: the Environment Judge who, for the time being, has the particular proceeding on her or his management docket.

Section 274 party: a person or organisation, other than the applicant or the Council, who or which gives notice under s274 of an intention to be a party to the proceeding before the Court.

Resource consent: means a consent or permit issued by the appropriate authority to undertake an activity that would otherwise contravene the Act or the relevant planning document.

Working day: means a day of the week other than—

(a) a Saturday, a Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's birthday, and Labour Day; and

(b) if Waitangi Day or Anzac Day falls on a Saturday or a Sunday, the following Monday; and

(c) a day in the period commencing on 20 December in any year and ending with 10 January in the following year.

Note: the term *working day* is used in defining the length of time a party or intending party has to take a step in the proceeding. For the 20 December – 10 January period it does not necessarily mean that the Court's Registry offices will not be open over that period.

Note: there are further definitions of terms to be found on the Court's website.

L J Newhook
Principal Environment Judge
1 October 2014

APPENDIX 1 – LODGEMENT AND USE OF ELECTRONIC VERSIONS OF DOCUMENTS

1 Introduction

(a) The Court has trialled the use in hearings of electronic versions of statements of evidence and exhibits - to date, by uploading them onto iPads. This may be expected to become standard practice over time. As technology evolves, and experience is gained in the use of electronic documents, this part of the Practice Note may be subject to modification in particular cases. When timetabling or other pre-hearing directions are made, the Court will address the issue of electronic documentation, and may make such directions as are considered appropriate.

(b) The law and practice relating to privilege, confidentiality, and evidence apply to all documents in electronic form, and the Court may direct that inadmissible material be removed from an electronic document.

(c) If the use of documents in electronic form at hearing is to be considered, the following issues should be addressed:

(i) the scope and nature of the documents proposed to be lodged as part of the evidence or submissions;

(ii) the documents a party intends to produce as exhibits;

(iii) what documents will need to be in paper form;

(iv) the conversion of all documents, or those that are agreed, into electronic form; and

(v) arrangements for hard copies or assistance with electronic access, for parties unable to prepare, send, or access electronic documents.

(d) An electronic bundle should be constructed so that documents, such as new exhibits can, when appropriate, be added.

(e) If an order is made for the lodging of electronic documents, the following procedures will apply unless the order varies them.

(f) To avoid doubt, any party may request from the lodging party a hard copy version of any document lodged with the Court, including application documents, statements of evidence and exhibits, and the common bundle of documents.

2 Co-operation

The duty of parties to co-operate in the preparation of the matter for hearing should be treated as including:

(a) an obligation, if requested, to provide electronic copies (multi-page images in PDF format) of statements of evidence, and any documents to be included in the bundle that were produced by that party; and

(b) an obligation, where it is fair and cost efficient to do so, to agree a format for an electronic bundle and indexes that will be compatible with any litigation support or other software intended to be used by any party.

3 Obligations on party who files and serves the common bundle of documents

The party who is to file and serve the common bundle for the hearing will:

(a) file one electronic set using a method arranged in advance with the Judge or the Registrar, such as on a USB flash drive or other suitable portable media device, or by secure online transfer;

(b) serve one electronic set on each other party on a suitable portable media device, via a pre-arranged website, or in such other manner as may be agreed in advance with the recipient party: and

(c) serve one hard copy set of the electronic bundle on any other party who so requests, without charge.

4 Documents generally to be identical to hard copy

(a) Except as expressly noted in any relevant bundle index, documents contained in an electronic bundle shall be identical to the corresponding documents in the hard copy bundles.

(b) One copy of every electronic document lodged with the Court, shall also be filed in hard copy.

(c) Subject to any court directions, an electronic bundle should comply with the default format specified below.

5 Default format

(a) This format prescription will apply unless varied by an order of the Court. Electronic documents will consist of electronic copies of the witnesses' statements and exhibits. Documents in the electronic bundle will be contained in electronic folders equivalent to the physical volumes of the hard copy, and within those folders each separate document will be a multi-page image in PDF format.

(b) When practicable, all electronic documents will:

(i) be in searchable PDF format; and

(ii) use portrait orientation, with each page of an original document or case authority occupying a full A4 page in the PDF format (but the hard copy bundles may be printed double-sided).

