

2017

# Consent Support

Direct Referral



## Direct Referral

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**This guidance has been updated to include the changes made to the consenting provisions of the RMA as a result of the Resource Legislation Amendment Act 2017 (RLAA17) which came into effect on 18 October 2017. For more information about the amendments refer to the RLAA17 Fact Sheets available from the [Ministry's website](#).**

This note provides guidance on the direct referral process to the Environment Court for notified resource consent applications, notices of requirement for designations, and heritage protection orders. The key provisions of the Resource Management Act 1991 (RMA) which provide for direct referral are sections 87C to 87I for resource consents and sections 198A to 198M for notices of requirement and heritage protection orders; and section 285 which provides for costs.

## Guidance note

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## Introduction and types of applications that can be directly referred

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### Introduction

This guidance note has been prepared to help practitioners, including council officers and applicants, understand the direct referral process to the Environment Court. The key provisions of the RMA which provide for direct referral are sections 87C to 87I for resource consents, sections 198A to 198M for notices of requirement and heritage protection orders and section 285 for costs.

Information sheets have also been developed to help the public understand the process, particularly in their role as potential applicants and submitters. These can be found on the ['Direct referral process - information for submitters'](#) and [the 'Direct referral process - information for applicants'](#) webpages of the Ministry's website.

The guidance note focuses on the direct referral process for resource consents. The direct referral process also applies to notices of requirement and heritage protection orders and the process is largely identical to that for resource consent applications, including timing. However, different sections of the RMA apply and have slight wording differences for notices of requirement and heritage protection orders.

### What is direct referral?

Direct referral allows applicants to make a request to a council that their notified resource consent, notice of requirement, or heritage order application be decided by the Environment Court, rather than the relevant council.

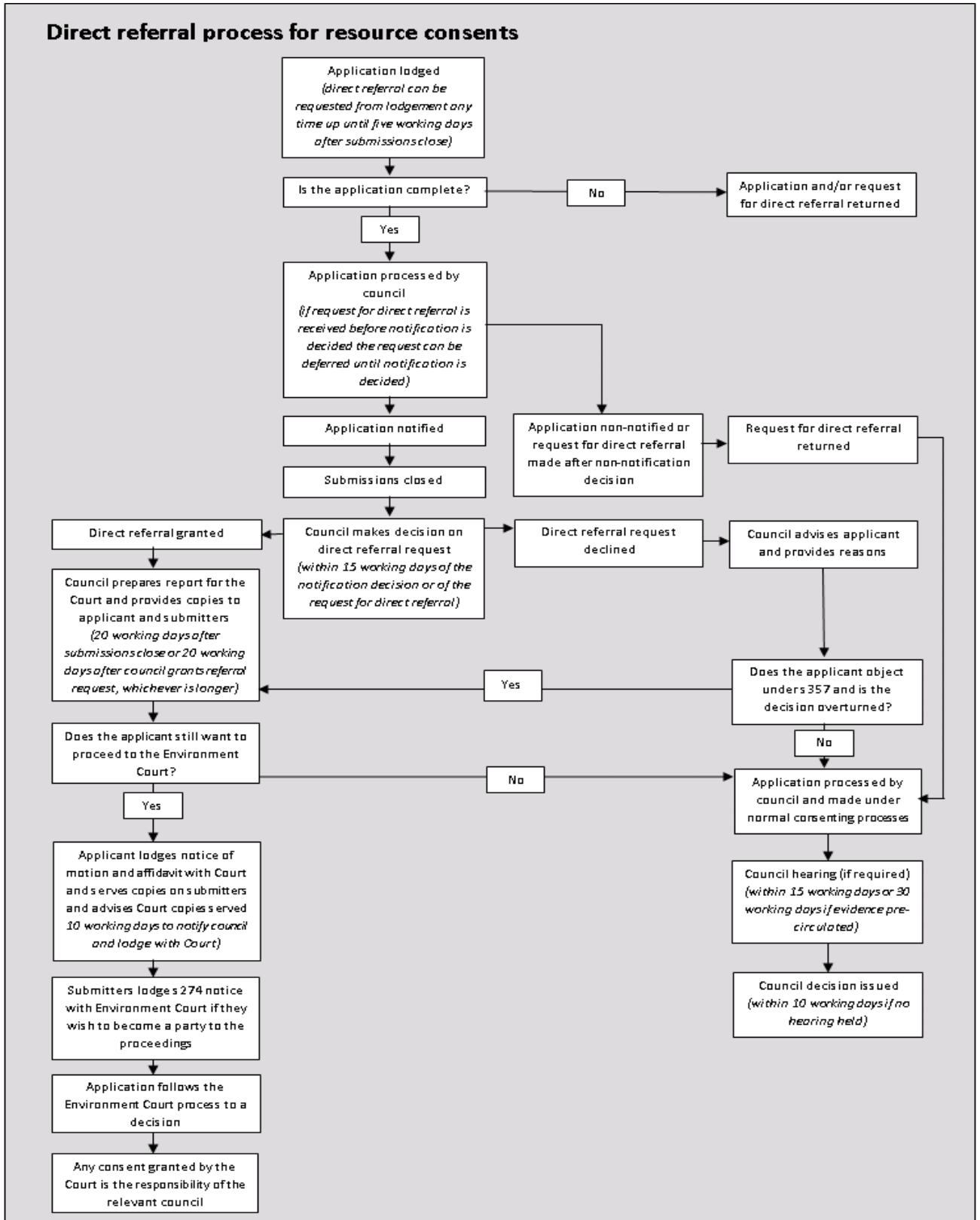
The direct referral process is intended to streamline decision-making for notified consents, particularly more contentious applications where there is likely to be some opposition to the activity. These tend to be the larger scale and/or complex applications that are likely to end up in the Environment Court on appeal. The direct referral process is intended to save time and costs for both applicants and submitters by avoiding the need for a 2-stage hearing process.

