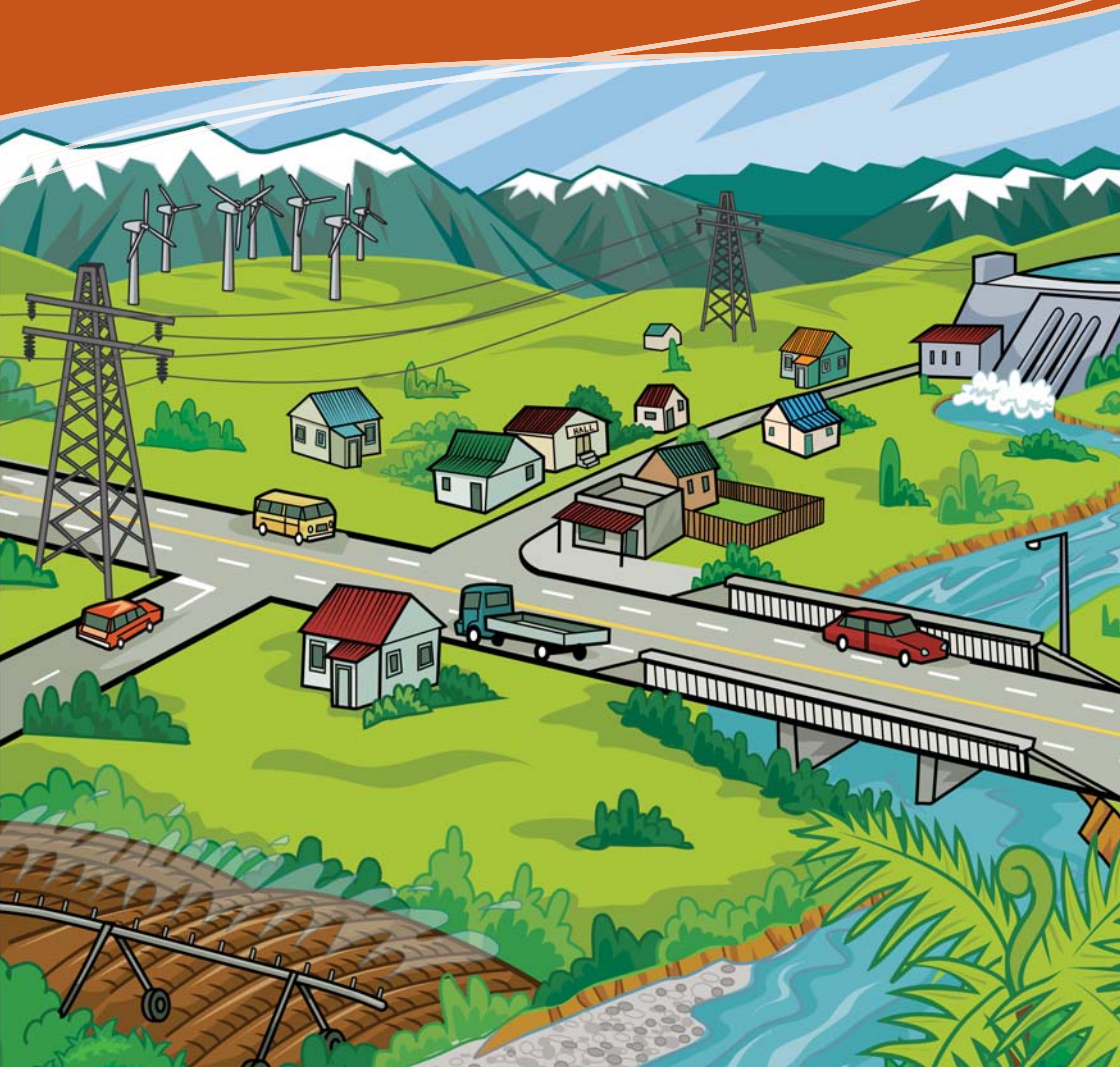
Ministry for the Environment
Manatū Mō Te Taiao

AN EVERYDAY GUIDE TO THE RMA → SERIES 1.4

National Level Guidance and Processes



SERIES

Series Overview

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Introduction

The Resource Management Act 1991 (the RMA) is the main law setting out how the environment should be managed, and especially how the environmental effects of our activities should be managed. The RMA is based on the idea of managing resources sustainably, and it encourages us (as communities and as individuals) to plan for the future environment.