(c) The above format is intended to be technology neutral so that an electronic document is usable in that electronic format, able to be printed to produce a hard copy set, and also suitable for importing into other litigation support software or applications that the parties may separately choose to use.

(d) To avoid incompatibility issues, folder or file names in an electronic bundle may not use the following characters: ` ~ ! @ # $ % ^ & * ( ) + = [ ] { } : ; ’ , ? | ” / - _ (and a full stop may only be used before the file extension).

(e) Where evidence and exhibits are provided in an electronic format other than PDF, care should be taken by the party producing to expressly confirm with the Court that the format is compatible with and usable on the equipment available in the Courtroom to be used for the hearing.

(f) Where evidence and exhibits are provided in electronic format, the pages must be numbered from 1 – including the first or title page, and every divider or otherwise blank page in the document or its appendices should be included in the sequential numbering.

6 Folders and folder names

(a) Each folder within a bundle of electronic documents will be named with an appropriate description. If there is more than one volume of a particular type of bundle, the folder for that type of bundle will include subfolders for each volume.

(b) An electronic folder for documents in the common bundle will be called "Common Bundle". If there is more than one volume, the "Common Bundle" folder will include subfolders called "Common Bundle v1", "Common Bundle v2", etc;

(c) An electronic folder for witness statements or affidavits will be called "Briefs" or "Affidavits" as appropriate. That folder will contain a subfolder for the evidence of the party called "Appellant’s/Applicant’s Briefs", "Respondent’s Briefs", etc.

(d) An electronic folder for legal authorities will be called "Authorities". If there is more than one volume, the "Authorities" folder will include subfolders called "Authorities v1", "Authorities v2", etc.

(e) An electronic folder for the parties’ written submissions will be called "Submissions".

7 Document names

Each document will be named with a description that begins with the relevant bundle page or tab number (so that the documents within the folder can be sorted in page or tab order):

(a) The name of each document within a "Common Bundle" folder will correspond with the pagination number of the first page of that document, "CB001.pdf", "CB234.pdf", etc (or tab number if the bundle is not paginated).

(b) The name of each document within a "Briefs" or "Affidavits" folder will start with a number that groups the evidence from any given person together (preferably in the order in which the witnesses are likely to be called), followed by the surname of that witness, eg "1 Smith Sally.pdf", "1A Smith Sally Rebuttal.pdf".

(c) The name of each document within an "Authorities" folder will start with the relevant tab number (or pagination number of the bundle if it does not contain tabs) and then an

appropriate description of the legal authority, "***McGuire v Hastings DC*** (PC).pdf", etc.

(d) The name of each document within the "Submissions" folder will start with the relevant tab number (indicating the relative chronological order in which it was filed or presented) and then an appropriate description, eg "1 Plaintiff opening submissions.pdf".

8 Indexes

Each folder type should include an index in searchable PDF format, with that index located at the highest relevant folder level for that bundle type:

(a) There should be two indexes to the "Common Bundle" folder or subfolders.

(b) The first index should be the index listing the documents in the order they appear in the common bundle, usually chronological.

(c) The second index should contain the same information but sorted by doc id.

(d) The index to the witness statements or affidavits in the "Briefs" or "Affidavits" folder will correspond with the order of the relevant bundle or bundles (usually by party and in the order in which the witnesses may be called).

(e) The index to the "Authorities" folder will correspond with the order of the relevant bundle or bundles.

9 Hyper-linking

(a) The witness statements or affidavits, legal submissions and indexes may contain hyperlinks to the relevant documents referred to.

(b) Each hyperlink will be relative (e.g."Common Bundle\Common Bundle v3\CB234.pdf"), meaning that it uses a path starting from where the hyperlinked document is located rather than starting from a specified hard drive.

APPENDIX 2 – PROTOCOL FOR COURT-ASSISTED MEDIATION

1 Initiation of mediation

(a) Mediation may be initiated at any time by the parties or at the suggestion of a Judge.

(b) Subject to any flexibility in procedure initiated or authorised by a Judge or a Commissioner, the parties will be deemed to agree to be bound by this protocol and guided by this Practice Note. It is vital that the parties liaise with, and co-operate with, the Registry's Mediation Manager in arranging times and venues for mediation meetings. Failure to co-operate in this way can result in a Judge issuing directions for the setting down of a hearing, or other steps. It would assist the Registry's Mediation Manager if the parties, in their reporting letter/memorandum requesting mediation could suggest some suitable dates.

