

**BEFORE THE INDEPENDENT HEARING COMMISSIONERS**

**IN THE MATTER** of the Resource Management Act 1991 ('the Act')

**AND**

**IN THE MATTER** Of Plan Change 7 to the Canterbury Land and Water Regional  
Plan

**BETWEEN** **RAYONIER NEW ZEALAND LIMITED AND PORT BLAKELY LIMITED**  
Submitter

**A N D** **CANTERBURY REGIONAL COUNCIL**  
Local Authority

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**LEGAL SUBMISSIONS ON BEHALF OF RAYONIER NEW ZEALAND LIMITED AND PORT  
BLAKELY LIMITED**

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Acting Solicitor: Chris Fowler  
**Adderley Head**  
Chris Fowler  
PO Box 1751, Christchurch 8140  
T 021 311 784  
E [chris.fowler@adderleyhead.co.nz](mailto:chris.fowler@adderleyhead.co.nz)

## INTRODUCTION

- 1 These legal submissions are filed on behalf of Rayonier New Zealand Ltd and Port Blakely Ltd (the **Forestry Submitters**) regarding their joint submission (the **Submission**) on proposed Plan Change 7 (**PC7**).
- 2 The Forestry Submitters are supported by several other forestry companies who operate in the Canterbury Region, namely Forest Management Ltd, PF Olsen Limited, Laurie Forestry Limited, and Waiake Forestry Ltd.
- 3 The Submission raises a number of issues regarding Rules 5.189 and 5.190 that seek to regulate plantation forestry activities (the **PC7 forestry rules**). The key issue that is now being pursued by the Forestry Submitters relates to the relationship between the Resource Management (National Environmental Standard for Plantation Forestry) Regulations 2017 (the **NES-PF**) and the forestry rules proposed by the Canterbury Regional Council (**ECan**).
- 4 The issue arises because the Forestry Submitters consider that the PC7 forestry rules relating to water quality are more stringent than comparable rules in the NES-PF. The Resource Management Act 1991 (the **RMA**) allows regional rules to be more stringent than a national environmental standard, but only in limited circumstances.
- 5 The case for the Forestry Submitters is focussed on a narrow but important point regarding ECan's Section 32 evaluation. The Forestry Submitters consider that the Section 32 evaluation is deficient because it fails to demonstrate that the more stringent forestry rules are necessary and justified in the context of the Canterbury Region. On this basis the Forestry Submitters contend that the forestry rules relating to water quality should be removed from PC7.
- 6 In addition, these submissions address the implications of the National Policy Statement for Freshwater Management 2020 (**NPS-FM 2020**) in respect of the forestry rules. The case for the Forestry Submitters is that the NPS-FM 2020 does not affect the merits or availability of the relief they seek.
- 7 Evidence in support of the relief sought by the Forestry Submitters has been filed by Jerome Wyeth, a statutory planner, and Darren Mann, General Manager Operations for Rayonier New Zealand Limited, also referred to as Rayonier Matariki Forests (**RMF**).
- 8 These submission have been provided to the Hearings Commissioners three working days in advance of the scheduled hearing of the Submission, together with a summary of evidence filed by Messrs Wyeth and Mann.

## BACKGROUND

- 9 The genesis of the PC7 forestry rules is the Canterbury Land and Water Regional Plan (the **CLWRP**) which contains very similar rules to the PC7 forestry rules. The CLWRP was made operative on 8 December 2016. Subsequently, the NES-PF was gazetted on 31 July 2017 and came into force on 1 May 2018.
- 10 ECan responded to the NES-PF by identifying water quality and water quantity rules in the CLWRP that regulate plantation forestry and consolidated them into proposed PC7 Rules 5.189 and 5.190 together with the inclusion of a new rule regarding activities undertaken within inanga spawning habitats.
- 11 At the same time ECan altered the PC7 forestry rules in several material respects to make them more stringent than the CLWRP versions of those rules (e.g. changing the default activity status of water quality rules from restricted discretionary to fully discretionary activity status)<sup>1</sup>.
- 12 The Submission seeks deletion or amendment to the PC7 forestry rules. The Section 42A Officer Report recommends rejection of the Submission filed by the Forestry Submitters, with one exception (discussed below).
- 13 The Forestry Submitters and the other forestry companies that support them are concerned that the PC7 forestry rules duplicate existing NES-PF regulations and create unnecessary and unjustified additional regulatory control over day-to-day plantation forestry activities in the Canterbury Region.