While the RMA is largely put into practice by local government (regional councils, unitary authorities, and city and district councils), it also allows central government to provide direction on specific national, regional or local issues, using a range of tools. This booklet will help you understand these tools, particularly:

- national environmental standards, national policy statements and water conservation orders: what they are, what effect they have, how they are developed and how you can get involved
- the different ways that the Minister for the Environment can intervene in decision-making processes
- how you can be involved in national RMA processes.

This guide does not cover all of the national instruments available under the RMA, such as Ministerial direction and the use of regulations setting administration and procedural matters.

National level planning instruments

National environmental standards

National environmental standards (NES) are regulations made under section 43 of the RMA. They provide certainty about requirements across the country by setting out minimum requirements for particular activities, and can protect public health and the environment.

NES prescribe technical standards, methods or requirements for land use and subdivision, water take and use, use of the coastal marine area, discharges and noise matters. They can also require monitoring, particularly if the standard is aimed at improving the environment.

A NES can set either a national standard, so that there is no local variation, or a minimum standard which councils cannot go below. However, in many cases, councils can impose stricter standards through rules in their own plans. A NES can also be developed that only applies to a certain area or matter.

National environmental standards may:

» prohibit an activity

» allow an activity. It may say that it is permitted without the need for a resource consent as long as it doesn't have a significant adverse effect on the environment

» specify that a resource consent is required; whether the activity is to be controlled, restricted discretionary, discretionary or non-complying; and what matters the relevant council will consider when assessing the resource consent

» be absolute – meaning that a council's rules and resource consent processes can be neither more lenient nor more strict than the standard

» restrict a council from making a rule about, or granting resource consent to, matters or activities specified in the standard

» require a person to obtain a certificate stating that an activity complies with a term or condition imposed by a NES

» specify those activities which a consent authority must publicly notify, and those it is not allowed to publicly notify.

What is the impact of a NES?

A NES automatically applies to councils. They must put it into practice when making resource consent decisions and through their plans, and then enforce it. Councils can amend their plans to remove any duplication or conflict between a NES and their own rules, without using the normal plan change process.

A NES may apply immediately, or have a transitional period to enable the councils to make sure it can comply by a certain date.

A new NES does not affect existing resource consents. However, councils can review the conditions of existing water, coastal and discharge permits once a NES has been set.

How are national environmental standards developed?

There are three stages to developing a NES: scoping, consultation and finalising the standard.

Stage 1: Scoping and seeking approval to proceed

In this stage, the Ministry for the Environment (or other relevant Crown agency):

- defines the problem and issues
- identifies existing policy instruments and whether these are already adequate to address the problem and issues
- asks Cabinet to consider whether a NES should be prepared
- drafts a discussion document
- sets up a reference or technical group (optional)
- gets Cabinet agreement for a draft NES to be prepared.

Stage 2: Public consultation

In this stage, the Ministry for the Environment (or other relevant Crown agency):

- notifies the proposed NES and discussion document to the public and iwi authorities
- receives submissions
- prepares and publishes a report on submissions.

Stage 3: Finalising the national environmental standard

In this stage:

- the Ministry for the Environment prepares a report and recommendations for the Minister
- the Minister considers the report and the recommendations along with a cost/benefit analysis, regulatory impact statement and business compliance cost statement, and the final policy for the proposed NES

- the Minister consults with Cabinet
- the Parliamentary Counsel Office prepares the draft NES
- the Ministry for the Environment publishes and publicly notifies the report, its recommendations and the cost-benefit analysis
- the Minister recommends the draft NES to the Governor-General
- the Governor-General makes the regulation by Order in Council.

This process need not be followed when a NES is simply being amended to correct errors or make similar technical changes (providing the amendments have no more than minor effects).

How can I get involved with the development of a national environmental standard?

The public can most easily get involved in Stage 2, by making a submission on the draft NES and its accompanying discussion document. Sometimes there may be earlier opportunities to comment, such as on issues and options papers prepared during the scoping phase. Opportunities for earlier consultation tend to be targeted at key interest groups.

National policy statements

Under the RMA, the Minister for the Environment can prepare national policy statements (NPS) that outline objectives and policies for matters of national significance. In deciding whether to prepare a NPS, the Minister might consider whether this is a matter that:

- affects more than one region
- affects New Zealand's interests and obligations in maintaining or enhancing the national/global environment
- is significant because of the nature or scale of change means change for a community, or to natural or physical resources
- is significant because of the environment's uniqueness, and because it involves actual or potential effects that are either irreversible or of considerable magnitude and/or risk
- affects a structure, feature, place or area of national significance
- concerns new technology, or a process that might affect the environment.

