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National Environmental Standard for Plantation Forestry

Local Government New Zealand's submission to the Ministry for
Primary Industries and the Ministry for the Environment

10 August 2015

Contents

Contents	2
Weare.LGNZ	3
Introduction	3
Alignment with national direction and statutory responsibilities	5
General drafting	8
Who is responsible for what, and what consents are required?	11
The relationship between forestry activity-specific rules and general conditions	12
Risk assessment tools: ESC, FSI, WSRC	12
Permitted activity conditions	13
Transitional arrangements	17
Conclusion	19
Schedule	20

We are. LGNZ.

LGNZ is the national organisation of local authorities in New Zealand and all 78 councils are members. We represent the national interests of councils and lead best practice in the local government sector. LGNZ provides advocacy and policy services, business support, advice and training to our members to assist them to build successful communities throughout New Zealand. Our purpose is to deliver our sector's Vision: "Local democracy powering community and national success."

This final submission was endorsed under delegated authority by Lawrence Yule, President, Local Government New Zealand and Stephen Woodhead, Chair Regional Sector Group of Local Government New Zealand.

We would like to be engaged as these regulations are developed. We also encourage the regulations to be "road-tested" before they are finalised. We note the Government has agreed that greater use of exposure drafts will help to lift the quality of final legislation. This was in response to the Productivity Commission's recommendation in their recent enquiry into local regulation¹ that the Cabinet Manual should be amended to set a general expectation that exposure drafts will be published and consulted on before introducing into Parliament legislation that creates a new regulatory regime or significantly amends existing regimes.

This will be a complex set of regulations with responsibility shared between regional and territorial government – the first National Environmental Standard (NES) to do so. As such, implementation will be more challenging and it is important that investment is made in the front end of the process, ahead of the Regulations being finalised. This will mean that ambiguities can be addressed and implementation issues identified.

Introduction

Thank you for this opportunity to submit on the consultation document for a National Environmental Standard for Plantation Forestry (NESPF). This submission has been prepared on behalf of New Zealand's local authorities.

We note with concern the matters that have been highlighted by local authorities – especially the regional councils – about the proposed NES. This is concerning, particularly because the regional sector in particular was reasonably supportive of the concept of an NES for Plantation Forestry. Some have gone so far as to recommend that it not be progressed. This submission, and the submissions of local authorities all show there is a great deal more work to do to if the NES is to be progressed into Regulations.

LGNZ acknowledges the intent of the NESPF: to resolve industry concerns about variation in controls across plans, to reduce compliance costs and uncertainty for industry, to secure improved environmental outcomes and to encourage development of the forestry sector. But achieving better environmental outcomes does not appear to be a driver of the proposed NESPF. However, if it is recast, it could be an important tool to help give effect to the National Policy Statement for Freshwater Management (NPSFM).

¹ <http://www.productivity.govt.nz/inquiry-content/1510?stage=4>

LGNZ is concerned that the NESPF is not aligned with other national direction – the National Policy Statement for Freshwater Management nor with regional councils' statutory responsibilities to manage the risks of pest species and to fulfil obligations bestowed by section 6 of the RMA. Careful consideration of these matters is required before the NES can be progressed. Regional councils are currently involved in intensive effort to give effect to the NPSFM and this NESPF has the potential to undermine and override this work.

Councils have concerns that there will be significant costs to bear in assessing regulatory compliance with the NES and no viable mechanism to recover the costs of the assessment work to determine activity status. Elevating the permitted activity framework to a controlled activity would provide certainty, consistency and a mechanisms for councils to assess applications and recover associated costs.

Territorial authorities have identified that the NES does not address some aspects of the management of plantation forestry and does not give the opportunity to be more stringent in relation to managing amenity conflicts that arise from harvesting operations and traffic management and wear and tear on council roads.

Analysis of the individual council's submissions will assist central government to determine the actual costs associated with implementation of the NES. We have encouraged councils to consider in their submissions how the proposed regulations will align with the work they are doing to give effect to the NPSFM, and whether the proposed regulations will mean that more or fewer consents will be required when compared with their plan provisions. Many councils advise that the proposed framework will require resource consents where none are currently required and that assessing compliance with permitted activity status will be complex, uncertain and impose costs where none currently exist. The overriding feedback is that the NESPF needs to be more certain.

This submission discusses:

- Alignment with national direction and statutory responsibilities;
- General drafting;
- Who is responsible for what, and what consents are required?;
- The relationship between forestry activity-specific rules and general conditions;
- Risk assessment tools: ESC, FSI, WSRC;
- Permitted activity conditions;
- Transitional arrangements and implications for existing resource consents/existing use rights; and
- Interface with existing and future plan provisions and other regulatory instruments: the stringency/scope issue.

Alignment with national direction and statutory responsibilities

Wilding conifer management

Regional councils have statutory responsibilities to manage the risks of pest species via Regional Pest Management Plans (RPMP) under the Biosecurity Act 1993. Councils also have a responsibility under the RMA under section 9(3) and caselaw has confirmed this in relation to the spread of wilding conifers. Regional councils are currently developing their own RPMPs and also working collectively to develop nationally consistent rules for wilding conifer management that will be incorporated into RPMPs.

Regional councils have identified that the provisions in the proposed NESPF for managing the risks of wilding conifer spread will undermine the approaches being taken in RPMPs to manage the risk associated with the spread of wilding conifers. Permitted activity status for afforestation in areas classified as low and moderate erosion risk is likely to exacerbate existing management problems for wilding conifers and will create considerable additional costs to manage the spread.

The NZ Wilding Conifer Management Strategy (the **Strategy**) (released in 2014) is the result of extensive work with the biosecurity sector. It establishes an agreed vision for wilding conifer management. The Strategy is led by MPI and it is of concern that the consultation document has not referred to it. The NES will override the provisions of the Strategy and will also potentially undermine the work being done by councils to develop RPMPs. Of concern is that the NES will compromise a regional council's ability to fulfil its statutory obligations for biosecurity.

The NESPF will rely on the Wilding Spread Risk Calculator (**WSRC**) and best practice guidelines to address the risk of wilding spread. The proposal is that Territorial Authorities will administer the WSRC even though biosecurity is a function of regional councils. The WSRC score will be the critical threshold for determining activity status. It is noted that the WSRC is untested and will be potentially inconsistent with the regulatory measures that will be necessary under the Strategy and councils' RPMPs. Where a regional council has identified a species as being particularly invasive, tools are needed to enable more stringent provisions to be developed.

Recommendations

- Amend the NESF to include provision for regional councils to make more stringent rules for the management of wilding conifer species that are priority risks in a region/district as identified in Regional Pest Management Plans.
- Amend the Wilding Spread Risk Calculator to align with decisions made to implement the Wilding Conifer Management Strategy and the National Policy Direction for Pest Management.

National Policy Statement for Freshwater Management

Regional councils are currently giving effect to the National Policy Statement for Freshwater Management (NPSFM). In many cases these rely on collaborative processes, involving the community, iwi and stakeholders. These processes are intensive, expensive, time consuming and well worth the investment as collaboration is regarded as the best way to address water management issues across a catchment. A collaborative process typically agrees priorities and targets for water management across a catchment. Concern has been expressed that the NESPF as it stands will create uncertainty and potentially constrain a regional council's ability to give effect to the NPSFM.

The NESPF allows councils to make more stringent rules to manage the impacts of forestry activities in tightly defined circumstances including:

- to meet the requirements of the National Policy Statement for Freshwater Management (NPSFM) and to meet Freshwater Management Unit (FMU) limits;
- to prevent adverse effects on the significant values of an outstanding water body that have been specified in a Water Conservation Order (WCO) or regional plan;
- to establish appropriate setbacks for outstanding freshwater bodies as defined in the NPSFM and identified in an RPS, regional plan or district plan;
- to manage impacts on the significant values of wetlands as identified under the NPSFM and specified in a regional plan or other relevant document; and
- to manage risks to groundwater systems, specifically only in relation to quarrying activities occurring over a shallow aquifer less than 30m below ground level within a drinking water protection zone identified in a regional plan.

