

RESOURCE MANAGEMENT ACT
MONITORING AND COMPLIANCE SECTION

Guidelines for implementing Alternative Environmental Justice

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Contents

1. Introduction	1
2. Purpose	1
3. Alternative Environmental Justice Desired Outcomes	2
4. Environment Canterbury's Compliance Decision Framework	3
5. The Alternative Environmental Justice (AEJ) Scheme	4
5.1 Evaluation Process	4
5.2 Making an Offer of AEJ	6
5.3 The AEJ Conference	7
5.4 Setting Appropriate Conditions	8
5.5 AEJ Conference Conclusion	9
6. Failure of the Alternative Environmental Justice Process	10
7. Monitoring and Auditing Alternative Environmental Justice	11
8. Reporting	11
9. Review of Guideline	11

1. Introduction

The development of an Alternative Environmental Justice (AEJ) scheme has been driven largely by the experience the Resource Management Act Monitoring and Compliance Section (RMAMC) of Environment Canterbury has gained through formal enforcement action following environmental offending. Many environmental offences do not appear to be the result of deliberate or deceptive activities. More often than not the offence is the result of clumsy or careless attempts to use land, water and air in ignorance of the actual and potential effects on the environment. Yet, significant and permanent consequences can follow from environmental offending, even though it may have been inadvertent. While ignorance of the law does not justify offending, environmental regulation can be complex and what is required to avoid environmental offending is often not well understood in some sectors of the community.

It is with this in mind that AEJ has been developed to fill an identified gap in the “regulatory toolbox” where an infringement fine does not provide an adequate deterrent, but a prosecution may be overly harsh. This document details the purpose, nature and scope of the AEJ scheme and should be read in conjunction with the Compliance, Monitoring and Enforcement Policy 2010.

2. Purpose

The purpose of AEJ is to expand the options for achieving compliance with environmental regulations while ensuring that the consequences for offending are accepted by the community, victim(s), Environment Canterbury and the defendant, as being just and fair. In this way this AEJ is intended to provide a lawful way to exercise prosecutorial discretion, and has been created with the interests of offenders, victims, communities, the criminal justice system and Environment Canterbury in mind.

The Guideline is founded on the principles underlying Restorative Justice and the Police Adult Diversion Scheme. AEJ is a hybrid of both of those approaches to reconciling offending, and therefore AEJ is not intended to be constrained by the existing conceptual frameworks of either the Police Adult Diversion Scheme or the Restorative Justice Conference scheme.

It provides for the exercise of prosecutorial discretion by Environment Canterbury, to resolve environmental offending in an alternative forum that supplements the District Court, in a manner that allows offenders to put right the harm caused by their offending. It achieves this by enabling eligible offenders to complete diversion activities within a given timeframe to avoid both a full prosecution and the possibility of receiving a conviction; and enabling community groups and affected parties to participate actively in the justice process. It is an approach with early intervention at its core. This means that judicial time can be reserved for more serious offences and offenders.

It is important to recognise that the development and use of AEJ is not intended to diminish the need for offenders to be issued fines, or receive a conviction where it is in the public interest to do so.

3. Alternative Environmental Justice Desired Outcomes

AEJ enables the Council to not only encourage compliance, but also ensures that any consequences of an offence can be resolved in a way which requires any harm caused to be remedied, in a manner which is acceptable to the community or victim harmed. It seeks to meet the public interest in reconciling environmental offending by engaging both offenders, victims and the community in a non-adversarial forum where the offender is made accountable for their offending, and by conditions agreed to at a conference, the offender “puts right” any harm caused by their offending. Where the public interest is met by the offender putting right their offending, Environment Canterbury will exercise its discretion to request the Court to withdraw part, or all, of the charges laid. If accepted by the Court, the result is that the offender is still fully accountable for the consequences of their offending, but that they will not receive a criminal conviction.

AEJ meets the public interest by delivering the following key outcomes:

1. An adequate deterrent to the offender which is proportionate to the deliberateness of the offending;
 2. Other parties are deterred from offending in the same or similar nature;
 3. The costs of the offending (including any costs of investigation and/or prosecution) as far as possible are borne by the offender and not the wider community or any victim of an offence;
 4. The offender is provided with opportunities to:
 - a. remediate/mitigate any environmental effects or other harm associated with the offending;
 - b. be accountable to the community affected by their offending as well as any direct and indirect victims of the offence. This may include compensation to a victim or community;
 - c. listen to those most directly affected by the offending, and (if desired) make apologies to them;
 - d. improve knowledge of what steps to take to avoid re-offending, and that those steps are also communicated to the wider community.
 5. Allows for the informant and defendant to exit from the AEJ process and resort to a prosecution/defence of the alleged offending before a District Court Judge if either party desires that;
 6. Is transparent but also adheres to the principles of confidentiality which would ordinarily apply to a restorative justice conference;
 7. Is available for all offenders (but not necessarily all offences) based on clearly defined criteria.
- While providing:
- For community participation in determining what are the appropriate outcomes for the resolution of the offence;
 - For resources to go back into the environment/ community affected by the offending;
 - A “safe” forum for all those involved in, and affected by, the offending to express themselves, understand each other, make apologies and mend relationships;
 - The offender the opportunity to “make up for” or “put right” their offending, and to fully understand the consequences of their offending; and
 - The offender with a better understanding of how to avoid future re-offending.

