

BEFORE THE INDEPENDENT HEARING COMMISSIONERS

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER

Of Proposed Plan Change 7 to the Canterbury Land and Water
Regional Plan

BETWEEN

RAYONIER NEW ZEALAND LIMITED

Submitter

AND

CANTERBURY REGIONAL COUNCIL

Local Authority

**MEMORANDUM OF COUNSEL FOR RAYONIER NEW ZEALAND LIMITED AND PORT BLAKELY
LIMITED**

Date: 24 February 2021

MAY IT PLEASE THE HEARING COMMISSIONERS

Introduction

- 1 This Memorandum is filed on behalf of Rayonier New Zealand Limited and Port Blakely Limited (the **Forestry Submitters**).
- 2 The purpose of this Memorandum is to respond to a specific matter raised in the Questions from the Hearings Commissioners (also referred to as **Panel**) on the Section 42A Reply Report document (**Questions document**).
- 3 The Questions document asks, in relation to Rules 5.189B and 5.190A, how appropriate a controlled activity status is for new areas of plantation forestry within flow sensitive catchments (**FSC**).
- 4 The Forestry Submitters submitted on the FSC rules seeking controlled activity status for afforestation but did not present evidence at the hearing for reasons noted below.
- 5 The Forestry Submitters respectfully seek an opportunity to be heard if the Hearings Panel is minded to alter the activity status of the FSC rules.
- 6 In the interests of efficiency, this Memorandum explains the development of the FSC rules through earlier regional planning instruments and why the Forestry Submitters consider that controlled activity status is appropriate for this activity.

Relevant section of Questions document

- 7 The specific part of the Questions document to which we refer is copied below:¹

Questions relating to Appendix A to the s42A Reply Report

Provision	Question
Rules 5.189B and 5.190A	The authors have recommend a 'controlled activity' status for planting new areas of plantation forestry within flow sensitive catchments. How appropriate is a controlled activity status given the potential adverse effects of plantation forestry (e.g. effects on flow) and given consent cannot be refused?

- 8 The matter of the FSC rules is of particular interest to the Forestry Submitters.
- 9 The Forestry Submitters' original submission on Proposed Plan Change 7 (**PC7**) to the operative Canterbury Land and Water Regional Plan (**LWRP**) opposed the changes proposed by PC7 to the LWRP FSC rules² because inter alia PC7 introduced

¹ From page 3 of the Questions document

² Para 11-13 of the Forestry Submitters' Original Submission

a default activity status of discretionary for all new plantings of plantation forestry in FSC.

10 The Forestry Submitters' original submission sought that the PC7 rules regarding FSCs be amended so that the rules were no more stringent than the LWRP FSC rules. Those rules allowed planting of new areas within a FSC as a controlled activity where the relevant requirements in the FSC rule are met, and defaulting to a restricted discretionary activity where those requirements are not met.

11 The Section 42A Reporting Officer recommended accepting this part of the Forestry Submitters' submission³. Due to that recommendation, the Forestry Submitters did not present evidence on the matter at the PC7 hearing although the matter was referred to in legal submissions as follows:⁴

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.

12 The same FSC rules (albeit with some minor wording changes) have been recommended by the Reporting Officer in the Reply Report.

13 If the Panel is minded to depart from the Section 42A Reporting Officer's recommendation, by imposing a more stringent activity status for afforestation in FSC, the Forestry Submitters respectfully seek to be heard on this matter.

Rationale for retention of controlled activity status for FSC rules

14 In the interests of efficiency, the Forestry Submitters' argument in support of retaining the controlled activity status for afforestation in FSC is set out below.

15 The FSC rules in the LWRP⁵ have been carefully crafted. They include specific criteria, including thresholds, which afforestation proposals must meet in order to qualify as a controlled activity. Otherwise the activity defaults to a restricted discretionary activity.

16 The criteria, and its component thresholds, are not arbitrary. They are the product of detailed hydrological evidence presented by forest owners at two full plan review hearings, being the hearings on the Natural Resources Regional Plan (NRRP) and more recently the hearings on the LWRP. This evidence was highly influential in decisions by the respective hearings panels on the final version of the FSC rules. An overview of the evolution of the FSC rules during these plan hearings is discussed below.