## ISSUES

- 14 The key issues arising in this case are as follows:
- (a) Are the PC7 forestry rules more stringent than comparable rules in the NES-PF?
  - (b) Has ECan provided sufficient evidence to justify the need for greater stringency in the circumstances of the Canterbury Region?
  - (c) Does the NPS-FM 2020 affect the merits or availability of the relief sought by the Forestry Submitters?

## SCOPE OF LEGAL SUBMISSIONS

- 15 The following matters are addressed in these submissions:
- (a) The Submission and relief sought by the Forestry Submitters;

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<sup>1</sup> Differences between the CLWRP and the PC7 forestry rules are detailed in the Submission.

- (b) The NES-PF and its sediment discharge regulations;
- (c) Forestry sector response to the NES-PF sediment discharge regulations;
- (d) The legal relationship between national environmental standards and regional rules and s 32(4) RMA;
- (e) Comparison between PC7 forestry rules and the NES-PF sediment discharge regulations;
- (f) Jurisdiction for greater stringency;
- (g) Justification provided by ECan for the PC7 forestry rules; and
- (h) Implications of the NPS-FM in respect of the forestry rules.

#### **THE SUBMISSION AND RELIEF SOUGHT BY THE FORESTRY SUBMITTERS**

- 16 The Submission opposes Rules 5.189 and 5.190 of PC7, which seek to regulate plantation forestry activities. It raises several general reasons for opposition to the forestry rules. Among other matters the Submission states that PC7<sup>2</sup>:
- (a) Is more stringent than the comparable rules in the LWRP, and the increase in stringency is unnecessary and unjustified;
  - (b) Is not based on an adequate and/or accurate Section 32 evaluation and as a consequence the Regional Council has failed to properly consider the costs and benefits of the proposed forestry rules; and
  - (c) Does not satisfy the requirement under Section 32(4) RMA to justify reasons for the greater stringency of the rules in PC7 compared with the regulations in the NES-PF.
- 17 The Submission also raises a range of specific reasons for opposition<sup>3</sup> in respect of PC7 forestry rules.<sup>4</sup> These matters are not being pursued at the PC7 hearing.
- 18 The Submission seeks the following relief<sup>5</sup>:
- (a) Relief by way of deletion or amendment to the PC7 forestry rules 5.189 and 5.190 as detailed in paragraphs 13, 18, 20, 22, 24 and 26 of the Submission; and

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<sup>2</sup> Supra paragraph 9

<sup>3</sup> Supra at paragraphs 10-26

<sup>4</sup> Submission filed by Forestry Submitters at paragraph 9

<sup>5</sup> Supra at paragraph 27

- (b) Any other consequential, further or additional relief as may be necessary to fully address the reasons for the Submission and give effect to the relief sought.
- 19 Subsequent to filing the Submission the Forestry Submitters have narrowed the range of issues they seek to pursue at the PC7 hearing. The case for the Forestry Submitters is that ECan has failed to meet the requirement at s 32(4) of the RMA to demonstrate that the more stringent PC7 forestry rules are necessary and justified in the context of the Canterbury Region.
- 20 On this basis the Forestry Submitters seeks that the following PC7 forestry rules be removed from PC7:
- (a) PC7 Rule 5.189(3) regarding discharge of suspended sediment;
- (b) PC7 Rule 5.189(4) regarding activities undertaken within Indigenous Freshwater Species Habitats;
- (c) PC7 Rule 5.189(5) regarding activities undertaken within Inanga Spawning Habitats;
- (d) PC7 Rule 5.189(6) regarding reduction in area of wetlands; and
- (e) PC7 Rule 5.189(7) regarding fuel storage and refuelling.
- 21 The Submission in relation to Rule 5.189(1) and (2), regarding afforestation and replanting within flow sensitive catchments is not being pursued further because the relief sought by the Forestry Submitters has been adopted in the s42A Officer Report.

#### **THE NES-PF AND SEDIMENT DISCHARGE REGULATIONS**

22 Mr Wyeth was closely involved in the development of the NES-PF and supported its implementation by government officials. His evidence provides a comprehensive overview of the NES-PF and sediment management regulations.