The New Zealand Coastal Policy Statement

New Zealand's Coastal Policy Statement (NZCPS) is a NPS setting out principles and policies for the sustainable management of New Zealand's coastal environment.

The RMA says that there must be a NZCPS at all times, and specifies what it may contain – including objectives and policies about:

- national priorities for preserving the natural character of the coastal environment, including protection from inappropriate subdivision, use and development
- the protection of characteristics of the coastal environment of special value to tāngata whenua
- matters to be included in regional coastal plans, including any restricted coastal activities
- international obligations
- public access
- how the effectiveness of the NZCPS will be monitored
- the protection of recognised customary activities.

What is the impact of a national policy statement?

A NPS has two main impacts:

1. Councils must amend their regional policy statements and regional and district plans to give effect to the NPS.
2. Decision-makers must consider the NPS as part of their decision-making process.

Amending regional policy statements and regional/district plans

A NPS sets out the process councils must follow to make it part of their RMA policy statements and plans. They must do so as soon as possible, unless the NPS itself includes specified timeframes.

There are two ways a NPS can be put into practice:

» Councils may directly incorporate NPS objectives and policies into their policy statements and plans without using the normal processes under the RMA (see below).

» Councils may amend their policy statements and plans, using the normal RMA process to give effect to the provisions of the NPS (eg, through introducing rules).

The 'normal RMA process' involves notifying the public of the amendment, receiving submissions and further submissions, and holding hearings. This is not an opportunity for councils to change the NPS – rather, it makes them focus on how their policy statements or plans will give effect to the NPS.

Anyone can be involved in this policy statement and plan change process. For further information see 'An Everyday Guide to the RMA' booklet *5.1 Making a Submission about a Proposed Plan or Plan Change*.

Considering the national policy statement as part of RMA decision-making

A NPS must also be considered in other RMA processes:

» Councils, boards of inquiry or the Environment Court must have regard to a NPS when making any decisions on resource consent applications, and when considering a designation or an application for a heritage order.

» Special tribunals and the Environment Court must have regard to any relevant NPS when considering an application for a water conservation order.

How are national policy statements developed?

Developing national policy statements is a four-stage process: scoping, drafting, consultation and public release.

Stage 1: Scoping and seeking approval to proceed

In this stage, the Ministry for the Environment (or other relevant Crown agency):

- defines the problem and issues
- identifies existing policy instruments and whether these are already adequate to address the problem
- asks Cabinet to consider whether a NPS should be prepared
- engages with iwi authorities and relevant stakeholders to seek their views
- sets up a reference or technical group (optional)
- gets Cabinet agreement to the preparation of a proposed NPS.

Stage 2: Drafting the national policy statement

The Ministry for the Environment or other agency:

- drafts the proposed NPS
- assesses and evaluates the potential economic, social, cultural and environmental impacts of the proposed NPS.

Stage 3: Public consultation

In this stage:

- the Government either appoints an independent board of inquiry to hear and decide on the NPS, or adopts an alternative process (the opportunities for public input are described below)
- a report and recommendations are prepared
- there is further evaluation of the impacts of the NPS.

Stage 4: Finalising the national policy statement

In this stage:

- the Minister considers the report and recommendations, additional analysis, and a regulatory impact statement
- any final changes are made
- the NPS is approved by the Governor-General and issued by the Minister by notice in the New Zealand Gazette

» the NPS is publicly notified and comes into effect.

The Minister for the Environment can suspend a proposed NPS, or withdraw all or part of one, at any time before the NPS is approved.

How can I get involved with the development of a national policy statement?

There are two opportunities to become involved in the development of a NPS:

» at the scoping phase – stage 1
» through public consultation – stage 3.

Stage 1: Scoping

When deciding whether to prepare a NPS, the Minister must seek input and comments from the relevant iwi authorities and anyone else the Minister considers appropriate. In some cases, the consultation may be targeted at specific audiences; at other times, anyone can contribute. The Ministry for the Environment carries out this initial consultation on behalf of the Minister.