Before a decision is made by the council on a direct referral request, the application progresses in the standard way, ie, the application is lodged with the council, a decision is made as to whether or not the application is notified and there is a 20 w.d. submission period provided (ss88-98 of the RMA apply).



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An overview of the direct referral process is provided in the flowchart below.





## What type of applications can be directly referred?

The direct referral process only applies to notified applications (including limited notified). Sections 87C, 198A and 198H of the RMA specify the notified applications which can be requested to be directly referred to the Environment Court. They are:

- applications for resource consents under s88
- applications for changes or cancellations to condition(s) of resource consents under s127
- notices of requirements for a designation under ss168 or 168A
- notices of requirements for a heritage order under ss189 or 189A
- notices of requirements for an alteration to a designation or a heritage order to which ss168, 168A, 189 or 189A applied.

Applications that have been directly referred in the past have included large retail, infrastructure or energy projects. Examples include quarries (Winstone Aggregates, Road Metals Ltd, Brookby Quarries), wind farms (Mt Cass, and Project Hurunui), Mahia Beach wastewater scheme, Queenstown airport expansion, retail developments (Pak n Save Rodney, Jackson Street Retail Ltd), and Hagley Oval.

The direct referral process is separate to the call-in or referral process that applies to proposals of national significance. If the Minister for the Environment considers that a matter is (or is part of) a proposal of national significance and it is called in under s142(2), or is called in following a recommendation of the Environmental Protection Authority (EPA) under s145 of the RMA, then the application follows the consenting path for proposals of national significance. For example, under Part 6AA of the RMA the Minister may make a decision to refer a matter of national significance to the Environment Court for a decision, which is a different process to the direct referral process under sections 87C and 198A. Refer to the [Resource Management Section of the Environmental Protection Authority \(EPA\) website](#) for further information on the decision-making process for proposals of national significance.

Changes to the RMA in 2013 have introduced the ability for the Minister for the Environment to make regulations prescribing an investment threshold amount for direct referral. When regulations are put in place, then a consent authority would be required to grant an applicant's request for direct referral if the value of the investment in the proposal is likely to meet or exceed the threshold amount prescribed in the regulations, unless the consent authority considers there are exceptional circumstances. In making such regulations the Minister must have regard to the intent of the regulations which is to require requests for direct referral to be granted for proposals of significant economic scale.

Until such regulations are passed, the council retains full discretion as to whether to grant or refuse a request for direct referral. There is a right of objection under section 357A for a requestor whose request has been refused by the council.



## Requesting Direct Referral

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### Who can make a request for direct referral?

Only the applicant, or their agent, can make a request to the council for an application to be directly referred to the Environment Court for a decision.

