

Before the Hearings Panels

Under the Resource Management Act 1991 (RMA)

In the matter Proposed Plan Change 1 (PC1) to the Natural Resources Plan for the Wellington Region

And

In the matter Hearing Stream 3 (Earthworks, Forestry and Rural Land Use)

**Legal submissions in rebuttal on behalf of Greater Wellington
Regional Council**

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MAY IT PLEASE THE PANELS

INTRODUCTION

- 1 These legal submissions in rebuttal are made on behalf of the Greater Wellington Regional Council (**Council**) in relation to Proposed Plan Change 1 (**PC1**) to the Natural Resources Plan for the Wellington Region (**NRP**), Hearing Stream 3 (Earthworks, Forestry and Rural Land use).
- 2 The purpose of these legal submissions is to address one legal issue that has arisen through legal submissions and evidence filed by submitters. In summary, that issue is the legal framework for supporting more stringent provisions in relation to forestry activities, in light of the National Environmental Standards for Commercial Forestry 2017 (**NES-CF**).

The issue

- 3 The matter of stringency is relevant to how PC1 interacts with the NES-CF. The issue of how to refer to the NES-CF and the relationship between the provisions of PC1 and the NES-CF was addressed in counsels' legal submissions in reply for Hearing Stream 1.¹ However, in this Hearing Stream, there is more of a focus on the issue of the ability for rules in PC1 to be more stringent than the NES-CF and the requirements of Regulation 6 of the NES-CF are met. As most relevant to this Hearing Stream, Regulation 6 enables:

National instruments

- (1) A rule in a plan may be more stringent than these regulations if the rule gives effect to—

¹ See specifically paragraphs 38-46, in the submissions dated 29 November 2024.

- (a) an objective developed to give effect to the National Policy Statement for Freshwater Management:
- (b) any of policies 11, 13, 15, and 22 of the New Zealand Coastal Policy Statement 2010.

4 In addition, there is the ability to be either more stringent (if requirements in Regulation 6 are met) or more lenient in respect of afforestation activities.

5 Mr Watson has explained this in detail in this section 42A report and rebuttal, and has worked through this process to ensure the position taken through PC1 complies with this statutory requirement. A careful and thorough exercise has been undertaken, with consideration of the relevant evidence. Some recommendations to remove notified provisions that were more stringent have been made, but other provisions, which are more stringent than the NES-CF provisions, are recommended to be retained.

Submitters' views

6 This issue of stringency and the applicable legal framework is addressed in the evidence of Mr Wyeth (New Zealand Farm Forestry Association) and Ms McLeod (New Zealand Carbon Farming Group) and in the legal submissions of Forest & Bird and the Environmental Defence Society. The material presents competing views on the issue – some submitters consider there is no ability to be more stringent, others consider still more stringency is required.

7 Reference is made throughout to a High Court decision of *Rayonier New Zealand Ltd v Canterbury Regional Council* [2024]

NZHC 1478, with Mr Wyeth proposing a four-step test to be applied as follows:²

In my opinion, there are four key tests that need to be met to demonstrate that a more stringent rule than the NES-CF is justified under Regulation 6 of the NES-CF and section 32 of the RMA as follows:

- (a) **Test 1:** Is there jurisdiction for more stringent rules under Regulation 6 of the NES-CF?
- (b) **Test 2:** Is there sufficient evidence that that commercial forestry activities are not achieving the outcomes sought by Regulation 6? In the context of PC1, this test is that commercial forestry activities are resulting in PC1 freshwater objectives to give effect to the NPS-FM not being met.
- (c) **Test 3:** Is there sufficient evidence that the NES-CF controls are not adequate to achieve the outcomes sought by Regulation 6? In the context of PC1, this test is that the NES-CF is inadequate to achieve the relevant PC1 freshwater objectives.
- (d) **Test 4:** Is there sufficient evidence that the more stringent rules being proposed will be more efficient and effective to achieve the outcomes sought by Regulation 6

8 Mr Wyeth considers that given his assessment as to a perceived lack of scientific evidence that tests 2, 3 and 4 are not passed by the framework proposed by PC1.