³ Page 77 of the Section 42A Report on PC7

⁴ Legal submissions at paragraph 21

⁵ Rule 5.73 and 5.74

- 17 For convenience, a copy of the NRRP FSC rules (decision version), the pLWRP FSC rules (as notified), the LWRP FSC rules (decision version), the PC7 FSC rules (as notified), and the PC7 rules (Reply Report version) is attached at **Appendix 1**.

The NRRP hearings process

- 18 Restrictions on afforestation in FSC were first proposed by Environment Canterbury under the proposed NRRP circa 15 years ago. The notified NRRP included rules to control forestry in FSC on a per property basis. Consent was to be required if more than 15% of any individual property in one of these catchments was to be afforested.
- 19 Foresters in Canterbury (**Foresters**) lodged a submission opposed to these new rules and engaged Professor Tim Davies to give hydrological evidence on their behalf at the relevant hearing.
- 20 Professor Davies gave evidence in support of bespoke rules for managing afforestation within flow sensitive catchments. Professor Davies' approach was accepted by the Hearings Panel, chaired by Dr Brent Cowie.
- 21 Dr Cowie was subsequently engaged by forestry submitters to give evidence in the LWRP hearings (see below). Dr Cowie's evidence is attached at **Appendix 2**. It discusses the NRRP decision in some detail including (relevantly) as follows⁶:

I agree that large scale forestry in some catchments in Canterbury could have significant adverse effects on flows, instream values, and downstream users. For this reason I consider that well targeted regulation controlling the effects of forestry on water yield are appropriate.

NRRP commissioners focussed on effects in two ways. First, the only catchments subject to regulatory control were those where forestry could reduce 7dMALF by more than 5%, and/or average annual flow by more than 10%. This meant only nine catchments in Canterbury were subject to restrictions on forestry in the Operative NRRP. Restricted discretionary consents would be required if either of these thresholds were exceeded over time in these catchments.

In practise protecting 95% of 7dMALF means there are fairly strong restrictions on afforestation in headwaters, as this is where baseflow is generated. However the requirement to protect 90% of average flow places less restrictions on forestry in the balance of the catchment.

- 22 Dr Cowie's evidence refers to the NRRP decision overview which summarised the merits of this approach to management of flow sensitive catchments as follows:⁷

This approach has some strong advantages. It promotes the sustainable management of water resources by protecting life supporting capacity. It also offers significant protection to existing users while allowing landowners reasonable use rights on their properties. As such, it is effects based, transparent, and we believe equitable. It will provide for the sustainable management of water yield in flow sensitive catchments on robust and defensible grounds. It also provides certainty for land owners wishing to undertake significant forest plantings on their properties in the flow sensitive catchments.

- 23 The NRRP Hearings Panel therefore decided to control new forest plantings in FSC that met specified criteria, namely where the proposed new plantings will not

⁶ Dr Cowie's evidence on the LWRP at paragraphs 14-16

⁷ Supra at paragraph 45

cumulatively cause more than a 5% reduction in the 7dMALF and/or more than a 10% reduction in the mean flow (refer NRRP Rule 28(1)(b) and condition (3) at Appendix 1).

The LWRP hearings process

- 24 The notified version of the LWRP proposed to alter the FSC rules from those contained in the decisions version of the NRRP by reverting back to a rule relating to the percentage area per title proposed to be afforested within a FSC.
- 25 Once again, the Foresters expressed their opposition to this approach via a submission on the LWRP.
- 26 The Section 42A Reporting Officer recommended two changes to the FSC rule in response to the Foresters' submission. First, the activity status was recommended to be changed from permitted to controlled. Second, the threshold for meeting the rule was changed from 15% of a property to 20% of the total area of flow sensitive catchment or sub catchment.⁸
- 27 Dr Cowie's evidence contains the following evaluation of the Section 42A Report recommended changes:⁹

I support the change to a controlled activity as the only matter for control is the provision of information, which is important for ECan to administer these provisions effectively.