4. Environment Canterbury's Compliance Decision Framework

Compliance Options Available

Environment Canterbury has a number of options available to encourage and compel adherence to the Resource Management Act 1991. These options are either directive or punitive in nature and are broadly as follows (listed in order of increasing severity):

Directive

1. Verbal Warning
2. Warning Letter
3. Abatement Notice
4. Enforcement Order

Punitive

5. Infringement Notice
6. Prosecution (which can also include an enforcement order upon conviction).

In some cases, it may be appropriate for Environment Canterbury to use a combination of punitive and directive options to address non-compliance. Environment Canterbury takes punitive action and secures convictions to punish offenders, to deter others from committing a similar offence, to recover a proportion of its costs of investigation and prosecution, and to require the remediation of the environment (where appropriate).

AEJ is a tool that will add value to achieving desired outcomes at the prosecutorial end of the spectrum.

Decision to Prosecute – Evaluative Criteria

To determine whether the public interest requires a prosecution, Environment Canterbury evaluates offences against the factors set out in the Solicitor General's Prosecution Guidelines. In the context of an environmental offence, the public interest in a prosecution and the seriousness of the offence is assessed as "High", "Medium" or "Low" against the following additional attributes:

Under the heading of 'Culpability'

1. Deliberateness of the action/intention or lack of due care;
2. Failure to act on prior instruction, advice or notice;
3. Lack of co-operation or effort to remediate and/or cavalier attitude.

Under the heading 'Environmental Effect'

4. Actual adverse effect/impact on environment (including any cumulative effect);
5. Potential adverse effect – toxicity, persistence of contaminants and sensitivity of receiving environment.

Under the heading 'Public Interest'

6. Degree and type of deterrence required (specific deterrence of offender/general deterrence of other potential offenders);
7. Previous convictions of offender.

The ratio of aggravating versus mitigating features of the offending, and where they are ranked (e.g. high, medium, low) on that criteria give an indication of how serious the offending is compared with environmental offences as a whole, and in comparison with other similar offences.

Once this has been completed by the officer in charge of the case, an Enforcement Decision Panel (EDP) considers the matter against the same criteria and makes a recommendation on progressing the file. If prosecution is recommended then an evidential review is conducted by a solicitor to establish evidential sufficiency and any further evidence-gathering that may be required prior to a full legal analysis and recommendation to the Director Resource Management and subsequently the Chief Executive. It is the responsibility of the Chief Executive to consider the matter and to decide whether a prosecution will be undertaken by Environment Canterbury. If the decision is made to lay charges, then the file will be returned to the solicitor to proceed with the swearing and service of informations, and to initiate the prosecution proceedings.

5. The Alternative Environmental Justice (AEJ) Scheme

5.1 Evaluation Process

When a file is considered for prosecution, those persons who are involved in the investigation make recommendations as to whether prosecution is appropriate or not. At the same time, those persons also give consideration, against developed criteria, as to whether the case being considered is of a type where the matter is deemed too serious for an infringement fine to be imposed but where the interests of justice may not justify the recording of a conviction against the defendant. Considerations of this type form a separate section of the recommendation report. While a recommendation is persuasive, no recommendation to offer AEJ will be binding on the decision maker or any other report writer.

Ultimately, the Chief Executive of Environment Canterbury will make a decision on whether initiating prosecution proceedings are warranted. If the Chief Executive decides that prosecution is in order, then a further decision will be made, based on the recommendations given, as to whether AEJ will be offered. This decision will be final except in exceptional circumstances, which are envisaged as occurring when significant factors about the offence, or the defendant, come to the attention of Environment Canterbury that were not known at the time the decision to prosecute and/or offer AEJ was made.

In this way there are two paths to initiate AEJ. Firstly, the Council will consider whether an offer of AEJ is appropriate at the time the decision is made to pursue a prosecution for the offending. The second pathway is for an offender to formally request AEJ.

