

The National Environmental Standards for Plantation Forestry – implications for the forestry sector

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Abstract

This paper will explain why the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 (the NES Plantation Forestry or the NESPF) was introduced, its legal effect and how it works in practice. It will identify key features of the NESPF and areas of uncertainty for the forestry sector, and provide some comments on practical implementation and compliance. Finally, it will discuss the overall implications of the NESPF for the forestry sector.

Introduction

The long awaited NES Plantation Forestry was notified in the New Zealand *Gazette* on 3 August 2017. It has been heralded as a new nationwide set of environmental rules for managing New Zealand's 1.7 million ha of plantation forestry that 'will better protect the environment and deliver significant savings in compliance costs ...' (Minister for the Environment, Dr Nick Smith, and Associate Minister for Primary Industries, Louise Upston, Press release, 8 August 2017).

The NES Plantation Forestry has a long genesis. The first NESPF proposal was notified for public submission in 2010. Since then there has been a protracted gestation period during which there have been several periods of real uncertainty about whether the NESPF would ever see the light of day. The document is the result of many years of stakeholder engagement coordinated first by the Ministry for the Environment and more recently by the Ministry for Primary Industries (MPI).

Overall, the forestry sector is anticipated to benefit from the proposed NESPF in the medium to long term. In the short term there will be additional costs as the sector adapts to the new regulatory environment. Some operators will be affected more than others and the impact of the NESPF will vary, depending on the existing level of regulation of plantation forestry activities in district and regional plans in different areas across the country.

What is the NESPF all about?

The current patchwork of varying regulation imposes substantial unnecessary compliance costs on the forest industry, which has been recognised by the Government:

Forestry is New Zealand's third largest primary industry but its efficiency is hampered by the confusing mix of planning rules across New Zealand's 86 councils. The strength of this national approach is that it will better protect the environment while also improving the productivity of the forestry sector by applying consistent environmental standards to reduce operational costs.

(Media statement of the Hon Nick Smith, Minister for the Environment, 3 September 2010)

The NESPF is a response to this patchwork of inconsistent planning regulation throughout the country. In particular, this approach resulted in:

- Re-litigation of the same issues across the country
- Inconsistent treatment of forestry operations
- Operational inefficiencies and investment uncertainty, and
- Variable environmental outcomes.

In summary, the intent of the NESPF is to improve national consistency in local authority plan rules relating to plantation forestry, to provide more certainty for those involved in the establishment and management of plantation forests, while also allowing local authorities to be more stringent where local variation is necessary.

What legal effect does the NESPF have?

Under the Resource Management Act 1991 (the RMA) there is a 'hierarchy' of planning documents. At the top of the pyramid are national instruments in the form of national policy statements and national environmental standards (NESs). Everything underneath this capstone, including regional and district plans and policy statements, must be consistent with these national documents.

What this means in practice is that rules in a district or regional plan must be the same as those in an NES, except in limited specified circumstances. In particular, a rule (or resource consent) that is more stringent or more lenient than an NES will prevail over the standard only if the standard expressly says that a rule or consent may be more stringent or lenient than it (sections 43B(1) and (3) of the RMA).

In the present case, regulation 6 of the NESPF specifies the circumstances in which a rule in a plan may be more stringent than the NESPF. These circumstances are relatively limited and are discussed further below.

How do Councils need to respond?

The RMA requires local authorities to respond by amending their district and regional plans if they contain a rule that duplicates or conflicts with a provision in the NESPF. This requirement applies to both operative and proposed plans, and must be undertaken without further consultation and as soon as practicable after the NESPF comes into force on 1 May 2018 (section 44A of the RMA).

This seemingly simple task may in fact prove to be quite a significant exercise for some local authorities. The situation is also complicated by the need for local authorities to determine which 'local rules' can be more stringent under the NESPF and therefore can be retained in regional and district plans (discussed further below).

In addition, the day-to-day administration of an NES is undertaken by regional and district councils, which are responsible for resource consent applications, permitted activity monitoring and enforcing observance of the standard (sections 44A(7) and (8) of the RMA).

Impact on existing resource consents

An NES does not affect a land use consent or a subdivision consent granted under district rules before the standard was notified in the *Gazette*.

