

# RISK AND COST MANAGEMENT IN A CHANGING REGULATORY ENVIRONMENT

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## Introduction

Since the inception of the Resource Management Act (the RMA), the forestry sector has responded to what may have seemed like almost constant changes to district and regional planning instruments. Rather than abating over time, the amount of change occurring at present is unprecedented across a range of national, regional and district planning instruments. There is presently an intense level of activity which presents both challenges and opportunities for the sector.

This paper identifies current and anticipated changes to regulation of forestry related activities under the RMA, examines how these changes may impact on the forestry sector, and discusses how the sector can respond to manage compliance risks and costs in a changing regulatory environment.

## Regulatory changes and impacts on forestry sector

### Hierarchy of planning documents under the RMA

Before discussing the various planning instruments that are currently being developed in New Zealand, it's important to first have some understanding of the management framework provided by the RMA. Under the RMA, there is a 'hierarchy' of different planning documents, as illustrated in Figure 1. At the top of the pyramid are national instruments in the form of National Policy Statements and National Environmental Standards. Everything underneath this capstone, including regional and district plans and policy statements, must be consistent with these national documents.

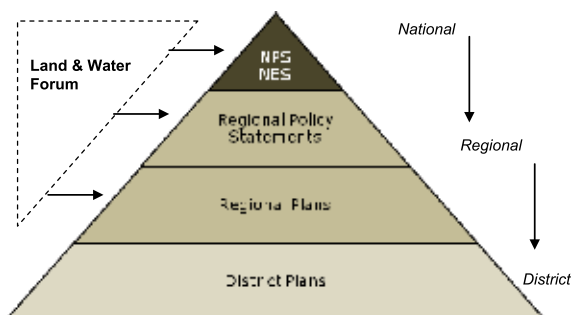


Figure 1: RMA Hierarchy

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National instruments currently being developed that are relevant to the forestry sector are the proposed National Environmental Standard for Plantation Forestry and the proposed National Policy Statement for Biodiversity. In addition, the National Policy Statement for Freshwater Management (the Freshwater NPS) took effect from 1 July 2011.

The Freshwater NPS is complimented by the work of the Land and Water Forum (the Forum), which is an independent non-statutory body established to develop a common direction for freshwater management in New Zealand. The Forum sits outside the RMA however its work is expected to significantly influence the content of regional plans and policy statements, and the way in which these instruments are developed in the future.

### NES for Plantation Forestry

In September 2010 the Government released the Proposed National Environmental Standard for Plantation Forestry (the NES). In broad terms, the NES is a form of national guidance that is intended to provide a consistent set of rules that govern how plantation forestry activities occur throughout New Zealand. Once operative, all district and regional plans must be consistent with the NES.

Following an initial round of public submissions in late 2010, five working groups of key stakeholders were established to focus on issues raised in submissions. This resulted in a revised NES, which was circulated for further comment in May 2011. One of the key features of the revised NES was the introduction of an erosion classification mapping system, which grouped land into one of four categories based on the likelihood of erosion. These classifications will be used to determine whether plantation forestry activities on a particular block of land require resource consent.

Since the close of submissions there have been ongoing negotiations between various interested parties, including the forestry sector and local authorities. Although agreement has been reached on many issues, several remain outstanding. One such issue is the relationship between the NES and deforestation liability under the Emissions Trading Scheme. There is a direct clash between the proposal for increased riparian setbacks and the potential liabilities this would create under the ETS

by removing trees without replanting. This issue is emerging as a potential roadblock to the NES and requires central government leadership to find a pragmatic way forward.

The biggest potential gain of the NES is consistency of regulation throughout the country, removing the need to comply with inconsistent rules in different areas and reducing the uncertainty and inefficiency this creates. However this benefit should not be pursued at all costs. It is inevitable that the NES will result in increased regulation in some areas that currently enjoy a relatively permissive regulatory framework. In addition, the NES will not be a one-stop shop and there will remain some areas where local authorities are able to create rules that are more stringent than the NES.

Notwithstanding the above and provided the remaining issues can be addressed, the NES should provide an overall benefit for the forestry sector by introducing a consistent regulatory framework throughout the country. The NES remains the most significant regulatory development for plantation forestry in New Zealand and the sector should continue to participate in the process to ensure the most favourable outcome is achieved.

### The Biodiversity NPS

The Proposed National Policy Statement on Indigenous Biodiversity (the Biodiversity NPS) was notified in early 2011. The broad objective of the Biodiversity NPS is to promote and encourage the maintenance and protection of indigenous biodiversity on private land throughout New Zealand. Unlike the NES, the Biodiversity NPS does not contain detailed standards and rules, but contains objectives and policies that provide broader guidance for decision making under the RMA.