Stage 3: Public consultation

The formal consultation phase for a NPS can be through either a board of inquiry or another process. Guided by the RMA, the Minister decides the most appropriate course of action, taking into account:

» the advantages and disadvantages of developing the NPS quickly
» the extent to which the NPS differs from existing policies
» whether there has been any recent and relevant public consultation and debate on the same subject.

1. A board of inquiry

A board of inquiry is generally chaired by a current or former Environment Court Judge, a former High Court Judge or an RMA lawyer of high standing. It has two to four other members with expertise in the relevant subject matter.

A board of inquiry must publicly notify the proposed NPS, establish a process for receiving public submissions and hold hearings at which submitters can be heard. The process is usually advertised in public notices in national and local newspapers, and on the Ministry for the Environment's website.

The timeframe for submissions is set by the board, and varies depending on the subject matter. How long hearings take depends on the number and nature of submissions.

2. Alternative process

If an alternative process for developing a NPS is adopted, the Minister must ensure it gives the public and iwi authorities adequate time and opportunity to make submissions. Unlike the board of inquiry process, there is no requirement for hearings to be held. Once submissions have been made, a report is prepared and recommendations made to the Minister.

Water conservation orders

What is a water conservation order?

A water conservation order (WCO) recognises the outstanding amenity or intrinsic values that a specific water body provides, in either a natural or modified state. WCOs can be used to preserve that natural state, or to protect characteristics such as:

- the water body's value as a habitat or fishery
- its wild and scenic nature
- its value for recreational, historic, spiritual, cultural or scenic purposes.

WCOs can apply to rivers, lakes, streams, ponds, wetlands or aquifers. They can cover fresh water or geothermal water.

What is the impact of a water conservation order?

A WCO can prohibit or restrict a regional council from issuing new water and discharge permits, although it cannot affect existing permits. Once a WCO is made, councils need to ensure that their regional policy statements and regional/district plans are not inconsistent with its provisions. Councils cannot

grant water, coastal or discharge permits that are contrary to the restrictions, prohibitions or provisions of a WCO.

How are water conservation orders developed?

Anyone can apply to the Minister for the Environment for a WCO. If the application meets specific RMA criteria, the Minister appoints a special tribunal to consider and make recommendations on the application.

The process for developing a WCO has three stages: assessment, consultation and finalising the WCO.

Stage 1: Assessing the application

In this stage:

» the Minister considers the application to decide whether it meets the criteria set out in the RMA. If it does, the Minister appoints a special tribunal. The Minister can request further information, or reject the application.

Stage 2: Public consultation

If the application is accepted:

» the special tribunal notifies the application

» a submission period of no fewer than 20 working days is set

» hearings are held

» a report outlining the tribunal's recommendations is sent to the applicant, the Minister, the regional council, the relevant territorial authorities, the relevant iwi authorities, and everyone who made a submission

» the applicant and submitters have the right to make submissions to the Environment Court on the special tribunal's report and recommendations

» if submissions are made to the Environment Court, it will hold an inquiry and recommend to the Minister whether the special tribunal's report should be rejected, accepted or modified.

Stage 3: Finalising the water conservation order

In the final stage:

- the Minister considers the report from the special tribunal (or, if an inquiry has been held, from the Environment Court), and decides whether to make the WCO
- the Minister must find in accordance with the relevant report, or reject it and provide reasons
- the Governor-General makes the WCO by Order in Council.

Getting involved in the development of a water conservation order

Anyone can make a submission to the special tribunal established to consider a WCO application. Once the tribunal has issued its report, anyone who made a submission can choose to make a further submission to the Environment Court on that report. The Environment Court must hold a public inquiry (like a hearing) if it receives one or more submissions.

Ministerial direction on proposals of national significance under the RMA

The Minister for the Environment can determine that a proposal is of national significance and refer it to a board of inquiry or the Environment Court for consideration and decision. This is called a direction, or 'call-in'.

Proposals that are treated in this way come to the Minister's attention in one of three ways:

- an applicant can lodge an application directly with the Environmental Protection Authority (EPA) who may recommend the Minister calls-in the matter
- an applicant or a local authority can ask the Minister to make a direction referring the matter to a board of inquiry or the Environment Court
- the Minister may choose to intervene on a proposal after it has been lodged with a council.

Matters that may be subject to ministerial direction are:

- resource consent applications (or changes or cancellations of consent conditions)

- notices of requirement for a designation or a heritage protection order (or alterations to a designation or heritage protection order)
- requests that a regional plan be prepared or a change made to a plan
- council plan changes or variations to a plan change.

