Forestry advocacy within the RMA regulatory framework

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Abstract

The primary objective of a forestry advocate in the Resource Management Act 1991 (the RMA) context is to secure a licence to operate for foresters so that they can undertake routine activities without needing resource consents. Achieving this objective is often far from straightforward. Foresters are frequently involved in RMA hearings on district and regional plans, trying to put in place a more workable planning framework that will allow day-to-day forestry activities.

In this article we discuss how a forestry advocate can best respond to the ever-changing RMA regulatory environment. We revisit the problems encountered by the forestry sector in this area, and discuss available solutions including examples from some recent cases. We also comment on the proposed National Environmental Standard for Plantation Forestry (the proposed Forestry NES) and the Forestry Policy Project (the Forestry Policy), and consider whether they will help foresters establish a licence to operate.

RMA rules and the 'licence to operate'

Forestry activities throughout New Zealand are currently managed under the framework of the RMA. This involves a myriad of different plans at the district and regional level containing rules that govern when, where and how forestry activities will occur. The outcome of this practice is a patchwork of inconsistent regulation throughout the country that creates uncertainty for the forestry sector. In particular, the current approach has resulted in re-litigation of the same issues across the country, inconsistent treatment of forestry operations, operational inefficacy and investment uncertainty.

Within the RMA regulatory context, the forestry sector typically seeks an outcome that allows routine forestry activities such as earthworks, construction of crossings/culverts, vegetation clearance, planting and harvesting to occur as permitted activities under regional and district plans. This is commonly known as a 'licence to operate' for the forestry section because it allows routine activities to be completed without the need for resource consents from local authorities. Securing a licence to operate benefits the forestry sector because it encourages best practice and protects the value of forestry investment by avoiding the cost, uncertainty and delay of securing multiple consents for routine forestry activities.

Forestry advocacy

In broad terms, there are currently three responses available to the forestry sector when confronted with onerous planning controls, namely: (1) challenge the proposed planning controls; (2) accept the controls and secure site-specific RMA consents; or (3) alter operational practices to meet the required standards specified in the planning instrument, where it is possible to do so.

The latter two options are employed when necessary. However in our experience foresters generally attempt to challenge planning rules that unduly regulate their licence to operate. So what tools are available to the forestry advocate?

Fortunately there are several measures that have proven to be successful in challenging undue regulation of forestry activities, as follows:

1. Early engagement with local authorities and participation in the submission process
2. Cooperation between affected forestry companies to present a coordinated response
3. Explain the costs of the proposed regulation to the forestry sector
4. Highlight the environmental services and economic benefits of forestry
5. Provide a workable alternative solution that addresses the environmental effects of concern at much less cost to the forestry sector, and
6. Be prepared to challenge unfavourable council decisions by appeal to the Environment Court where necessary.

Providing a workable alternative solution is often very important. This involves drafting plan rules that provide a solution that works in the context of the planning document. It is preferable for the forestry sector to draft the alternative rules, rather than leaving this to council planners, because foresters will have a better understanding of what is feasible from an operational perspective. Alternative rules can then be developed that meet the regulator's need to manage potential environmental effects of rural land use activities, as well as imposing the least possible cost on the forestry sector.

Often the most challenging step is convincing the local authority that an alternative, less stringent, regulatory regime is both appropriate and workable. In this context, the industry good practice guidelines have proven very valuable as an advocacy resource. The *NZ Code of Practice for Plantation Forestry 2007*, the *NZ Forest Road Engineering Manual* and the *NZ Forest Engineering Manual – Operations Guide* are increasingly recognised by local authorities as credible documents that provide clear guidance about industry good practice across a

wide range of activities that are commonly regulated under RMA plans.

Foresters have argued that the compliance with these documents will achieve the environmental outcomes that local authorities are seeking through RMA regulation, and that it is therefore reasonable to include reference to them in RMA permitted activity rules. In cases where this has been achieved, the outcome is that compliance by foresters with the industry guideline will also achieve compliance with the RMA rules.