2 Appointment of mediator

(a) The managing Judge or the Registrar may appoint an Environment Commissioner to act as mediator, or may appoint a person who is not a member of the Court to do so. If the latter, agreement will be needed between the parties and the Registrar as to who will bear the costs of the mediation.

(b) The mediator must have no personal interest in the matters in dispute, and no connection with any of the parties. Nor will he or she have knowledge of the dispute, except to the extent disclosed to the parties and accepted by them for the purpose of proceeding with the mediation.

3 Role of mediator

(a) The mediator is an independent intermediary who will seek to act impartially, fairly and objectively, and to treat the parties in an even-handed way. The role of the mediator is to

assist the parties to arrive at agreement to settle the dispute or resolve particular issues which are part of the wider dispute.

(b) The mediator's role does not involve making a decision to be imposed on the parties.

(c) The mediator will seek to commence and conclude the mediation as promptly and efficiently as possible. He or she will aim to conclude the mediation in one session if possible, and the preference of the Court is that mediation will not go beyond three sessions, except in exceptional circumstances. In appropriate cases, the mediator may set a timeline to ensure that further steps, such as the provision of further information, are completed in a timely and sequential way.

4 Representation and attendance at mediation

(a) Parties may attend the mediation in person, or be represented by one or more persons. There is no requirement that a representative be a lawyer, or have other professional qualifications. The names and contact particulars of each representative and attendee are to be provided to the Court and the other parties at least 5 working days in advance of the mediation, as part of the preparation for the mediation.

(b) Each party shall have at least one representative who is present through all sessions and who is authorised to participate, for instance by answering questions and co-operating in the mediation in any appropriate manner.

(c) Where a party appoints a representative to attend the mediation, the party will be taken, unless express advance notice to the contrary is given to the Court and all other parties, as required by Clause 5.1(h) of the Practice Note, to have given that representative full authority to settle the dispute or the issues at stake. (Refer to Clause 5.1(h) for the full detail on this.)

(d) Where issues in dispute relate to matters of expert opinion, the parties' relevant experts should, whenever reasonably practicable, attend the mediation, or at least be available by telephone, should the need arise to discuss such issues during the mediation.

5 Documents to be exchanged prior to mediation meetings

(a) Depending on the nature of the case, the mediator may request from the parties prior to or at the first meeting, a written synopsis of the dispute, the relevant facts (whether agreed between the parties or in contention in the proceedings), and their respective interests and concerns. Such a synopsis may include written statements of factual information or expert opinion.

(b) Copies of relevant documents should be attached to any such synopsis, or at least referred to with sufficient clarity for the mediator and other parties to understand what they are and the particular aspects of them that are to be referred to or relied upon.

(c) Copies of any synopsis and other documents provided to the mediator are to be provided to all other parties. If, however, a party wishes to communicate confidential information to the mediator, the party must consult the mediator to make appropriate arrangements about the information and the subsequent appropriate conduct of the mediation.

(d) Any communication with the mediator outside of a mediation session must be directed through the Court's Registry and with notice to all other parties.

6 Conduct of mediation

(a) The mediator may conduct the mediation as he or she thinks fit, having regard to the nature and circumstances of the dispute and the wishes of the parties.

(b) The Court's Registry will arrange premises for the mediation, and the mediator will arrange an appropriate timetable with assistance from the Registry.

(c) The parties will be expected to co-operate in good faith with the mediator and with each other in attempting to settle the dispute or issues. They will also be expected actively and constructively to assist the process by genuine participation in it, and by providing documents, information, submissions, and other assistance suggested or requested by the mediator.

(d) The mediation shall not be conducted under formal procedures or rules of evidence, and will be guided at all times by the mediator.

(e) At the commencement of the mediation, the mediator will usually make an opening statement covering issues such as the role of the mediator, the conduct of the mediation and the confidential nature of the process.

(f) The mediator may conduct joint or separate meetings with any one or more of the parties.

(g) The mediator may ask questions and seek clarification, and may request the parties to exchange further information, or further explain their positions and any information provided.