There may be instances where a proposal either crosses territorial boundaries or requires both regional and district approvals and applications need to be made to more than one council. In such a case, the request for direct referral should be made to all relevant councils simultaneously. Where practicable, the document requesting direct referral should be lodged in person or sent electronically on the same day so the direct referral processing 'clock' begins on the same day for each council.

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

If a council receives a request for direct referral, as a matter of good practice, the council should let the Environment Court know it has received a request. This will help the Court with its forward planning. When the council has made its decision on the request, then it should send a copy of its decision to the Court as soon as possible, so the Court knows whether it is likely to receive the direct referral application. If the applicant decides to proceed to the Court and lodge its notice of motion, the Court will already have prior warning of the application and will have started to plan for how the Court will process the application and allocate resources to it.

### When can a request for direct referral be made?

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

The council must return the request for direct referral to the applicant without making a decision on it if the council:

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

While the council should be made aware of a potential or pending request, the applicant may choose to wait at least until the application has been notified before formally requesting direct referral. Applicants may also choose to wait until after the closing date for submissions to request direct referral (applicants only have 5 days after the close of submissions to make the request, however). This allows the applicant to analyse any submissions received and consider whether direct referral to the Environment Court is



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still the best route for the application. For example, opposition to the application may not be as great as expected and there may be a reasonable chance that the matter could be resolved in a council hearing without any subsequent appeals. In such situations, direct referral is not likely to be the most appropriate option.

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

### **How must a request for direct referral be made?**

The request for direct referral must be made either electronically or in writing using the form in the Resource Management (Forms, Fees, and Procedure) Regulations 2003 as a template ([Form 7A](#) for a resource consent and [Form 27A](#) for a Notice of Requirement).

The following information needs to be provided to the council in a request for direct referral:

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

### **Council decision on a request for direct referral and objections to the council decision**

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#### **The council decision on a request for direct referral**

Until Regulations are passed prescribing an investment threshold amount, the council has discretion in deciding whether to grant or refuse a request for direct referral. Submitters do not have a right to be heard by the council about a request for direct referral.

If the council receives the request for direct referral before it has determined whether to notify the application, the council must defer its decision until the decision on notification is made. If the council decides not to notify the application, it must return the request.

If a request for direct referral is made before the council has determined whether or not the application will be notified, and the council subsequently decides to notify the application, the decision on direct referral must be made by the council within 15 working days after the notification decision. Otherwise, the decision on direct referral must be made within 15 working days after the council receives the request.



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Whether and how to delegate the decision on direct referral is at the discretion of each council.

The RMA does not specify the information required to be included in the council decision on direct referral, other than a requirement to give reasons if a request for direct referral is refused. The decision will be shaped by the particular application considerations and whether it was accepted or declined.

If the council declines a request for direct referral, it must provide the applicant with reasons for declining the request, either electronically or in writing, and the reasons must be issued at the same time as the decision. An applicant can object to a council's refusal of a request for direct referral. It is good practice for the council to send a copy of its decision to the Environment Court.

If the council grants the request for direct referral, the applicant must be advised of the decision and the council must prepare a report to the Environment Court. The applicant then has the discretion whether to proceed with direct referral or not. The Environment Court does not have the ability to refuse to hear an application for direct referral. The council should send a copy of their decision to the Environment Court as soon as possible after the request has been granted. This will help the Environment Court plan and prepare for the receipt of a direct referral application should the applicant continue with direct referral.

Although not a requirement of the RMA, if the decision on direct referral is made after the close of submissions, the council should also notify the submitters of the decision on direct referral and advise them of the implications for their involvement in the process. The Ministry for the Environment's [information sheet](#) for submitters may also be helpful to include with any correspondence to submitters.

Note that the council's discretion will be removed for certain applications if regulations are promulgated under section 360(1)(hm). Before promulgating regulations, the Minister must have regard to the intent of such regulations, which is to require requests for direct referral to be granted for proposals of a significant economic scale. This regulation making power was included as part of the RMAA13, but no regulations have yet been made under this provision.

Such regulations can prescribe an investment threshold. Any applications over that threshold must be referred to the Environment Court unless the relevant council considers that 'exceptional circumstances' apply.

The regulations may also specify what matters a council must have regard to when determining whether there are exceptional circumstances. The Act (s.87E(6A)(b)) creates an obligation for direct referral if an investment threshold (specified by regulation) is likely to be met or exceeded. However, that obligation does not exist if the relevant council considers there are "exceptional circumstances".