Over the past two to three years these industry guideline documents have been referenced in several regional and district plan rules. See for example: the Canterbury Land and Water Regional Plan at rules 5.167, 5.168 and 5.170(e) and (f) which refer to the *Environmental Code of Practice for Plantation Forestry 2007* and the *NZ Forest Road Engineering Manual (2012)*; and the proposed Southland District Plan at Rule 1(15)(g) includes a note that refers to the *Environmental Code of Practice for Plantation Forestry 2007* and the *NZ Forest Road Engineering Manual (2012)*. (Note the wording of this rule has been agreed between appellants and the council, but remains subject to Environment Court approval). As more RMA plans refer to these documents, other local authorities gain confidence that it is reasonable to adopt the same approach in their region or district.

Recent case studies

During the past three years our office has acted for the forestry sector in three significant plan review processes, which are briefly discussed below to highlight some of the points mentioned above. These cases also provide a reference point to access whether the Forestry NES and the Forestry Policy will help foresters secure a licence to operate under the RMA.

During 2012–2013 we acted for a consortium of forestry companies that opposed very stringent regulation of sediment discharges proposed by the Otago Regional Council (ORC) in Plan Change 6 to the Otago Regional Plan. This was one of the first regional plan changes initiated after the National Policy Statement on Freshwater Management was made operative. Unfortunately, regional sediment discharge rules intended to regulate intensive land use activities also applied to plantation forestry. The ORC Hearings Panel declined to accept that the environmental effects profile of sediment discharges from plantation forestry were distinctly different from other rural land uses. However on appeal to the Environment Court, an acceptable solution was negotiated after the ORC obtained expert advice on the merits of its case.

Not long afterwards we acted on a similar issue in respect of the proposed Canterbury Land and Water Regional Plan. However in this case the Hearings Panel was comprised of very experienced RMA Commissioners, including former Principal Environment Court Judge David Sheppard. The panel more readily accepted the argument presented for the forestry sector. This case is noteworthy because the panel endorsed the industry guidelines developed by the forestry sector, and included reference to them in an alternative suite of rules that regulated vegetation clearance and earthworks relating to forestry activities.

More recently, we have represented forestry interests regarding submissions and appeals on the proposed district plan review initiated by the Southland District Council (the SDC). Issues regarding financial contributions for road repair and maintenance were resolved at the council hearing. However earthworks rules and rules about protection of significant indigenous vegetation rules are subject to appeal to the Environment Court. The former have been resolved by negotiated agreement (subject to approval of the Environment Court) using photos from the forestry sector guideline documents to illustrate the scale of earthworks required to establish forest roads. The latter issue regarding indigenous vegetation is to be mediated later this year.

A recent complication in this case has been the notification by the Southland Regional Council of Variation 1 to the Regional Policy Statement (Variation 1), which introduces stringent provisions intended to address the decline of indigenous biodiversity in the region. Under the RMA, district plans must give effect to a regional policy statement. Variation 1, if implemented in its current form, would require the SDC to regulate the clearance and modification of indigenous vegetation unless the landowner first obtains an ecologist's assessment that the vegetation is not significant.

This outcome would diminish the forestry sector's licence to operate because it would require an ecological assessment to be completed whenever activities require clearance, removal or modification of indigenous vegetation. If the assessment found that the vegetation was significant then a resource consent would need to be obtained before the activity could commence. This case has potential implications for district plan rules in other parts of the country.

These cases occurred prior to the proposed Forestry NES or the Forestry Policy. In the next sections we discuss these documents and consider how they might help foresters in the RMA context.

Proposed Forestry NES – will it make a difference?

In broad terms, the purpose of the proposed Forestry NES is to reduce RMA advocacy costs for the forestry sector through a consistent suite of rules covering the whole plantation forest cycle that would replace most existing plantation forestry activity rules in regional and district plans. Submissions closed on 11 August 2015 and the NES is intended to be in effect by late 2016. The proposed Forestry NES should result in a significant reduction in compliance costs because, with limited exceptions, it will provide for consistency of RMA rules throughout the rotation cycle of a plantation forest and across different local authorities throughout New Zealand.