(h) In mediations involving a large number of parties, and/or complex issues, the Court may arrange for co-mediation to be undertaken by more than one mediator. Co-mediations and peer-reviews may also occasionally be undertaken in the interests of maintaining and enhancing the quality of the Court's mediation service.

7 Settlement

(a) The ADR facilitator or mediator does not have the power to impose a settlement on the parties, but will endeavour to assist them to reach settlement of the whole or parts of their dispute, employing a range of techniques reaching an advisory level in some cases.

(b) The mediator may actively work with the parties to stimulate communication and settlement, or may take a more passive role, as he or she thinks appropriate.

(c) The scope and terms of settlement which the parties may develop may not necessarily be within the jurisdiction of the Court, or within the scope of the proceeding. The parties may request that aspects of their agreement that are within jurisdiction be referred to a Judge for the making of consent orders, and may enter into separate agreements on matters outside jurisdiction, or outside scope.

(d) In the interests of parties reaching a binding commitment to the settlement of the dispute, they should either have all necessary legal advice before mediation commences, or have clear arrangements for access to it during the mediation process.

(e) The mediator may, with the consent of the parties, seek advice from a Judge and will disclose the results of such enquiry to all parties.

(f) Information will not be given under oath during the course of the mediation, and the Court gives no guarantee as to the accuracy of any information.

(g) Participation in mediation of itself will not prejudice the existing legal rights of the parties but parties should understand that a settlement or agreement reached through the mediation process may change their legal rights and may be legally enforceable. They should understand also that the law will support parties who decline to be bound by a mediated agreement reached on the basis of false or misleading information.

(h) The mediator may assist the parties to record their agreements in writing, whether by way of heads of agreement, a detailed agreement, or a draft consent order and memorandum for a Judge. In the alternative, details of a draft consent order and memorandum for a Judge may be committed to writing within an agreed timeframe, but mediators will generally encourage the parties to record as much as possible of their agreement in writing before concluding the mediation session. From time to time the Principal Environment Judge may publish a template for Consent Orders on the Court's website.

(i) The Judge considering a draft consent order is not bound to make the order as presented by the parties. For example, the Judge may be required to have regard to matters of wider public interest than were addressed by the parties, and also to the purpose and principles of the legislation. If the Judge considers modifications to be desirable, the parties will have the opportunity to consider those suggestions and to decide whether they might affect their willingness to settle the issues.

8 Confidentiality

(a) Mediation is a private procedure. The parties and the mediator (subject to rights of the parties to take legal advice during the process) shall maintain the confidentiality of the process, and not discuss what occurred in the mediation with anyone not involved with the process.

(b) The mediator may meet separately with any party or parties and may be offered information which is to be kept confidential from other parties. Subject only to any overriding duty to the contrary imposed by law, the mediator shall keep that information confidential and not disclose it to anyone else without the consent of the party who provided it. The parties should pay careful regard to whether settlement will be assisted by such conduct, however.

(c) Subject to (e) below, what is discussed or disclosed in a mediation shall not be referred to or relied upon in any other proceedings in the Court. Specifically, a party shall not, without the written consent of all other parties, introduce as evidence in any proceedings:

(i) documents prepared expressly for the mediation;

(ii) a document disclosed at the mediation on terms that it remain confidential to those present;

(iii) admissions made by a party in the course of the mediation;

(iv) views expressed or suggestions made by any party concerning a possible settlement of the dispute;

(v) proposals made or views expressed by the mediator; or

(vi) the fact that a party had or had not indicated willingness to consider a proposal for settlement.

(d) Nothing in this Practice Note shall prevent the discovery of, or affect the admissibility of, any evidence that is otherwise discoverable or admissible and that existed independently of the mediation process, merely because the evidence was presented or referred to in the course of the mediation.

(e) Communication between mediating parties:

(i) As with mediations of legal disputes in New Zealand generally, communications amongst the parties and with the mediator will generally be treated as confidential and privileged, and not to be divulged in any Court proceeding.

(ii) The parties may collectively waive that privilege.

(iii) Parties need to be aware that s57 of the Evidence Act 2006 establishes privilege for communications in a mediation on certain conditions, but contains exceptions which include evidence as to the terms of an agreement settling the dispute, and evidence necessary to prove the existence of such an agreement, where the conclusion of such an agreement is in issue.