The Biodiversity NPS is likely to have an impact on forestry due to the presence of indigenous vegetation in forestry plantations throughout New Zealand. By way of example, Policy 6 of the Biodiversity NPS relates to those areas of biodiversity that are not identified as being "significant" and promotes a range of measures to maintain and support the resilience and viability of such areas. This policy may be relied upon by local authorities to impose new restrictions through district and regional plans that limit the ability to harvest and manage existing plantations containing indigenous biodiversity.

Whether or not this outcome eventuates will depend on the final wording of the Biodiversity NPS and how the document is interpreted and applied by local authorities. Since the close of submissions in May 2011, the Ministry for the Environment has

released a summary of submissions and is currently preparing a report and recommendations on the Biodiversity NPS for the Minister for the Environment to consider. The Minister will then decide whether or not to proceed with the Biodiversity NPS, or make changes to it.

### The Land & Water Forum and the Freshwater NPS

Established in August 2009, the Forum brings together a range of industry groups (including the forestry sector), electricity generators, environmental and recreational NGOs, iwi, scientists and other organisations with a stake in freshwater and land management. This Forum is intended to assist implementation of the Freshwater NPS, which requires (among other matters) every regional council to make or change its regional plans to establish freshwater objectives and set quality limits for all bodies of fresh water.<sup>1</sup>

On 18 May 2012, the Forum released "The Second Report of the Land and Water Forum" (the Second Report). It provides a national framework within which Regional Councils can work with their communities and iwi to set freshwater objectives and develop limits for its use. It promotes a collaborative process to set objectives and limits which is intended to provide effective and enduring outcomes, including greater certainty for investment and development.

The key issue for the forestry sector is the nature of rules that will be promoted by regional councils to give effect to the Freshwater NPS and the Second Report, particularly in respect of suspended sediment. The Second Report acknowledges the challenge of setting numeric objectives for suspended sediment due to variation caused by natural processes, differing environments, and large rainfall events.<sup>2</sup>

The inherent natural variation in suspended sediment is exacerbated by the cyclical nature of plantation forestry. Over the full rotation, plantation forestry compares well with non-forested catchments. However harvesting activities will inevitably cause some increase in suspended sediment. At present there is no consensus about appropriate measurement of, and limits for, suspended sediment. The challenge for the forestry sector is to ensure regional rules do not unduly penalise a land use activity that over the full rotation cycle generates only modest levels of suspended sediment and provides significant ecosystem services.

To implement limits as rules in regional plans, the Forum supports the use of prohibited activity status as a means to avoid cumulative adverse effects caused by the progressive increasing of a specified limit on

<sup>1</sup> Refer *Freshwater NPS, Policy A1(a)*.

<sup>2</sup> Refer *Second Report, paragraph 57*.

a consent-by-consent basis. The rationale is that the appropriate way to change a limit is through a plan change, rather than through resource consent.<sup>3</sup>

The use of prohibited activity status with respect to sediment controls in regional plans is problematic for the forestry sector. As acknowledged by the Forum<sup>4</sup>, suspended sediment levels can vary significantly and inaccurate or inappropriate limits expressed as regional rules create potential for non-compliance and associated prosecution risks.

This is illustrated by proposed Variation 6A to the Otago Regional Water Plan (proposed V6A), which sets a very precise and prescriptive permitted activity standard for suspended sediment. Activities that are non-compliant with the standard default to prohibited activity status. Proposed V6A also contains a suite of relatively imprecise prohibited activity rules regarding discharge of contaminants to water that reduce visual clarity, discharges resulting in flooding and erosion, and discharges of sediment from disturbed land to water.<sup>5</sup>

## Local Government Reorganisation

The Government considers that structural reform of local government has the potential to achieve better efficiencies and better decision making for some regions in New Zealand. Regions which have multiple territorial authorities can create instances of overlap and waste through provision of similar services and core functions. Therefore reforms that promote reorganisation of local authorities, or the amalgamation of neighbouring councils, into a single unitary authority, are seen as a possible solution.

Auckland is one such example where seven territorial authorities and the Auckland Regional Council were combined in 2010 to form one single unitary authority known as the Auckland Council. This has resulted in a reduction of some 2000 staff and savings estimated at \$140 million in its first year. These benefits are the catalyst for the Government seeking to simplify and streamline the process of reorganisation of local authorities because the current process is seen as lengthy, complex, and with a low chance of success. Provisions to streamline council reorganisation procedures are likely to be included in legislation during 2012.

There is already considerable interest in local body amalgamation within some larger local authorities such as Wellington City Council and Dunedin City Council<sup>6</sup>, and it appears likely that the reforms, if

enacted, will quite rapidly be utilised by ratepayers and/or councils to reorganise local government in some parts of New Zealand.