In addition, the Minister of Conservation can make a direction on matters that relate solely to the coastal marine area. Where something relates only partly to the coastal marine area, the decision to intervene will be jointly decided by both Ministers (Environment and Conservation).

When may a Minister make a direction?

The Minister may call-in resource consent applications and notices of requirement at any time up until five working days after submissions close (if the application is notified) or before the council makes its decision or recommendation on the matter (if the application is not notified). Council plan changes or variations must be called-in no later than five working days after submissions close. The Minister cannot direct a regional plan or request for a plan change be decided by the Environment Court if either of these things has not yet been notified.

Where an application has been lodged with the EPA, the EPA must make a recommendation to the Minister within 20 working days (excluding any time where further information is requested). The EPA cannot direct a regional plan or request for a plan change be decided by the Environment Court if either of these things has not yet been notified. The Minister will then decide whether to make a direction, or refer the matter back to the council to deal with under the standard process.

Sometimes, the public may suggest that the Minister intervenes on a particular matter. While these are not formal requests, the Minister may choose to do so. Any request to the Minister for intervention needs to be made **in writing** and as early as possible.

How do Ministers decide if a proposal is of national significance?

The relevant Minister may consider several factors, including whether the issue:

- has aroused widespread public concern or interest about its actual or likely effect on the environment, including the global environment
- involves, or is likely to involve, significant use of natural and physical resources
- affects, or is likely to affect, any structure, feature, place or area of national significance
- affects, or is likely to affect, more than one region or district
- affects, is likely to affect, or is relevant to New Zealand's international obligations to the global environment
- involves, or is likely to involve, technology, processes or methods which are new to New Zealand and which may affect the environment
- causes, is likely to cause, or contributes to significant or irreversible environmental changes, including to the global environment
- is significant, or is likely to be, in terms of section 8 of the RMA (Treaty of Waitangi)
- will help the Crown fulfil its public health, welfare, security, or safety obligations or functions
- relates to a network utility operation that extends (or may extend to) more than one district or region.

The Minister must also consider:

- the capacity of the council that would process and determine the matter
- the views of the applicant and the local authority
- the EPA's recommendations (if applicable).

What happens if the Minister calls-in a proposal?

When the Minister decides to call-in a proposal, the matter may be decided by a board of inquiry, the Environment Court, or the relevant council (under the standard process).

Boards of inquiry and the Environment Court follow similar procedures – hearings are held where submitters have an opportunity to be heard, and cross-examination may be permitted. The principal differences are:

- As part of the board of inquiry process, a draft report is made available to the applicant, council, any submitters and the Minister for comments before a final report (including the decision) is issued. The Environment Court need

not produce a draft report before issuing its decision.

» The board of inquiry's report can include recommendations relating to plans, regional policy statements and national policy statements. The Environment Court can order changes to plans and regional policy statements.

Once a Minister has made a direction to call-in a proposal, the applicant and the council is advised by the EPA through a public notice that:

» states the Minister's reasons for making the direction

» gives details on where information on the proposal may be viewed

» invites submissions from anyone to be forwarded to the EPA within 20 working days of the public notice

» provides the EPA's and applicant's address.

This public notice and call for submissions must be done in all cases where the Minister has called-in a matter, even where the council has already previously publicly notified the proposal and received submissions. The EPA must also give specific notice of the direction to the owner(s) and occupier(s) of the land to which the matter relates and all adjacent land, and to everyone who has made a submission.

Once a matter has been called-in, the council must provide the Minister with all relevant information about it, including any submissions that have already been received.

How can I get involved?

Anyone can make a submission to the Minister on a nationally significant matter that has been called-in by the Minister and publicly notified. In addition, submissions already made to the council will be considered as submissions to the EPA, and anyone who has made a submission to the council or EPA (or both) can be heard.

Once a final decision has been made on the matter, it can be appealed to the High Court on questions of law only. In the case of board of inquiry decisions, appeals can be made only by parties who were sent copies of the board's decision. Environment Court decisions may be appealed by the applicant, or by submitters.

What happens if the Minister decides to refer the matter to the council?

If the Minister decides not to refer the matter to a board of inquiry or the Environment Court, it goes back to the relevant council for a decision. If the application(s) have come through the EPA, the EPA must provide the council with all the material it has received on the issue. The council must treat the application as if it had been lodged with it, and regard it as complete: it cannot return the application on the grounds of insufficient information.