Council position

9 While Mr Wyeth has put forward what he considers the tests are, it is submitted that they should not be relied on to alter the applicable legal framework. They are not tests recorded in the

² Mr Wyeth, at [26].

relevant High Court decision on this issue and it is submitted that the analysis undertaken overlooks the fundamental premise of the NPS-FM.

- 10 It is important to record that the decision cited and relied upon is a High Court decision on a points of law appeal basis only, where the Court itself was clear that:³

First, this Court's analysis of the s 32(4) issue straddles a fine line, and I remind myself that a challenge to the merits of the panel's decision is not a legitimate appeal ground.

- 11 In that light the High Court considered when looking at the requirements of section 34(2) of the RMA that:⁴

Importantly, the examination of whether a proposed restriction is justified must be considered in the circumstances of the region in which it is to have effect. This means that local factors, rather than matters generally of concern at a national level or of concern in other regions or districts, must be examined. In my view, this required the panel to be satisfied that there was good reason arising from the circumstances of the Canterbury region to impose greater restrictions on plantation forest activities that have the potential to cause sediment discharges than those that appear in the NES-PF.

- 12 Then, when looking at the Council decision in that specific case, the High Court observed:⁵

I agree with Mr Pilditch that the sediment discharge effects mentioned in the s 42A reply report apply throughout New Zealand, but the key issue raised by the appellants, namely whether additional rules over and above the baseline provided by the NES-PF sediment discharge rules are necessary in the Canterbury region was not addressed. Further, there is no discussion in the reply report about the reasons why greater stringency is required in the

³ *Rayonier New Zealand Ltd v Canterbury Regional Council* [2024] NZHC 1478, at [134]. The appeal was made under the Environment Canterbury (Transitional Governance Arrangements) Act 2016 as opposed to the RMA.

⁴ *Ibid* at [138].

⁵ *Ibid*, at [139]- [145].

“circumstances of the Canterbury region”, as is required under s 32(4)

This is not surprising because no evidence was provided to the panel setting out the circumstances of the Canterbury Region which would justify more stringent sediment discharge rules for plantation forestry activities than those provided for in the NES-PF. Neither was there any assessment about how the additional stringency would likely better achieve the freshwater objectives in the operative plan concerning this potentially adverse effect when compared to the NES-PF regulations.

Mr Wyeth’s evidence was that the NES-PF regulations already appropriately managed sediment discharges from plantation forestry activity and this was not challenged. ...

...

But the panel failed to address whether the stringency proposed was justified in respect of the sediment discharge rule as was required by s 32(4). There is no reference to any evidence justifying greater stringency in the Canterbury region and the absence of this is, in my view, fatal. The panel could not recommend that greater stringency was justified for sediment discharges from plantation forestry in Canterbury in the absence of such evidence.

13 For completeness, section 32(4) of the RMA requires:

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.

14 While the High Court decision does provide useful guidance, it is primarily relevant as to consideration of the process followed, and the level of reasoning provided in the decision when reaching the conclusion to impose more stringent provisions. It does not however directly address the relationship between section 32(4) of the RMA and the policy direction of the NPS-FM, where there is disputed evidence.

15 Here, the issue is not whether the Council can impose more stringent provisions where they are being used to regulate activities to achieve the TAS (a freshwater objective), but whether there is the evidence base to justify that approach.

16 In that light, similar to the submission made through rebuttal submissions for Hearing Stream 2 for the Council, the context of the NPS-FM and its objective and directions as to the use of information is highly relevant and needs to be considered by the Panels when reaching a conclusion as to the ability to impose more stringent rules in relation to forestry activities.