23 Mr Wyeth considers that<sup>6</sup>:

*A key driver for the NES-PF was to address unwarranted variation across regions and districts in the management of plantation forestry under the RMA. This variation was creating significant operational and regulatory uncertainty for the forestry industry and leading to uncertain and inconsistent environmental outcomes.*

24 This is reflected in the policy objective of the NES-PF, which is to<sup>7</sup>:

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<sup>6</sup> Evidence of Jerome Wyeth at paragraph 11

<sup>7</sup> Supra at paragraph 10

*a) Maintain or improve the environmental outcomes associated with plantation forestry activities nationally; and*

*b) Increase efficiency and certainty in the management of plantation forestry activities.*

25 Mr Wyeth explains that the NES-PF provides a nationally consistent set of provisions to manage eight core plantation forestry activities that cover the full forestry life cycle, as well as three ancillary forestry activities and general provisions that apply to all plantation forestry activities<sup>8</sup>.

26 Mr Wyeth notes that the NES-PF includes comprehensive permitted activity standards which are more targeted and specific to plantation forestry activities than existing regional and district plan rules, and which are deliberately comprehensive and robust to ensure they do not permit an activity with significant adverse effects<sup>9</sup>.

27 Overall, Mr Wyeth's view is that<sup>10</sup>:

*By providing a nationally consistent set of provisions that are specifically targeted to the environmental effects of different plantation forestry activities, the NES-PF creates both greater certainty for the plantation forestry sector while also 'raising the bar' (or at least maintaining it) in terms of environmental outcomes.*

28 With regard to sediment management regulations in the NES-PF, Mr Wyeth's evidence is that the NES-PF includes a range of regulations relating to sediment management that are primarily focused on those plantation forestry activities with the greatest potential for sediment discharges (earthworks, forestry quarrying and harvesting)<sup>11</sup>.

29 Mr Wyeth's evidence explains that collectively these regulations focus on controlling and containing sediment runoff at source and ensuring appropriate setbacks to sensitive receiving environments. Mr Wyeth then identifies and discusses in detail each of the key NES-PF regulations relating to sediment management, namely setbacks, management plans, erosion and sediment controls, and water quality mixing standards<sup>12</sup>.

30 Mr Wyeth also refers to the NES-PF Section 32 Report that evaluates the effectiveness of the NES-PF and quotes the following passage (emphasis added)<sup>13</sup>:

*The NES-PF provisions are targeted to the effects and risks associated with forestry activities and are designed to achieve consistent, more certain environmental outcomes through the consistent application of established best practice forestry management practices. **A key focus of the NES-PF is***

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<sup>8</sup> Evidence of Jerome Wyeth at paragraph 13

<sup>9</sup> Supra at paragraphs 13 and 14

<sup>10</sup> Supra at paragraph 15

<sup>11</sup> Supra at paragraph 16

<sup>12</sup> Supra at paragraphs 17 - 32

<sup>13</sup> Supra at paragraph 34

***managing sediment and erosion at source and using a risk based approach and management plans to proactively identify and manage activity and site-specific risks.*** Foresters and councils will benefit from the use of risk management tools and improved centralised information on environmental risks to better inform decision-making. In particular, the *Erosion Susceptibility Classification (ESC)* which provides a tool to assess erosion risk and apply consent requirements on high risk land.

- 31 In summary to this point, Mr Wyeth's evidence illustrates that the NES-PF represents a paradigm shift in environmental regulation of plantation forestry activities with a particular focus on managing sediment and erosion at source using best practice forestry management practices.

#### **Response to the NES-PF**

- 32 Mr Mann's evidence is that the NES-PF is supported RMF because it provides certainty for RMF as to how it is to operate to manage the effects of its forestry operations on the environment.<sup>14</sup> Counsel understand this view is also held by Port Blakely and the other forestry companies that support the Forestry Submitters.
- 33 Considerable effort has been made to ensure successful implementation of the NES-PF. Guidance documents to support implementation have been prepared by the Ministry of Primary Industries (**MPI**), the New Zealand Forest Owners Association (**NZFOA**) and individual forestry companies, including RMF<sup>15</sup>.
- 34 RMF has invested in training of staff and contractors through workshops, webinars and development of template documents for the various management plans required to comply with the NES-PF<sup>16</sup>.
- 35 Mr Mann's evidence provides an overview of how the NES-PF sediment discharge regulations are applied on a day-to-day basis by RMF in the Canterbury Region. He refers in particular to harvest management plans and earthworks management plans and explains the new practices required by the NES-PF regulatory regime with regard to controlling erosion and sediment<sup>17</sup>.
- 36 Implementing these measures on a day-to-day basis to achieve compliance with the NES-PF creates additional costs for RMF, which are also discussed in Mr Mann's evidence<sup>18</sup>.
- 37 It is apparent from Mr Mann's evidence that the NES-PF has raised the bar in terms of regulation of sediment and erosion control and that NZFOA and RMF has responded in a positive and comprehensive way to the need for more and better management of these matters. ECan inspections of RMF and Port Blakely harvesting

