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Overview of Environment Court processes



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Environment Court

- The Environment Court has jurisdiction over a range of RMA matters including appeals in relation to:
 - contents of regional policy statements, regional plans and district plans
 - resource consent applications (can be directly referred to Env Court)
 - designations
 - abatement notices
- Decides on applications for orders determining the date on which rules have legal effect, enforcement orders, declarations, costs awards and applications for proposals of national significance if referred by Minister for the Environment
- The Court usually conducts an appeal against a decision on an application for a consent, or permit, as a complete rehearing (ie de novo).

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Appeals



If you have made a submission on a proposed plan or policy statement, a change to an operative plan or a variation to a proposed plan, you can appeal the council's decision (30 working days)

If you are the applicant, the consent holder, or have made a submission, you may appeal council decisions on the following (15 working days):

- an application for a resource consent
- an application for a change of consent conditions
- a review of the conditions of an existing consent.

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Filing Fees

Notice of Appeal against decision on proposed policy statement or plan or decision on resource consent

1 August 2003 to 6 May 2009 = \$55 filing fee



Increased filing fee since 7 May 2009 = \$511.10

Other proceedings

There is a \$56.20 filing fee for other proceedings. For example if you apply for an enforcement order or declaration.

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Third Parties

You can become a party to proceedings if you (section 274):

- lodged a **submission** at the local authority stage; or
- have an interest in the proceedings **greater than the public generally** but this right may be limited if you are a trade competitor or a surrogate for the trade competitor

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Third Parties

Who are those with an interest greater than the public generally?

Will normally include neighbours, downstream resource users and iwi authorities.

Since the enactment of the Resource Management (Simplifying and Streamlining) Amendment Act 2009, it is uncertain whether public interest groups may be able to become parties under this category as well.



Third Parties

Public Interest groups?

There is no longer the option for public interest groups to become a party to proceedings on the basis that they represent the public interest. Only the Attorney-General may bring such proceedings.

If public interest groups have made a submission or have an interest greater than the general public (e.g. own neighboring land) then they will be able to become a party to proceedings.

Time frame

You must give notice to the Environment Court and all other parties to that you wish to be a party to the proceedings within **15 working days** after the period for lodging a notice of appeal ends.



Form of Notice

Must state:

(a) the proceedings in which the person has an interest; and

(b) whether the person supports or opposes the proceedings and the reasons for that support or opposition; and

(c) if applicable, the grounds for seeking representation under subsection (1)(c) or (d); and

(d) an address for service.



Case management

Court practice note – essential features

- Identification of the issues in dispute
- Encouragement of settlement by negotiation, or the use of ADR techniques
- Planning the course of the proceedings so that the parties and counsel are aware of the events that will occur, and the likely time and cost involved
- Court supervision for more complex cases through directions and conferences
- Monitoring parties' performance in ensuring that events occur as time-tabled so that orderly progress towards conclusion results



Case management tracks

Cases are assigned by a Judge or the Registrar to one of the case tracks:

Standard track
Cases that are not complex (most resource consent appeals)

Complex track
More involved cases (such as statutory plan appeals, appeals concerning a major development proposal, and matters directly referred to the Court) which require individual management.

Parties' hold track
Subject to the Court's agreement, cases in which the parties agree that management be deferred for a period.

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Role of expert witnesses

Why you may need experts

- RMA disputes often turn on technical matters
- Increasing expectation that assertions about technical matters will be made only by experts
- Only experts' opinions are usually given weight.
- Council hearings more tolerant than Environment Court, but same principles apply
- If you have limited resources – prioritise!

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Role of expert witnesses

Types of Experts

- Planners**
- Landscape architect/urban designer**
- Ecologist**
- Archaeologist/heritage expert**
- Noise engineer**
- Traffic engineer**
- Surveyor**

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 **Role of expert witnesses**
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Role and Responsibilities of an Expert

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

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

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 **Role of expert witnesses**
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Getting Value from Experts

- Get advice on what expert(s) you need.
- Keep in touch with the council – what experts are they calling?
- Contact other parties with similar concerns to explore cost or expert witness sharing
- Initial consultation, short report, pro bono work
- Scope of work needed– original research or just peer review?
- Brief your expert witnesses well so that they are clear about the issues in contention and how their evidence will contribute to your case.
- Discuss budget and timeframes
- Provide all information

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 **Preparing evidence**
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- The person presenting the expert evidence will need to prepare it.
- They will need to have first-hand knowledge of the issues in dispute and have formed an independent and professional view of the merits of your case.
- Make your evidence relevant.
- Identify and concentrate on the important issues.
- Evidence should start with the expert setting out her or his qualifications and experience.
- Maps, diagrams and photographs should be used where possible to illustrate the evidence.
- Comply with Code of conduct (set out in the Environment Court Practice Note 2011).

