

Environment Court
Consolidated Practice Note 2006

This consolidated Practice Note is a guide to practice in the Environment Court, and contains some amendments and additions to previous Practice Notes. It is intended to replace those Practice Notes appearing at [1998] NZRMA 282, [2004] NZRMA 237, and [2005] NZRMA 193, with effect from 31 July 2006. The Practice Note is not a set of inflexible rules, but its provisions will be followed unless there is good reason to do otherwise. Legislative references are to the Resource Management Act 1991 (RMA) unless otherwise indicated.

Contents:

1 Lodging appeals

- 1.1 Notices of appeal to contain particulars
- 1.2 Waiver of time limits
- 1.3 Multiple consents

2 Case management

- 2.1 Objectives
- 2.2 The concept of management tracks
- 2.3 The essential features of case management
- 2.4 Management tracks
- 2.5 The standard track
- 2.6 The complex track
- 2.7 The parties' hold track
- 2.8 Prehearing conferences
- 2.9 Callovers
- 2.10 Setting down for hearing
- 2.11 Adjournments
- 2.12 Priority Hearings
- 2.13 Withdrawals and consent orders
- 2.14 Witness summonses
- 2.15 Statements of evidence
- 2.16 Exhibits
- 2.17 Planning instruments, maps etc
- 2.18 Co-operation in the preparation of evidence
- 2.19 Citation of Court decisions

3 Alternative dispute resolution (ADR)

3.1 Introduction

3.2 Mediation protocol: Court-assisted mediations

3.2.1 Initiation of mediation

3.2.2 Appointment of mediator

3.2.3 Role of mediator

3.2.4 Representation and attendance at mediation

3.2.5 Documents to be exchanged prior to mediation meetings

3.2.6 Conduct of mediation

3.2.7 Settlement

3.2.8 Confidentiality

3.2.9 Costs

3.2.10 Termination

3.2.11 Variation

4 Procedure at appeal hearings

4.1 Order of parties

4.2 Presentation of case

4.3 Presentation of evidence

4.4 Viewing of site or area at issue

4.5 Costs

4.6 Communicating with the Court

5 Expert witnesses – code of conduct

5.1 Expert witnesses to comply with code of conduct

5.2 Duty to the Court

5.3 Evidence of an expert witness

5.4 Directions to confer

1 Lodging appeals

1.1 Notices of appeal to contain particulars

The notice of appeal must give full and clear particulars of the grounds of appeal, and, following lodgement, the appellant must confer meaningfully with the respondent and other parties in seeking to agree on, or otherwise narrow, relevant issues.

1.2 Waiver of time limits for lodging appeals

1.2.1 On receiving a notice of appeal, if it appears to the Registrar that the appeal is out of time, the Registrar will record it as having been received subject to the Court having jurisdiction to hear and determine it, and will advise the parties accordingly.

1.2.2 If a waiver of the time limit for lodging the appeal under s281 is required, an application should be lodged with the appeal document. The appropriate form is form 38 of the Resource Management (Forms, Fees and Procedure) Regulations 2003. If written consents of the respondent and the applicant for resource consent are lodged with the Registrar, an extension of time for lodging and/or serving the appeal will normally be granted as of course. In other cases, good grounds to waive the time limit will have to be made out. 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, and there is no opposition to the waiver, and no undue prejudice will arise.

1.2.3 Until a waiver is granted, any party may apply for an order that the appeal be dismissed on the ground that it has been lodged or served out of time.

1.3 Multiple consents and appeals

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

1.3.2 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 hear those appeals together.

2 Case management

2.1 Objectives

The objectives of case management by the Court are to –

- ensure the just treatment of all parties;
- promote the prompt and efficient disposal of cases;
- improve the quality of the litigation process;
- maintain public confidence in the Court; and
- efficiently use available judicial, legal, and administrative resources, and achieve the purpose of the RMA (where that is the relevant controlling legislation).

2.2 The concept of management tracks

The Court's principal methods of case management are as follows:

- Cases that are not complex are assigned to a **standard track**, under which the Court issues directions that are standard in nature for the management of each case.
- More involved cases (such as statutory plan appeals, appeals concerning a major development proposal, and matters referred to the Court by the Minister for the Environment under s141B(l)(b)) which require individual management are assigned to a **complex track**, and are managed through mechanisms such as timetabling of procedural steps and progress reporting to the Court, judicial conferencing, and formal pre-hearing directions or rulings.
- Subject to the Court's agreement, cases in which the parties agree that management be deferred for a 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.