Regional coastal, water or discharge permits, or a land use consent granted under a regional rule are subject to the following requirements:

- Those permits or consents must have been granted before the NES is notified in the *Gazette*
- A review of the conditions of the permit or consent can result in some or all of the standard prevailing over the permit or consent (section 43B(5)-(7) of the RMA).

Primary forestry activities allowed under the NESPF

The NESPF provides a set of rules that determine whether or not a resource consent is required for plantation forestry activities. As mentioned, these rules generally override any existing rules in district and regional plans. Table 1 identifies key forestry activities that will be allowed to occur as permitted activities (i.e. no resource consent required) provided that a range of criteria are met. These criteria, known as 'permitted activity conditions', fall into three broad categories as described in the table.

If forest operators can meet the conditions, the activity is permitted. If not, they must seek a resource consent from the relevant regional or district council. It is important to note that the permitted activity conditions are comprehensive, nationwide and quite demanding. Forest operators will need to alter current

practices if some routine forestry operations are to qualify as permitted activities under the NESPF.

Table 1: Primary forestry activities and permitted activity conditions

Primary forestry activities	Permitted activity conditions
Afforestation	<ul style="list-style-type: none"> • Standards to avoid, remedy or mitigate environmental effects • Requirements for compliance with management plans for higher-risk activities (i.e. forestry earthworks management plans, harvest management plans, quarry erosion and sediment management plans) • Use tools for risk assessment regarding erosion, wilding trees and fish spawning.
Pruning and thinning to waste	
Earthworks	
River crossings	
Forestry quarrying	
Harvesting	
Mechanical land preparation	
Replanting	

Other permitted activities

The NESPF also specifies 'ancillary activities' that are allowed as permitted activities, again subject to permitted activity conditions (NESPF subpart 9). In addition, the NESPF contains 'general provisions' that deal with a range of other activities related to commercial plantation forestry (NESPF subpart 10). These activities are also allowed, subject to compliance with permitted activity conditions. The relevant activities are described in Table 2.

Table 2: Ancillary activities and other activities

Activities identified as ancillary activities	Other activities identified in general provisions
Slash traps	Discharges, disturbances and diversions
Indigenous vegetation clearance	Noise and vibration
Non-indigenous vegetation clearance	Discharge of dust
	Forestry near indigenous bird nesting sites
	Fuel storage and refuelling

Matters where Councils may be more stringent and activities outside scope

As mentioned, the NESPF recognises that there are some instances where different rules may be warranted because of different receiving environments or specific local circumstances. In such cases, a 'one rule fits all' approach will not be appropriate and local management of areas sensitive to the effects of plantation forestry needs to be retained. The NESPF allow plan rules to be more stringent in certain circumstances as follows (NESPF regulation 6):

- Management of unique and sensitive environments such as geothermal areas and drinking water supplies
- To protect significant natural areas and outstanding natural features and landscapes

- To give effect to other national RMA instruments, particularly the National Policy Statement for Freshwater Management and the New Zealand Coastal Policy Statement.

Where councils apply more stringent rules, the overall status of the activity may change so that even if a forestry activity complies with NESPF permitted activity conditions a resource consent may still be required under 'local rules' in the regional or district plan. Obvious examples where this is likely to occur include local rules about water quality and water yield, protection of outstanding landscapes and significant natural areas, and management of special or sensitive environments where afforestation is likely to cause significant environmental effects.

The NESPF also restricts afforestation within a visual amenity landscape if local rules in the relevant plan restrict plantation forestry activities in that landscape (NESPF regulation 13).

Finally, it is important to note that some activities are outside the scope of the NESPF. For example, it does not apply to activities outside the plantation forest, such as effects from logging trucks or timber milling and processing activities. Also, the NESPF does not apply to historic heritage matters, burning and spraying, or vegetation clearance before afforestation. The effects of these activities are managed through existing rules in regional and district plans.

Key features

It is beyond the scope of this paper to provide a comprehensive analysis of the entire NESPF, so three key features are discussed in the sections below.

Erosion susceptibility classification (ESC)

The ESC is a novel feature of the NESPF. The ESC determines the risk of erosion on land across New Zealand based on environmental characteristics, including rock type and slope. It classifies land into four categories or zones of erosion susceptibility according to the level of erosion risk from plantation forestry activities using a 'traffic light' approach as shown in Table 3.