## Objections to the council decision on a request for direct referral

If the council declines a request for direct referral for a resource consent application or requirement, the applicant can object under ss357A(1)(e) or 357(8) of the RMA respectively. The decision on the objection is solely at the discretion of council.

Councils should establish clear policy and/or delegations about who considers the objection. If the objection is successful and the original decision to decline the direct referral request is overturned, then the application proceeds as if direct referral was granted: ie, the council prepares a report for the Court.

## Liaison with the Environment Court

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Councils should identify a key contact person to liaise with the Court. This could be an administrative role but the administration officer will likely need input from specialist planning and/or legal staff with knowledge of the direct referral provisions in the RMA, the application and the relevant plans. Alternatively, the council officer responsible for the report or the council's legal counsel could undertake this role. The key is to have one lead contact person the Court can deal with who has sound knowledge of the process.

Once the Court has been advised of the direct referral application, the Court Registrar and/or a Court case manager will liaise with the council and the applicant about information requirements and the process. For further information refer to the [Environment Court Practice Notice 2014](#). The Court will likely ask the council for a list of submitters, their contact details, their position on the application (support, opposition or neutral), and whether they wish to be heard. The Court has prepared an [example excel spreadsheet \(XLS, 17KB\)](#) for councils to use for providing these submitter details. This information will help the Court to gauge the size of the hearing and enables the submitters' information to be transferred directly to the Courts database for future correspondence.

Section 87G(3) requires the council to provide the Court with a range of information following the lodgement of the notice of motion with the Court, including submitters' information.

Also, before the notice of motion is lodged and the case formally proceeds before the Court, the Environment Court Registrar and/or case manager may request a meeting with the council representatives (reporting officer, legal counsel etc.) and possibly the applicant. The intent of this meeting is to discuss the council's progress with the report, the process up until the notice of motion is lodged, and the logistical and administrative steps involved.

## The council report

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If the council grants the request for direct referral it must then prepare a report for the Court on the application.

### Content

Section 87F(4) of the RMA states the council report must address the issues set out in ss104 to 112 of the RMA (decisions on applications) to the extent that they are relevant



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to the application, provide a summary of submissions received, and suggest conditions that it considers should be imposed if the Environment Court grants the application.

The Council report will set the context of the application and help the Court identify the relevant statutory provisions and identify and narrow the issues in contention. Suggesting conditions if the application is granted is required by the Act and is also good practice as the council is ultimately responsible for the compliance and monitoring of any consent granted by the Court.

It's preferable for the summary of submissions to be broken down by topic (e.g., traffic, noise, landscape). While the Court will review the submissions, a summary of submissions with a breakdown by topic provides an overview of the issues for the Court and is helpful for mediation purposes should this occur. The summary of submissions will also ensure the matters raised in submissions are brought to the Court's attention, regardless of whether the submitters wish to be heard and appear in person before the Court or not.

For applications to two or more councils, in some cases it is expected that each relevant council will produce its own report to the Court as producing a combined report is not always practical and feasible. However, where possible, joint reports and conditions agreed by all the relevant councils are preferred to help ensure consents are approached in an integrated, consistent and comprehensive way.

### **Structure of the report**

Relevant background reports from other council officers and consultants should be appended to the main report. This will enable each officer or expert in their field to present separately to the Court when and if required and to respond to any cross examination on their subject matter. The main report could also include a summary of these reports in the assessment section.

### **Timing and distribution of the council report**

The council must prepare the report within the longer of the following periods:

- 20 working days after the date on which submissions close, or
- 20 working days after the date on which the council grants the request for direct referral.

The council must provide a copy of the report to the applicant and every person who made a submission on the application as "soon as is reasonably practicable after the report is prepared". While this timeframe is not defined in the RMA, it is important that councils make distribution of the report a priority once completed.

A hard copy of the report should be posted and/or distributed electronically where possible. The report should also be posted on the relevant council's website. Most council websites have a section devoted to notified applications. There may be the potential for submitters to indicate to council what form they would like to receive correspondence in (electronically and/or hard copy) when making their submission.



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For applications to two or more councils, the timing of the sending out of the reports should be coordinated (if separate reports are prepared). The applicant has 15 working days to lodge a 'notice of motion' from the date the council report(s) are received. Therefore, ideally, the reports should be received at the same time by the applicant to help the applicant meet this timeframe.