2.3 The essential features of case management

The essential features are –

- Identification at an early stage of the issues in dispute and encouragement of settlement by negotiation, or the use of alternative dispute resolution (ADR) techniques under s268;
- Planning the course of the proceedings soon after commencement, in consultation with the parties and counsel, so that the parties and counsel are aware of the events that will occur, and the likely time and cost involved;

- Reduction in the delay and expense of interlocutory processes;
- The application of Court supervision for more complex cases through directions and conferences, timed to occur at critical points in the progress of those cases where such supervision is required. In consultation with counsel and the parties, the Court will settle pre-hearing steps and specify associated timetables to meet the needs of complex track cases;
- Monitoring parties' performance in ensuring that events occur as time-tabled so that orderly progress towards conclusion results, parties' preparation is facilitated, and prompt settlement is encouraged.

2.4 **Management tracks**

2.4.1 All cases, on filing, are assigned by a Judge or the Registrar to one of the case tracks, and the parties notified.

2.4.2 Cases may be transferred at any time from one track to another where circumstances warrant by direction of the Court, whether upon application by a party or not. Any request for transfer will be considered at the next conference or upon an application made for that purpose.

2.4.3 Proceedings requiring priority attention, including urgent applications for enforcement orders and for priority proceedings under Part 12 of the Act, will have tailored case management applied according to the needs of each case. Such proceedings will usually be placed in, or moved to, the complex track.

2.4.4 Applications for priority hearing, if granted, will usually result in proceedings being moved for case management purposes to the complex track.

2.5 **The standard track**

2.5.1 This track includes most s120 (ie resource consent) appeals, some plan appeals, and non-urgent enforcement and other miscellaneous proceedings. The features underlying or associated with case management under the standard track are:

- Identification by the parties of the issues in dispute at an early stage, and promptness in seeking to achieve resolution by negotiation or through alternative dispute resolution (ADR) techniques;
- The affording of an opportunity to the parties 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;
- Avoidance of formal interlocutory applications and unnecessary appearances in Court for callovers or conferences;

- A standard directive format that a party to the proceedings (normally the respondent) is to lodge with the Court and serve a report (to include a programme for the proceedings), consequent upon consultation with other parties, within 50 working days, or such other (generally shorter) period that the managing Judge may specify;
- Identification as soon as practicable of a firm date for hearing the proceedings;
- Stipulation of particular requirements for evidence exchange and lodging if considered appropriate by the Court.

2.5.2 If any party fails to co-operate with the reporting party in the preparation of the report, the reporting party is still to lodge the report in consultation with those parties who do co-operate within the time prescribed. Should a party's failure to comply with the Court's directions occur without reasonable excuse, sanctions and other steps will be considered and invoked by the Court as appropriate.

2.5.3 Any local authority that consistently fails to report in time runs the risk that all appeals in which that local authority is respondent will automatically be placed on the complex track.

2.6 **The complex track**

2.6.1 This track applies to more complex proceedings – including all matters referred by the Minister for the Environment under s141B, most plan appeals, urgent enforcement proceedings and some groups of related s120 appeals. Given that in practice most plan appeals do settle, reasonable opportunity is needed for parties to consider settlement and if necessary to move the proceedings to the parties' hold track. Further, it is recognised that a local authority will need time to analyse and categorise plan appeal proceedings and supply information about that to the Court in summary form.

2.6.2 Matters referred to the Court by the Minister under s141B are, by definition, of national significance and likely to be complex. The likely large number of submitters, and the absence of a first instance hearing, are indicative factors that intense case management will be required.

2.6.3 The essential feature of the complex track is that cases (or sets of related cases) will be managed on an individual programme as set by the managing Judge. Issues to be addressed will include –

- directions on the definition and narrowing of issues, including any related matters such as scheduling within timetables, and separation or consolidation of proceedings;
- determination of procedural and jurisdictional disputes, particularly those that may substantially affect the course or scope of the proceedings; and
- periodic monitoring of progress to see that timetables are being followed.

2.6.4 Except in the case of the 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 controls and 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. If they are not, sanctions for failure to comply and dilatory tactics, (such as the awarding of costs to disadvantaged parties irrespective of the eventual substantive outcome), will be considered and invoked by the Court as appropriate. In cases of serious default, striking out of the defaulting party's case may ensue.