Table 3: Erosion susceptibility classification zones and erosion risk

Erosion susceptibility classification zones	Erosion risk
Green zone	Low
Yellow zone	Moderate
Orange zone	High
Red zone	Very high

The NESPF controls afforestation, earthworks, forest quarrying, harvesting, mechanical land preparation and replanting, depending on which ESC zone the activity is located within. As you would expect, the level of control increases with erosion risk. All of these forestry activities are permitted in the green and yellow zones, subject to

permitted activity criteria. In the orange zone, these activities are also permitted but some are subject to additional controls regarding land slope and location.

In the red zone, the status of these forestry activities varies from permitted, to controlled and restricted discretionary activity status, depending on various factors, including the scale of the forestry activity and the slope of the affected land. Overall, the NESPF does not encourage plantation forestry activities in the red zone. This is illustrated by regulation 80 which requires controlled activity resource consent for replanting an area greater than 2 ha in the red zone.

In addition, within the red zone the ESC identifies land that is defined as Land Use Capability Class 8e, which is land having severe to extreme erosion limitations or hazards that make the land unsuitable for arable, pastoral or commercial forestry use. Harvesting of forestry in these areas will require a restricted discretionary resource consent from the relevant regional council (NESPF regulation 71(1)(a)).

Wilding tree calculator

Wilding tree spread from plantation forestry is increasingly recognised as a problem in New Zealand, particularly in Central North Island, Canterbury and Otago. The response to this issue in regional and district plans varies considerably, with some plans having no provisions to control wildings and others containing very stringent rules. The NESPF addresses this issue in a consistent and comprehensive way by reference to a wilding tree calculator and wilding tree risk guidelines (refer NESPF Schedule 2 for these documents). These documents apply to both afforestation and replanting.

With respect to wilding tree spread, afforestation is a permitted activity provided that:

- Afforestation of a conifer species must not occur in an area with a wilding tree risk calculator score of 12 or more
- The calculation must be undertaken in accordance with the wilding tree risk guidelines by a suitable competent person
- The calculation must be completed no more than six months before notice is given of the date on which the afforestation is planned to begin
- A copy of the calculation must be given to the relevant regional and territorial authority at the same time that notice of afforestation is given.

The controls for replanting of conifer species are the same as for afforestation. An important proviso is that the wilding tree controls only apply if the conifer species being replanted is different from the trees most recently harvested on the affected land (NESPF regulation 79(1)(a)).

Note however that before replanting commences, and every five years following replanting, forest operators must remove all wilding conifers that have established in wetlands or significant natural areas on



Photo courtesy of Hunter Harrill, School of Forestry, University of Canterbury

the same property on which the replanting occurs or on any adjacent property under the same ownership or management (NESPF regulation 79(6)).

Earthworks/harvesting plans

The NESPF contains detailed provisions about forestry earthworks management plans (earthworks plan) and harvest management plans (harvest plan). A harvest plan is required as a permitted activity condition for harvesting within all ESC zones.

An earthworks plan is required as a permitted activity condition for:

- All earthworks that involve more than 500 m² of soil disturbance in any three month period
- Harvesting in the green and yellow zones, unless the harvesting activities are to be undertaken without earthworks
- Harvesting in the orange and red zones.

The required content of these plans is similar and specified in Schedule 3 of the NESPF. Requirements common to both plans are that they must contain details of the person and property involved, a map showing key details of the proposal including 'on-site risk areas' (such as water bodies, downstream risks and significant natural

areas) and the location of forestry infrastructure, and management practices for maintenance and monitoring.

Earthworks plans must contain additional material covering the scope of works, anticipated construction time, and erosion and sediment control measures. Harvest plans must also include management practices to avoid, mitigate or remedy risks due to forest harvesting on the above-mentioned on-site risk areas, and identify operational restrictions to minimise damage to indigenous vegetation and avoid damage to downstream and adjacent infrastructure and properties.

These plans must be in place a minimum of 20 working days and a maximum of 60 working days before earthworks or harvesting begins, and be available to the relevant council on request. Material amendments must be documented and the relevant council advised of the change (NESPF regulations 27 and 66).