This potentially allows regional councils to establish appropriate measures in relation to the potential impacts of plantation forestry for “outstanding” water bodies. However the provisions by which councils would be allowed to set more stringent rules under the NESPF apply only to specific values, water bodies and locations recognised in plans. All regional and unitary councils are in the midst of giving effect to the NPSFM; this involves setting limits. Identifying Freshwater Management Units and “outstanding water bodies” is part of this work. Councils are at different stages of this process and have until 2025 to give effect to the NPSFM. The proposed NESPF has the potential to cut across the processes underway. Identifying outstanding water bodies is time consuming and expensive and subject to appeal to the Environment Court; an appropriate amount of time is needed to allow councils to do this work or the NESPF will override the NPSFM. Consideration is needed of how to “protect” the limit-setting processes underway; perhaps the simplest way is to provide for transitional arrangements that give the necessary time to complete this work.

More broadly, Regional Policy Statements, regional plans and implementation strategies take a wider, more holistic view across a catchment. The proposed NESPF provisions in relation to the ability to be more stringent, are constrained to narrowly defined areas and sites and, as Environment Canterbury has noted in its submission to the discussion document, *“the wider contexts, ecological connections, and effects on downstream receiving environments may not be able to be given meaningful recognition.”*

Of concern:

- many wetland areas will not rank highly enough to warrant “significant” classification but nevertheless have importance for a range of values;
- the proposal in relation to groundwater (councils can be more stringent in relation to quarrying activities occurring over a shallow aquifer) may not ensure adequate protection for some ground water resources. In some regions groundwater resource sensitivities may need to be evaluated and managed over a very wide area and include many inter-related factors;
- the terminology around “Drinking Water Protection Zones” is unclear and it is unclear how these are to be mapped; and
- it is unclear what controls might be possible to limit the effects of forestry on water quantity in catchments in low-to-moderate rainfall areas.

Recommendations

- Amend the proposed NESPF to include provision for regional councils and territorial authorities to make more stringent rules for the management of potential adverse environmental effects of plantation forestry on a broad range of regionally and locally determined freshwater management priorities.
- Amend the NES to include an appropriate setback from indigenous biological diversity habitats.
- Amend the terminology and definition intended for around shallow aquifers and Drinking Water Protection Zones so it covers the different terms and approaches used by councils to address water management for human and stock drinking water.

Other areas where councils may apply more stringent rules

The other areas where a council may apply more stringent rules are:

- Coastal marine area;
- Geothermal and karst protection areas;
- Places and areas of known cultural or heritage value; and
- Significant natural area and outstanding natural features and landscapes

The specific matters that allow more stringent rules to be made in relation for biodiversity are also constrained – to mapped areas of significant indigenous vegetation and significant habitats of indigenous fauna in a plan. The consultation document acknowledges that in some cases there will be valuable indigenous vegetation that is not classified as “significant” in plans but it is unclear how this will be applied. Some regional councils (for example Horizons Regional Council) has taken the approach of managing biodiversity, not through mapping significant habitats but through describing these in words through objectives, policies and rules. This approach was thoroughly tested during the formal RMA planning process and was found to be an acceptable alternative to mapping. The NES in its current form would provide no protection for indigenous biological diversity in the Manawatu-Whanganui region and other regions which have taken a similar approach.

The NESPF needs to work with the approaches that councils have taken in their plans to identify significant natural areas, significant indigenous vegetation, significant habitats of indigenous fauna and outstanding natural features and landscapes.

Section 3.4 of the discussion document (the table) provides for councils to be more stringent in relation to outstanding natural landscapes where these have been mapped (note that Appendix 3 does not mention mapping). The greater stringency is limited to “afforestation”. Other activities permitted under the NESPF, such as earthworks, will have significant impacts on a landscape and councils need to be able to apply more stringent rules.

In our submission to the proposed amendments to the NES for Telecommunication Facilities, we argued that the Regulations should be worded so the bar is lowered from “outstanding” to include other landscapes that have been identified in district and regional plans e.g the Wellington District Plan contains landscape provisions as a “Ridgelines and Hilltops” overlay.

Those local authorities that have not identified outstanding natural features and landscapes, but who manage adverse effects, for example through overlays with special rule sets, on other special landscapes will be disadvantaged by the Regulations as proposed. Consistency with the NES for Telecommunications Facilities is encouraged in relation to setting the threshold.

The time and cost to local authorities to identify and map “outstanding natural features and landscapes” will be significant. This is in the absence of consistent criteria for “outstanding” because the message from central government when pressed for this back in 2010 is that “it is too difficult.”

Councils with karst landscapes have made the point that their karst landscapes and contributing allogenic landscapes are not currently mapped. Clarification is needed to also include non-karst catchment areas that can affect karst landscapes (see Tasman District Council’s submission for detail). A council’s ability to be more stringent must extend to contributing non-karst catchment areas.

The current approach of the NESPF will impose significant costs onto councils to undertake this mapping work, and this is subject to an Environment Court process. The section 32 evaluation and the Regulatory Impact Statement should quantify the costs of mapping to local authorities so they can be fully appreciated.

The NES should allow for more descriptive means of identifying Significant Natural Areas, Outstanding Water Bodies and Outstanding Natural Features and Landscapes in plans. In addition, the transitional provisions should provide sufficient time for mapping to take place where councils choose to do this.

Recommendations:

- Amend the rules to acknowledge that both regional councils and district councils have jurisdiction for indigenous biological diversity
- The NESPF should generally allow for descriptive means to identify Significant Natural Areas, Outstanding Water Bodies and Outstanding Natural Features and Landscapes; for example replace the text “...significant natural areas (SNA)...” in the rules with “...*significant natural area (SNA) or identified in a rule in a regional or district plan...*”
- Amend the proposed NESPF to clarify that regional councils and territorial authorities may make more stringent rules for the management of potential adverse environmental effects of plantation forestry on a broad range of regionally and locally determined management priorities for indigenous biodiversity
- The bar should be set lower than “outstanding” in relation to landscapes
- The NESPF should be consistent with the NES for Telecommunications Facilities in relation to landscapes in relation to setting the threshold for stringency
- Widen the scope of matters of greater stringency (in relation to Significant Natural Areas, Outstanding Water Bodies and Outstanding Natural Features and Landscapes) beyond afforestation
- The transitional provisions need to allow sufficient time to allow mapping/identification of outstanding/special landscapes (including court processes)
- The ability to be more stringent should extend to contributing non-karst catchment areas

General drafting

The draft rules convey the policy intent of the proposed subject matter for an NESPF. Changes to the drafting and language of the rules are therefore anticipated. The language and structure of the current draft rules need to be considered with that in mind.

As the formal regulations used to implement the NESPF are likely to use the current draft as a base, comments on the drafting approach are included.

Our legal advice is that the drafting of the NESPF could be tightened so that there is greater internal consistency in the language used. For example, the rules for afforestation include the statement '*Note: consents in Orange Zone to be non-notified*'. In contrast, the rules for earthworks include the statement '*Consents in Orange Zone must be non-notified*'. The differences between these two provisions are obviously subtle. However, the inconsistencies - and others like them that are scattered throughout the NESPF - can have significant impacts on the interpretation of regulatory instruments. That is particularly the case if the Courts apply the presumption that differences in language are deliberate.

The language is also relatively clumsy in places, or not properly representative of underlying provisions of the Resource Management Act 1991 (RMA). For example, various rules include the following language:

... discretion must be restricted to the effects that the specific permitted activity condition(s) that could not be met was attempting to avoid.

This could be recast more simply as:

... discretion is restricted to effects relating to permitted activity condition(s) that are not met.

By way of further example, it would also arguably be preferable if the language of the non-notification provisions was more closely related to that of section 43A(7) of the RMA, which refers to activities for which a consent authority is precluded from giving public/limited notification of an application for resource consent.