2.7 **The parties' hold track**

2.7.1 Cases will be placed on the parties' hold track when the parties are not 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.

2.7.2 However, there does need to be some judicial oversight so that progress occurs; and cases may be set down for a judicial conference at a Judge's direction or upon written application.

2.8 **Pre-hearing conferences**

2.8.1 The Court expects the parties, 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.

2.8.2 If the parties cannot resolve issues between themselves, then, at the request of any party or on the Court's initiative, there may be a pre-hearing conference of the parties or their representatives, as contemplated by s267. The purpose of the conference is to ensure that proper preparations are made for the fair, orderly and efficient hearing of the proceedings. Directions may be given about disposal of preliminary questions, delivery of statements of evidence, and time and duration of the hearing of the case. Any request for a conference should state

any particular matters which the party requesting it proposes should be considered at the conference. Any party who intends to take part in the hearing of the proceedings should attend the conference, or be represented at it by someone who is familiar with the part to be taken and the submissions and evidence to be given.

2.9 **Callovers**

Callovers of numbers of proceedings are held from time to time. The purpose of callovers is for the parties to inform the Court of the status of the proceedings. A callover allows 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, or for directions to be sought and given in preparation for hearing of the proceedings (including disposal of preliminary questions, timetables for exchange of evidence, and the time of hearing of the case).

2.10 **Setting down for hearing**

The Court has a statutory duty to hear and determine every appeal as soon as practicable after it is lodged unless circumstances warrant otherwise. Consequently, the Registrar will, without prior reference to the parties, issue a notice of hearing as soon as an opportunity presents itself for an appeal to be heard. Therefore, if there are reasons in any particular case why the hearing of an appeal should be deferred, the Registrar should be informed by one of the parties 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.

2.11 **Adjournments**

If, after notice of hearing of an appeal has been given, the parties want an adjournment, they should communicate with the Registrar immediately stating the grounds for the adjournment. Such an adjournment request, though by consent, may not necessarily be granted. If an adjournment is sought at a late stage, the Court may order payment of costs to the Crown.

2.12 **Priority hearings**

In the normal course, and as far as practicable, the Court hears proceedings in the order in which they were commenced. If a party in any proceedings seeks that those proceedings be heard earlier, an application for a priority fixture may be made. Such an application should show reasons (if appropriate by reference

to the contents of an affidavit) why the proceedings should be heard in priority to other proceedings – whether in the public interest, or in relation to the justice 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 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 consider the priorities that applied before the primary decision-maker.

2.13 **Withdrawals and consent Orders**

If any matter is to be withdrawn, or disposed of by consent order, the parties must notify the Registrar as soon as that course of action is reasonably certain. If the text of a proposed consent order is submitted in appropriate form in writing signed by or on behalf of all parties, with a sufficient explanation of what is proposed and why, appearances may be dispensed with. Otherwise, when seeking a consent order, a copy of the proposed order and supporting explanation is to be made available for each member of the Court.

2.14 **Witness summonses**

2.14.1 To avoid unreasonableness through the belated summoning 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.

2.14.2 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.

2.15 **Statements of evidence**

2.15.1 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 of the proceedings. In most cases, directions are given about the time when statements of evidence are to be delivered to the other parties. In every case 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. If copies of a statement of evidence are not delivered in time, leave will need to be sought to call the witness, and the failure to comply will need to be explained. Leave to call the witness may be refused, or the party in default may be ordered to pay the costs of adjournment incurred by other parties and by the Court.

2.15.2 For extra requirements that relate to the evidence statements of expert witnesses, see part 5 of this Practice Note.

2.16 **Exhibits**

All exhibits, including photographs and other visual presentations, are to be presented in a practical and manageable form. By way of example, individual photographs should be separately mounted and identified. A bundle of documents, or a series of photographs, should be presented in a folder or binder which should be paginated and indexed, with protruding tabs. If a photograph or other visual presentation is of a size or kind that renders it impractical to provide copies to other parties, it will suffice for the party intending to produce it at the hearing to notify the other parties not less than 5 working days prior to the hearing where it may conveniently be inspected.

2.17 **Planning instruments, maps etc**

2.17.1 On any appeal, the respondent Council 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. The Court may need to retain a copy for reference in its deliberations and in the preparation of its decision.