If two councils are involved, generally, the regional council would take the lead and coordinate sending out the report(s) and transferring all information to the Court. A dedicated administrative resource for each council is recommended to coordinate the process.

### **What status and role does the council report have?**

The Court expects the council to be involved in the Court proceedings given they have the most knowledge of the application and its background, and ultimately will need to administer the consent if it is granted. The Court sees the council report as a preliminary 'scene setter' which can later be developed into briefs of evidence to be presented to the Court during the hearing.

Under the Act the council is automatically a party to the Court proceedings for direct referral. The council must be available to attend the hearings to discuss or clarify any matters in its report, give evidence about its report, discuss the submissions received and address issues raised by submitters and provide any other relevant information to the Court. The council is able to recover its costs for preparing the council planning report. The Court may order an applicant to pay costs and expenses that a council incurs in assisting the Court in relation to its report.

### **If direct referral is granted can an applicant decide not to proceed to the Environment Court?**

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If a request for direct referral is granted, the applicant may still decide not to proceed to the Environment Court. The applicant should advise the council if the application is not proceeding to the Court.

If the application does not proceed to the Court, the application must be determined by the council.

Section 88D(6) excludes the days from the initial request for direct referral to the day the applicant either informs the council that they no longer want the application to be directly referred or when the applicant fails to lodge a notice of motion (due 15 working days after receiving the councils 87F report). The clock starts again on the count it was up to prior to the excluded period.

The council then follows the normal process and must comply with the normal timeframes for a notified application. This means that if a hearing is to be held, it must be completed 75 working days from the date submissions closed for publicly notified applications and within 60 working days for limited notified applications. The decision must then be made 15 working days after the hearing. If no hearing is to be held, the council has 20 working days from the date submissions close to issue a decision.

## The Environment Court process

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### Notice of motion

Once the applicant has received the council report prepared under s87F(4), and the applicant wishes to proceed with direct referral, the applicant needs to lodge a notice of motion with the Court within 15 working days of receiving the council report. The lodging of a notice of motion effectively starts the Environment Court process.

A notice of motion is a written document which commences the case and informs the Environment Court and (when served) other parties that the applicant has lodged its application with the Court.

Section 281 of the RMA does not expressly allow for the Court to grant waivers for notices of motion which are lodged late. Therefore, if the notice of motion is not lodged within 15 working days, the application will not proceed to the Court and will fall back to the council for a decision.

The notice of motion must be lodged in the prescribed form specifying the orders sought and the grounds upon which the application is made. Refer to [Form 31A Notice of Motion](#). A supporting [affidavit](#) about the matters giving rise to the application also needs to be included with the notice. The applicant's legal adviser will generally prepare the notice and the affidavit. The applicant must lodge the original and one copy of the notice and supporting affidavits with the Court. However, the applicant is encouraged to liaise with the Court Registrar and/or case manager to see whether additional copies would assist the Court, i.e., if commissioners are also appointed by the Judge, extra copies of the documentation would be beneficial to the Court. The Court can advise the [filing fee](#) payable by the applicant.

At this stage it is advisable to indicate to the Court whether the applicant is interested in mediation.

As soon as reasonably practicable after lodging the notice with the Court, the applicant must serve a copy of the notice and affidavit on the council(s) that granted the direct referral request and every person who made a submission to the council on the application. The applicant must also tell the Court Registrar when these copies have been served on these parties. The Court will work with the applicant to remedy any issues with the format or content of the notice that are evident to the Registrar.

### The role of council

The council is required to appear before the Court and speak to the section 87F(4) planning report. The council's planning report is a key piece of information for the Court.

The council is automatically a party to the proceedings and must be available to attend the hearing to discuss or clarify matters in the report, give evidence to the Court about its planning report and any other relevant information.

## Transfer of information from the council to the Environment Court

Once the council receives a copy of the notice of motion and affidavit (served on them by the applicant within 15 working days), the council must provide the Environment Court with the following information:

- the application to which the notice of motion relates
- the council report on the application
- all the submissions received on the application
- all the information and reports on the application that were supplied to the council, including any further information. This is interpreted as including all information supplied by the applicant to the council that forms part of the application such as the applicant's assessment of environmental effects (AEE), development plans, any reports, and any information submitted in response to further information requests.