Structure of the draft rules

Each set of rules for a specific forestry activity commences with an outline of the underlying objective, scope and risks. Our advice is that these preliminary provisions are not analogous to 'objectives and policies' that can formally be provided for in other planning instruments, but which are not typically features of a NES.

While not specifically provided for in section 43A of the RMA, these preliminary provisions are simply interpretative aids and are unobjectionable from a structural perspective. Care will need to be taken in the final drafting to ensure that the provisions do not conflict with other parts of the regulations used to implement the NESPF (such as broader statements of scope/application).

Use of 'notes'

Our legal advice is that the use of 'notes' through the NESPF is a concern. These are variously used to inform interpretation and to impose substantive controls. The 'note' about non-notification of afforestation consents in the Orange Zone referred to above is an example of the latter situation. This is problematic, as notes in other types of planning instrument are generally regarded as being for informational purposes only and not of legal effect.

To avoid any doubt, notes should not be used to impose substantive controls.

The use of consistent language is again an issue. For example, some notes are identified as 'advice notes' whereas others are simply 'notes'. A consistent approach should be taken throughout the NESPF.

Expression of underlying policy rationale

It is unclear whether the comments about underlying policy intent that are included in the draft rules will form part of the formal NESPF as an interpretive aid.

If it is to be retained, that may be valuable for users of the NESPF. However, it would also have the potential to confuse the meaning of provisions that are otherwise clear. Careful evaluation of the content of any underlying policy explanations that are included in the NESPF will be required.

Definitions/glossary

The Consultation Document contains a glossary, which commences at page 48 (46). 'Forestry/plantation forestry' is a key definition within the glossary. It reads:

A forest (native or exotic) deliberately established for commercial purposes. Under the proposed National Environmental Standard for Plantation Forestry, this is specifically defined as:

- (a) *at least 1 hectare of forest cover of forest species that has been planted and has been, or will be, harvested;*
- (b) *including all associated internal infrastructure; but*
- (c) *not including:*
 - (i) *a shelter belt of forest species, where the tree crown cover has, or is likely to have, an average width of less than 30 metres;*
 - (ii) *forest species in urban areas;*
 - (iii) *nurseries and seed orchards;*
 - (iv) *fruit and nut crops;*
 - (v) *long-term ecological restoration planting of forest species;*
 - (vi) *willows and poplars space planted for soil conservation purposes.*

Local authorities will need the NESPF to be **certain**. For instance, it may be difficult to determine whether a forest has been 'deliberately established for commercial purposes' in some situations. The state of mind or intent of the owner may not always be able to be objectively gauged. In other situations, a landowner may decide to harvest trees that were originally planted for some non-forestry purpose. In terms of an effects based planning regime - can the need for a deliberate commercial purpose be justified?

At a practical level - the meaning of '1 hectare of forest cover' will not be particularly certain or easy to ascertain.

Local authorities have identified concerns about differences between terms in the glossary and definitions in the RMA. In particular, the glossary includes the RMA's definition of 'river', but also has a separate definition of 'perennial river or stream'. The latter term is used throughout many of the NESPF's provisions, although the more general 'river' is also referred to. From a legal perspective, our advice is that departures from the usual RMA definitions can be permissible. Even where they are used in the RMA, the RMA's definitions can be departed from where context otherwise requires. Other enactments (such as NES regulations) and planning instruments (such as regional or district plans) are also free to specify their own independent definitions, without triggering some sort of automatic legal invalidity.

However, while the use of alternative definitions may be legally permissible, they should be carefully considered. There is a clear risk of unintentional conflicts or absurdities. For example, a 'perennial river or stream' is arguably a subset of the broader definition of 'river'. Ephemeral streams have high values at particular times of the year (e.g fish spawning in winter) and should not be excluded from the definition of river.

Recommendations

- Avoid using notes to impose substantive controls.
- Align the terms in the glossary and definitions with definitions under the RMA.
- Ensure internal consistency in the language used.

Who is responsible for what, and what consents are required?

The NESPF's draft rules are divided into eight activity-specific parts and one general part. Appendix 3 of the Consultation Document comments:

Each table is divided into several sections ... Broadly, these aspects are: ...the local authority responsible for this matter (that is, with jurisdiction)...

The jurisdiction column indicates whether each individual permitted activity condition is a district or a regional council function. There is otherwise no particular guidance as to how local authority responsibility for monitoring, compliance and consenting functions is to be divided or shared.

This gives rise to several issues:

- It is unclear how each of the identified forestry activities - and their constituent permitted activity conditions - relate to sections 9 to 15 of the RMA.
- It is unclear which local authority (or local authorities) is to be the consent authority where permitted activity conditions are not satisfied, especially where:
 - permitted activity conditions that jointly or severally relate to regional/district functions are not satisfied, or
 - a proposal is classified as fully discretionary and all aspects/effects of the activity can be considered.

It is consequently unclear how monitoring and compliance functions are to be allocated between regional and district councils, although it is possible that a degree of pragmatic coordination and agreement is anticipated (eg through triennial agreements).

Some clear commentary at the front-end of the NESPF could address these issues.

Some of the allocations of conditions to 'regional' and 'district' functions are not appropriate in all cases (noting that the majority of functions are allocated to regional councils). For example, within the earthworks activity 'road widening and realignment for safety purposes' is classified as a regional council function. This should be regarded as a matter within the functions of territorial authorities, when regard is had to sections 30 and 31 of the RMA.

The NESPF also assumes that it is district councils that are responsible for controls relating to significant biodiversity and that the approach to protection is to map them as significant natural areas. This is **not** the case for all regions, including the Manawatu-Whanganui Region. The Horizons One Plan takes responsibility for indigenous biological diversity in the Manawatu-Whanganui Region and has objectives, policies and rules to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna.

Recommendation

- Align the regional/district allocations to section 30/31 functions

The relationship between forestry activity-specific rules and general conditions

As noted in the Schedule to this advice, a surprising aspect of the 'general conditions' is that they commence with the following statement:

Notwithstanding specific activity rules, all forestry activities are permitted, provided the following conditions are met ...

We presume that the 'general conditions' are supposed to apply to all forestry activities in addition to the relevant activity-specific rules. However, as the statement above is currently worded, the general conditions effectively displace - or apply as an alternative to - the activity-specific rules. If that is not the overarching policy intention, then the statement quoted above will need to be amended.

Risk assessment tools: ESC, FSI, WSRC

Local authorities have queried the reliability and accuracy of the three risk assessment tools discussed in the Consultation Document. The practicality and technical merit of the tools is a matter councils will comment on.

Undefined land

The Consultation Document indicates that undefined land under the Erosion Susceptibility Classification (ESC) is conservation land and land in urban areas.

While conservation land is therefore generally excluded from classification, at least one local authority has indicated to you that some areas of Crown land (administered by the Department of Conservation) are subject to forestry activities.

There needs to be a clear mechanism for the assessment of currently 'undefined' land under the ESC. The Consultation Document indicates that a 'formal process' will be provided to address that. However, no details currently appear to be available. Given the importance of land's status under the ESC, consideration should be given to the incorporation of the process directly into the NESPF.

Reliability of ESC and other tools

The Consultation Document notes that the ESC has been updated from previous iterations, with misclassifications corrected. The adjustments made are described in percentage terms in the Consultation Document. The numbers are significant, ranging from 3.6% to 40.8% (presumably this refers to reclassification on an area basis). The scale of reclassification confirms feedback provided during earlier consultation processes that queried the accuracy and reliability of the ESC.

Some local authorities still harbour the concern that if the ESC isn't accurate then poor environmental outcomes will result. This reinforces the need to have a transparent and formally recognised process for the review and adjustment of land status under the ESC. Ideally, any such process should be clear about:

- who can trigger it;
- the circumstances in which that can occur;
- how the costs of the process are to be borne; and
- whether any appeal/objection rights are created.