2.17.2 In the case of appeals lodged under statutes other than the RMA, the Court expects to be provided with copies of the relevant legislation.

2.17.3 The respondent Council shall ensure that it is in a position to make available to the Court during any hearing all relevant documents, maps, plans and other exhibits that are in its custody and not subject to privilege.

2.18 **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 encouraged to, and may be directed to, provide a statement of agreed facts and issues, and an agreed dossier or folder containing copies of relevant provisions of statutory planning instruments, and any other documents common to the

parties, at or shortly before the hearing. Succinctness and the avoidance of needless repetition, aided by efficient cross-referencing, tabulation and indexing, are sought by the Court.

2.19 **Citation of Court decisions**

2.19.1 A considered and discerning approach to the citation of cases needs to be adopted, with particular emphasis on –

- citation of the most recent or authoritative statement on a point rather than a plethora of cases (remembering however that some points are not amenable to simple or straightforward answers);
- identification of relevant passages by paragraph and/or page number;
- identification of official report citations where such exist; and
- succinctness and avoidance of needless repetition.

2.19.2 The Court does not expect bundles or casebooks of authorities to be provided beyond those cases that are sought to be specifically drawn to the Court's attention and relied on.

3 Alternative dispute resolution (ADR)

3.1 **Introduction**

3.1.1 Section 268 empowers the Court to arrange mediation and other forms of ADR. For the purpose of encouraging settlements of cases, it can authorise its members (Judges or Commissioners) or other persons to conduct those procedures.

3.1.2 The Court actively encourages forms of ADR and offers a mediation service run by its Environment Commissioners. The Commissioners receive comprehensive professional training for the purpose, and bring other professional skills and specialist knowledge to the task.

3.1.3 Other types of ADR can also be offered, whether by Environment Judges, Environment Commissioners, or other persons appointed for the purpose. Examples of other forms of ADR may include conciliation, conferences to narrow issues, meetings of relevant expert witnesses, arbitration, expert determination and judicial settlement conferences.

3.1.4 The Court regards mediation and other forms of ADR as particularly well-suited to resolution of many environmental disputes. ADR techniques are often highly

cost-effective compared to proceeding to full hearing before the Court, and acceptable outcomes may be reached that would be beyond the jurisdiction of the Court in a hearing (see paragraphs 3.1.9 and 3.2.7.2), but sound preparation and input are important. The protocol contained in this Practice Note is intended to provide guidance and encouragement to that end.

- 3.1.5 The Court is not required by statute to, and does not, make the use of ADR processes mandatory. It is widely recognised that ADR processes offer the most value when they are voluntary, as they then offer flexibility, an interests-based approach, ownership of resolution of the dispute, and are often more conducive to the preservation of inter-party relationships as distinct from litigation.
- 3.1.6 The Court recognises that not all disputes are apt for resolution by ADR processes. Because every case is different, it is not sought to nominate types of cases as being more suited to this form of resolution than others. The Court expects parties in all cases to give due and proper consideration to undertaking ADR processes. It is important, however, that parties wishing to achieve resolution through mediation or other means short of a hearing by the Court act swiftly, so as to avoid delay in the allocation of a hearing fixture should resolution not be achieved and Court hearing time be needed.
- 3.1.7 During all stages of the life of cases, the Court expects parties to continue to address the applicability of ADR, be willing to consider it on an objective basis, and to employ it constructively. Even in cases where ADR processes might be less likely to produce a complete settlement, full consideration should still be applied to the use of them to narrow and settle issues within disputes.
- 3.1.8 Proceedings in which ADR has been undertaken will often become the subject of documentation referred to a Judge with a request for a consent order. The Judges will give due consideration, in exercising their overall decision-making discretion, to the making of consent orders, either in the terms sought by parties, or with modifications approved by them (whether to correct mistakes or ambiguities, or to bring the order within jurisdiction, or to meet any other point of concern).
- 3.1.9 Mediation and other ADR processes can sometimes produce, in addition to resolution within the case, outcomes that are beyond the jurisdiction of the Court. Such additional matters will not be included in a draft consent order placed before

a Judge for approval, but may instead be made the subject of a separate agreement that may be enforceable in other forums.

3.1.10 Where parties agree to undertake ADR, the proceedings may either be placed in the parties' hold track or, if directed by a Judge, the parties may be required to commence or continue preparation for a hearing in parallel with the ADR process.