(iv) If any party considers invoking those exceptions, serious consideration should be given to the making of an application to the Court under s276 for guidance and directions.

(v) Caselaw seems clear that it is not possible to contract out of the exceptions.

(f) The mediator may sit as a member of the Court to hear a proceeding on the dispute or issue mediated only if the parties, the member concerned, and the other members of the Court are satisfied that such is appropriate.

9 Costs of mediation

The mediation, if conducted by an Environment Commissioner, will be without fee payable to the Court. The parties shall meet their own costs of the mediation unless they agree otherwise between themselves. The mediator has no power to make any order for costs as between parties or in favour of the Court.

10 Termination of mediation

(a) A party may withdraw from a mediation at any time, but is encouraged not to do so and instead to participate in the full spirit of endeavouring to settle the dispute or at least elements of it. It should be borne in mind that a refusal to engage in mediation, or withdrawal from it, may influence the possible award of costs if the dispute goes to a hearing before the Court.

(b) The mediation may be terminated at any time by agreement between the parties, or by direction of the mediator.

(c) The mediator may terminate the mediation if he or she considers that any person's safety is at risk.

(d) Subject to any further input sought by a Judge from the parties, the mediation shall be concluded upon execution of a final agreement, upon finalisation of detailed documentation left to be completed after the mediation, or on agreement that no resolution short of a hearing is possible.

11 Variation of this protocol

Subject to preceding matters which vest discretion in the Judges, the parties may depart from this protocol by agreement and under the guidance of the mediator, but are encouraged to utilise as much of it as possible as a procedure for settling disputes.

12 Other forms of ADR

The protocol is deliberately focussed upon mediation, because that is the most common form of ADR used in attempting to resolve proceedings in the Environment Court. If parties to a particular proceeding believe that some other form of resolution is preferable for them, they may of course pursue that, and the terms of this protocol may serve as an adaptable guide to appropriate processes.

APPENDIX 3 – PROTOCOL FOR EXPERT WITNESS CONFERENCES

1 Introduction

(a) Expert conferencing is a process in which expert witnesses confer and attempt to reach agreement on issues, or at least to clearly identify the issues on which they cannot agree, and the reasons for that disagreement. Such a conference is a structured discussion amongst peers within a field of expertise which can narrow points of difference and save hearing time (and cost). All experts have a duty to ensure that any conference is a genuine dialogue between them with the aim of reaching a common understanding of the relevant facts and issues. An expert conference is a forum in which to seek technical, scientific and other professional agreements amongst people holding relevant qualifications and/or experience. It is not a forum in which compromise or a mediated outcome between the experts is anticipated.

(b) Issues that are agreed are to be recorded. The Joint Witness Statement produced from the conference will identify the issues, both agreed and not agreed, accompanied by the experts' reasoning set out as succinctly as the circumstances will allow. The aim is that the parties and the Court gain focus in the case and that the overall cost of the proceedings to all is reduced.

(c) It should be understood that the term "expert" means a person who would be recognised by the Court as an expert in his or her field by reason of relevant qualifications and/or experience. Persons not having such qualifications and/or experience, and counsel and the parties, will not participate in conferences unless specifically directed by the Court.

(d) Like mediation, conferencing is a private procedure and, apart from any agreed primary data, and the joint statement produced at the conclusion of the conference, what is said or done at the conference cannot be referred to or relied on in any proceeding before the Court. In that sense it is a "without prejudice" discussion, although those participating may report back to the parties engaging them.

(e) Every expert witness participating in a conference must agree to comply with the Code of Conduct for such witnesses, and not act as an advocate for the party who engages the witness. The expert witness must exercise independent and professional judgement and must not act on the instructions or directions of any person.

(f) An expert witness conference may occur at any stage of proceedings including, at the direction of the Court, during a hearing, but the general expectation is that conferencing will occur prior to a hearing. In most cases the parties should be able to make the arrangements without Court intervention, although the Court will be willing to assist if required. Sound preparation is essential and the parties must allow adequate time for this process to be completed. Counsel are responsible for ensuring that the experts have all necessary documentation to enable proper preparation, and for briefing the experts on the process to be followed and their responsibilities as participants.