Evolution of tools and implications for commenced activities

In light of the matters discussed above, it appears that the ESC may be able to fluctuate. Similarly, the Consultation Document indicates that the Fish Spawning Indicator (**FSI**) is an evolving tool that will be updated from time to time as the underlying science/data develops, with revised versions incorporated into the NESPF.

If that is to occur, then we consider that the NESPF should clarify the implications for activities that have commenced under previous versions of the risk assessment tools. Given the long-run nature of many forestry operations and the potential absence of resource consents (given the permitted activity ethos that underpins the NESPF), this could be a significant source of uncertainty if it is not adequately addressed in the NESPF.

Relevance of FSI unclear - direct link?

The ESC is a fundamental tool that is used throughout the NEFPF's draft rules. The Wilding Spread Risk Calculator (**WSRC**) is also used in the first permitted activity condition for the afforestation activity.

In contrast, there does not appear to be a specific reference to the FSI in the draft rules.

Fish spawning is addressed as part of the general conditions that apply to all forestry activities. The relevant condition refers to the New Zealand Freshwater Fish Database, which we understand is a component of the data on which the FSI is based. However, neither the condition nor the accompanying explanatory content refer expressly to the FSI or how it is to be used to evaluate compliance. It is unclear whether this is intentional or not. However, our advice is that the standing of the FSI must be questionable in the absence of a clear reference within the NESPF.

Recommendations

- There needs to be a clear mechanism for the assessment of currently 'undefined' land under the ESC, with the process incorporated directly into the NESPF.
- A transparent and formally recognised process for the review and adjustment of land status under the ESC needs to be incorporated directly into the NESPF.
- The NESPF should clarify the implications for activities that have commenced under previous versions of the risk assessment tools.
- If the , Fish spawning Indicator is to have standing in evaluating the status of an activity then it needs clear reference within the NESPF.

Permitted activity conditions

One of the underlying tenets of the NESPF is that, where possible, activities should be permitted provided that robust permitted activity conditions are met. There is a lack of clarity and certainty inherent in the permitted activity conditions.

In accordance with that theme, the bulk of the draft rules deal with permitted activity conditions.

Local authorities have made comment that above all, permitted activity conditions must be **certain** and they are concerned that many of the proposed conditions are not.

Scope, certainty, management plans, permitted baseline implications and compliance and monitoring are discussed below.

Scope

The draft rules contain several provisions that do not usually appear in permitted activity conditions. These are conditions that provide for third party or consent authority approval (or, in some cases, the exercise of discretion) as a component of a permitted activity condition. For example:

- the first 'setback' condition for afforestation states that the minimum horizontal set back distance is 10m, *unless approval of the adjoining owner(s) has been obtained; and*
- the 'notice of commencement' condition for earthworks states that a local authority can waive the notification requirement, *or alternatively reduce this notice period at their discretion.*

In the context of regional and district plan rules, permitted activity conditions that purport to reserve some form of discretion to the consent authority are generally regarded as ultra vires and invalid. That is a result of the principle that a person should be able to determine whether an activity is permitted (or not) on the face of the planning document, without the activity classification being subject to some discretion on the part of the erstwhile consent authority².

That said, our legal advice is that they have not been able to locate any case law that examines whether:

- the reservation of a similar degree of discretion to a third party other than the consent authority is legitimate/illegitimate, or
- whether the ability to specify permitted activity rules/conditions under a NES is broader than that otherwise arising under a regional or district plan.

After considering the issues, and acknowledging that there is some risk in the absence of relevant case law, our legal advice concludes that:

- The usual common law principles applicable to permitted activity rules and conditions under regional and district plans are also likely to apply to the same sorts of rules when imposed through a NES. The rules will serve the same function and will be subject to the same machinery provisions in the RMA (eg as to the significance of an activity being classified as 'permitted'). There is also nothing in sections 43 to 44A of the RMA that expressly contradicts this conclusion.
- Permitted activity conditions that purport to reserve a discretion to a consent authority (which, we note, will also be the enforcement authority) are consequently likely to be ultra vires and invalid.
- In contrast, permitted activity conditions that refer to approval of something, or the exercise of some discretion by, a third party other than the consent authority may be valid, so long as they are sufficiently certain to enable an assessment of whether an activity is permitted or not.

In support of the last of these points, we observe that there would be little benefit – aside perhaps from the ability to impose consent conditions - derived from a situation where:

- an activity requires consent because of, say, a breach of a setback control;
- the adjoining owner affected by the breach consents to the reduced setback and provides a written approval;
- the effects of the breach cannot be taken into account because of the written approval; but
- consent is nevertheless required, even though there are no relevant effects to assess.

² See *TL & NL Bryant Holdings Limited v Marlborough District Council* [2008] NZRMA 485 (HC), at paragraph 50

In summary, our legal on adjoining owner approvals **are likely to be legally legitimate**. It will be a clear yes/no evaluation as to whether a written approval advice considers that the permitted activity conditions in the NESPF that make permitted activity status contingent exists and how that correspondingly affects the application of permitted activity conditions.

Another aspect of the scope of permitted activity conditions commented on is the attribution of permitted activity status to the use of genetically modified tree stock. Our advice finds this approach is interesting, given the Environment Court's recent finding in *Federated Farmers of New Zealand v Northland Regional Council* that there is jurisdiction under the RMA for regional councils to make provision for control of the use of genetically modified organisms (GMOs) through regional policy statements and plans. The NESPF provision appears to have been included on the premise that the Environmental Protection Authority, acting under the Hazardous Substances and New Organisms Act 1996 (HSNO), is best placed to deal with the risks associated with the use of GMO tree stock. That position is called into question by the following quote from the Environment Court's decision:

The question that needs to be addressed is as to whether the two pieces of legislation provide separate codes, with HSNO being the only code to address GMOs. As against this, it can be asked whether consideration of the control of GMOs can be addressed under the undoubted comprehensive RMA framework for promotion of the sustainable management of natural and physical resources including the avoiding, remedying or mitigating of any adverse effects of activities on the environment, while HSNO plays a more confined role in the overall legislative picture, addressing the more limited issue of the granting of approvals to import, develop, field test, or release, new organisms, somewhat as a more one-off regulatory transaction.

The Environment Court accepted the latter approach, which characterises HSNO as a more limited regime than the RMA that is focussed on a discrete range of issues. The comment in the NESPF's explanatory material that the HSNO regime is regarded as 'adequate' should be carefully scrutinised in light of the Environment Court's comments.

Our advice also points out that there do not appear to be any relevant matters over which control or discretion is reserved where the permitted activity condition for GMO tree stock is not satisfied. There needs to be a mechanism within the NESPF that addresses the possibility that people may seek to use GMO tree stock outside of the HSNO regime, either by failing to comply with the terms of any HSNO approval or using tree stock that is not the subject of such an approval.

Certainty

The issue of certainty is referred to above. This is a significant issue in relation to many of the NESPF's draft rules. Another consequence of the principle that a person should be able to determine whether an activity is permitted (or not) on the face of the planning document is that provisions must be sufficiently certain to enable that. Local authorities have identified this as a significant concern.

Our advice is that permitted activity rules or conditions that require some form of evaluative judgement are often (although not always) found to offend against that principle and to be invalid; relevant cases are cited in the legal advice.

While language that requires a degree of evaluative judgement is possible, this decision (and others like it) indicates that judicial tolerance for it is low.

It will be apparent from the comments in the table in the attached Schedule that many of the NESPF's permitted activity conditions involve elements of subjective evaluation. To take an example from the harvesting activity, one of the permitted activity conditions for 'slash and debris management' is.

Whenever safe and practicable to do so, remove potentially unstable slash that has the potential to mobilise under flood flows from water bodies, and:

- block or dam stream flow; or
- divert flow into stream banks in a way that is likely to cause erosion; or
- damage downstream infrastructure, property or receiving environments; or
- cause significant adverse effects on aquatic habitat.

