

**BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA**

**IN THE MATTER** of the Resource Management Act 1991 ('the Act')

**AND**

**IN THE MATTER** of an appeal under Clause 14(1) of First Schedule to the Act

**BETWEEN** **RAYONIER NEW ZEALAND LIMITED**  
(ENV-2018-CHC-49)

Appellant

**AND** **SOUTHLAND REGIONAL COUNCIL**

Respondent

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**MEMORANDUM OF COUNSEL FOR RAYONIER NEW ZEALAND LIMITED**

Date: 28 August 2018

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Judicial Officer: Judge Hassan

## MAY IT PLEASE THE COURT

### Introduction

- 1 This Memorandum of Counsel is filed on behalf of Rayonier New Zealand Limited (**Rayonier**) which has appealed against a decision by the Southland Regional Council (**the respondent**) on the proposed Southland Water and Land Plan (the **pSWLP**). Rayonier has also filed section 274 notices on appeals filed by Southwood Export Limited and Others (ENV-2018-CHC-046), Federated Farmers of New Zealand and Royal Forest and Bird Protection Society of New Zealand Inc (ENV-2018-CHC-050).
- 2 Counsel refers to the Minute of the Court dated 25 July 2018 (**the Minute**) and notes the Court's request that the respondent provide an early explanation of the pSWLP's relevant underpinnings and design approach through the preparation of an Initial Planning Statement.
- 3 The Minute expressed value in a refreshed and comprehensive s32 and s32AA analysis being provided in advance of mediations through the Initial Planning Statement, and identified a series of questions to be covered by this document, including whether there are any relevant national environmental standards.
- 4 Rayonier considers that some of the pSWLP rules that are subject to appeal will impose a greater restriction on an activity which is regulated under the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 (**the NES-PF**).
- 5 The issues addressed in this Memorandum are:
  - (a) whether s32(4) of the Resource Management Act (the RMA) is engaged in the circumstances of the pSWLP appeals, and
  - (b) whether the Initial Planning Statement to be prepared by the respondent should include an examination of whether the rules in the pSWLP that are more restrictive than those in the NES-PF are justified in the circumstances of the Southland Region.
- 6 Counsel has raised this matter with Counsel for the respondent. The position expressed by the respondent is that there is no legal requirement to carry out a section 32 report at this time, and that the respondent does not consider that the Initial Planning Statement should include a s32(4) evaluation in relation to the pSWLP/NES-PF.

- 7 Counsel for Rayonier disagrees with that position and considers that a s32(4) evaluation should be included in the Preliminary Planning Statement for the reasons discussed below.

#### **The NES-PF**

- 8 The NES-PF received Royal Assent on 31 July 2017 and was notified in the New Zealand Gazette on 3 August 2017. The NES-PF came into force on 1 May 2018 but took effect (for limited purposes) from the date on which it was notified in the Gazette.
- 9 The NES-PF regulates eight core plantation forestry activities, namely afforestation, pruning and thinning to waste, earthworks, river crossings, forestry quarrying, harvesting, mechanical land preparation and replanting. It also regulates three ancillary activities (slash traps, indigenous vegetation clearance and non-indigenous vegetation clearance).
- 10 The NES-PF is potentially relevant to several appeal topics identified by the respondent in its Memorandum dated 17 July 2018 including indigenous biodiversity, water quality, discharges, bed disturbance and cultivation.
- 11 Rayonier's appeal relates to the topic of cultivation. The appeals in respect of which Rayonier has lodged s274 notices also relate to, among other matters, the topic of cultivation.

#### **Relationship between National Environmental Standards and the rules in the pSWLP**

- 12 Section 43B of the Resource Management Act 1991 (RMA) governs the relationship between a national environmental standard and rules or controls in plans.
- 13 In summary, sections 43B(1) and (3) of the RMA provide that a rule (or resource consent) that is more stringent<sup>1</sup> or more lenient<sup>2</sup> than a national environmental standard will prevail over the standard if the standard expressly says that a rule or consent may be more stringent or lenient than it.
- 14 Regulation 6 of the NES-PF specifies the circumstances in which a rule in a plan may be more stringent than the NES-PF. The circumstances supporting a more stringent rule are relatively limited.
- 15 Further, if a district or regional plan proposes a greater (or lesser) restriction on an activity to which a national environmental standard applies, an evaluation is

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<sup>1</sup> See section 43B(2) of the RMA

<sup>2</sup> See section 43B(4) of the RMA

required to examine whether that restriction is justified under s32(4) RMA. Section 32(4) provides that:

*If the proposal will impose a greater or lesser prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.*

- 16 In essence, section 43B of the RMA and the NES-PF require the rules in the pSWLP be the same as those in the NES-PF, unless the rule is allowed to be more stringent under regulation 6 and the greater stringency can be justified in the circumstances of the district or region under s32(4) RMA.
- 17 Pursuant to section 44A of the RMA, the respondent is required to amend the pSWLP if it contains a rule that duplicates or conflicts with a provision in the NES-PF as soon as practicable after the date on which the standard comes into force (unless such rule is allowed as discussed above). Such amendment can be undertaken without using the process in Schedule 1.