In what other ways can the Minister intervene?

When making a direction on a proposal of national significance, the Minister can also make a Crown submission to the Environment Court or board of inquiry considering the matter. If the matter is referred back to a council, the Minister may:

- appoint a project coordinator to advise the council
- direct councils to hold a joint hearing if the matter involves more than one council
- appoint an additional hearings commissioner to a hearings panel, if the council decides that commissioners should be used.

What does a Crown submission involve?

A Crown submission is a single statement that represents the collective view of all relevant Ministers and government agencies, combining and integrating their various experiences, expertise and resources.

What does a project coordinator do?

The role of a project coordinator is to advise the council and to act as an additional resource. A project coordinator can help organise hearings, coordinate any experts, and provide liaison between consent agencies.

What is a joint hearing?

This brings together representatives from two or more councils to make the hearing process more efficient and integrated.

A joint hearing avoids the need for multiple hearings in cases where several resource consents are required, where it is proposed to make the same change to two or more plans, when a proposal of national significance crosses the boundaries of multiple territorial authorities, or when it requires consent from both a territorial authority and a regional council.

While councils already routinely hold joint hearings, the Minister's power to direct such hearings provides a backstop to ensure they are held whenever sensible.

What does the appointment of a hearings commissioner involve?

Councils often appoint independent commissioners in place of or alongside elected representatives. Acting under delegated authority, they hear and decide on resource consent applications, and make recommendations on designations and plan changes. They are especially valuable when highly complex or technical issues are under debate, when there may be a conflict of interest, or simply when the volume of hearings makes the use of councillors unfeasible. They are also used when the applicant and/or submitters makes a request for one or more independent commissioners to be appointed to the hearings panel.

When appointing a hearings commissioner, the relevant Minister may seek someone with particular expertise in the matter.

Who pays when a Minister intervenes?

The Minister, the EPA and the council can all seek to recover costs from the applicant. The EPA can also recover its actual and reasonable costs for providing any assistance before a matter is lodged with it, even if the applicant ultimately decides not to lodge it. The applicant can request an estimate of costs from the council, the EPA, or the Minister. The Minister has established a Cost Recovery Policy for Proposals of National Significance to guide the recovery of costs by the EPA and the Minister. The policy is available on the Environmental Protection Authority website: www.epa.govt.nz.

How can I make a good submission on a nationally significant matter?

Whatever national RMA process you are involved in, your submission must be clear, concise and specifically address whatever you support or oppose in the proposal. This is particularly important where the process does not involve a formal hearing, as you will not have the opportunity to be formally heard and expand on any points raised in your written submission.

For more information see 'An Everyday Guide to the RMA' booklets *3.2 Making a Submission about a Resource Consent Application* and *5.1 Making a Submission about a Proposed Plan or Plan Change*.

What can I expect when I am being heard by a board of inquiry, special tribunal or the Environment Court?

These hearings are generally more formal than council hearings. They usually involve more people, including experts and lawyers who may take longer to present their case than they would at a council hearing.

Like in a council hearing, the applicant and submitters may be questioned by members of the board, tribunal or Court. However, unlike a council hearing, there are no subsequent rights of appeal to the Environment Court for a decision made by a board of inquiry or special tribunal. This means that the case that you present must be clear, concise, well reasoned and cover all points of concern.

Prepare yourself well:

- Write a statement to read out at the hearing. You should identify key points you want to raise and make sure that these are covered. Be specific about your concerns, how you want them addressed, and what you want the outcome to be.
- Practise reading your statement.
- Think about questions that the board, tribunal or Court might ask, and how you might answer them.

In presenting your submission, you should:

» read your statement slowly and clearly

» stick to the facts

» focus on the environmental matters and effects

» back up any statements you make with clear evidence

» expand on your written submission verbally, but don't introduce any new issues

» don't repeat yourself or be long winded

» don't play on emotions, breach protocol or get distracted by personal issues or past disputes