Subjective elements within this condition include:

- determining whether it is 'safe and practicable' to do something;
- evaluating the meaning of 'potential' and whether it is a threshold that is triggered;
- determining whether erosion is 'likely' to be caused; and
- evaluating whether adverse effects on aquatic habitat will be 'significant'.

These matters involve too much subjective discretion to properly be the subject of permitted activity conditions. If Central Government considers it practical to proceed with the draft provisions, this will have a significant bearing on the practicality of assessing compliance with the proposed permitted activity conditions - which will in turn have a significant bearing on the enforceability of the NESPF.

Management plans

The permitted activity conditions variously provide for the preparation of erosion and sediment control plans (**ESCPs**), harvesting plans (**HPs**), and quarry management plans (**QMPs**).

These generally need to be provided to local authorities within certain timeframes before activities start, or on request.

However, there is no requirement for local authority approval or certification of the plans. Similarly, there is no express ability for a local authority to compel someone to amend a plan that is deemed to be inadequate, so long as it satisfies the minimum requirements set out in the relevant permitted activity conditions.

A requirement for local authority approval or certification would necessitate a consent process, as (for the reasons set out above) such a process could not legally be part of a permitted activity condition.

The absence of any approval/certification mechanism is likely to be problematic and may encourage a 'minimum necessary to achieve compliance' approach. Consideration should be given to controlled activity status to provide a process for approval of these management plans.

Permitted baseline implications

The Consultation Document acknowledges concerns raised during previous consultation rounds on the relationship between permitted activities under the NESPF and the permitted baseline in the context of other activities. In particular, concern was expressed that overly lenient NES provisions might create a correspondingly broad permitted baseline that could undermine other planning controls.

The response to that concern in the Consultation Document is the observation that the permitted activity conditions in the NESPF confine the scope of permitted activities. There is also a recognition that application of the permitted baseline is discretionary at notification stage (this obviously applies to the substantive assessment of resource consent applications too).

Our legal advice is that all of these points are valid. The NESPF does have the capacity to expand the permitted baseline. Conversely, decision-makers will need to pay careful attention to the permitted activity conditions and consider the discretionary nature of the permitted baseline. Local authorities will carefully consider whether they are comfortable with the overall scope of the permitted activity components of the NESPF. One issue in this regard is the broad scope of the 'river crossings' activity which is imperfectly linked to forestry activities. On its face, it applies to river crossings generally and may have a significant impact on riparian areas in a permitted baseline sense.

Compliance and monitoring

The Regulatory Impact Statement for the NESPF includes the following comment:

At present councils often fund compliance and monitoring programmes by directly charging for consent monitoring activities; this is provided for by s36(1)(c) of the Resource Management Act. MPI is also aware that a number of councils currently operate permitted activity regimes for forestry activities; some of these councils charge for permitted activity monitoring through s150 of the Local Government Act. However, the legal legitimacy of this is unclear and permitted activity charging is not explicitly provided for through the RMA.

Our advice is that the ability to charge for permitted activity monitoring through section 150 of the Local Government Act 2002 (LGA02) is uncertain, particularly given the express reference to section 150 in section 36(2) of the RMA (which may be interpreted as a sign that there is no ability to rely on section 150 more generally).

The lack of a clear charging power poses some very difficult issues for local authorities when evaluating the compliance and monitoring requirements arising from the NESPF. Other issues that are relevant in that regard include:

- the certainty (or otherwise) of the permitted activity conditions against which compliance will need to be assessed
- the allocation of monitoring and enforcement responsibility between regional councils and territorial authorities

The lack of a clear charging power is another argument to elevate activities proposed as permitted to controlled.

Recommendations

- Remove subjective discretion from permitted activity conditions.
- Consideration should be given to allocating controlled activity status instead of permitted activity status.

Transitional arrangements

The Consultation Document indicates that NESPF would come into force (if it proceeds) 6-12 months after being publicly notified in the New Zealand Gazette. An indicative date of late 2016 is consequently given. Local authorities' ability to adjust existing planning instruments and processes before the NESPF comes into force will ultimately depend on their capacity and central government is urged to carefully consider councils' feedback on this point.

Local authorities' rules for forestry activities will survive (or be able to be made) where:

- they are outside the scope of the NESPF. The 'scope' of the NESPF is determined by a combination of:
 - the matters that are expressly identified as within scope and outside of scope; and
 - limitations inherent in various elements of the NESPF, such as the definition of 'forestry/plantation forestry'; or
- the NESPF says that local authorities can apply more stringent rules.

If the NESPF proceeds, local authorities will need to embark on a significant exercise to determine what aspects of their existing planning instruments will be extinguished and, to the extent that some remain, whether and how they need to be reformulated or adapted to operate effectively and sensibly (in terms of their relationship with the balance of the original planning instrument and the NESPF). The scale of this exercise will have a bearing on local authorities' views as to the adequacy of the proposed transitional/implementation period. Detailed guidance in this area should be made available when the NES is gazetted.

The allowance for greater stringency for section 6(c) matters is subject to its own list of exclusions. Many of these are significant, especially when linked to the permitted activity ethos of the NESPF and the consequent implications for permitted baseline status. Issues arising include:

- There is no age restriction or other qualification on the kind of 'pre-existing access way' through a significant natural area on which vegetation can be damaged/destroyed/removed. The exclusion arguably captures old bridle and walking paths etc.
- It may be difficult to craft rules, or alternatively to monitor and enforce rules, around the exclusion that requires an evaluation of whether riparian vegetation will 'readily recover within five years'.

Greater stringency has been discussed earlier in relation to outstanding freshwater bodies.

Clarity is needed regarding any interim provision for councils to address inconsistencies between existing plan provisions and the NESPF and the scheduled reviews of councils' RMA plans. This could create significant confusion until councils' planning cycles work through the various plans that will be affected by the NES. The transitional arrangements should enable a council to identify where changes are necessary and the areas where more stringency is required – to accommodate the new NESPF. Until this work is carried out through a scheduled plan review, the existing plan rules should apply.

Recommendations

- Amend the NESPF to provide for a council's existing rules to apply until a scheduled plan review to align the plan with the NESPF.
- Amend the NESPF to allow a council to identify areas of a plan where greater stringency will apply and provide for a council's existing rules to apply until a scheduled plan review to align the plan with the NESPF.
- Work with local government to provide for adequate transitional arrangements to enable councils to undertake mapping work as necessary to enable more stringent rules to be applied.

The NESPF and existing resource consents

Land use consents for forestry activities granted before the NESPF is notified in the New Zealand Gazette will prevail over the NESPF. This means that activities may continue to be carried out under existing consents (or may be commenced under an existing consent that has not lapsed), irrespective of the new

controls imposed through the NESPF. It will be a question of fact in each case what components of a forestry activity are covered by an existing consent (eg one consent may relate only to afforestation, whereas another may relate to afforestation, harvesting and replanting).

To the extent that components of an activity are not the subject of an existing resource consent, compliance with the NESPF will be required. This may result in some unusual conflicts, which will need to be addressed on a case by case basis.

The NESPF and existing use rights

Where the NESPF imposes a consent requirement for an otherwise permitted activity, sections 10-10B and 20A(2) apply as though the NESPF were a rule in a plan that has been made operative. In other words, existing use rights will be preserved for forestry activities that satisfy the requirements of those provisions (as relevant). Where there is evidence of the long-term, cyclical afforestation, harvesting, and replanting of forests, the significance of this may be profound. It may also affect the cost-benefit analyses that underpin the justification for legislative intervention.

Our legal advice is that against this background, the apparent attempt to grandfather existing river crossings in the draft rules is surprising. It purports to establish a de facto existing use right regime for existing river crossings. However, that will arguably exist in addition to - rather than in substitution for - any existing use rights preserved under the RMA. Its effectiveness is consequently doubtful.