(a) Offer of AEJ

When a charge is laid, the decision-maker will assess whether the specified screening criteria for the AEJ scheme are met, and if so, the offender will be made an offer to participate in the AEJ Scheme.

(b) Request for AEJ

A defendant may request AEJ following their receipt of a court summons. The defendant's request will need to include reliable information that demonstrates that they meet the eligibility criteria. The information presented will be evaluated, and either the defendant's request will be declined, or an offer of participation in the AEJ Scheme will be made.

If AEJ is considered appropriate the offer made to the defendant will include a deadline by which the defendant must accept or decline. On receipt of the offender's acceptance of AEJ, the District Court will be advised and (if necessary) an adjournment for an appropriate period may be sought by Environment Canterbury.

Eligibility Criteria for an Offer of AEJ

A precondition in every case is that the offender admits their offending.

Beyond that, the variety of environmental offences means that narrow or rigid criteria to decide whether or not an offer of AEJ is appropriate are unhelpful. However, criteria for evaluating whether or not an offer of AEJ is appropriate in any particular case are necessary to ensure consistency and fairness within decision-making.

The decision to offer AEJ will be assessed against both factors specific to the circumstances of the offending and also the circumstances of the offender. Public interest factors are also relevant. The eligibility criteria for deciding whether to make an offer of AEJ is similar to that of the Police Adult Diversion Scheme, with some adjustments to align the criteria to the nature of an environmental offence.

The failure to meet any one of the following criteria does not necessarily mean that an offer of AEJ is inappropriate. However, the greater the number of criteria fulfilled the more appropriate it is to make, or accept an offer of AEJ. Even if several criteria are met, AEJ will not be appropriate where an offence is highly deliberate, or where the offending concerned deception.

Factors to be considered in an assessment for AEJ

Offence Factors

When deciding whether an offer of AEJ is appropriate the following factors will be considered:

- **Officer Recommendations:** This term is used to refer to the recommendation of the investigating officer, the views of the Enforcement Decision Panel, Resource Management Group Managers, Director Resource Management, Solicitor and Chief Executive;
- **The views of any victim directly affected by the offending (if any):** It is acknowledged that the rights of a victim are an integral part of the criminal justice system and the views of identified victims will be considered. However, ultimately the prosecuting authority must make decisions based on the public interest and the interests of justice, and therefore the views of a victim may not necessarily determine whether AEJ is offered to a defendant.
- **The offence is not so serious as to necessitate a conviction:** The variety of environmental offences in this field makes strict criteria for the assessment of this factor unworkable. The overall scale and impact of the environmental effects associated with the offence will be considered, as well as the weight and/or priority that the Regional Plan objectives and policies give to the environmental issue. For example, it may still be appropriate to offer AEJ for an offence resulting in a small-scale, but permanent environmental impact, particularly where action has, or can, be taken to mitigate its impact.

Offender Factors

- The compliance history of the defendant: a record of consistent and persistent non-compliance will exclude a defendant from the process. The prior issue of an infringement notice and/or an abatement notice may also disqualify the defendant from an offer of AEJ.
- The defendant is a first offender or has not been offered what would be considered diversion in the past: This is important in the determination of eligibility. The presence of previous convictions for environmental offending will bar the defendant from participation in this process.
- The defendant's personal factors: For example, the age of the offender may make the full intervention of the criminal law inappropriate.
- Culpability: The factor given the most weight in this assessment is culpability. That factor is to be assessed by considering the level of intent involved in the commission of an offence and the defendant's motivation for the offending.

Public Interest Factors

- Degree and type of deterrence required: This factor is directed at whether the conference can reach an outcome that will achieve specific deterrence of this offender, and reduce their risk of re-offending. It is also relevant to consider whether a conference might reach an outcome that will assist in the general deterrence of other potential offenders.
- Whether victims of the offence would be assisted by AEJ: For example, if a conference plan can include remedial or compensatory outcomes.

Irrelevant Factors

Factors which will not be considered in deciding whether to make an offer of participation in AEJ are:

- Statutory defences – It is irrelevant that the defendant may have a defence, because the process is only available to those who admit an offence.
- Evidential weakness – It is also inappropriate to offer diversion on the sole basis that a case is evidentially weak. An evidentially weak case should not be the subject of an offer of AEJ. The case should be tested by the Court, charges should not be laid, or the case should be withdrawn from the Court.
- Irreparable environmental effects – Even where there is irreparable damage to an environment, this should not in itself mean that AEJ is not made available.
- Whether or not the defendant has already accepted responsibility for the offence – An admission of responsibility will be required before an offender is accepted for AEJ. An offer of AEJ will be made without regard to whether or not a defendant has already admitted responsibility, but a referral to an AEJ conference will not occur if a defendant does not acknowledge their responsibility for the offending.
- Public Opinion/Community Views – It is important for the exercise of prosecutorial discretion to be objective and

independent of public opinion. The view of the community as a whole will not be a criterion to determine whether or not an offender be offered AEJ. The potential number and diversity of community interests and opinions held mean that it is not realistic for a decision-maker to assess that factor objectively. Rather, it is anticipated that the views of the public, would be factored in to an assessment of the public interest when considering what conditions agreed to at a conference are appropriate.