While I do not support the second limb of Rule 5.110, I do support the changes recommended to it, at least in smaller catchments. It is a significant improvement over the provisions of the pLWRP as notified. This is because the rule now refers to the total area planted in a catchment or sub catchment – if the total area does not exceed 20%, planting is provided for, and this provides at least a potential opportunity for significant afforestation as a controlled activity on individual properties that the rule in the proposed Plan doesn't.

The problem with this rule, as recommended to be changed, is that from an effects based viewpoint it remains flawed. This is because the effects on water yield of planting in a catchment depend critically where the trees are planted. If they are in the headwater reaches, where baseflow is generated, 20% afforestation could have significant effects on 7dMALF. However, outside of the headwaters effects will largely be on average flows...

- 28 Dr Cowie's concluding remarks included the following comments¹⁰

By returning essentially to the approach in the proposed NRRP, ECan have in the pLWRP placed administrative simplicity ahead of managing effects. As any such rules to control forestry in flow sensitive catchments are made under s9(2) of the Act, in my view they should be strongly focussed on the effect being managed, not administrative simplicity. In other words the primary focus should be primarily on effectiveness, not administrative efficiency. The approach ECan have used in the [notified LWRP] returns to the NRRP as notified, ignores NRRP submitters, ignores the deliberations of the NRRP hearing committee, and is not founded in effects based management. It should be rejected because it lacks reasonable justification, and the approach in the operative NRRP inserted in its place.

However changes recommended by Officers to Rule 5.110 are a significant improvement over what was in the proposed LWRP, but they remain flawed because they are not entirely effects based. This is because effects on flows depend where in a catchment trees are planted, with headwater locations being particularly sensitive.

⁸ Supra at paragraph 61

⁹ Supra at paragraphs 62-64

¹⁰ Supra at paragraphs 68-71

However I do think the amendments recommended by Officers to Rule 5.110 have merit in smaller catchments. One of the nine flow sensitive catchments subject to restriction in the operative NRRP is French Farm Stream on Bank's Peninsula, which has an area of <5km². There are only likely to be one or two landowners who could afforest significant parts of the catchment, so a restriction on a catchment area planted basis could be appropriate there to maximise efficiency. This could also apply in other small catchments of say up to 20km². This would include most of the additional "flow sensitive" catchments listed in Sections 6-15 of the pLWRP, as many of these catchments (or at least those I am familiar with) are small

However in larger catchments – the Waipara for instance is 856km² - it would be inexcusable in my view to sacrifice effectiveness and targeted regulation to protect water yield simply because to do so would be administratively expedient.

- 29 The Forester's arguments, and Dr Cowie's evidence, were accepted by the LWRP Hearings Panel and the result is the current Rule 5.73 in the LWRP (refer Appendix 1). Notably, the LWRP Panel had the same chair as the present hearing, retired Principal Environment Court Judge David Sheppard. Mr Rob van Voorthuysen was also on the LWRP Hearings Panel.

Controlled activity status best meets requirements of section 32

- 30 The question of appropriate RMA regulation of afforestation in FSC has been thoroughly canvassed in earlier regional plan hearings. On each occasion the hearings panel has adopted recommendations of experienced hydrological experts and accepted that a controlled activity rule is appropriate.
- 31 The FSC rule contained in the Officer Reply Report is in all material respects the same as the FSC rule in the operative LWRP.
- 32 To reiterate, the current FSC rule framework only allows certain afforestation proposals that qualify under the rule to be processed as a controlled activity.
- 33 The qualifying criteria are critical to operation of the rule and they are imbedded in the FSC rule itself (refer Appendix 1). These criteria have been developed through expert evidence from experienced hydrologists familiar with Canterbury's topography and hydrological conditions, and the effects of afforestation on flow sensitive catchments.
- 34 Afforestation proposals that do not meet the specific criteria expressed in the rule would default to a discretionary activity.
- 35 It is considered that the controlled activity status included in the operative LWRP and recommended in the PC7 Section 42A Report is more effective and efficient than a more stringent activity status. A controlled activity status better achieves an appropriate level of management of environmental effects relative to the level of restriction on afforestation activity.
- 36 In light of the above, it is respectfully submitted that an increase in the activity status of new planting in FSCs, above a controlled activity, is not justified when the effects of a qualifying afforestation proposal will be minimal.
- 37 The Forestry Submitters would welcome the opportunity to be heard on this matter should the Panel be minded to depart from the recommendations of the PC7

Section 42A Report and impose a more stringent activity status for afforestation in flow sensitive catchments.