Recommendation

- Ensure the “grandfathering” of river crossings sits legally with existing use rights

Conclusion

The preceding discussion has identified some of the issues associated with the proposed framework of the NES that need to be addressed if it is to proceed into regulations. We urge officials to take the time needed to consider these matters with care. The following Schedule contains more detailed recommendations in relation to the proposed rules.

Schedule

Comments on specific aspects of draft rules

(nb page references relate to **on-line version** of consultation document)

Page ref	Content	Comment	Recommendation
Afforestation			
62	Bullet points that define scope of permitted activities	Do all 3 bullet points need to be satisfied? The use of the word 'and' at the end of the second bullet point suggests that they do, but the first 2 bullet points are presumably supposed to be alternatives	Adjust language and punctuation to confirm relationship between bullet points
63	Minimum horizontal setback distances (m)	Unclear whether this distance is affected by topography: ie a two dimensional setback in plan, or a distance measured on a plane that matches the land slope	Adjust language to clarify how minimum horizontal setback distance is calculated, potentially be defining term in glossary Note: this comment applies to all forestry activity rules that refer to a minimum horizontal setback distance - reference to the issue is not repeated where it applies to other activities below
63	Setback distance from adjoining existing dwelling	Unclear whether 'adjoining existing dwelling' means the boundary of a parcel of land that has a residential dwelling on it, the boundary of a curtilage of a residential dwelling, or just the residential dwelling (ie the building itself)	Adjust language to clarify scope of 'adjoining existing dwelling', potentially be defining term in glossary. Note the reference to a 'notional boundary' in the general conditions for noise (see page 85)
63	Point (ii) of setback distance from adjoining dwelling	Language used does not actually define any setback position. By inference is the point at which shading will impact on an adjoining existing dwelling, but this is not expressly stated	Adjust language to clearly state how shading assessment relates to establishment of setback distance (as alternative to 40m default)

Page ref	Content	Comment	Recommendation
63	Point (ii) of setback distance from adjoining dwelling	Query feasibility/practicality of determining shading situation in a permitted activity compliance and monitoring context	Reconsider this provision
63	Setback distance from adjoining dwelling	A plantation forest may comply with the setback to a dwelling when first established but new dwellings may establish as permitted activities; it is unclear how this is to be enforced	Reconsider this provision
63	Road setbacks	Unclear whether 'paved public road' includes footpath and carriageway, or just carriageway (unformed legal road appears to be excluded)	Adjust language to clarify extent of 'paved public road', potentially by defining term in glossary It is acknowledged that this may be something of a non-issue, as the number of formed footpaths in forestry environments are likely to be limited
63	Setbacks from perennial rivers/streams, wetlands, lakes and outstanding freshwater bodies or surface water bodied subject to WCOs	The NES provides setbacks from perennial waterways, wetlands, lakes coastal marine areas and water bodies subject to water conservation orders. It does not appear to provide for setbacks from other significant indigenous biological diversity habitats. Instead, there is a "General Condition" that allows incidental damage, destruction or removal of indigenous vegetation during forestry activities.	The NES should take a more precautionary approach and provide for an appropriate setback from indigenous biodiversity habitats
63	Setbacks from perennial rivers and streams	Do ephemeral streams also need to be considered in some situations?	Reconsider this provision
63	Setbacks from perennial rivers and streams	Unclear why setback variation to accommodate the requirements of a regional pest management strategy where a river/stream is more than 3m in width does not also apply to a river/stream that is less than 3m in width?	Clarify the reason for the distinction, after which the appropriateness of the distinction can be considered
64	Afforestation using genetically modified treestock	Unclear whether wilding tree risk and setback conditions apply to genetically modified treestock, or whether EPA-imposed conditions will be sole control	Adjust language to clarify how the genetically modified treestock condition relates to the earlier permitted activity conditions for afforestation

Page ref	Content	Comment	Recommendation
		Unclear how a LA will check compliance with this standard if the EPA holds the information	Consider practicality of checking compliance with this condition
64	Matters to which discretion is restricted for Red Zone land	Unclear whether discretion in relation to afforestation on Red Zone land extends to wilding spread risk, setback matters <i>and</i> erosion risk, or whether it is solely limited to erosion risk	Adjust language to clarify how matters to which discretion is restricted apply to Red Zone land If discretion is not reserved over wilding spread risk and setback on Red Zone land, explain why
64	Consents in Orange Zone to be non-notified	Unclear why notification restriction only applies to Orange Zone land. Should it also be extended to Green/Yellow Zone land, where permitted activity conditions are not satisfied?	Clarify the reason for directing non-notification on Orange Zone land only, after which the appropriateness of that can be considered
	Notice of commencement	A requirement to advise regional and district councils of the intention to plant will provide councils with t record so they can monitor permitted activity conditions if required	Require a notice of commencement for afforestation, in line with the other activity stages
Earthworks			
65	Permitted status of earthworks	No maximum volume or area control is proposed. Regulation through ESCPs and other permitted activity conditions is unlikely to be sufficiently robust.	Activity status needs to be elevated to enable assessment and approval of the ESCP
65	Orange Zone (slope < 25 degrees)	The slope criterion presumably relates to the specific area where earthworks are proposed/carried out, rather than the slope of a parcel of land generally. If this is incorrect, then clarification is likely to be required	Adjust language if necessary to clarify how land slope relates to earthworks
65	Notice of commencement	Do the relevant regional council and district council <i>both</i> need to agree to reduce the notice period, or can one of them make the decision? The condition currently refers to both types of local authority Local authority discretion to reduce or waive the notice	Adjust language to clarify whether reduction of notice period must be a joint decision between relevant local authorities, whether each local authority can exercise discretion independently, or whether intention is that only one local authority needs to be notified (in which case it will presumably

Page ref	Content	Comment	Recommendation
		period would also usually be incompatible (ie <i>ultra vires</i>) with a permitted activity condition	have sole jurisdiction over the notice period) If potential issue <i>vires</i> issue is to be avoided, local authority discretion should be removed from permitted activity condition
66	Reference to New Zealand Forest Road Engineering Manual (2012)	This manual is not appropriate material for incorporation by reference. Incorporation is legally legitimate under Schedule 1AA of the RMA	Reconsider this provision
66	Road widening and realignment for safety purposes	Is this appropriately classified as a matter of regional council jurisdiction?	Territorial authorities need jurisdiction here
66	Road widening and realignment for safety purposes, 5th bullet point	Bullet requires the volume of earth moved to be <i>more than</i> 5,000m ³ . This should presumably be <i>less than</i> 5,000m ³	Adjust language if intention is that limit should be a maximum, rather than a minimum
66	Requirements for ESCPs	<p>Notable features of ESCP regime:</p> <ul style="list-style-type: none"> • ESCP involves assessment and response to 'operational risks to the environment'. Indicative locations of ESCP measures must be provided, but otherwise there does not appear to be any requirement for plans or graphic depictions of the proposed scope of works • No requirements for submission to local authority (unless request made), or certification by local authority • Anticipate that local authorities will have difficulty determining whether 'material amendments' to an ESCP have been made after the event • Potential for diverging views on whether an ESCP matches the scale and complexity of a proposed operation, which introduces uncertainty for both operators and monitoring and enforcement staff 	Provide for earthworks as a controlled activity with approval of ESCP as condition