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<sup>14</sup> Evidence of Darren Mann at paragraph 16

<sup>15</sup> Supra at paragraph 18

<sup>16</sup> Supra at paragraphs 22-25

<sup>17</sup> Supra at paragraphs 26-47

<sup>18</sup> Supra at paragraphs 50-53

and earthworks operations have shown full compliance with NES-PF and consent conditions requirements respectively.<sup>19</sup>

## **THE LEGAL RELATIONSHIP BETWEEN NATIONAL ENVIRONMENTAL STANDARDS AND REGIONAL RULES**

- 38 Regional councils are tasked with a wide range of functions including the requirement to control the use of land in order to maintain and enhance the quality of water and of ecosystems within waterbodies<sup>20</sup>, and the control of discharges of contaminants into or onto land or water. To undertake these functions the RMA provides that regional councils may create regional plans including regional rules to implement regional policies and objectives<sup>21</sup>. Such plans must be prepared by regional councils in accordance with their obligations to prepare an evaluation report in accordance with Section 32 RMA, and they must have particular regard to that report<sup>22</sup>.
- 39 The RMA also authorises the Governor-General, by Order in Council, to make regulations known as national environmental standards<sup>23</sup>. In this case the nature of the NES-PF is such that there is considerable potential for duplication, overlap and conflict between the national standard and the PC7 forestry rules.
- 40 The relationship between national environmental standards and rules is governed by section 43B RMA which (relevantly) provides that a rule that is more stringent than a national environmental standard will prevail over the standard, but only if the standard expressly says that a rule may be more stringent than it<sup>24</sup>. A rule is more stringent than a standard if it prohibits or restricts an activity that the standard permits or authorises<sup>25</sup>.
- 41 The primacy of a national environmental standard over local authority plans and proposed plans is supported by s 44A which deals with local authority recognition of a national environmental standard. It provides that if a plan or proposed plan conflicts with a provision in a national environmental standard, then the local authority must amend the plan or proposed plan to remove the conflict<sup>26</sup>. A conflict arises if the rule is (a) more stringent than the standard, and (b) the standard does not expressly say that a rule can be more stringent than it<sup>27</sup>.
- 42 The RMA also requires that regional councils that propose more stringent regional rules must explain why such rules are necessary in the particular circumstances of

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<sup>19</sup> Supra at paragraphs 48 and 49

<sup>20</sup> RMA section 30(1)(c)(iii) and (iiia), and section 30(1)(f)

<sup>21</sup> RMA section 65(1) and section 67(1)

<sup>22</sup> RMA section 66(1)(d) and (e)

<sup>23</sup> Pursuant to section 43 RMA

<sup>24</sup> RMA s 43B(1)(a)

<sup>25</sup> RMA s 43B(1)(b)

<sup>26</sup> RMA s 44A(3)-(5)

<sup>27</sup> RMA s 44A(2)



their region. This requirement is founded in councils' duties under Section 32 of the RMA, specifically Section 32(4), which provides:

*If the proposal will impose a greater or lesser prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.*

- 43 In summary to this point, regional rules that are more stringent than a national environmental standard are allowed, provided that such rules are expressly contemplated by the relevant standard and the regional council has completed an evaluation report under s 32 RMA that explains why greater stringency is justified in the particular circumstances of the region.
- 44 This requirement imposes an important constraint on the power of regional councils to promulgate rules that are more stringent than a national environmental standard and supports the hierarchy of planning instruments provided by the RMA.