- 38 Counsel notes that the PC7 hearing is being reconvened this Friday to hear the Officers' reply to the Panel's questions. Counsel does not have anything further to add, however if it will assist the Panel, Counsel is available at short notice to attend the hearing should the Panel have any questions arising from this Memorandum.

DATED at Christchurch this 24 day of February 2021



Chris Fowler
Counsel for Rayonier New Zealand Limited and Port Blakely Limited

The NRRP FSC Rule (decision version)

Rule ~~WQN4628~~¹³⁵¹ Planting new areas of plantation forest in flow-sensitive catchments ~~listed in Schedule WQN15~~¹³⁵² —permitted activity¹³⁵³

Activity	Conditions	Cross-Ref.
<p>1. The planting of new areas of plantation forest within any flow-sensitive catchment listed in Schedules WQN15.1–15.4¹³⁵⁴ is:</p> <p>(a) a permitted activity provided the activity complies with the conditions 1 and/or 2 of this rule;</p> <p>(b) a controlled activity provided the activity complies with condition 3 of this rule.</p> <p>2. (c) a restricted discretionary activity where any one or more of the conditions 1–3 are not complied with, the activity is a restricted discretionary activity under Rule WQN47.¹³⁵⁵</p>	<p>1. <u>Existing Areas of exotic tall vegetation, other than plantation forest:</u>¹³⁵⁷</p> <p>(a) greater than two metres tall; and</p> <p>(b) occupying more than 80 percent of the canopy cover;</p> <p>may be planted in plantation forest provided that Environment Canterbury has received <u>from the land owner, accurate description of such areas on using 1:50,000 topographical maps, GPS co-ordinates</u>¹³⁵⁸ or aerial photographs of equivalent scale, <u>within 12 months of the notification of this chapter by 1 November 2012,</u>¹³⁵⁹ and has verified that the vegetation meets the criteria for <u>existing exotic tall vegetation in Policy WQN6(3)(b)(i).</u>¹³⁶⁰</p>	<p>Policies WQN3 and WQN6.</p>
	<p>2. <u>Areas of willow meeting criteria (a) and (b) of Condition 1, and growing within 40 m of the edge of the bed of a water body, may be replaced by an equivalent area of plantation forest planted elsewhere within the same catchment, provided that:</u></p> <p>(a) <u>No vegetation used for flood control shall be disturbed, removed, damaged or destroyed except by or on behalf of the person or agency responsible for maintaining that vegetation for flood control purposes; and</u></p> <p>(b) <u>Environment Canterbury has been provided with an accurate description of the area using 1:50 000 topographical maps or aerial photographs of equivalent scale; and</u></p> <p>(c) <u>the original area is cleared of all willows and is retained as short or open canopy vegetation; and</u></p> <p>(d) <u>the new area of plantation forest is not planted within 20 m of the edge of the bed of any water body.</u>¹³⁶¹</p> <p>2.3. <u>For any Forestry Unit, the total Other than those areas of plantation forest planted under Condition 1 and 2 above, the new area of new planting, together with all other new areas of planting in the same flow sensitive catchment since 1 November 2010, plantation forest, in addition to condition 1 above, will not exceed: cumulatively cause more than a five percent reduction in the seven day mean annual low flow, and/or more than a 10 percent reduction in the mean flow.</u></p> <p>(a) <u>five percent of the Forestry Unit area, for catchments listed in Schedule WQN15.1;</u></p> <p>(b) <u>ten percent of the Forestry Unit area, for catchments listed in Schedule WQN15.2;</u></p> <p>(c) <u>15 percent of the Forestry Unit area for catchments listed in Schedule WQN15.3; or</u></p> <p>(d) <u>20 percent of the Forestry Unit area for catchments listed in Schedule WQN15.4.</u>¹³⁶²</p> <p>3. <u>Environment Canterbury shall be notified:</u></p> <p>(a) <u>prior to the planting of trees, of the location and size of the area to be planted; and</u></p> <p>(b) <u>within 14 days of planting of the trees, showing the area planted on 1:50,000 topographical maps or aerial photos of equivalent scale.</u>¹³⁶³</p>	
<p>Resource consent information requirements</p> <p><u>Any application for resource consent under this rule must meet the information requirements set out in 5.7.2 and 5.7.3.3.</u></p>	<p>Matters for control</p> <p><u>Where the activity is classified as a controlled activity, Environment Canterbury has reserved control over the following matters in imposing any conditions:</u></p> <p>1. <u>The location and size of the new area to be planted</u></p> <p>2. <u>The proportion of the new area to be planted within the Low Flow Production Area;</u></p> <p>3. <u>The effect of the new area of planting on the water allocation status of the catchment;</u></p> <p>4. <u>Consent duration.</u>¹³⁶⁴</p>	