Page ref	Content	Comment	Recommendation
		<ul style="list-style-type: none"> There is no reference to a prescribed template (contrast, for example, the approach to harvesting plans at page 71) 	
67	Operation: deactivation of temporary tracks	Query feasibility/practicality of monitoring and enforcing this requirement, given local authorities' lack of information about use of temporary tracks/earthworks	Reconsider this provision
67	Operation: land disturbance in ephemeral stream channels must be managed to the extent that no more than minor damming, flooding or erosion occurs	Potential for diverging views on whether obstruction/diversion will result in damming/flooding/erosion that is no more than minor. Degree of uncertainty arguably inappropriate for a permitted activity condition	Reconsider this provision
67	Fill material must contain no more than 5% (by volume) of vegetation and wood (some exceptions)	Query feasibility/practicality of monitoring and enforcing this requirement, given difficulty of determining content of fill and relative volume once filling has occurred	Reconsider this provision
67	Controls on deposit of spoil	<p>Potential for diverging views on whether various controls satisfied or contravened, especially in relation to the first 2 bullet points. Degree of uncertainty arguably inappropriate for a permitted activity condition</p> <p>It is also uncertain what 'outside a production area' means, as there is no corresponding term in the glossary</p>	<p>Reconsider this provision</p> <p>Adjust language if reference to 'production area' is supposed to be to an 'activity area'</p>
68	Sediment and stormwater control measures, stabilisation and containment, design	<p>Potential for diverging views on whether various controls satisfied or contravened: eg requirement to assess whether slumping has been prevented 'as far as possible'</p> <p>Query consequent feasibility/practicality of monitoring and enforcing requirements</p>	<p>Reconsider this provision</p> <p>Adjust language to clarify what requirement for exposed areas of soil to be 'contained within the site' means</p>
69	Consents in Orange Zone must be	Unclear why notification restriction only applies to	Clarify the reason for directing non-notification on Orange Zone land only, after which the appropriateness of that can be

Page ref	Content	Comment	Recommendation
	non-notified	Orange Zone land. Should it also be extended to Green/Yellow Zone land, where permitted activity conditions are not satisfied?	considered
Harvesting			
70	Low intensity harvesting, 1st bullet point	Query feasibility/practicality of monitoring and enforcing requirement for 75%+ canopy closure in any given hectare of forest land	Reconsider this provision
71	Notice of commencement	Do the relevant regional council and district council <i>both</i> need to agree to reduce the notice period, or can one of them make the decision? The condition currently refers to both types of local authority Local authority discretion to reduce the notice period would also usually be incompatible (ie <i>ultra vires</i>) with a permitted activity condition	Adjust language to clarify whether reduction of notice period must be a joint decision between relevant local authorities, whether each local authority can exercise discretion independently, or whether intention is that only one local authority needs to be notified (in which case it will presumably have sole jurisdiction over the notice period) If potential issue <i>vires</i> issue is to be avoided, local authority discretion should be removed from permitted activity condition
71	Requirements for Harvest Plans	Notable features of Harvest Plan regime: <ul style="list-style-type: none"> • No requirements for approval or certification by local authority (regional council) • Ability to provide Harvest Plan on an annual basis may not correlate with obligation to provide it no more than 60 working days before harvesting operations start • Anticipate that local authorities will have difficulty determining whether 'material amendments' to a Harvest Plan have been made after the event • Potential for diverging views on whether a Harvest Plan matches the scale and complexity of 	Provide for this as a controlled activity with approval of Harvest Plan as condition

Page ref	Content	Comment	Recommendation
		<p>a proposed operation, which introduces uncertainty for both operators and monitoring and enforcement staff</p> <ul style="list-style-type: none"> • An ESCP must be provided (and be prepared in accordance with a prescribed template) for harvesting in the Orange Zone • Query whether slash management planning is required for ephemeral as well as perennial waterbodies 	
71	Ground disturbance outside riparian zones	Opening clause is arguably too uncertain to be a viable permitted activity condition: 'during harvesting operations, avoid, mitigate or remedy actions that accelerate erosion and minimise the discharge of sediment to water bodies'. The subsequent bullet points are more definite, although there are still elements that require subjective appraisal	Remove or reformulate opening clause
72	Riparian disturbance	<p>Requirement to determine whether effects will be 'more than minor' is too subjective to be a viable permitted activity condition (see 3rd paragraph of permitted activity condition)</p> <p>The NES allows for the destruction of vegetation within buffer areas during harvesting and a requirement to monitor these to ensure that aquatic and riparian habitat is not degraded to a</p>	Remove or reformulate reference to degree of effects associated with outcomes referred to in 3rd paragraph
	"Amenity" matters	The NES does not enable the management of hours of operation and traffic management	Enable district plans to be more stringent with respect to hours of operation and traffic management for harvesting
	Financial contributions	Some councils currently levy financial contributions to recoup costs for damage to road infrastructure	Enable councils to (continue to) levy financial contributions for harvesting to recover costs for damage to roads associated with

Page ref	Content	Comment	Recommendation
		associated with harvesting operations	harvesting operations
	Slash and debris management	(Comments as per pruning and thinning to waste activity below, to the extent that the permitted activity conditions are materially similar)	
Mechanical land preparation			
74	Bullet points that define scope of permitted activities	3rd bullet point appears to be an error, as it is inconsistent with the first permitted activity condition and virtually replicates the description of activities that are restricted discretionary (see page 75)	Adjust language to confirm that the 3rd bullet point relates to mechanical land preparation in Orange and Red Zone that does not affect the subsoil
74	Methods of mechanical land preparation	Potential for diverging views on whether various controls satisfied or contravened: eg assessing whether mechanical land preparation parallel to the contour is practical/impractical Query consequent feasibility/practicality of monitoring and enforcing requirements	Issue for reconsideration
Pruning and thinning to waste			
76	Permitted activity conditions for slash	Permitted activity condition refers to the potential for mobilisation during flood flows, but the severity of flooding is not specified. The 'rationale' section refers to a 10 year return period event. This should be transposed into the permitted activity condition, or alternatively clarified in the glossary	Adjust language to confirm the severity of flooding that need to be considered when mobilisation risk is evaluated
76	Permitted activity conditions for slash	Potential for diverging views on whether various controls satisfied or contravened: eg 'potential' for mobilisation with various impacts, including 'likely' erosion or 'significant adverse effects on aquatic habitat' Query consequent feasibility/practicality of monitoring and enforcing requirements	Reconsider this provision

Page ref	Content	Comment	Recommendation
76	Permitted activity conditions for slash	The link between the final comment that 'slash should be removed from a water body only if it is safe and practicable to do so' is unclear. For instance, if slash is deposited in a perennial water body with the potential to dam the flow in a flood event, would it nevertheless be permitted if its removal is not considered 'safe and practicable'?	Adjust language to confirm the relationship between the final comment and the balance of the permitted activity condition. Perhaps the final comment would be more suitable as a 'note'
Forestry quarrying			
77	Permitted activity condition for visibility	Volumetric and time (ie 5-year) limits on quarrying are problematic when linked to the 'per activity site' qualification. This is presumably supposed to be a reference to an 'activity area'. The definition of an 'activity area' in the glossary is uncertain and the number of activity areas - and how they relate to quarrying activities as opposed to other forestry activities - is opaque	Consider feasibility/practicality of determining what an activity area is and how volumetric/time limits on quarry are affected. Adjust language to address any uncertainty
78	Fill or spoil	Requirement that 'material must not be transported off the property on public roads' appears to be the only <i>de facto</i> requirement for quarried material to be contained/used within the forestry site from which it is extracted (unless it can be moved to different sites without using public roads) This condition may not be the most effective way of achieving the underlying objective: ie that quarried material is used for forestry related roads. A control that is more express in that regard may be more effective	Consider whether a specific control is required to ensure that quarried material is used to form roads within or near the forestry site from which it is extracted
78	Water table: quarry depth must not go below the water table of	Query feasibility/practicality of monitoring and enforcing this requirement	Reconsider this provision

Page ref	Content	Comment	Recommendation
	any aquifer		
78	Requirements for Quarry Management Plans (QMPs)	<p>Notable features of QMP regime:</p> <ul style="list-style-type: none"> • No requirements for approval or certification by local authorities • Anticipate that local authorities will have difficulty determining whether 'material amendments' to a QMP have been made after the event • Potential for diverging views on whether a QMP matches the scale and complexity of a proposed operation, which introduces uncertainty for both operators and monitoring and enforcement staff • Indicative locations of erosion and sediment control measures must be provided, but otherwise there does not appear to be any requirement for plans or graphic depictions of the proposed scope of works • No reference to prescribed template for QMPs 	Reconsider this provision
79	Controlled activity description	<p>Description appears to be in error: 1st bullet point indicates that activities that are identified as permitted are also controlled</p> <p>Note the 1st bullet point is linked to the 2nd bullet with an 'or' rather than an 'and'</p>	Adjust language to correctly state scope of controlled activities
Replanting			
(Comments as per afforestation activity, to the extent that the permitted activity conditions are materially similar)			
82	Matters over which control is reserved	Should control also be reserved where the use of genetically modified tree stock is proposed and that	Consider whether matters over which control is reserved should be expanded to relate to use of genetically modified tree