#### **Waikato Plan Change 1 example**

- 45 There is a paucity of case law authority on s 32(4) RMA and the NES-PF generally. However a recent Commissioner's decision is of interest as it deals with a similar fact situation regarding the relationship between regional forestry rules and NES-PF regulations.
- 46 Proposed Plan Change 1 to the Waikato Regional Plan (**PC1**) contained implementation methods to achieve the objective of restoring water quality in the Waikato River. Submitters to PC1 proposed additional forestry rules that duplicated and were more stringent than regulation in the NES-PF. The proposed new rules were opposed by forestry companies inter alia on the grounds that the requirements of s 32(4) were not satisfied.
- 47 The Commissioners' decision on PC1 (the **PC1 decision**) declined the proposed additional forestry rules. The PC1 decision highlights the importance of evidential support for rules that are more stringent than the NES-PF. The Commissioner's stated that<sup>28</sup>:

*We therefore accept the point made by Counsel for WRC in closing, questioning whether the Panel has evidence upon which to undertake a section 32AA analysis, and accept the submission that it is particularly important to have appropriate evidential support for that relief given that what is being requested is more stringent than the NES-PF.*

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<sup>28</sup> PC1 decision at paragraph 1845

48 And<sup>29</sup>;

*We are therefore, persuaded by the evidence of Dr Mitchell, Ms Robson and Ms Strand and agree with Council Officers that the rules of the NES-PF should prevail, particularly given there is insufficient evidential support (particularly in terms of assessing the costs to forest owners) to...depart from the universal application of the NES-PF.*

49 The PC1 decision does not create a legal precedent and is not binding on other local authorities. However, the issues addressed are very similar to those arising in this case and therefore it is submitted that the PC1 decision is relevant and of assistance in determining the appropriate outcome of submissions on the PC7 forestry rules.

#### **COMPARISON BETWEEN PC7 FORESTRY RULES AND THE NES-PF SEDIMENT DISCHARGE REGULATIONS**

50 Mr Wyeth's evidence discusses this matter in some detail. In summary, Mr Wyeth makes the following key points<sup>30</sup>:

- (a) The relationship between the PC7 forestry rules and the NES-PF is unclear and requires further clarification;
- (b) Based on the PC7 Section 32 Report, ECan consider that all standards in the PC7 forestry rules are more stringent than the NES-PF (or address effects not dealt with in the NES-PF) and are therefore intended to prevail over the NES-PF;
- (c) However it's not clear what NES-PF regulations the PC7 forestry rules are intended to prevail over, and this uncertainty is a potential cost that should be addressed;

51 In the absence of a comparative analysis in ECan's Section 32 Report, Mr Wyeth's evidence includes a high-level assessment of the PC7 forestry rules against the corresponding regulations in the NES-PF<sup>31</sup>. Mr Wyeth concludes that "nearly all standards – most of which have been rolled over from the CLWRP – are more stringent than the NES-PF"<sup>32</sup>. The one exception is proposed Rule 5.189(1) and (2) regarding the effects of plantation forestry on water yield – these effects are not addressed by the NES-PF and therefore plan provisions can address such effects (in accordance with s43A(5)(c) RMA).

#### **JURISDICTION FOR GREATER STRINGENCY**

52 Regulation 6 of the NES-PF contains a number of circumstances in which regional plan rules are able to be more stringent than the NES-PF. One of these

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<sup>29</sup> PC1 decision at para 1849

<sup>30</sup> Evidence of Jerome Wyeth at paragraph at paragraph 50-53

<sup>31</sup> Supra at paragraphs 54-61

<sup>32</sup> Supra at paragraph 62

circumstances is where the subject rule gives effect to an objective that has been developed to give effect to the NPS-FM<sup>33</sup>.

- 53 This is the jurisdiction that ECan seeks to rely on for promoting the PC7 forestry rules that are more stringent than equivalent rules in the NES-PF. ECan states that these rules are meant to achieve certain objectives and policies within CLWRP which in turn give effect to the NPS-FM<sup>34</sup>.
- 54 The Forestry Submitters accept that ECan does have jurisdiction to propose rules that are more stringent than the NES-PF in the circumstances of this case.