#### **Plan Alignment Guidance document**

- 18 In May 2018 the Ministry of Primary Industries published a technical paper entitled Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017, Plan Alignment Guidance - May 2018 (**the Plan Alignment Guidance**) to support the interpretation and implementation of the NES-PF.<sup>3</sup>
- 19 In particular the document is focused on helping councils align their plans to recognise the NES-PF in accordance with the requirements of the RMA and where plan rules may be more stringent than the NES-PF.<sup>4</sup>
- 20 It states that the underlying policy objectives of the NES-PF are to:<sup>5</sup>
- *Maintain or improve the environmental outcomes associated with plantation forestry activities; and*
  - *Increase the efficiency and certainty of managing plantation forestry activities.*
- 21 At Section 4 the Plan Alignment Guidance discusses where plan rules may be more stringent than the NES-PF and explains that the RMA requires councils to demonstrate why a proposed rule needs to be more stringent than a NES in the context of each region or district through their section 32 evaluation. After referring

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<sup>3</sup> Although the document is marked "Draft" it is publicly available via MPI's website

<sup>4</sup> Plan Alignment Guidance at page 1

<sup>5</sup> Ibid

to s32(4) RMA, the Plan Alignment Guidance states, with respect to new rules, that:<sup>6</sup>

*When new rules are being introduced in a regional or district plan, the section 32 evaluation therefore needs to specifically consider whether a rule needs to be more stringent than the NESPF. If a council considers that a more stringent rule than the NES-PF is justified, this should be clearly documented in the section 32 evaluation report.*

#### **Is section 32(4) RMA engaged in the circumstances of the pSWLP appeals?**

##### Respondent's position

22 Counsel understands that the respondent has not completed an evaluation under s32(4) to date. The respondent has explained the reasons for this through its legal counsel, which has been paraphrased as follows:

- (a) At the time the pSWLP was being considered, regulation 6(1)(a) of the NES-PF provided that rules in a regional plan could only be more stringent than the NES-PF where they gave effect to-  
  
"a freshwater objective" developed to give effect to the National Policy Statement for Freshwater Management" (my underlining).
- (b) The Decision Report and the pSWLP (decisions version) both make it clear that the objectives contained in the pSWLP are not "freshwater objectives" as that term is defined in the NPSFM.<sup>7</sup>
- (c) Accordingly, at the time of the pSWLP decision (which was received by Rayonier on or about 4 April 2018), none of the rules in the pSWLP could have been more stringent than the NES-PF, as regulation 6 did not apply (and therefore the need for an evaluation under s32(4) did not arise).
- (d) However, after the pSWLP decision, the NES-PF was amended by deleting the word "freshwater" from regulation 6(1)(a) (see Resource Management (National Environmental Standards for Plantation Forestry) Amendment Regulations 2018 which received Royal Assent on 24 April 2018 (**the NES-PF Amendment**)).
- (e) This means that plan rules can be more stringent where they give effect to "an objective" developed to give effect to the NPSFM. This change meant that rules in the pSWLP can be more stringent than the NES-PF where those rules give effect to" (or implement) objectives that give effect to the NPSFM.

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<sup>6</sup> Supra at page 17

<sup>7</sup> See discussion at paragraph [135] of the Decision Report and pages 7 and 23 of the pSWLP (decisions version).

- (f) Accordingly, the amendment to regulation 6 changed the relationship between the NES-PF and the pSWLP, and the extent to which pSWLP rules are more stringent than the NES-PF. In this scenario, where the pSWLP decision had been made, the rules that prohibit or restrict activities that the NES-PF permits will be more stringent.
- (g) Further, because of the timing of the NES-PF Amendment, section 32(4) does not apply because no further section 32 assessment is required in respect of the assessment of what rules in the pSWLP are more stringent than the NES-PF.