Assessing Eligibility Criteria

Impact on the Environment

In assessing the impact of offending, it is important to consider the purpose and principles of the Resource Management Act 1991, which are directed to achieving the sustainable management of natural and physical resources while avoiding, remedying or mitigating any adverse effects on the environment. The term “environment” is defined by the Act as meaning:

- “(a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in the paragraphs (a) to (c) of this definition or which are affected by those matters”¹

It follows that environmental effects include not only those effects on the biophysical parts of the environment, but also the effects on people and communities, and the social, cultural, and economic dimensions of those communities. The express reference to amenity values and aesthetic values is broad and encompasses any effects on a person's perception or appreciation of the pleasantness, aesthetic coherence and cultural and recreational attributes of the natural and physical qualities and characteristics of an area (including any cumulative effects) on those characteristics. Therefore, the assessment of the consequences of the offending on the environment will consider a wide variety of factors.

Culpability and Motivation

The relevant categories of culpability are outlined in the Machinery Movers² decision that is frequently applied to assess various categories of environmental offending. These criteria will be met by assessing culpability. The levels will be assessed as minor, moderate, or significant according to the following broad categories:

- Carelessness (e.g. unexpected systemic failure)
- Negligence (e.g. failure to perform a duty/performance of a duty below the expected standard of care)
- Recklessness (e.g. wilful blindness)
- Deliberate (e.g. calculated commission of an offence).

¹ Section 2, Resource Management Act 1991

² [1994] 1 NZLR 492

Motivation may involve personal gain – usually a direct financial advantage to the offender. However, offending can also occur where motivation has been for altruistic reasons, undertaken to benefit a community group or family. An offence resulting from carelessness may deliver large personal gain to an offender, and equally a fully planned offence may be driven from a desire to deliver a community benefit. So although closely related, the motivation for any offending will be evaluated separately. Motivation for an offence will fall into the following main categories:

- Altruistic reasons – (i.e. offending occurring as a consequence of charity project or similar public project)
- No personal/financial gain – (i.e. no commerciality)
- Some personal/financial gain – (i.e. some commerciality)
- Significant personal/financial gain – (i.e. full commerciality).

The financial gain intended or achieved may not be a direct profit but the saving of expenditure. This is just as real as it results in increased profits, at least in the short term.

This assessment criterion will be based on a graduated scale of increasing levels of culpability, with an AEJ offer being limited to the minor end of the culpability scale.

It is necessary to consider a broad range of criteria because an investigation may result in multiple charges or involve multiple offenders. The criteria outlined above allow each offence and each offender to be comprehensively assessed on the facts of their own contribution to the offence.

5.2 Making an Offer of AEJ

Multiple Offenders

Where an offence has been carried out by more than one person, each offender may have made a different contribution to the offence. Therefore, an offender's culpability is not necessarily identical to that of a co-offender and it may be appropriate to offer AEJ for one offender only. All offenders will be assessed separately.

Authority to offer AEJ

All prosecutions undertaken by Environment Canterbury are worked through a chain of authorisation, with the Chief Executive Officer exercising the prosecutorial discretion. A decision whether or not to offer AEJ to an offender is an exercise of the discretion to prosecute. Therefore, any decision to offer AEJ will be made by the Chief Executive Officer on the basis of a report from the RMA Monitoring and Compliance Section, via the Director Resource Management, to be considered at the time of deciding whether or not to lay charges. Any decision to make an offer is also a decision to authorise staff to attend the conference and decide on what outcome is required for a withdrawal of charges.

While a prosecuting solicitor retains prosecutorial discretion, this discretion is restricted to a power to make a recommendation to the Chief Executive Officer. The prosecuting solicitor will not have the authority to offer AEJ without an

instruction from the Chief Executive Officer, as the Chief Executive Officer is the only person authorised to exercise Environment Canterbury's prosecutorial discretion.

If a request is made for AEJ following the decision to prosecute and the issue of court summons, the Chief Executive Officer or the Director Resource Management will make a decision whether or not to offer AEJ following receipt of advice from the RMA Monitoring and Compliance Section and a review of the defendant's reasons for the request and supporting information.