The NESPF requirements for these plans builds on and extends the good practice guideline documents published by the NZFOA (e.g. the Environment Code of Practice and the *Road Engineering Manual* and the *Operators Manual*). The requirements are comprehensive and quite demanding. In highly erodible parts of the country some forest operators may already be preparing earthworks and harvest plans to this level of specification. Under the NESPF, this standard

of planning and risk management will need to be extended so that it applies throughout the country.

Areas of uncertainty

It is inevitable that there will be some areas of uncertainty in a new planning instrument of this scale, and the NESPF is no exception. At the time of writing three areas have been identified that generate uncertainty for forest operators and MPI is considering how to respond to these issues. Other concerns may arise as the practical implications of the new regulations become better understood.

River crossings

Subpart 4 of the NESPF deals with river crossings. An earlier draft version of the NESPF provided an exemption for existing lawfully constructed culverts. However, this exemption is not included in the *Gazetted* version of the document.

This potentially creates quite a sizeable problem for forest operators because existing culverts are not protected by existing use rights under section 10 of the RMA as the control of activities in or on the bed of a river is a regional council function (sections 30(1) (c) and (f) of the RMA). Similarly, existing use rights relating to activities affected by a regional rule are of little assistance because the protection afforded by section 20A of the RMA is very limited. Essentially, the person carrying on the activity affected by the new rule must apply for resource consent within six months after the date the new rule become operative.

The outcome appears to be that the NESPF will require forest operators to obtain resource consent for existing culverts, or otherwise replace or upgrade their existing culverts to comply with the numerous permitted activity conditions relating to culverts. It is understood that this is not the outcome intended by MPI and further guidance on this point may be available during the NESPF implementation roll-out.

Significant natural areas – use of ‘significance criteria’

One area where local authorities can set more stringent rules in district or regional plans is in relation to the protection of significant natural areas (SNAs) (NESPF regulation 6(2)(a)). However, the definition of ‘significant natural areas’ has changed from earlier drafts so that these areas no longer need to be specifically identified on a map or by description. Instead, they may now also be identified by ‘using significance criteria’.

This is intended to cater for local authorities that have not yet mapped the location of SNAs and included them in their plans. These councils then utilise rules about clearance or disturbance of indigenous vegetation that require that an ecological assessment be undertaken. The assessment must determine, using ‘significance criteria’ in the relevant plan, whether the vegetation contains an SNA. The effect is that the resource consent process itself is used to identify the location of SNAs within the district or region.

This change extends the ability of local authorities to have more stringent rules for the protection of SNAs. It creates a level of uncertainty for forest operators within the areas where significance criteria will be used to identify SNAs, as they will not know whether an area of indigenous vegetation within the plantation forest is protected as an SNA until the completion of an ecological assessment.

Discharge of sediment – ‘reasonable mixing’

Regulations within various sections of the NESPF require that the discharge of sediment must not result in any conspicuous change in colour or visual clarity of the receiving water bodies, allowing for ‘reasonable mixing’. Most regional plans that refer to this term provide a mixing zone, which is defined by a specific distance within which reasonable mixing of sediment can occur before the plan requirement applies.

However, the NESPF does not provide any definition of ‘reasonable mixing’, which creates uncertainty as to how these regulations will be applied by local authorities. There is ambiguity about the size of the mixing zone allowed under the NESPF, and consequently it is unclear where the level of sediment contamination should be measured to determine compliance with the NESPF.

Similar issues arise in relation to the absence of any definition of ‘conspicuous change’ in colour or visual clarity because this term is not defined in the NESPF. It is possible for two reasonable people to form quite different views as to what constitutes a conspicuous change in water colour or visual clarity.

Finally, it is noted that the same rules apply to almost all aspects of the forestry cycle. However, some (such as harvesting) are much more likely to generate sediment than others. Depending on how these regulations are interpreted and applied in practice, it may be difficult for some forest operators to comply with permitted activity standards governing sediment discharges.

Practical implementation of the NES

It is important that forest operators become familiar with the new compliance regime and realise how far the bar will move when the NESPF becomes operative on 1 May 2018. Critically, forest operators will need to understand what needs to change in the day-to-day operation of their business to achieve compliance with the new regulations. Some suggestions to achieve practical implementation are given below:

- Appoint an ‘NESPF champion’ within the organisation who is given the task of becoming intimately familiar with the new regulations
- Review and update management plans to ensure compliance with NESPF requirements
- Develop processes and procedures to secure operational compliance within the forest
- Be aware of more stringent ‘local rules’ (discussed above) that remain relevant

- Build relationships with local authorities and discuss how they intend to implement the NESPF within their region and district
- Be vigilant about: (a) district and regional plan reviews that could introduce more stringent 'local rules'; and (b) annual plan reviews that can set new charges payable by forest operators for the monitoring of permitted activities under the NESPF.