#### **JUSTIFICATION PROVIDED BY ECAN FOR THE PC7 FORESTRY RULES**

- 55 However, jurisdiction of itself is not sufficient; ECan is also required to justify the need for greater stringency than the NES-PF. The key issue arising in this case is whether ECan has provided sufficient justification for the greater stringency.
- 56 The significance of the issue and the appropriate approach to assessing whether it has been answered by ECan is discussed by Mr Wyeth in his evidence<sup>35</sup>:

*As noted above, Section 32(4) of the RMA also requires councils to demonstrate that proposed rules (including rules being rolled over as part of a plan review) are justified in the context of the particular region/district. This is important as the circumstances provided for in Regulation 6 are not in of themselves justification for more stringent rules – they simply allow more stringent rules in certain circumstances when site-specific factors warrant this. In our opinion, the starting point when assessing the need for a more stringent rule under Regulation 6(1)(a) is firstly to demonstrate the NES-PF controls are not sufficient to achieve a plan objective that gives effect to the NPS-FM. The next step is to then demonstrate how a more stringent rule will achieve that objective in a more effective and efficient way than the NES-PF and that the more stringent rule is justified in the context of the particular region. Simply proving a link between a proposed rule and a plan objective that gives effect to the NPS-FM is not sufficient in our opinion.*

- 57 The PC7 Section 32 Report and the PC7 Section 42A Report have been assessed by Mr Wyeth. His key findings are discussed below.

#### **PC7 Section 32 Report**

- 58 Mr Wyeth identifies two significant omissions in the s 32 Report. First, Mr Wyeth considers that while PC7 Section 32 Report makes general reference to the NPS-FM and the CLWRP objectives that are relevant to the PC7 forestry rules, the report does not contain any clear evidence or analysis to demonstrate why the more stringent PC7 forestry rules are necessary to achieve those objectives. This omission is described by Mr Wyeth as a "fundamental gap" in the PC7 Section 32 Report<sup>36</sup>.

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<sup>33</sup> NES-PF Regulation 6(1)(a)

<sup>34</sup> ECan's Section 32 Report at page 56

<sup>35</sup> Evidence of Jerome Wyeth at paragraphs 43 and 44

<sup>36</sup> Supra at paragraph 65 and 68

59 Secondly, Mr Wyeth considers that the s 32 Report fails to identify implementing the NES-PF as it stands as a reasonably practicable option. The Section 32 Report identifies three options (the status quo of the CLWRP rules and two different suites of amendments, one being the PC7 rules). However, a fourth option is notably absent from this list, that being removal of all rules from the CLWRP that overlap with the NES-PF and simply implement the NES-PF as it stands

60 This significance of this omission is discussed by Mr Wyeth as follows<sup>37</sup>:

*[I]n our opinion, the NES-PF should be the starting point for forestry rules across New Zealand and the only rationale to deviate from these should be where greater stringency is required to manage the specific issues anticipated under Regulation 6. Thus, the Section 32 evaluation should focus on any additional controls on plantation forestry in addition to the NES-PF and the NES-PF should certainly not be omitted as a reasonably practicable option.*

#### **PC7 Section 42A Report**

61 Mr Wyeth's evidence includes an assessment of the Section 42A Report, and whether it contains evidence to demonstrate that a more stringent approach for sediment discharges in proposed Rule 5.189(3) than the NES-PF is justified in the context of the Canterbury Region. His conclusion is that<sup>38</sup>:

*In this respect, ...the PC7 Section 42A Report does provide any specific analysis to demonstrate this as required under Section 32(4) of the RMA (and Section 32 in general). As such, it fails to address one of the overarching concerns with the PC7 forestry rules raised in the submission of Rayonier New Zealand Limited and Port Blakely Limited.*

62 In our submission, the deficiencies of the s 32 Report identified by Mr Wyeth have not been cured by the s42A Report.

#### **Evaluation**

63 The omission to identify the NES-PF as a reasonably practicable option is central to the failings in the Section 32 Report because this appears to have led to the other shortcomings identified by Mr Wyeth, namely failure to undertake an assessment of:<sup>39</sup>

- (a) The adequacy of the NES-PF to manage the effects of plantation forestry in the Canterbury Region;
- (b) Regionally specific factors and values that may justify more stringent rules; and

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<sup>37</sup> Supra at paragraph 67