Presenting an Offer of AEJ

Although the authority to make an offer of AEJ lies with the Chief Executive, the prosecuting solicitor will present the offer. This will be in a letter to be delivered to the defendant at the time of the service of summons (or at the first practicable opportunity, if AEJ has been requested by the defendant). The solicitor is also responsible for making the referral of the case to an independent restorative justice agency.

Accepting an offer of AEJ

An offer of AEJ must be accepted in writing. The acceptance of the offer must include an intimated guilty plea and advice as to the defendant's availability to attend a conference.

Defendants who are offered the opportunity for AEJ often take it notwithstanding the existence of a defence. If a guilty plea is intimated then the defendant may proceed to a full defence of their case if they wish to exit the AEJ scheme at any stage. In this way AEJ can be pursued without prejudice

Request for AEJ

A defendant may apply to Environment Canterbury to enter into the AEJ scheme. The application must be in writing and presented to the prosecuting solicitor. An application need not follow any prescribed format, but should present reliable information not previously available to Environment Canterbury that demonstrates that the AEJ eligibility criteria are met.

Authority to Withdraw an Offer of AEJ

Where a defendant continues to deny liability after accepting an offer of AEJ, or reverses their admission of the offending before they complete the AEJ programme, the offer of AEJ will be withdrawn. The withdrawal of AEJ may occur at any time before the charges are withdrawn in the District Court. As it is the exercise of the Council's prosecutorial discretion, charges may only be withdrawn on the authority of the Chief Executive Officer or the Director Resource Management.

If AEJ does not result in the withdrawal of charges, the case will then proceed to a hearing in the District Court. It is critical that AEJ is only available to defendants who genuinely accept the consequences of their offending, and wish to put matters right by completing the agreed conference plan.

5.3 The AEJ Conference

After an offer to participate in an AEJ conference has been accepted by an offender, an AEJ conference will occur. To maintain transparency and impartiality for all parties these conferences will be facilitated by an independent agency that is listed as a provider of Restorative Justice conferences with the Ministry of Justice. This also ensures that appropriately experienced and qualified facilitators are engaged to conduct the conference.

The independent agency will approach affected victims, and organise and conduct the conference. This agency will also be responsible for writing a report recording the events in the conference as well as any agreed conditions. In some cases this agency will monitor performance of the conditions and report to Environment Canterbury on whether these conditions have been met within the specified timeframe. Alternatively, Environment Canterbury will monitor the performance of the conference plan.

Environment Canterbury will then seek the leave of the Court to withdraw the charges laid against the defendant. In support of that application, Environment Canterbury will present the Court with the conference report and evidence that the conditions agreed to have been met.

Conference Participants

Where possible the conference will include the following people:

a) Conference Facilitator

The task is to facilitate the discussion between attendees to resolve issues surrounding the offending as far as possible between participants. The facilitator will be required to undertake a pre-conference with the attendees and to report to the court on the AEJ conference, and to record the conference plan agreed by all participants. Where agreed, the facilitator will also monitor and report on progress for the completion of the conference plan.

b) Environment Canterbury

This will generally involve a Resource Management Group Manager, solicitor, and the officer involved in the case. The Council will present the summary of facts. The role of the Council is to outline the context of the offence, or to help clarify factual matters in dispute if a dispute arises in the course of the conference; also to evaluate whether the measures proposed by the defendant meet the public interest in resolving offending.

c) Offender and Support Person

The offender can attend with a support person(s) who may be a family member, friend, community leader and/or a solicitor. As the AEJ conference is to resolve the defendant's offending, the support person can assist a defendant to identify opportunities to put matters right, or suggest conference plan conditions. As the focus of the conference is not to justify or excuse the offending, but rather to explore the best way to put right the offending, it is unnecessary for a support person to advocate on behalf of a defendant.

d) Victim and/or Community Panel

Environmental offences often do not have direct or identifiable individuals as victims. The identification and engagement of victims can be problematic if they are unaware of the prosecution or do not consider themselves to have been affected. Often complaints are made to Environment Canterbury's Pollution Hotline simply because a person has noticed something unusual, rather than actually being affected directly by the offending.

The victims of environmental offending in the context of inclusion in the AEJ process, will be any person or community who has suffered any direct loss, adverse effect, harm, or suffering in any social, economic, aesthetic or cultural dimension associated with breaches of the Resource Management Act 1991. Examples of victims who have been involved in restorative justice conferences are residents affected by odours, users of polluted waterways and neighbours concerned about breaches of resource conditions. The Council will assist in identifying any victims.