17 The sole objective of the NPS-FM is (emphasis added):

The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:

- (1) first, the health and well-being of water bodies and freshwater ecosystems
- (2) second, the health needs of people (such as drinking water)
- (3) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

18 Further, in implementing the NPS-FM, clause 1.6 requires:

- (1) In giving effect to this National Policy Statement, local authorities must use the best information available at the time, which means, if practicable, using complete and scientifically robust data.
- (2) In the absence of complete and scientifically robust data, the best information may include information obtained from modelling, as well as partial data, local knowledge, and information obtained from other sources, but in this case local authorities must:
 - (i) prefer sources of information that provide the greatest level of certainty; and

- (ii) take all practicable steps to reduce uncertainty (such as through improvements to monitoring or the validation of models used).

(3) A local authority:

- (i) must not delay making decisions solely because of uncertainty about the quality or quantity of the information available; and
- (ii) if the information is uncertain, must interpret it in the way that will best give effect to this National Policy Statement.

19 As previously set out in the rebuttal submissions for Hearing Stream 2 for the Council⁶, setting of water quality objectives (including TAS) is subject to significant direction in the NPS-FM and it does not anticipate that the process of achieving TAS will be simple or cheap. The same applies in respect of freshwater quality more generally, with obligations imposed on the Council under section 30 of the RMA regarding maintaining and enhancing the quality of water:⁷

So, in summary, it is a function of every regional council to control the use of land to maintain and enhance the quality of water in water bodies — ie including water in aquifers, and to control the discharges of contaminants into *water* (again, including water in aquifers). This function is not optional — it is something a regional council is required to do, whether it be difficult or easy.

20 Accordingly, it is submitted that both the RMA and the NPS-FM are clear on the obligations imposed on, and faced by, the Council and those obligations apply, even where the information available is not to the usual standard of certainty. The ultimate direction in clause 1.6 of the NPS-FM is to interpret the information that is available in the way that will best give effect to the NPS-FM. This is what we have referred to in previous legal

⁶ See specifically paragraph [22], in the submissions dated 29 November 2024

⁷ At paragraph [6] of its legal submissions dated 28 March 2025.

submissions as the 'lens' that needs to be applied to the section 32 assessment when dealing with NPS-FM issues.⁸

21 It is submitted that the exercise undertaken by Mr Watson in assessing the proposed PC1 provisions against the requirements for stringency in the NES-CF is one which is consistent with the applicable legal framework as his evidence:⁹

21.1 Clearly considers what is needed to give effect to the TAS (objectives which give effect to the NPS-FM) as required by Regulation 6 of the NES-CF. In this case, the suspended fine sediment TAS needs improvement in some part FMU's.

21.2 Assesses the evidence available from Mr Reardon, Mr Blyth and Dr Greer. This includes evidence that where the suspended fine sediment TAS is not being met, forestry activities will be contributing to that and more than the current requirements of the NES-CF is required to appropriately protect water quality. See for example, the rebuttal evidence of Dr Greer, where he summarises Mr Blyth's evidence:¹⁰

Commercial forestry is an anthropogenic source of sediment; and

Reductions in sediment losses from those tributaries of the Hutt where commercial forestry is the predominant land use (i.e., the Whakatikei and Akatarawa rivers) are necessary to achieve the suspended fine sediment TAS for the Te Awa Kairangi lower mainstem part-FMU.

21.3 Assesses the risk of doing nothing further (ie, relying on the NES-CF alone to regulate forestry activities). As

⁸ Council's rebuttal legal submissions, Hearing Stream 2, 28 March 2025 at {28}-[29]

⁹ Mr Watson's rebuttal evidence, Table 3, Line 1.

¹⁰ Dr Greer, rebuttal evidence, at [18], [33] and [49].

there is an expected 40% increase in harvest area in these Whaitua in the next 5 years (approximately) and climate change is expected to increase the frequency and severity of adverse weather events, Mr Watson concludes this will not best give effect to the NPS-FM and is not an appropriate response to TAS not being met.

22 Accordingly, it is submitted that this assessment supports the ability for the rules in PC1 to be more stringent than the NES-CF in the part FMU's where TAS are not met.

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