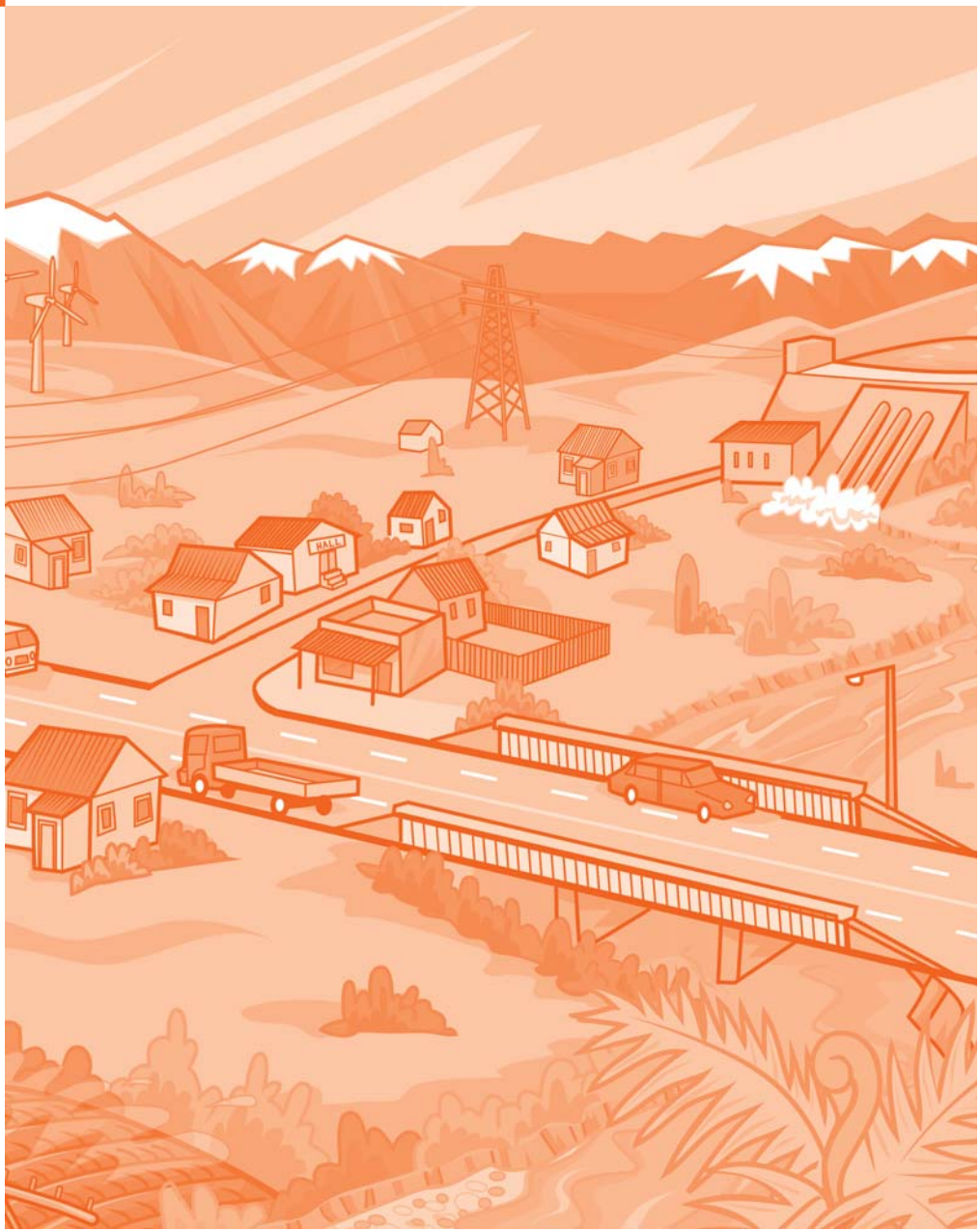
» use experts or lawyers if you need them to support you.

For more information see 'An Everyday Guide to the RMA' booklets *3.3 Appearing at a Resource Consent Hearing* and *5.2 Appearing at a Council Plan or Plan Change Hearing*.

Cross-examination

Cross-examination generally occurs only in the Environment Court, and does not take place in council hearings. A board of inquiry appointed to hear a matter of national significance that has been called-in by a Minister may also allow cross-examination.

Cross-examination allows lawyers for the applicant or a submitter to ask questions of the opposing party's witness(es), including any submitters. You may be cross-examined even if you don't have a lawyer representing you. Therefore (unless you are appearing at a council hearing), you should prepare yourself for cross-examination. In particular, you should carefully think about any questions that you might be asked, particularly in areas where you disagree with the party that will be cross-examining you.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Disclaimer

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