3.1.11 The protocol that follows is for use in mediations because that is the most common form of ADR offered by the Court (noting, however, that mediation in the Environment Court can at times encompass elements of conciliation and negotiation). If parties seek assistance through some other ADR method, application should be made to a Judge who will progress matters with them and make directions or otherwise assist to such end. Equally, it should not be forgotten that direct negotiation, constructively focussed, should be within the contemplation of parties at all times.

3.2 **Mediation protocol: Court-assisted mediations**

3.2.1 **Initiation of mediation**

3.2.1.1 Mediation may be initiated at any time during the life of a case, whether at the time of the first report to the Court under the case management track procedures, or subsequently. The agreement to mediate may come from the parties or be offered by the Judge.

3.2.1.2 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 the preceding paragraphs of this Practice Note.

3.2.2 **Appointment of mediator**

3.2.2.1 Subject to such consultation with the Principal Environment Judge as is appropriate, the managing Judge or the Registrar (subject to any direction of a Judge) 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.

3.2.2.2 The mediator shall have no personal interest in the matters in dispute, neither will he or she be acquainted or connected with any of the parties, nor 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.

3.2.3 Role of mediator

3.2.3.1 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 issues within it.

3.2.3.2 The mediator's role does not involve making a determination to be imposed on the parties.

3.2.3.3 The mediator will seek to commence and conclude the mediation as promptly and efficiently as possible in all the circumstances of the case. 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.

3.2.4 Representation and attendance at mediation

3.2.4.1 Parties are at liberty to be represented by one or more persons who may have particular qualifications. The names and contact particulars of such persons shall be provided to the Court and to the other participants in the manner required by the Court's Registry.

3.2.4.2 Each party shall have at least one representative who retains consistency in that role through all sessions, who is fully authorised to participate (for instance by answering questions and co-operating in the mediation in any manner appropriate from time to time), and who is able to be present (save in exceptional unforeseen circumstances) during the whole of every session.

3.2.4.3 Where a party appoints a representative to attend the mediation, the party represents that, through the party's nominated representative, full authority exists to settle the dispute or issues at stake. Where such authority is not available in the case of any party, that party shall advise the other parties and the Court prior to the mediation, and the mediation shall not proceed unless all parties and the mediator agree to proceed on that basis. Bodies such as Councils, corporates, and groups are encouraged to provide their representatives with full delegated authority to settle.

3.2.5 **Documents to be exchanged prior to mediation meetings**

3.2.5.1 Depending on the nature of the case, the mediator may request from the parties prior to, or at, the first meeting, a written synopsis recording the nature of the dispute, relevant facts (whether agreed between the parties or in contention in the proceedings), and their respective interests and concerns. This step is entirely at the discretion of the mediator as to whether it occurs and/or how. The mediator will seek input from the parties on these matters. Such a synopsis may include written statements of factual information or expert opinion.

3.2.5.2 Copies of relevant documents may 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, the nature of them, and the particular aspects of them that are to be referred to or relied upon.

3.2.5.3 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 is to work with the mediator to put appropriate arrangements in place concerning the information and the consequent appropriate conduct of the mediation.

3.2.5.4 Any communication with the mediator outside of a mediation session shall occur only through the Court's Registry and with notice to all other parties.

3.2.6 **Conduct of mediation**

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

3.2.6.2 The Court's Registry will arrange premises and appropriate furnishings and equipment for the mediation, and the mediator will arrange an appropriate timetable with assistance from the Registry.

3.2.6.3 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 at stake. They will also be expected actively and constructively to assist the process by duly participating in it, and in providing documents, information, submissions, and other assistance suggested or requested by the mediator.

- 3.2.6.4 The mediation shall not be conducted under formal procedures or rules of evidence, and will be guided at all times by the mediator.
- 3.2.6.5 At the commencement of the mediation, the mediator will usually be expected to 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.
- 3.2.6.6 The mediator may conduct joint or separate meetings with any one or more of the parties.
- 3.2.6.7 The mediator may ask questions and seek clarification, and may request the parties to exchange further information, or further explain their submissions and any information provided.
- 3.2.6.8 The mediator will refrain from providing any assessment of matters in dispute, whether legal, factual, or of expert opinion, or relating to possible outcomes for any aspect of the dispute. The parties and the mediator, however, may agree to depart from this protocol.
- 3.2.6.9 In mediations involving large numbers of parties, and in others involving complex issues, the Court may arrange for co-mediation to be undertaken by more than one mediator. Co-mediators and peer-reviews may also occasionally be undertaken in the interests of maintaining and enhancing the quality of the Court's mediation service.
- 3.2.7 **Settlement**
- 3.2.7.1 The 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.
- 3.2.7.2 The scope and terms of settlement which the parties may develop may not necessarily be limited by the jurisdiction of the Court. 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.
- 3.2.7.3 It is preferable for the parties to make a binding commitment to the settlement of the dispute, and they should either have all necessary legal advice before mediation commences, or have access to it during the mediation process.