It may be difficult to identify any community, or community sector that would benefit from participating in AEJ. Additionally, there are often no representatives of that community. However, interest groups or community groups may be able to send a representative to attend an AEJ conference. The role of a community or interest group that attends an AEJ conference is to describe to the offender how the offence has or will potentially impact on that interest group or community, and to help create a constructive remedial plan from which all concerned (including the community) may benefit.

Pre-Conferencing

The facilitator (in accordance with the best practice guidelines for restorative justice conferences) will discuss pre-conference matters with all conference attendees, including an explanation of the principles of AEJ, including any confidentiality requirements.

If a solicitor attends with an offender, s/he is not there as an advocate or mouthpiece for the offender but as a support person and to give advice if needed.

Pre-conferencing will also include a preliminary assessment of whether the offender and/or offence is suitable for a conference. If the facilitator's opinion is that the conference should not proceed due to a conflict with the principles of restorative justice,³ the offer of AEJ will be withdrawn and the case will proceed in the usual way in the District Court.

³ There are 8 principles of Restorative Justice Conferences: Voluntariness, Full Participation, Parties Well-Informed, Hold Offender Accountable, Flexibility and Responsiveness, Emotional and Physical Safety, Delivery of an Effective Process, Undertaken only in appropriate cases. Ministry of Justice: "Restorative Justice in New Zealand: Best Practice."

AEJ Conference Agenda

Given that there is such a broad variation in the nature of offending, a variety of issues will need to be traversed. Therefore, an AEJ conference will not follow a rigid agenda. However, for the conference to be effective, it will normally cover the following:

The summary of facts will be read and any dispute about the content must be resolved or clarified;

1. As a pre-condition to the conference occurring, the offender must accept their responsibility for the offending. This should be re-affirmed by the offender after the summary of facts is read out. The defendant must accept responsibility for their offending, and have an opportunity to comment about the offending;
2. Victims/community groups should comment on the offending and how it has had an effect on them.
3. The defendant should offer to put matters right, and describe a plan for how they intend to do so. It is expected that the defendant will offer an apology and to do something which meets each of the criteria for a conference plan, unless it is not relevant or when evaluated overall, it would not be appropriate for every criteria to be met given the nature, gravity and/or scale of the offence charged.
4. The victims/community panel/support persons and Environment Canterbury will assist in developing the conference plan, and particular attention should be given to how the proposed conference plan achieves sustainable management;
5. The conference facilitator will record the plan agreed to, together with a record of what was discussed in the conference;
6. Arrangements for monitoring of the conference plan's outcomes will be agreed and stated. The consequences for not completing the plan will be explained by Environment Canterbury.

5.4 Setting Appropriate Conditions

As the AEJ process is to facilitate the resolution of offending to the standard where it is no longer in the public interest to proceed with a prosecution, the onus is on the defendant to offer measures to address the impact of their offending. These measures will be included in the conference plan as a set of agreed conditions that will clearly set out the expectations which, upon fulfilment will satisfy the public interest in not proceeding with prosecution before the Court.

The principles and purpose of the Sentencing Act 2002 will guide the assessment of the public interest and the appropriateness of proposed conditions, particularly where the offending concerns aggravating and mitigating factors. Additionally, the Regional Policy Statement, Regional Plans and other Council strategies (e.g. Regional Biodiversity Strategy) will inform what conditions may be appropriate to remediate the harm caused.

When considering the balance between any conditions agreed and the likely sentence that might be imposed by the Court, an assessment of the gravity of a conviction will be given careful

consideration. The appropriateness of the conditions agreed to will be evaluated against the following criteria:

- **Proportionality:** The conditions when looked at in combination must be proportionate to the offence and must appropriately balance the public interest in justice being pursued through AEJ. The outcome must address the wrong done and provide for environmental outcomes commensurate with the seriousness of the offending. A sense of proportionality should be maintained, so that excessively harsh or lenient outcomes are avoided when all circumstances (including the outcomes in other cases referred to AEJ) are considered.
- **Achievability/timeframe:** All conditions must be able to be completed within the adjournment period and preferably within 6 months (or alternatively within any extension to that period granted by the District Court).⁴
- **Rehabilitation:** the offender must demonstrate an improved understanding of the regulations which apply to their activities.⁵ This may be satisfied by the defendant (where appropriate) submitting a resource consent application to bring an end to a continuing non-compliance.
- **No Benefit to Environment Canterbury:** other than the recovery of actual and reasonable costs of the remediation, investigation and prosecution (which have already been incurred), no condition set as a part of an AEJ conference may result in either a direct or indirect financial benefit to Environment Canterbury. Additionally, no other organisation which receives funding from Environment Canterbury may benefit directly.
- **Admission of Offending:** An admission of responsibility for the offending will be a prerequisite for referral to an AEJ conference. An intimated guilty plea is sufficient where the defendant is prepared to enter a plea of guilty in advance of leave being sought to withdraw charges. In this way, the process can be seen to be fair and allow any defendant to withdraw from the process to present a defence of the charge before a District Court Judge.
- **Remorse:** Apologies and acceptances should be exchanged in person, and recorded by the conference facilitator. The defendant may also enter an apology in writing to the victim, or put on the Court record.
- **Remediation:** If practicable, the defendant should remediate any harm caused to the environment, and the conference should reach agreement as to a remediation plan which addresses how and when remediation is to occur. It may be necessary for the Environment Court to make enforcement orders (if agreed and appropriate) to secure the performance of the conference plan. A remediation plan should be consistent with the objectives and policies of the Regional Policy Statement, and Regional Biodiversity Strategy.