<sup>38</sup> Supra at paragraph 77

<sup>39</sup> Supra at paragraph 71

- (c) The economic costs to plantation forest owners and manager associated with the more stringent provisions of PC7.
- 64 In the absence of an assessment of the above matters it is virtually impossible to assess the efficiency and effectiveness of the PC7 forestry rules in achieving the objectives of the CLWRP and the NPS-FM (as required by s 32(1)(b)(ii) of the RMA).
- 65 The absence of a meaningful or robust assessment of the benefits and costs of the PC7 forestry rules against the comparable NES-PF provisions (as required by s 32(2) RMA) is noteworthy. The evidence of Mr Mann is that there is uncertainty about how PC7 will align with the NES-PF (i.e. does RMF need to comply only with the PC7 forestry rules or both the PC7 forestry rules and the equivalent provisions of the NES-PF?). Mr Mann also expresses uncertainty about how compliance with the PC7 sediment discharge rules will be measured and how compliance will be assessed in the forest by RMF at an operational level, or by ECan during compliance inspections<sup>40</sup>.
- 66 Further, Mr Mann highlights the wide scope of application of the suspended sediment standard in the PC7 forestry rules (applies to all rivers, in any forest of any soil type – not just highly erodible soils) and in any rain event<sup>41</sup>. This is considerably different to the risk-based approach of the NES-PF which uses a system of Erosion Susceptibility Classification (ESC) to identify erosion which then informs the regulatory standards that apply depending on the level of erosion risk present on any given site.
- 67 Mr Mann’s summary of evidence includes an update regarding work being undertaken for RMF for a sediment discharge consent at Omihi Forest required under the PC7 forestry rules. The work undertaken shows existing high levels of suspended sediment in some catchments and the ecologist report commissioned by RMF indicates highly variable ecological values within different catchments<sup>42</sup>. This supports Mr Wyeth’s view that ECan has further work to undertake to implement the NPS-FM 2020 (discussed below) and highlights the significant gap between the broad brush approach of PC7 forestry rules and the targeted approach required by the NPS-FM 2020.
- 68 These matters are important because the uncertainty of application of the PC7 forestry rules creates potential for significant additional costs for forestry companies in the Canterbury Region, over and above the costs they are already incurring to comply with the NES-PF regime, without any apparent environmental benefit.

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<sup>40</sup> Supra at paragraphs 54-69

<sup>41</sup> Supra at paragraph 64

<sup>42</sup> Darren Mann summary evidence at paragraph 27

## IMPLICATIONS OF THE NPS-FM 2020 IN RESPECT OF THE FORESTRY RULES

- 69 Central Government recently released its Essential Freshwater Package, which contains (relevantly) the National Policy Statement for Freshwater Management 2020. The NPS-FM 2020 contains one objective and a number of policies, which are designed to improve the various aspects of freshwater health and to give effect to the fundamental concept of Te Mana o te Wai. The NPS-FM 2020 was gazetted on 5 August 2020, and has legal effect from 3 September 2020.
- 70 It is submitted that the NPS-FM 2020 is highly relevant to the PC7 forestry rules because:
- (a) The NPS-FM 2020 deals with freshwater quality and quantity;
  - (b) A regional plan must give effect to a national policy statement<sup>43</sup>;
  - (c) When preparing and changing a regional plan, regional councils must do so in accordance with a national policy statement<sup>44</sup>;
  - (d) The NPS-FM itself directs that “[e]very local authority must give effect to this National Policy Statement as soon as reasonably practicable”<sup>45</sup>; and
  - (e) A regional council must notify any freshwater planning instrument that has the purpose of giving effect to the NPSFM 2020, no later than 31 December 2024<sup>46</sup>.
- 71 In summary, it is submitted that the Hearings Panel must endeavour to give effect to the NPS-FM 2020 when making decisions on the PC7 forestry rules to the extent that it is reasonably practicable to do so.
- 72 Notwithstanding the above, it is considered that three practical considerations limit or constrain the Panel’s ability to give effect to the NPS-FM 2020. These are:
- (a) The implementation steps that need to be completed by ECan to give full effect to the NPS-FM 2020;
  - (b) The scope constraints of the PC7 submission process; and
  - (c) The requirement at s 32(4) to justify greater stringency than the NES-PF.
- 73 Full implementation of the NPS-FM 2020 requires completion of a number of distinct steps to be followed<sup>47</sup> that in our submission should influence the Panel’s decision. Mr

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<sup>43</sup> RMA s 67(3)(a)

<sup>44</sup> RMA, s 66(1)(ea)

<sup>45</sup> Clause 4.1, para 1

<sup>46</sup> RMA, s 80A(4)(b)

Wyeth has identified the steps required to fully implement the NPS-FM 2020 with respect to sediment attributes in accordance with the National Framework (**NOF**)<sup>48</sup>. Full implementation of the NPS-FM 2020 would require the forestry rules to be amended in a way that provided for rules aimed at achieving the targeted management of freshwater bodies, in a location-specific way. Mr Wyeth's evidence is that ECan does not yet have the data available to support such rules. In these circumstances the Panel may decide that it's not practically feasible to give full effect to the NPS-FM 2020 in decisions on the PC7 forestry rules.