(g) The general expectation of the Court is that the conference will occur after exchange of evidence-in-chief, but in particular cases, a Judge might direct that it proceed on the basis of "will say" briefs being exchanged beforehand. If this occurs, it is essential that the witnesses are nevertheless fully prepared, and the Court will expect that:

a) each expert witness will confirm any evidence given at an earlier hearing in relation to the same matter; or

b) each expert witness will, except as otherwise directed by the Court, provide to all other participating experts a summary "will say" brief of relevant evidence, that will, as a minimum:

(i) set out the key facts and assumptions relied upon;

(ii) identify the methodology and standards used in arriving at his or her opinion; and

(iii) clearly explain the opinion arrived at.

(h) The Court may limit cross-examination of experts on the matters agreed to at the conference, and may restrict the calling of any further evidence, particularly where a witness attempts to introduce an issue or issues which the participants in the conference agreed did not need to be considered.

(i) While the experts participating in the conference may agree on matters within their fields of expertise, it should be understood that their agreement will not necessarily bind any party to a particular overall outcome, or to the wording of conditions.

2 Statement of agreed facts, and resolved and unresolved issues

Unless previously undertaken in the course of the proceeding, the first step towards expert conferencing is to be the preparation of a ***Statement of agreed facts and of resolved and unresolved issues***, and a proposed agenda for expert conferencing. This step is to be led by counsel for the parties, where counsel has been instructed. If a party is self-represented, that party will need to be involved in the preparation of the statement. This document should include a description of the proposal, the site and local (and, if relevant, wider) environment, and should refer to all relevant aspects of the case for the purpose of avoiding the need for each expert to re-state such facts in her / his evidence.

3 The Role of Counsel in expert conferencing

The role of counsel includes:

(a) identifying the key issues to be addressed;

(b) proposing a conferencing timetable that will address the key issues and liaising with other counsel and the Court in relation to this;

(c) organising the Statement of facts and issues described above;

(d) briefing witnesses on the case and discussing the implications of the witnesses' views on environmental effects, avoidance and mitigation thereof, and statutory provisions;

(e) ensuring the client understands the purpose of conferencing, potential costs and possible outcomes;

(f) ensuring that the experts have all necessary documentation to enable proper preparation; and

(g) briefing the experts on the process to be followed, and their responsibilities as participants.

4 Preparation for Expert Conferencing

In most cases, the parties should be able to make the arrangements for expert conferencing without Court intervention, although the Court will be willing to assist if required. Sound preparation is essential and the parties must allow adequate time for the conferencing process to be completed. Experts should also be thoroughly familiar with their material, the positions of their counterparts and any other relevant evidence. They should also know the content of the statement of agreed facts and issues resolved/unresolved (to the extent they are relevant to the issues to be discussed), and understand their role in expert conferencing.

5 Process of Expert Conferencing

(a) The following factors can contribute to successful expert conferencing outcomes:

(i) a pre-circulated agenda which, if so directed by the case-managing Judge, is to be approved by the Court;

(ii) allowing adequate time to prepare for the conference;

(iii) allowing adequate time to reach an agreement;

(iv) providing a hard copy, and/or making available electronically, to other participants relevant documents and other exhibits;

(v) conferencing face to face - conferences should not take place by video link, telephone or emails unless the Court approves otherwise;

(vi) documenting and signing the final Joint Witness Statement as soon as possible after the conclusion of the conference; and

(vii) not restating the participants' evidence in the final statement.

(b) Unless the Court agrees otherwise, there must be an independent facilitator of the conference, who is to acquaint her/himself with potential imbalances amongst participants and who can assist to mitigate any imbalances in a fair way. The Court's strong

preference is for a Commissioner to be appointed as facilitator, but he or she may be another expert of relevant qualifications and experience. If the conference is facilitated by a Commissioner, that person may sit as a member of the Court to hear a proceeding on the same matter only if the parties and all members of the Court are satisfied that is appropriate.

(c) In cases where there are only two witnesses within a given field of expertise, or where the experts have agreed to manage the process themselves, facilitation may not be necessary. Where this is suggested, the Court should be consulted before arrangements are finalised.