- 3.2.7.4 The mediator may, with the consent of the parties, seek information or advice from an Environment Judge and shall disclose the results of such enquiry to all parties in an even-handed way.
- 3.2.7.5 The mediator may work with the parties actively to stimulate communication and settlement, or may take a more passive role as he or she thinks appropriate.
- 3.2.7.6 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.
- 3.2.7.7 Participation in mediation shall not prejudice the existing legal rights of the parties, but parties should understand that a settlement or agreement reached through the process may change their legal rights and may be legally enforceable. On the other hand, there is civil case law precedent involving the granting of legal relief to parties who have declined to be bound by mediated agreements reached on the basis of an exchange of misleading information.
- 3.2.7.8 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 left to be reduced to writing immediately after the mediation, or otherwise within an agreed timeframe, but mediators will generally encourage the parties to record as much as possible of their agreement in writing before conclusion of the mediation session.
- 3.2.7.9 The mediator will advise the parties (if all or any of them are unaware) that the Judge considering any draft consent order has a discretion whether or not to make the order, or to recommend modifications to the parties. For example, the Judge may in the course of exercising his or her discretion have regard to matters of wider public interest than were addressed by the parties, and also the purpose and principles of the relevant legislation.

3.2.8 **Confidentiality**

- 3.2.8.1 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 others who were not involved with the process.

3.2.8.2 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.

3.2.8.3 The mediation shall be without prejudice to the dispute, and shall not be referred to or relied upon in any other proceedings in the Court. The parties shall not, without the written consent of all other parties, introduce as evidence in any such proceedings:

- Documents prepared expressly for the mediation;
- Admissions made by a party in the course of the mediation;
- Views expressed or suggestions made by any party concerning a possible settlement of the dispute;
- Proposals made or views expressed by the mediator;
- The fact that a party had or had not indicated willingness to consider a proposal for settlement.

3.2.8.4 Nothing in this part of the Practice Note bearing on confidentiality shall prevent discovery, or affect the admissibility, of any evidence (being evidence that is otherwise discoverable or admissible that existed independently of the mediation process), merely because the evidence was presented in the course of the mediation.

3.2.8.5 Unless directed by the Court, the mediator shall not divulge any aspect of the mediation in any proceeding in the Court. The parties may collectively waive confidentiality, but unless that occurs, or a direction is specifically made by a Judge, he or she shall not divulge any matters disclosed in the mediation.

3.2.8.6 The mediator may only sit as a member of the Court to hear a proceeding on the subject matter of the dispute mediated, if the parties, the member concerned, and the Court are satisfied that it is appropriate.

3.2.9 **Costs**

3.2.9.1 The mediation, if conducted by an Environment Commissioner, will be without fee payable to the Court unless directed or authorised by any relevant legislation.

3.2.9.2 The parties shall meet their own costs of the mediation unless they agree otherwise between themselves.

3.2.9.3 The mediator has no power to make any order for costs as between parties or in favour of the Court.

3.2.10 **Termination**

3.2.10.1 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.

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

3.2.10.3 The mediator may terminate the mediation if he or she considers that a party's safety, or his or her own safety, is at risk.

3.2.10.4 Subject to any further input sought by a Judge from the parties, the mediation shall be concluded upon execution of a final agreement, or alternatively upon finalisation of detailed documentation left to be completed after the mediation.

3.2.11 **Variation**

3.2.11.1 The parties may vary this protocol by an agreement and under the guidance of the mediator, but are encouraged to utilise as much of it as possible as a procedure for settlement of planning and environmental disputes.

4 Procedure at appeal hearings

4.1 Order of parties

4.1.1 The Court usually conducts an appeal against a decision on an application for a consent, approval or permit as a complete rehearing. When hearing such an appeal falling under the standard track, the Court will normally call first upon the person who applied for the consent, approval, or permit to state his or her case, and then to call the evidence in support of it – followed, in turn, by the cases of those who support the grant. Then the Court will call upon those parties who oppose the grant of the consent, approval, or permit to present their cases.