Section 87G(3) states that the council must provide this information to the Court 'without delay'. Again, while 'without delay' is not defined in the RMA, this information should be transferred as quickly as possible so as not to hinder the process. Preparation for this information transfer should ideally begin before the applicant lodges the notice of motion. There is a small risk the applicant may not continue with the application to the Court, but maintaining open lines of communication with the applicant should minimise this risk.

The Court Registrar and/or case manager will liaise with the council to determine the format of this information (ie, hard and/or electronic copy) and the most practicable way to transfer it to the Court. The Court also needs to act promptly to avoid any unreasonable delay.

## Where will the Court hearing be held?

Section 271 of the RMA requires the Environment Court hearing to be held as near to the locality of the subject matter to which the proceedings relate as the Court considers convenient, unless the parties otherwise agree.

The Court is responsible for disseminating information to all parties about the hearing location and timing. However, it would also be helpful for the council to make this information available through their website or some other means.

## Environment Court case management

Once the notice of motion is lodged an Environment Judge will be assigned to the case and a case manager from the Court will be formally appointed. The key features of case management include:

- planning the course of the proceedings, in consultation with the parties and counsel so the parties and counsel are aware of the events that will occur, and the likely time involved
- the identification at an early stage of the issues in dispute and encouragement of settlement by negotiation (if appropriate), or the use of alternative dispute



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resolution (ADR) techniques under s268. If the Court orders ADR parties must participate unless leave is granted by the Court (s268A).

The Environment Court's [Practice Note 2014](#) contains more detailed information on case management.

The Environment Court has indicated the intention to contact all submitters with information about the proceedings and to advise them of the need to file a s274 notice with the Court should they wish to be a s274 party ([Form 33](#)). Although there is now a filing fee of \$100 for becoming a s274 party, that fee is exempt for direct referral proceedings.

### **Pre-hearing conference**

As soon as practicable after proceedings are lodged, an Environment Judge must consider whether to convene a pre-hearing conference. A pre-hearing conference will ensure preparations are made for efficient, fair and ordered Court proceedings. The Court also occasionally uses the term 'status hearing' for a pre-hearing conference.

The Environment Judge can require any party who will be involved in the hearing to attend the pre-hearing conference or be represented by another person. At this meeting, directions may be given about preliminary questions, circulation of evidence, delivery of statements of evidence, and the timing and duration of the case.

### **Alternative Dispute Resolutions (ADR)**

An alternative dispute resolution process (for example, mediation) is designed to facilitate the resolution of a matter. The Environment Court can (at their discretion) ask one of its members (or other person) to conduct an ADR process at any time after the lodgement of proceedings. Where the Court requires an ADR process, all parties must participate in the process or be represented by another person, unless the Court grants leave otherwise.

Currently, the Court expects the majority of applications on appeal to the Court to proceed to ADR. The Court has indicated this is also the expectation for direct referral cases. ADR can help parties identify common ground and define, narrow and resolve issues, which may negate the need for a hearing, or at the very least, reduce hearing time.

The timing of any ADR process will be at the discretion of the Environment Judge. However, it is expected ADR will not occur until the Court has read the submissions and council report, so the Judge has a clear idea of the topics for ADR. The Environment Court's [Practice Note 2014](#) contains useful information on alternative dispute resolution and the mediation process. The [Ministry for the Environment's An Everyday Guide: You, Mediation and the Environment Court](#) also contains useful information about the mediation process.

### **Expert witness caucusing/conferencing**

The Court is increasingly using and promoting expert witness caucusing/conferencing. The Court may direct that groups of expert witnesses confer to try to agree on matters in their field and to narrow the issues in contention. If and when this occurs in the



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proceedings is at the discretion of the Judge, but it generally occurs after the exchange of primary statements of evidence. Appendix 3 of Environment Court Practice Note 2014 provides a Protocol for Expert Witness Conferences and contains greater detail on expert witness caucusing/conferencing.

### **What is council's role at the Court?**

Potentially, councils can have a role as an applicant, and/or submitter and/or provider of expert witnesses/technical advisers or any combination of those roles at the Court. This is an unusual situation for councils to be faced with, which potentially presents conflicts. It is therefore important that the council roles are given thought to and defined early on and documented as to which staff, consultants and/or independent experts will be fulfilling each role. Possibly different delegations will also be required.