Page ref	Content	Comment	Recommendation
		particular permitted activity condition is not satisfied? While there will be other legislative controls (eg HSNO), a further check through the NESF may also be warranted	stock
82	Matters over which control is reserved	Statement that the 'consent must apply only to the area that could not be planted as a permitted activity' is unusual. Whether it precludes the full consideration of the relevant effects of a controlled activity will require careful evaluation	Reconsider this provision
	General	Replanting needs the same assessment as afforestation (e.g wilding risk)	Apply the same consideration to replanting as to afforestation
	Notice of commencement	A requirement to advise regional and district councils of the intention to replant will provide councils with t record so they can monitor permitted activity conditions if required	Require a notice of commencement for replanting, in line with the other activity stages
River crossings			
88	General conditions: new crossings	<p>'River crossings' are generally permitted, subject to compliance with permitted activity conditions. As the draft rules are framed, there is no express link between river crossing and forestry activities (this extends to the definition of 'river crossing' in the glossary). River crossings are also not inherently linked to land categorised under the ESC, which contrasts with the approach taken to other forestry activities</p> <p>The net effect is a very broad permitted activity provision that may be significantly wider in application and effect than is intended</p> <p>The provisions are less stringent than some regional councils; if the rules are relaxed this will create conflict</p>	<p>Review the River Crossings Rule as it is not currently workable. for example: the controlled activity rule refers to permitted activity conditions 2,3 and 4, however condition 2 is used 10 times in the permitted activity rule. Another example allows construction of a culvert would stop most culverts from being built because of how it is drafted.</p> <p>There are some risks with the current rules relating to River Crossings:</p> <ul style="list-style-type: none"> • Overtopping of a culvert could cause flooding to nearby buildings; the rule only refers to dwellings. • Upstream flooding. Where the crossing point is within 1 km of a residential area where the backup of flow behind the culvert could cause flood problems

Page ref	Content	Comment	Recommendation
		with other users who face more stringent requirements	<ul style="list-style-type: none"> • In areas where high debris loads are likely eg, significant gravel bed load, flood debris such as trees or logs, culverts may not be an appropriate form of crossing • Land stability in steep hill catchments. The Permitted activity condition only talks about the 6% slope of the river +/- 50 of structure. There are other parts of the NES that map these catchments, these should be carried into this rule. • Wetlands are not protected, therefore the NES enables the draining of wetlands using a culvert. • The rule makes no reference to the existence of Water Conservation Orders. In accordance with 43C of the RMA these may override the rules. <p>There may be a link to the 'forestry/plantation forestry' definition in the glossary, which refers to 'all associated internal infrastructure'. However, this is not abundantly clear</p>
88	General conditions: existing crossings	The 2nd component of the general conditions relates to existing, lawfully established river crossings. It makes these permitted activities in certain circumstances. It is unclear what consideration has been given to existing resource consents and/or existing use rights, which the permitted activity parallels	Clarify the relationship between this permitted activity and activities authorised under existing resource consents/existing use rights, then re-evaluate provision
88	Notice of commencement	Local authority discretion to waive the notice period would usually be incompatible (ie <i>ultra vires</i>) with a permitted activity condition	If potential issue <i>vires</i> issue is to be avoided, local authority discretion should be removed from permitted activity condition

Page ref	Content	Comment	Recommendation
		Note language is different to other reduction/waiver provisions for specific forestry activities	
89	Flow calculation options	<p>The flood flow estimation methods specified in points 1 to 3 should be defined in the glossary, so there is certainty as to what they mean</p> <p>There is also an advice note that indicates that an 'online tool' will be provided to assist foresters to conduct relevant calculations: it is unclear how that tool will relate to the different options for calculating flood flows</p>	Insert relevant terms in glossary
89	Fish passage	The final clause 'except where the relevant statutory fisheries manager advises the council otherwise' is unclear. The intent is tolerably clear but the language needs to be adapted to achieve it more precisely, and the use of exclusions (signalled by the word 'except') at the start and end of the clause should be reworked to avoid any potential confusion	Adjust language to clarify meaning
89	Contaminant discharges	<p>Potential for diverging views on whether various controls satisfied or contravened: eg determining whether 'all practicable' steps have been taken</p> <p>Query consequent feasibility/practicality of monitoring and enforcing requirements</p>	Reconsider this provision
92	Controlled activity description	First paragraph of description is very broad and captures permitted activities (ie is, in isolation, incompatible with earlier permitted activity description). However, 1st paragraph is qualified by 2nd paragraph. This relationship could be made clearer to avoid any confusion	Adjust language to make it clearer that both paragraphs of the controlled activity description have to be read together
General conditions			

Page ref	Content	Comment	Recommendation
83	Description of permitted activities	<p>General conditions currently commence with the following statement:</p> <p>'Notwithstanding specific activity rules, all forestry activities are permitted, provided the following conditions are met ...'</p> <p>This suggests that compliance with specific activity rules is not required, if the general conditions are satisfied. However, the presumed intent is that compliance with the general conditions is required <i>in addition</i> - rather than <i>in the alternative</i> - to the activity specific conditions</p>	Consider the intent of the general conditions and adjust the language of the opening statement to correctly reflect the application and significance of the general conditions
83	Storage of fuel	Is the degree of control appropriate? For example, should preventative measures (such a bunding) be referred to in particular circumstances, such as where fuel over an identified volume threshold is being stored?	Reconsider this provision
84	Vegetation clearance and disturbance	<p>Is the permitted clearance of vegetation in significant natural areas appropriate?</p> <p>Query the feasibility/practicality of evaluating whether indigenous vegetation will 'readily recover'</p>	Reconsider this provision
85	Spatial bundling provision	<p>This provision affects the classification of activities that span multiple ESC areas. The current drafting is unclear. In particular:</p> <ul style="list-style-type: none"> • The suggestion is that the higher ESC classification should be ignored if the bullet points are satisfied (it is unclear whether either/both bullet points must be satisfied), but this is not absolutely certain • If either or both bullet points are not satisfied, then it is unclear whether the highest ESC classification is to be applied to all activity areas 	Adjust the language of the provision to make its intention and operation clear

Page ref	Content	Comment	Recommendation
		(this is what the 'bundling' label suggests) or whether two separate classifications should be applied	
86	Fish Spawning	It is unclear how the fish spawning controls relate to the FSI. The link should be made apparent so that the relevance of views formed on the basis of the FSI is clear	Adjust language to clarify how fish spawning controls relate to the FSI
86	Fish spawning	The fish spawning tool does not take into account the climatic variation and the difference in spawning times associated with a species. The tool does not include some regionally important species, nor recognise the fact that some species are migratory and operations could affect part of their lifecycle.	Amend the NESPF to enable councils to apply more stringent rules regarding operations in proximity to the beds of waterways, which could result in greater positive gains for freshwater species through the protection of habitat.
86	Bed disturbance/partial suspension	“Bed disturbance” does not include “partial suspension.” Partial suspension activities (where the cut end of a tree/log is held above the ground and dragged) are thus a given, with no controls. For small streams such activity would completely destroy the bed ad margins of that stream.	Partial suspension where streams are involved should be included in the definition of “bed disturbance.”
87	Slash traps	This provision refers to 'an assessed risk of slash mobilising and causing adverse effects'. There is no indication as to who is to conduct this assessment, when it must be carried out, or whether any recording/reporting requirements apply	Reconsider this provision