4.1.2 The order of parties in complex case track matters (such as plan appeals) 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 to call first upon the Council to present its case before calling upon the applicants or other parties who would ordinarily commence, the Court may so direct, either of its own motion or on the motion of any party. This may apply even when appeals in a group are not to be heard together.

4.1.3 Where there is a burden of proof upon a particular party, the Court will usually call first upon that party to state his or her case and call evidence.

4.2 **Presentation of cases**

4.2.1 The Court expects that when parties open their cases, they will 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.

4.2.2 The Court does not normally allow parties who have heard all the evidence of opposing parties prior to opening their cases to make further submissions in reply. After all the evidence has been heard, the parties who stated their cases and called their evidence before hearing the cases and evidence of those parties opposed to them, 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.

4.3 **Presentation of evidence**

4.3.1 Unless paragraph 4.3.2 applies, evidence-in-chief will normally be given by the witness reading the pre-exchanged statement of evidence (see paragraph 2.15.1), of which 4 copies are to be made available for the use of the Court, and additional copies for the other parties. Four copies of exhibits and graphic presentations, such as documents or photographs, should be produced where practicable. Where matters of primary fact are in issue, the Court may require evidence-in-chief to be given in viva voce examination by question and answer, avoiding leading questions.

4.3.2 Section 276(IA)(b) empowers the Court, whether or not the parties consent, to direct how evidence is to be given to the Court. The Court may direct that evidence be given by –

- (a) the witness reading the pre-exchanged statement of evidence to the Court;
or
- (b) the Court pre-reading the statement of evidence; or
- (c) a combination of (a) and (b), or another method.

This issue should be clarified at a pre-hearing conference or in prior directions. Where the Court has directed that the evidence of any witness is to be pre-read, the witness, when called at the hearing, will confirm the statement of evidence as correct, and cross-examination will immediately follow.

4.3.3 The preceding paragraphs outline the Court's general practice. However, the Court has power to regulate its procedure in such manner as it sees fit. It may therefore modify its procedure in particular cases if the interests of justice, and the orderly and logical presentation of evidence, so require.

4.4 Viewing of site or area at issue

4.4.1 In many cases, the nature of the Court's work renders it desirable that the site or area at issue in the proceedings be viewed by the Court. In general, the taking of a view assists the Court in better understanding the evidence presented in Court. The Court's normal practice is to confer with the parties during the hearing over the taking of a view, its timing, a suggested itinerary, and any other relevant details that the parties or the Court may raise.

4.4.2 If the taking of a view should present the Court with additional or different information to that provided in Court, or information that no witness has correctly or accurately addressed in evidence in Court, and the Court considers the information is of a significance that might influence it in determining the proceedings, the parties will be consulted by minute of the Court, or orally at a reconvening of the hearing, or via a judicial conference. The purpose of such consultation will be for steps to be put in train to ensure that the parties are duly heard in relation to the information concerned before the case is determined.

4.5 Costs

4.5.1 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.

4.5.2 Where an appeal under the First Schedule to the RMA has proceeded to a hearing, costs will not normally be awarded to any party.

4.5.3 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. On other appeals, the Court will not normally award costs against the public body whose decision is the subject of the appeal.

4.5.4 One factor which will be relevant 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 undisputed 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 undisputed 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. Any such statement should be made within 15 working days of receipt of the respondent's reply to the notice of appeal.

4.5.5 In giving the decision on an appeal, the Court may reserve costs without indicating whether or not an award will be made.

4.5.6 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 –

- any party claiming costs should lodge a claim, supported by particulars, within 10 working days of the date of issue of the decision; and
- any party from whom costs are sought should lodge a reply within a further 10 working days; and
- the applicant for costs may respond within a further 5 working days to any relevant matter raised for the first time in the reply.

4.6 **Communicating with the Court**

4.6.1 Where any party seeks to communicate with the Court on any matter relating to the merits of the case or its outcome, otherwise than in open Court or at a judicial conference, such communication must be by way of a memorandum lodged with the Registrar and served on other parties, so that other parties may have the opportunity to respond. 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.