- 74 Regarding scope, in light of the regulatory framework contemplated by the NPS-FM 2020 there is unlikely to be sufficient scope to fully implement the NPS-FM 2020 through the PC7 forestry rules because the relevant submissions do not seek relief that would readily enable amendment of such rules in the manner contemplated by the NPS-FM 2020. This is not surprising in the circumstances but does highlight the practical difficulty the Panel faces to give effect to the NPS-FM 2020 when it has come into effect part-way through the submission and hearing process on PC7.
- 75 In addition to the above matters, s 32(4) RMA remains highly relevant and the requirement to justify greater stringency in the circumstances of the region must still be satisfied. Put another way, the Panel, in reaching its decision on the PC7 forestry rules, must take into the account the need to give effect to the NPS-FM 2020 as soon as reasonably practicable and the requirement to justify greater stringency under s 32(4).
- 76 In the absence of the data and other information required by the NPS-FM 2020 to inform appropriate limits on use of the land resource for plantation forestry activities the Panel does not have the material it needs to undertake a robust s 32AA assessment, including the evaluation required by s 32(4) RMA. In these circumstances it is submitted that it's not practicable for the Panel to give effect to the NPS-FM 2020 via decisions on the PC7 forestry rules.
- 77 There are three other important factors that in our submission should have a bearing on the Panels' consideration of this matter:
- (a) Firstly, the NPS-FM 2020 does require immediate change; ECan has until 2024 to give effect to the NPS-FM 2020;
  - (b) Secondly, removal of the PC7 forestry rules will not result in a vacuum or absence of control over plantation forestry operations because, as discussed in the evidence of Mr Wyeth, the NES-PF already contains numerous

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<sup>47</sup> As detailed in Subpart 2 of the NPS-FM 2020

<sup>48</sup> Summary of evidence of Jerome Wyeth at paragraph 22-24

regulations to manage the potential adverse effects of plantation forestry activities on sediment discharges, water quality and instream values;

- (c) Thirdly, Mr Wyeth considers that the NES-PF regulations are consistent with the overarching objectives at Part 2 of the NPS-FM<sup>49</sup>; and
- (d) Finally, there is no evidence in the Section 32 Report or the Section 42A Report that the environmental effects of plantation forestry operations in the Canterbury Region are not being adequately managed through the existing provisions of the NES-PF.

78 Overall, there are sound practical reasons why the NPS-FM 2020 cannot be given effect to via submissions on the PC7 forestry rules. In our submission the appropriate approach in the circumstances is for ECan to prepare a comprehensive plan change to give effect to the NPS-FM 2020. This would allow ECan to complete the required implementation steps and undertake a robust s 32 assessment prior to notification of any new rules affecting plantation forestry activities.

#### **CONCLUSION**

79 The primacy of national environmental standards can only be departed from in limited circumstances, and only where such departure is supported by a robust section 32 assessment. Section 32(4) in particular performs an important function in the statutory scheme of the RMA by constraining the circumstances when local rules may prevail over national environment standards. In this way, the primacy of the national instrument is not undermined by unjustified local rules. Overall, there is no merit in making regional rules that prevail over the NES-PF without proper justification, because doing so results in inconsistency between the regions, which is one of the problems that the NES-PF was designed to overcome.


80 There are sound practical reasons why the NPS-FM 2020 cannot be given effect to via submissions on the PC7 forestry rules. Conversely, there are obvious advantages to fully implementing the NPS-FM 2020 via a separate plan change process in the future. During the interim period, the NES-PF standards are considered adequate to improve or maintain freshwater quality within the Canterbury Region.

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<sup>49</sup> Supra at paragraph 30



Dated 12 November 2020



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Chris Fowler / Meg Buddle

Counsel for Rayonier New Zealand Limited and Port Blakely Limited