There are however some exceptions. Under the proposed Forestry NES local authorities can set tighter rules in special circumstances where local conditions require this approach to achieve important environmental goals. For example, councils can impose more stringent rules in plans (or more stringent conditions on resource consents) than provided by the NES where forestry activities may adversely affect:

- The coastal marine area
- Places of known cultural or heritage value
- Areas of significant indigenous vegetation
- Outstanding natural features and landscapes, and
- The achievement of objectives of the National Policy Statement for Freshwater Management.

Most of these are identified in the RMA as matters of national importance, and it is not surprising that local rules can be developed under the NES to manage activities that may affect these natural resources. Other matters that are beyond scope of the NES are more localised, such as protection of geothermal and karst areas, management of water yield and gravel extraction from the beds of rivers (see Appendix 3 of the proposed Forestry NES for more details).

It seems likely that the proposed Forestry NES will materially reduce compliance costs for the forestry sector. However there remain some areas outside the scope of the NES where the sector will need to remain vigilant. For instance the ORC and CRC sediment discharge rules will not be affected as they are outside the scope of the proposed NES. The SDC rules regarding significant indigenous vegetation may (depending upon the final wording of the NES) also be unaffected. In these sorts of cases foresters will still need to utilise the advocacy tools discussed above.

Forestry Policy Project – will it make a difference?

The Forestry Policy is an industry-led initiative to help realise potential growth in the economic and environmental benefits to New Zealand from forestry. The document is being compiled through five working parties that are drafting future strategies and policies dealing with the following matters:

- Forest and land resource
- Forest management
- Products, processing and marketing
- Environmental and social
- Regulatory framework.

The aim of the Forestry Policy is to produce a forest policy that is accepted and used by all parties in the forestry sector and to help guide government thinking. The document is intended to be intergenerational so that it can assist consistent, integrated, informed and long-term decisions on matters affecting the forestry sector in New Zealand. It is difficult to make definitive statements about whether the Forestry Policy will make a difference to forestry advocacy in the RMA context until the text of the document is settled, however it is possible to make the following observations.

Although the Forestry Policy is primary directed at participants in the sector and central government, it is expected that over time it will also prove to be another useful advocacy resource within the RMA context at the level of local government. This because the Forestry Policy is anticipated to contain important information about the economic, social and environmental benefits of plantation forestry. At present, when this material is required for a council hearing it must be presented through evidence of foresters and other experts. The Forestry Policy should reduce the need to call this evidence.

Of course, in many cases such evidence is not required. However it is expected that the Forestry Policy will still be a useful advocacy resource because it will provide credibility and support for statements made by the forestry sector about the benefits of plantation forestry at council hearings, negotiations and mediations.

Perhaps, more importantly, the Forestry Policy may provide a useful resource to aid communication between local government and the forestry sector at a national level, and also with individual district and regional councils. In combination with the other industry guidelines discussed above, the Forestry Policy could be used by the forestry sector to front-foot dialogue with local authorities about the content of proposed RMA policies and rules outside the scope of the Forestry NES that may have unforeseen negative consequences for the forestry sector.

Conclusion

The proposed Forestry NES is expected to substantially reduce RMA advocacy costs for the forestry sector. It has the potential to be a 'game-changer' in the context of RMA plans because it will establish a consistent suite of national rules for everyday forestry activities. There are some matters outside the scope of the proposed NES that will still require participation by foresters in the RMA planning processes, and some of these areas are potentially quite contentious.

There are recognised measures and industry guidelines that can provide great assistance to the forestry sector in these RMA policy debates. It is expected that the Forestry Policy will be a useful addition to these resources because it is expected to provide a credible and concise commentary on the economic, social and environmental benefits that forestry provides to New Zealand, which will help establish a foundation for advocating in support of the forestry sector's licence to operate.

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