	Restriction of discretion
<p>Where rule applies</p> <p>This rule applies in flow-sensitive catchments listed in Schedule WQN15¹³⁶⁵ does not apply to all areas/situations in the Canterbury Region — see Table WQN2 Index of rules⁴³⁶⁶</p>	<p>Where an activity is classified as a restricted discretionary activity, Environment Canterbury has restricted its discretion to the following matters:</p> <ol style="list-style-type: none"> 1. <u>The impacts of forestry planting on the water¹³⁶⁷ allocation status of the catchment.</u> 2. <u>The effects of the location of planting, species of tree and harvesting regime on flows.¹³⁶⁸</u> 3. <u>The impact of the plantation forest on the maintenance of any minimum flow or flow regime set for that catchment.</u> 4. <u>The impact of the plantation forest on any instream values and authorised abstractions takes and use¹³⁶⁹ of the water.</u> 5. <u>The ability to mitigate any adverse effects on flows.</u> 6. <u>The impact of any mitigation measures on the catchment.</u> 7. <u>The benefits of the forestry for slope stability, erosion control, noxious plant control, water quality and biodiversity protection.</u> 8. <u>The effects of the forestry on the flood-carrying capacity of the river and the magnitude of flood flows and flood runoff¹³⁷⁰.</u> 9. <u>The effect on any values of significance to Ngāi Tahu.</u> 10. <u>The effects of the new areas of planting inside and outside the Low Flow Production Area on the 7-day MALF and the mean flow.¹³⁷¹</u> 11. <u>The effect on flows of any widening spread from the forestry planting.¹³⁷²</u> 12. <u>Financial contributions Bonds¹³⁷³ as specified in Part 5.11 of Chapter 5.¹³⁷⁴</u> 13. <u>Consent duration.¹³⁷⁵</u>

pLWRP FSC Rule (as-notified)

5.110 The planting of new areas of plantation forest within any flow-sensitive catchment listed in Sections 6-15 is a permitted activity, provided the forest planting meets the following conditions:

1. Existing areas of exotic tall vegetation, other than plantation forest, that is greater than 2 m tall and occupies more than 80% of the canopy cover and existed at 1 November 2010 may be planted in plantation forest; and
2. The total area of land planted in plantation forest, other than land planted pursuant to condition 1, does not exceed 15% of the total site area of a certificate of title that existed at 1 November 2010.

5.111 The replanting after harvest of areas of plantation forest that does not meet the conditions of Rule 5.109 or the planting of new plantation forest that does not meet one or more of the conditions of Rule 5.110, within any flow-sensitive catchment listed in Sections 6-15 is a restricted discretionary activity.

The CRC will restrict discretion to the following matters:

1. The impacts of forestry planting on the surface water flows in the catchment, including water allocation status, minimum flow or flow regime, in-stream values and authorised takes and use of the water;
2. The impacts of forestry planting on groundwater recharge;
3. The benefits of the forestry for slope stability, erosion control, noxious plant control, water quality and biodiversity protection;
4. The spacing and density, and species of the planting; and
5. The extent to which the proposed activity will prevent or compromise the attainment of the environmental outcomes sought by, or is inconsistent with, the objectives and policies of this Plan.