4 New Zealand Police, "Police Adult Diversion Scheme Policy" www.police.govt.nz/service/diversion/index.html (accessed 22/09/09)

5 New Zealand Police, "Police Adult Diversion Scheme Policy" www.police.govt.nz/service/diversion/index.html (accessed 22/09/09)

- **Compensation/Reparation:** The defendant may compensate the victims of the offending, and non-financial compensation should also be considered as meeting this criteria.
- **Education:** At the end of the AEJ the defendant should understand why what they did was wrong, and how to avoid re-offending. This is especially important when charges arise out of a lack of knowledge.
- **General Deterrence:** The process is to be transparent and is not designed to allow a person or company to avoid consequences for their actions in secrecy. Utilisation of this process will involve an element of publicity (at Environment Canterbury's discretion) which describes the consequences of the offending so that others are deterred from committing a similar offence. In some cases defendants have agreed that they will publicise their experience and the benefits of doing things the correct way. The High Court has said deterrence can be understood in an educative way, not just a punitive way. Content of a media release can be discussed and recorded at the conference.
- **Restitution:** If a community is affected, it may also be appropriate for the defendant to contribute to the community in some way. This can include a donation to either a local or national charity associated with the environmental issue that is subject of the charge. Any 'package' of outcomes should be commensurate with the level of fine that might have been imposed if the prosecution had been continued, and should only be made to a registered charitable organisation. Alternatively, the defendant may provide works or services to the local community or contribute to a local community project.
- **Costs:** As costs and fines are both consequences of a conviction, it is similarly appropriate that the issue of the costs of remediating, investigating and prosecuting offences be a part of the AEJ process. Unless the defendant has restricted financial capacity, it is expected that the defendant should make a significant contribution to the costs of remediation, the investigation and/or prosecution.

It is appropriate that all costs of the offending be covered by the offender and not the rate-paying community. This has been referred to by the Courts as a "polluter pays" approach. This is because persons who seek to comply with their duties under the Act are subject to full cost recovery. Therefore a person who seeks to avoid compliance should similarly be subject to full cost recovery. It is considered that offenders who have avoided the costs of compliance should pay the Council's reasonable costs associated with the non-compliance, such as the reasonable costs of the investigation and/or the reasonable costs of a prosecution. If costs are not agreed it is Environment Canterbury's discretion to seek costs before a District Court Judge.

5.5 AEJ Conference Conclusion

An AEJ conference will conclude when the participants are satisfied that appropriate conditions have been agreed, and that those conditions meet the public interest. The consequences for the defendant of failing to perform the agreed plan will be discussed and agreed upon, before the conference ends.

Alternatively, an AEJ conference will not be successfully concluded if:

- Agreement as to appropriate conditions can not be reached;
- A dispute arises as to the facts of the offence which is not resolved;
- In the course of the discussion it becomes clear that a defence is available to the defendant;
- The defendant denies responsibility for their offending;
- The participants act in a manner inconsistent with the spirit of the AEJ scheme. Examples include:
 - Support persons advocating justifications or excuses for the defendant. The focus of an AEJ conference is to put right harm caused, not to provide a captive audience for the defendant to explain or justify their offending;
 - Insulting, intimidating or threatening behaviours;
 - Hagglng or bargaining. Robust debate concerning what is appropriate to meet the public interest is acceptable, but where the focus of discussion becomes hagglng or bargaining, the defendant has engaged in minimising their involvement/cost exposure in resolving their offending. That would suggest that the defendant is putting their interests before those of the community and victims contrary to accepting responsibility for their offending and also contrary to the spirit of the AEJ scheme.

Content of Conference Plan

A conference plan will include a description and agreement on how the performance of the plan is to be monitored, so that the defendant can take appropriate steps to show that they have completed it.