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 **Exchange of evidence**

- To be exchanged 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.

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 **Legal submissions**

- Your legal submissions/opening submissions should cover the following matters:
 - The background circumstances to the case (unless these have already been covered by an earlier party)
 - The issues in dispute
 - The nature of the evidence which you will be presenting
 - The principles of law which apply to the issues in dispute
 - The differences between your case and that of the opposing parties and the reasons why your case should be preferred

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 **Presenting your case**

- Can cross-examine other side's witnesses
 - The purpose of cross-examination is to test the witness's evidence and, if possible, to uncover reasons why the Environment Court should not rely on it.
 - Focus on identifying flaws in the credentials and reasoning process of the witness. Is the witness qualified in all areas on which he or she is giving evidence? Has the witness relied on the opinions or evidence of others? If so, are there flaws in those opinions or evidence which would invalidate the witness's conclusions? Has the witness given inconsistent opinions in the past, such as in relation to other RMA cases?
- The Bench can also ask questions

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 **Security for costs**

A defendant may seek security for costs if they consider that the appellant will not be in a position to pay costs if an award is made.

When hearing an application the Court will consider the issues in two stages: the threshold test and the exercise of the discretion.

Threshold test

- Insufficient assets to pay any order for costs in favour of the applicant. This is a factual matter that must be established by credible testimony.
- Even when the threshold test is met the Court has a residual discretion as to whether or not it is appropriate to make an order for security for costs.

 **Security for costs**

Exercise of discretion

The Court has a broad and unfettered discretion as to whether to award security for costs. Some of the following criteria may be relevant:

- There is no presumption either way for or against an order for security;
- Discretion is to be exercised in all the circumstances of the case;
- Security is not to deprive a party from its right to bring or defend a claim;
- A financially poor party is not to have advantages through inability to pay costs by putting unfair pressure on a solvent party;

 **Security for costs**

Exercise of discretion continued

- Regard is to be had to the public interest aspect of the litigation brought by an appellant who is acting responsibly as a watchdog in the public interest;
- Whether there are grounds for thinking the defendant is using the application oppressively;
- The merits of the appellant's case and whether the action has reasonable prospect of success;
- The likelihood of the Court ordering an unsuccessful appellant to pay costs; and
- Overall balance is to be maintained in the interests of justice.

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Purpose is to compensate a party for unnecessary costs incurred as a result of the actions of other parties.

Such actions include lodging proceedings which have little merit or pursuing a case in a manner which results in other parties incurring unnecessary expense.

Costs are not routinely awarded, only under special circumstances.

Costs are more rarely awarded against parties representing the public interest and, if awarded in these cases, have historically been usually much lower.

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Guidance from Environment Court Practice note:

- 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.
- Where an appeal against a Proposed Plan, or a Plan has proceeded to a hearing, costs will not normally be awarded to any party.
- A relevant factor in considering whether to order payment of costs, and in fixing the amount of an award, will be whether any party has been required to prove undisputed facts which, in the Court's opinion, should have been admitted by other parties.

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Costs Awards

To minimise risk:

- Where possible, seek professional advice to ensure that they have sufficient legal merit, i.e. that there is an arguable case
- Narrow your appeal to the substantive issues you wish to pursue. Take out minor issues or technical challenges which do not have a strong likelihood of succeeding
- Approach the other party early on to discuss your concerns and explore the potential for early settlement, or at least for narrowing the issues in dispute
- Be open to mediation
- Make sure that you meet all the procedural requirements
- Make sure that you have substantive evidence to back up your case and that it is concise and to the point
- If you decide not to pursue your proceedings, withdraw them without delay, well before a hearing has been set down

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