The impact of these reforms on the forestry sector is likely to be positive, although not without some risks. Consolidation of local authorities will reduce the number of planning instruments regulating the sector and limit duplication of functions between district and regional councils. However, the creation of new and larger local authorities will prompt review of existing planning instruments to form a consolidated or unitary plan with the associated risk of new, more restrictive planning rules controlling forestry activities.

## **Trends and themes**

We are witnessing a fundamental shift in the form and content of RMA regulation. Adopting a 'helicopter view', there are several broad trends and themes emerging from the changes discussed in this paper, which can be summarised as follows.

The first is national guidance. The Government is more willing to initiate and lead processes that provide policy direction and regulatory outcomes applicable throughout New Zealand. In particular, the Government is driving change at a national level through the development of national planning instruments and the work of the Forum.

Linked to the above, the second theme is greater consistency in planning instruments throughout New Zealand, which is smoothing out differences in RMA regulation of forestry related activities. Over time, the present north (higher) - south (lower) gradient in regulation will reduce, particularly if the plantation forestry NES is adopted by Government.

Thirdly, it seems likely that local government reorganisation will consolidate and reduce the number of planning instruments regulating plantation forestry activities. However they will likely contain more consistent, stringent and targeted policies and limits.

The fourth is use of collaborative processes to build a consensus among stakeholders about sustainable management of natural resources, which was one of the key features of the Forum's work. Collaboration provides opportunities for the forestry sector to participate in a structured, non-litigious process to develop planning instruments. Of particular interest to the forestry sector is the emphasis this process places on rigorous, impartial evidence-based evaluation of information and proposals.

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*neighbouring territorial authorities and relevant regional council about possible amalgamation.*

<sup>3</sup> *Supra*, paragraph 107 and Recommendation 13(a).

<sup>4</sup> *Refer Second Report*, paragraph 57

<sup>5</sup> *Refer V6A*, Rules 12C.0.2 – 4.

<sup>6</sup> *These Councils have already commenced consultation with*

## How should the forestry sector respond?

Given the trends discussed above, engagement in planning processes at national, regional and district council level is increasingly important if the sector wishes to influence the content and detail of planning rules that regulate forestry activity. Engagement at the national level is critical, as these higher level documents will influence the content of the regional and district planning instruments and the controls they impose on plantation forestry.

The sector is already a major participant in the Forum and the NES for Plantation Forestry. It can build on this work through engagement with regional and district councils as they seek to give effect to national instruments and the work of the Forum through the development of second generation RMA plans and policy statements.

The sector should be proactive and seek to engage with local authority planning officers before they commence drafting RMA planning instruments. This will allow the sector to share with local authorities information and research as early as possible, so that they are better informed, and the impacts 'on the ground' of different policies and regulatory responses can be assessed before plans and policy statements are publicly notified.

Early engagement, whether through a collaborative process or informal pre-plan notification discussions, will benefit the forestry sector by providing opportunities to influence the content and direction of the RMA plans and policy statements, reduce transactional costs associated with submissions, hearings and appeal processes, and provide for more certain outcomes for the forestry sector.

In order for this engagement to be effective and achieve workable outcomes, it must be informed by quality science, data and information. However, relevant science is not available regarding the effects of some forestry activities. The forestry sector should consider developing a program that identifies the science 'gaps', and a funding program (perhaps jointly resourced by the sector and the Government) to commission appropriate scientific research.

Engagement with local authorities should also be expanded to include discussion of global resource consent applications for activities that are non-compliant with second generation RMA plans. Global consents can authorise forestry activities across multiple sites over a lengthy period,<sup>7</sup> and provide a common set of conditions that apply to

the consented activities. Such conditions can be informed by industry best practice and other external reference documents.<sup>8</sup>

Finally, the sector should engage with council compliance and enforcement officers to develop relationships, open lines of communication, and establish agreement regarding practical measures to control potential adverse effects of harvesting and roading activities.

Overall, the forestry sector's response to this changing regulatory environment should aim to achieve the following outcomes:

- Early engagement in development of policy and plans to ensure that trigger values (limits) and restrictions on activities are reasonable and realistic;
- (Global) resource consents are held to authorise necessary departures from plan rules;
- Field management of forestry operations is sustainable and consistent with industry best practice standards;
- Regular and constructive engagement occurs with local authority compliance and enforcement officers.

## Conclusion

The regulatory environment for plantation forestry is undergoing a period of significant change. This change is being led at the national level through collaborative processes and will have a varied impact throughout the country in order to achieve a more consistent regulatory framework.

The forestry sector is already a significant and regular participant in the development of RMA planning instruments. However, with increased, targeted, and early engagement, the sector can better influence and drive favourable changes to planning instruments as they are being developed. This should result in an overall reduction in management costs and prosecution risks for the sector.

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<sup>7</sup> Up to 35 years for regional consents, and longer for district council consents.

<sup>8</sup> For example, the Plantation Forestry Environmental Code of Practice and NZ Standards