LWRP FSC Rules (operative version)

5.73 The planting of new areas of plantation forest within any flow-sensitive catchment listed in Sections 6 to 15 is a controlled activity, provided the forest planting meets the following conditions:

1. Existing areas of exotic tall vegetation, other than plantation forest, that is greater than 2 m tall and occupies more than 80% of the canopy cover and existed at 1 November 2010 may be planted in plantation forest; and
2. In catchments less than or equal to 50 km² in area the total area of land planted in plantation forest does not exceed 20% of the flow sensitive catchment or sub-catchment listed in Sections 6 to 15; and
3. In any catchment greater than 50 km² in area the new area of planting, together with all other new areas of planting in the same flow sensitive catchment since 1 November 2012, will not cumulatively cause more than a five percent reduction in the seven day mean annual low flow, and/or more than a 10% reduction in the mean flow.

The CRC reserves control over the following matter:

1. The provision of information on the location, density and timing of planting.

PC7 FSC Rules (as-notified)

5.189 Any plantation forestry activity regulated by the Resource Management (National Environmental Standards for Plantation Forestry) Regulations including:

- a. the use, excavation, deposition or disturbance of land, including in the bed of a lake or river, or in a wetland; or
- b. the planting, replanting or clearance of vegetation, including in the bed of a lake or river, or in a wetland; or
- c. the taking or diverting of water; or
- d. the discharge of contaminants into water or onto or into land in circumstances where it may enter water;

is a permitted activity, provided the following conditions are met:

1. Planting of new areas does not occur within any Flow Sensitive Catchment listed in [Sections 6 to 15](#) of this Plan;...

5.190 Any plantation forestry activity regulated by the Resource Management (National Environmental Standards for Plantation Forestry) Regulations including:

- a. the use, excavation, deposition or disturbance of land, including in the bed of a lake or river, or in a wetland; or
- b. the planting, replanting or clearance of vegetation, including in the bed of a lake or river, or in a wetland; or
- c. the taking or diverting of water; or
- d. the discharge of water or contaminants into or onto land in circumstances where it may enter water;

that does not meet one or more of the conditions in [Rule 5.189](#) is a discretionary activity.

5.189B

The planting of new areas of plantation forest regulated by the Resource Management (National Environmental Standards for Plantation Forestry) Regulations that does not meet condition 1 of Rule 5.189, is a controlled activity, provided the following conditions are met:

1. The new area of planting will replace, and will be entirely located within, an existing area of vegetation, where the existing vegetation:
 - a. is exotic species, is greater than 2 m tall, occupies more than 80% of the canopy cover of the existing area, and existed at 1 November 2010;
and
 - b. is not a plantation forest or a forest that is specifically planted and managed for a carbon sink; and
2. In any flow sensitive catchment less than or equal to 50 km² in area the new area of planting, together with all other areas of planting in the same flow sensitive catchment, does not exceed 20% of the area of that flow sensitive catchment; and
3. In any flow sensitive catchment greater than 50 km² in area the new area of planting, together with all other new areas of planting in the same flow sensitive catchment since 1 November 2012, will not cumulatively cause more than a five percent reduction in the 7DMALF, and/or more than a 10% reduction in the mean flow.¹⁴¹

The CRC reserves control over the following matter:

1. The provision of information on the location, density and timing of planting.¹⁴²

5.190

Any plantation forestry activity regulated by the Resource Management (National Environmental Standards for Plantation Forestry) Regulations including:

- a. the use,¹⁴³ excavation, deposition or disturbance of land, including land¹⁴⁴ in the bed of a lake or river, or in a wetland; or
- b. the planting, replanting or clearance of vegetation, including in, on, or under¹⁴⁵ the bed of a lake or river, or in a wetland; or
- c. the taking or diverting of water; or
- d. the discharge of water or contaminants into or onto land in circumstances where it may enter water;

that does not meet one or more of the conditions 2, 3, 4, 5, 6 or 7 in of Rule 5.189 or one or more of the conditions of Rule 5.189B is a discretionary activity.¹⁴⁶