A particular area of difficulty is when a council may want to submit on an application. This is a similar scenario to the situation councils find themselves in when they are dealing with applications they have made themselves. As with those scenarios, the council should clearly convey which 'hat' they are wearing in the various documents they submit to the Court and other parties. This enables the Court to determine what weight to place on those documents and avoids any sense that the council is not being entirely transparent, or is obtaining any advantage due to its position as consent authority.

The Court expects council to have legal representation. If the council has different and conflicting roles/positions at the hearing (ie, consent authority and submitter with different views) then having separate legal counsel and expert advisers is advisable.

The Court supports the idea of a primary planning report with expert reports attached as outlined above. This approach makes it clear which expert contributed to the council report and easily allows for individual briefs of evidence to be developed. The Court has indicated that each of the people who have contributed to the report must be made available to the Court to participate in the proceedings, be able to speak to their report(s), and answer questions.

The Court may also call on the council witnesses to comment on any recommended consent conditions contained in the report and other recommended conditions which may emerge during the course of the hearing.

The order of proceedings will be outlined at the start of the case by the Judge, which will include when the council planning report will be heard.

A further issue for councils in appearing before the Court are the costs involved. However, there is an ability for a council to recover its costs for participation. The council can also recover its costs of being involved in a direct referral application after the application is referred to the Court. These are the costs of appearing as a party and giving evidence in relation to the planning report. Once the application is before the Court section 285 applies. The council can apply for a costs order to recover the costs of presenting the council report from the applicant.

## What is the submitter's role at the Court?

One key difference between a council hearing and a Court hearing is that submitters need to formally lodge a s274 notice with the Court in order to be involved in the Court proceedings (eg, pre-hearing conference and mediation), including appearing before the Court and speaking to their submission or evidence. If a s274 notice is not lodged, a submitter or anyone engaged to act on their behalf may not participate in the Court proceedings.

However, if the submitter does not lodge a s274 notice, their written submission will still be considered by the Court as it is part of the information transferred from the council to the Court and the submissions should have been summarised in the council report.

The need to lodge a s274 notice to be involved in the Court proceedings makes it important for submitters to give early thought as to whether they would like to speak to their submission or evidence before the Court or have others do it for them and be well prepared for this. If there are other submitters with the same issues, submitters may want to prepare and present a joint submission and have combined legal and expert representation, if required, to potentially save on both time and costs. If developing an original submission into evidence, the evidence needs to be within the scope of the matters raised in the original submission and the s274 notice. The anti-trade competition provisions as set out in Part 11A of the RMA also apply to parties seeking to be heard on matters of direct referral.

The council could also advise submitters of the requirement to lodge a s 274 notice when they send out the council report, although the actual date for lodging the notice (15 working days from the proceedings beginning) would not be known at this point.

To become a party to the proceedings, the submitter must lodge a s274 notice within 15 working days after the proceedings are commenced. After giving notice, the submitter must give the same notice to all other parties (ie other people who have lodged s 274 notices) within 5 working days after the deadline for giving notice to the Court.

The implications of being a s274 party before the Court differ to those of being a submitter before a council hearing. Being a s274 party does not necessarily mean there is an obligation to present a submission, produce evidence or cross-examine; however, there is the ability to do so. It also provides a right to participate in mediation.

Further information for submitters on the Court process is contained in the [Information Sheet](#) on the Ministry for the Environment website. The Environment Court website also has useful [Guidelines for litigants in person](#) about the Court procedure, including useful guidance on how to set out written statements of evidence.

## Cross examination of witnesses





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Cross-examination is not permitted in council hearings. However, before the Environment Court, all parties, including lay parties, have a right to cross-examine and may be subject to cross examination themselves. Nobody can be precluded from cross-examination; however the Judge will keep an order to proceedings to avoid time wasting and repetitive questioning.

### **The Environment Court decision**

The Environment Court will issue the decision on the application to the applicant, the council(s), and all section 274 parties by post. It is also good practice for the Court to send the copy of the decision to all submitters, even if they did not become section 274 parties. In some instances, the decision may be issued in the form of a CD\_ROM and/or sent as a PDF attachment via email. The Court may include supporting information with the decision and may refer to the relevant parts of the Court website.

### **Appeals from the Environment Court decision**

Appeals from the Environment Court's decision can be made to the High Court by the applicant and any party, but only on points of law and not findings of fact or decisions on the merits. Legal advice is recommended before considering an appeal.