(d) It may also be appropriate to engage a person to take notes of the discussions and their outcome, and to assist in drafting the Joint Witness Statement. Such a person will need sufficient familiarity with the issues to understand what should, and should not, be recorded.

(e) While the experts participating in the conference may agree on matters within their fields of expertise, it should be understood that their agreement will not necessarily bind any party, or the Court, to a particular overall outcome, or to the wording of conditions.

6 Conferencing as part of case management

Expert conferencing is an essential element of case management and evidence exchange timetables. Parties are to take the lead in timetabling issues, and are to suggest to the Court an efficient and effective approach to timetabling. To that end, subject to any directions from the Court, at an early stage in case management the parties should direct their minds to it and provide to the Court and all other parties the following information:

(a) details of any expert conferencing that has already occurred;

(b) identification of the expert witnesses who are to confer, and their disciplines;

(c) whether it is appropriate to have a single or multi-disciplinary conference (the latter may be necessary where issues overlap);

(d) a proposed sequence by which the topics and their related issues are to proceed to conferencing; and

(e) whether an Environment Commissioner is requested to convene and facilitate the conference.

7 General Directions on Conferencing

Subject to any specific directions from the Court, any expert conference is to be conducted subject to the following general conditions:

(a) Before the conference the experts are to be provided (usually by counsel) with the following:

(i) a copy of the Environment Court's Expert Witnesses Code of Conduct and this Protocol;

(ii) a copy of the application and any proposed amendment, the Notice of Appeal, the Assessment of Environmental Effects and the proposed conditions and all other

documents necessary to enable them to thoroughly understand the issues in the proceeding; and

(iii) copies of the relevant evidence (if prepared) and any relevant reports.

(b) The experts are to familiarise themselves with the Code of Conduct and this Protocol before commencing the conference.

(c) The experts are to confer in the absence of the parties and their legal counsel, except with the express consent of the Court.

(d) The experts are not to be instructed as to what may or may not be agreed at the conference.

(e) The experts must confer in their roles as experts and are not to act as advocates for the parties who engage them.

(f) The experts must only confer on matters within their fields of expertise.

(g) While conferencing is inherently an iterative process and may require a number of meetings to reach conclusion, the experts may request that the Court approve a formal adjournment of the process if, for instance, it is agreed that further information or analysis is required.

(h) At the conclusion of the conference the experts, without the assistance of counsel or the parties, will prepare and sign a Joint Witness Statement.

(i) The Joint Witness Statement is to be lodged with the Court and circulated to all parties who have given an address for service.

(j) The joint witness statement will include the following matters:

(i) the key facts and assumptions that are agreed upon by the experts;

(ii) identification of any methodology or standards used by the experts in arriving at their opinions and reasons for differences in methodology and standards (if any);

(iii) the issues that are agreed between the experts;

(iv) the issues upon which the experts cannot agree and the reasons for their disagreement;

(v) identification of all material regarded by the experts as primary data;

(vi) identification of published standards or papers relied upon in coming to their opinions;

(vii) confirmation that, in producing the statement, the experts have complied with the Code of Conduct for Expert Witnesses;

(viii) identification of issues which the experts agree are not adequately addressed by the evidence lodged to that point, and the reasons for such inadequacy; and

(ix) the Joint Witness Statement may include reservations by one or more participants about issues on which they are uncertain about the substantive law (for instance, whether the concept of a “permitted baseline” applies) or about procedural matters.

(k) Other than matters agreed by the experts to be primary data, the matters discussed at the conference of expert witnesses (but not included in the Joint Witness Statement) must not be referred to at the hearing unless all the parties by whom the expert witnesses have been engaged so agree.

(l) No party may, without the express consent of all other parties, introduce as evidence documents expressly prepared for the conference except for documents containing only agreed primary data.

(m) The witnesses shall review their evidence in light of the Joint Witness Statement. If formal briefs were exchanged before the conference, they may be withdrawn and replaced by briefs which accord with the agreements reached and, where applicable, deal only with the issues remaining in dispute.

(n) The production of conditions of consent is not generally a product of conferencing, but experts may agree that a specific type of mitigation would reduce adverse effects to being minor. The drafting of conditions may more appropriately be carried out by counsel, planners, or others, at a later time. In that event, consultation between the drafters and the experts may be appropriate to ensure that the agreement reached is accurately recorded.