Rayonier's position

- 23 Rayonier does not reach the same conclusion regarding operation of section 32(4) in the circumstances of this case.
- 24 In essence, what appears to have happened is that the pSWLP hearings panel decided that the objectives in the pSWLP were not "freshwater" objectives (for reasons stated in the Decision Report). Because regulation 6(1)(a) NES-PF as originally Gazetted only applied to "freshwater objectives", none of the rules in the pSWLP qualified as being more stringent than the NES-PF, and the NES-PF regulations prevailed.
- 25 That changed overnight when the NES-PF was amended in April and the word "freshwater" was removed from regulation 6. This caused all the pSWLP rules that give effect to objectives that achieve the NPSFM to become more stringent than the NES-PF regulations.
- 26 Since then a number of appeals have been lodged on the pSWLP and some of these appeals relate to rules that either are more stringent than the corresponding regulations in the NES-PF, or would be more stringent if the relief sought were granted. Rayonier has not completed a comprehensive assessment however, for example, this would include appeals regarding cultivation rules<sup>8</sup> and gravel extraction rules.<sup>9</sup>
- 27 Against this context, it is submitted that the requirements of 32 RMA, including s32(4), are engaged for the following reasons:
  - (a) The rules which are subject to appeal are not yet beyond challenge.

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<sup>8</sup> Refer Rayonier appeal and appeals by several other parties

<sup>9</sup> Refer Federated Farmers appeal at paragraph 24

- (b) The Environment Court conducts a hearing de novo when hearing appeals under clauses 14 and 15 of the First Schedule RMA.<sup>10</sup> Therefore the Court has jurisdiction to consider the pSWLP provisions that are subject to appeal afresh.
- (c) One of the consequences of this is that the Court is required to make a decision against the legal position that applies now (including the abovementioned amended wording of regulation 6(1)(a)), as opposed to the position as it was when the hearings panel released its decision on the pSWLP.
- (d) Counsel understands that one of the reasons why the Court has requested that the respondent prepare a Preliminary Planning Assessment is to enable the Court to better understand the most up-to-date position in respect to sections 32, 32AA and the relationship between the pSWLP and other higher order planning instruments such as NPSs, national environmental standards and the Southerland Regional Policy Statement.

#### **Should the Initial Planning Statement include a s32(4) assessment?**

- 28 It is submitted that it is appropriate for the Initial Planning Statement to include a s32(4) assessment as this information will influence future steps in the resolution of the appeals.
- 29 In particular, it would cause the respondent to give effect to the alignment process contemplated by Plan Alignment Document, namely to identify which rules that are subject to appeal are more stringent than the NES-PF and specifically consider whether such rules need to be more stringent than the NESPF. If a more stringent rule than the NES-PF is justified, this could be clearly documented.
- 30 The above evaluation would clarify the respondents' view on the relationship between the NES-PF and the pSWLP. Depending on the outcome of the evaluation, it may resolve Rayonier's appeal (or parts thereof) and matters raised in Rayonier's s274 notices. Even if this does not occur, the evaluation would assist constructive mediation and resolution of the proceedings.
- 31 More broadly it would assist Rayonier and other forest operators understand the RMA planning requirements that apply to plantation forestry activities in the Southland Region.

#### **Existing rules that are not subject to appeal**

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<sup>10</sup> *Leith v Auckland CC* [1995] NZRMA 400 (PT), followed in *North Shore CC v Auckland RC* [1997] NZRMA 59 (EnvC)

- 32 In addition to the above, there is another related matter which Rayonier would like to raise. This matter is not squarely before the Court however given the relative novelty of the NES-PF Rayonier would welcome any guidance that might be provided by the Court.
- 33 Rayonier is concerned that there may be other rules in the pSWLP that are more stringent than the NES-PF which are not subject to appeal, and in respect of which there has been little if any assessment by the respondent regarding whether such rules are necessary or justified in the circumstances of the region due to the timing of the NES-PF Amendment.
- 34 Counsel submits that given the circumstances of this case, it would be appropriate for the respondent to complete an assessment of pSWLP rules that are **not** subject to appeal in accord with good practice as detailed in the Plan Alignment Guidance, which provides as follows with respect to existing rules:<sup>11</sup>

*It is also good practice to carefully assess existing rules that are more stringent than the NES-PF to ensure that each rule is clearly within the circumstances prescribed in Regulation 6. This is important to meet the requirements in section 43B and 44A of the RMA (i.e. that a rule can only be more stringent than NES when the NES expressly states this). It is also important to ensure that more stringent rules only prevail over the NES-PF in appropriate circumstances to ensure the underlying policy objectives of the NES-PF to achieve consistency and certainty in the management of plantation forestry activities are not compromised.*

**Request for guidance or directions**

- 35 Counsel respectfully requests that the Court make a decision and/or provides guidance on these matters or otherwise give directions about how this preliminary issue should be dealt with.

**DATED** at Christchurch this 28<sup>th</sup> day of August 2018



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Chris Fowler  
Counsel for Rayonier New Zealand Limited

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<sup>11</sup> Plan Alignment Guidance at page 17