Where an agreed outcome is reached at the conference, it will be recorded in a plan prepared by the conference facilitator and signed by all persons present at the conference (including the conference facilitator).⁶

In some rare cases there may be a change in the agreed conditions (e.g. a natural event) which makes the planned activities impossible or inappropriate to perform. Alternatively, the offender's circumstances may change (e.g. their health) which will mean that it is appropriate for some conditions to be removed from the plan, or substituted. In these cases, it is necessary for the conference plan to be adjusted, and it may be necessary to re-convene the conference for this purpose.

⁶ The conference facilitator signs the agreement to verify that it is an accurate record of the decisions made and the conference plan agreed to and which is to be monitored.

Conference Report

The Court will be informed of what took place at the AEJ conference and whether or not the conference plan was performed, to ensure that the AEJ process is transparent. Appropriate practice in the Christchurch District Court Registry is that at the time an application for leave to withdraw charges is made, the solicitor is to advise the Court that the conference plan has been performed. A copy of the conference report and information demonstrating completion of the conference plan is to be handed up to be placed on the Court record.

Timeframes

Any timeframe set for the AEJ scheme to occur should ensure as far as possible that there is no delay to the District Court. The offer of AEJ will be made at the time of serving the court summons with a period of 4 weeks in which the defendant may accept that offer. This is to ensure that there is sufficient time for disclosure to occur and for the defendant to seek legal advice in advance of accepting or declining an offer of AEJ. Where appropriate, Environment Canterbury will apply to the District Court for an appropriate adjournment date.

In rare cases where the performance or final completion of conference plan conditions is to be completed after the withdrawal of charges, then if the conference plan is not completed, Environment Canterbury will apply to the Environment Court for an enforcement order and will seek full costs recovery from the defendant.

6. Failure of the Alternative Environmental Justice Process

AEJ is considered a privilege (not a right) which may be withdrawn by Environment Canterbury at any time if good faith participation does not occur. A defendant will have a maximum of one month to accept any offer of AEJ before that offer will lapse and the prosecution will be continued. If the offer lapses, the prosecution will proceed, although this should not preclude the defendant from engaging in a restorative justice process to assist the Court in sentencing the offender at a future court date.

In any process of this type there will always be situations where a mutually beneficial outcome cannot be reached or it is not approached in good faith. If a defendant does not participate in good faith then Environment Canterbury may withdraw the AEJ scheme at any time prior to the completion of the conference plan conditions.

A withdrawal of AEJ will occur after an appropriate written warning has been given to the defendant that Environment Canterbury is not satisfied with the defendant's participation in AEJ; for example a lack of progress in performing an agreed AEJ conference plan. That letter will set out the circumstances that Environment Canterbury believes shows inappropriate action or omission or a lack of good faith. It will also set out what is required for the defendant to complete the AEJ scheme successfully and a warning that if the identified issues are not resolved to Environment Canterbury's satisfaction after a specified deadline, AEJ will be withdrawn on that date. A copy of this letter will also be delivered to the Court to be placed on the Court file. If Environment Canterbury withdraws the AEJ scheme, the full District Court prosecution process re-commences.

A defendant may withdraw from the process at any time and for any reason. In that event, the full District Court prosecution process re-commences. The Court will be advised of a withdrawal of AEJ, so that the appropriate court date may be set for re-commencing the prosecution.

7. Monitoring and Auditing Alternative Environmental Justice

To ensure the integrity of AEJ, decision making must be consistent. Consistency will be measured using rigorous monitoring, evaluation and audit processes.

Record keeping

These following documents will be kept on the prosecution file:

- The summary of facts;
- The letter of offer of AEJ to the defendant;
- A defendant's letter requesting AEJ and the letter back to the defendant advising of the decision made on that request;
- The AEJ conference plan and conference report;
- Referral to independent facilitator;
- Victim impact statements;
- Evidence of compliance with conditions (receipts, reports);
- Any correspondence with the court relating to adjournments;
- File note recording the application to the district court for withdrawal of charges.

Audit

When directed by the Director Resource Management, files referred to AEJ will be reviewed to consider the:

- Consistency of decision making;
- Types of offence offered AEJ;
- Conditions of AEJ conference plans;
- Audit trails for:
 - donations;
 - hours and organisations for community service.

8. Reporting

Environment Canterbury produces a public report outlining the use of compliance tools each year. This will include a report as to what cases were referred to AEJ.

9. Review of Guideline

Environment Canterbury welcomes comments on this draft Guideline document which would improve the content, implementation and practice of the Guideline outlined above. All comments received will be held on record until an appropriate Guideline review date. Contact details for Environment Canterbury are available within the frontispiece.

Everything is connected

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in the Canterbury region*

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