5 Expert witnesses – code of conduct

5.1 Expert witnesses to comply with code of conduct

5.1.1 A party to proceedings 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 it.

5.1.2 An expert witness must comply with the code of conduct in preparing any affidavit for filing with the Court, or in the preparation of a proposed brief of evidence, or in giving any oral evidence in any proceeding in the Court.

5.1.3 The evidence of any expert witness who has not read, or does not agree to comply with, the code of conduct may only be adduced with leave of the Court.

5.2 Duty to the Court

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

5.2.2 An expert witness is not an advocate for the party who engages the witness.

5.3 Evidence of an expert witness

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

- (a) acknowledge that the expert witness has read this code of conduct and agrees to comply with it;
- (b) state the witness's qualifications as an expert;
- (c) describe the ambit of the evidence given and state either that the evidence is within the expert's area of expertise, or that the witness is relying on some other (identified) evidence;
- (d) identify the data, information, facts, and assumptions considered in forming the witness's opinions;
- (e) state the reasons for the opinions expressed;
- (f) state that the expert witness has not omitted to consider material facts known to the witness that might alter or detract from the opinions expressed;

- (g) specify any literature or other material used or relied upon in support of the opinions expressed;
- (h) describe any examinations, tests, or other investigations on which the expert witness has relied, and identify, and give details of, the qualifications of any person who carried them out; and
- (i) 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 produced containing relevant excerpts.

5.3.2 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.

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

5.3.4 If after the exchange of a brief of evidence has occurred, an expert witness changes any of his or her opinions, that must be communicated without delay to the party or parties wishing to call the witness.

5.4 Expert Witness Conferencing

5.4.1 Expert conferencing is a process by 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. Conferencing is a structured discussion between peers within a relevant field of expertise which can narrow points of difference and save hearing time (and costs). All experts have a duty to ensure that any conference is a genuine dialogue between them in a common effort to reach agreement about the relevant facts and issues. 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 experience. Persons not having such qualifications and experience will not participate in conferences.

5.4.2 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.

5.4.3 Every person at an experts' conference is participating in his or her role as an expert witness, having agreed to comply with the Code of Conduct for such witnesses, and not 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.

5.4.4 The Court expects that, as a matter of course, expert conferencing will occur prior to a hearing. In many circumstances it will be most advantageous to do so before full briefs of evidence are prepared, with the conference proceeding on the basis of summarized 'will say' briefs being exchanged beforehand (see para 5.7.1). 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.

5.4.5 Either by agreement of the parties, or at the Court's direction, the conference may be facilitated by another expert (who has not been engaged to act by a party to the proceeding), an Environment Commissioner, or any other person agreed to by the parties. If the conference is facilitated by an Environment Commissioner, that person may sit as a member of the Court to hear a proceeding on the same matter only if the parties and the Court are satisfied that is appropriate. 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.

5.4.6 The Court may limit the 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.

5.4.7 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.

5.5 Case management

5.5.1 Expert conferencing is an essential element of case management and evidence exchange timetables. 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 parties:

- (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.

5.6 General Directions on Conferencing

5.6.1 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 with the following:
 - (i) a copy of the Environment Court's Expert Witnesses Code of Conduct;
 - (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;
 - (iii) copies of the relevant evidence (if prepared) and any relevant reports;
- (b) the experts are to familiarise themselves with the Code of Conduct before commencing the conference;
- (c) the experts are to confer in the absence of the parties and their legal counsel;
- (d) the experts are not to be instructed as to what may be agreed or not 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 be concluded, 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 for 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.

5.6.2 The joint witness statement will include the following matters:

- (a) the key facts and assumptions that are agreed upon by the experts;
- (b) 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);
- (c) the issues that are agreed between the experts;
- (d) the issues upon which the experts cannot agree and the reasons for their disagreement;
- (e) an identification of all material regarded by the experts as primary data: and
- (e) confirmation that in producing the statement the experts have complied with the Code of Conduct for Expert Witnesses.

5.6.3 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.

5.6.4 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.

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

5.6.6 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.

5.7 Conferencing in Advance of Evidence Exchange

5.7.1 If conferencing occurs in advance of the exchange of formal briefs of evidence it is essential that the witnesses are prepared. The Court will expect that:

- (a) the expert witness will confirm any evidence given at an earlier hearing in relation to the same matter; or
- (b) except as otherwise directed by the Court, will 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;
 - (iii) clearly explain the opinion arrived at.

C J Thompson

Principal Environment Judge

4 February 2011