## **Monitoring and enforcement of the decision and costs**

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### **Monitoring and enforcement of the decision**

If the Environment Court grants the application, the council becomes responsible for monitoring and enforcing the decision, including all conditions. The need for enforceable consent conditions also reinforces the role that council has to play in the Court hearing as the Court will likely require advice from the council regarding suitable consent conditions, which may evolve throughout the course of the hearing.

### **Costs and cost recovery**

Under s285, the Environment Court may order any party to proceedings before it to pay costs and expenses to any other party that the Court considers reasonable.

With respect to the Court's costs, s285(3) enables the Environment Court to recover its costs and expenses from any party and s285(5) states the Court must apply a presumption that the Court's costs and expenses are to be ordered against the applicant in direct referral cases. The Court will seek to recover the actual and reasonable costs associated with a direct referral case. The Court can be contacted to discuss their cost estimate for a particular case.

Councils are able to recover their costs in carrying out their functions in relation to receiving and processing applications to the point that the application is transferred to the Court. However, in terms of their Court costs, councils will need to make an application to the Court in the usual way to recover their costs incurred in the Court process. This includes time spent appearing at the Court hearing. Therefore, councils should keep accurate records of time spent, prior to and following the direct referral of the application to the Court, with detailed descriptions to assist with cost recovery.

The council can recover all of its costs involved in the processing of the application up to the point of direct referral using section 36 of the RMA. This includes the preparation of the planning report. The council's costs in attending the hearing can be awarded under section 285.

Further information on costs is provided in the [Environment Courts Practice Note 2014](#) and in the [Ministry for the Environment's An Everyday Guide to the RMA Series 6.3: The Environment Court: Awarding and Securing Costs](#).

### **Do the Discount Regulations apply to the direct referral process?**

[The Resource Management \(Discount on Administrative Charges\) Regulations 2010](#) apply to council charges on applications for resource consent and applications to change or



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cancel a resource consent condition, including resource consent applications where an applicant has requested direct referral.

The Regulations require councils to provide a discount where a resource consent application is not processed within the timeframe(s) set out in the RMA. Councils can develop and adopt their own discount policy that is more generous than the Regulations. The Regulations do not apply to any of the costs of the Environment Court.

The Discount Regulation applies when:

- an applicant requests direct referral under s87D, and
- the applicant does not withdraw the application that is the subject of the request, and
- the application is not processed within the time limits applicable to it.

The discount is one per cent of the total of the administrative charges the council imposes for every working day on which the application remains unprocessed beyond the time limits, up to a maximum of 50 working days.

There is no total time limit specified in the RMA that is applicable to applications that are affected by direct referral. Therefore the separate timeframes and the time exceptions for different stages in a consent process where a request for a direct referral is made need to be selected and added together to find the total time limit for each application on a case-by-case basis. To assist with the calculations, refer to the Ministry for the Environment's [Discount Regulations](#) guidance.

For direct referral applications, a discount needs to be given if the number of working days described in the applicable scenarios below is smaller than the number of working days actually taken:

- If the applicant **files a notice of motion in the Environment Court**, the timeframe starting on the day after the day on which the application is lodged, up until the last day of the period described in s87F(3) (ie, the last day of the 20 working day period within which the council must prepare their report for the Court).
- If the applicant **does not file a notice of motion in the Environment Court** and the council determines the application, the timeframe starting on the day after the day on which the application is lodged and ending on the day on which the council complies with s114(1) (ie, notice of notification decision) within the time limits in s115 (ie, time limits for notification decision). Where a hearing is required, this is likely to be a total of either 130 working days for publicly notified applications or 100 working days for limited notified applications. Where no hearing is held, the timeframe will be 60 working days to issue a decision in total.

The number of working days actually taken is calculated by totalling the number of working days (excluding the 'excluded days' which are set out in the Regulations) used to process the application in the applicable timeframe.

## Glossary

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

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

**Case manager** – The Environment Court staff member allocated to manage a case from filing, through to the matter being set down for a hearing. See also 'Court Registrar'

**Caucusing** – a meeting of expert witnesses to try and reach agreement on aspects of their evidence. See also 'Expert witness'.

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

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

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

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

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

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

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

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



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

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

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

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

Written submission – a written submission made to the council on a resource consent application.