Where compliance with the NESPF permitted activity conditions is unattainable or difficult/expensive to achieve, the options available to forest operators are discussed below.

Alternatives to compliance with the NESPF permitted activity conditions

The options are quite limited, but the following approaches may be worthwhile for some forest operators who cannot achieve compliance with the NESPF permitted activity conditions.

The most obvious response is to apply for resource consent under the NESPF seeking approval to undertake the relevant forestry activity in a manner different from that required by the permitted activity conditions.

Another option is to seek a certificate of compliance under section 139 of the RMA. A certificate of compliance generally applies to activities that are proposed to occur but not yet established. It states that the activity described in the certificate can be done at a particular location without a resource consent, as at the date on which the authority received the request for it. Accordingly, a certificate gives the holder a guarantee of land use rights, protected for a time from the effects of changes to the relevant plan. There is a potential window of opportunity to seek a certificate of compliance for a proposed forestry activity that is currently permitted under the relevant plan before the NESPF comes into force on 1 May 2018. However, how easy they are to obtain and how useful they will be for forest operators will vary, depending on the circumstances of individual operators and the provisions of the relevant regional and district plans.

Further, as mentioned earlier, existing use rights survive the introduction of the NESPF due to section 43B(9) of the RMA, which provides that the existing use rights provisions of the RMA at sections 10, 10A and 20A(2) apply to activities regulated under an NES. This means that land use activities with existing use rights prior to the NESPF will continue to be protected, provided that such activities continue to comply with the usual requirements at section 10 of the RMA about lawful establishment, non-discontinuance and similar effects. An existing use rights certificate can be sought under section 139A of the RMA. The grant of a certificate does not extend the rights that are available under the RMA but simply confirms their existence.

Overall implications

The NESPF was developed through a lengthy collaborative process involving all of the most affected

stakeholders. The outcome is a planning instrument that is unique in the comprehensive scope of activities covered and its focus on a specific sector of the economy. Against this context, the following key implications have been identified for the forestry sector arising from the NESPF.

First, it provides a national 'environmental licence to operate' for the forestry sector by enabling most day-to-day forestry activities to occur as permitted activities, albeit subject to compliance with quite stringent permitted activity conditions.

Second, the impact of the NESPF will vary across different districts and regions, depending on the particular wording of existing plans in those areas. An independent review commissioned by MPI found that the NESPF will raise environmental standards for most effects when compared to existing rules. However, this will be achieved primarily through permitted activity standards rather than requiring additional resource consents from the forestry sector. It is anticipated that some forest operators will need to change management practices and procedures to achieve consistent compliance with the NESPF.

Third, although the NESPF will improve consistency it will not be a 'one-stop-shop'. Some additional 'local rules' will still exist outside the NESPF because not all forestry activities are covered by the NESPF and there are a range of matters where local authorities can be more stringent about 'local issues'. So these rules will continue to be relevant. The forestry sector will need to be aware of them and be vigilant when district and regional plans are reviewed, to ensure that new rules do not unduly regulate existing forests and especially the potential for new forests.

Fourth, it will significantly reduce the 'churn' currently experienced by forest operators participating in multiple district and regional plan review processes across New Zealand. This will result in considerable savings for the sector, although some of this will be offset by the additional compliance costs associated with securing permitted activity status for primary forestry activities under the NESPF. Arguably, this is a better spend of the sector's resources because compliance with permitted activity conditions should result in better environmental outcomes.

Finally, it will significantly simplify the forestry sector's ability to manage environmental performance and compliance because the vast majority of RMA planning controls applicable to the sector will be contained within one comprehensive document. As such, the NESPF democratises the interpretation and application of RMA planning rules as they relate to plantation forestry. RMA planning rules are intended to be read and understood by ordinary people because they regulate their everyday lives. Quite possibly, the NESPF has achieved this outcome and it may set an important precedent for other sectors and new national planning tools.

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