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

MEMORANDUM OF COUNSEL FOR RAYONIER NEW ZEALAND LIMITED

Date: 10 September 2018

Judicial Officer: Judge Hassan

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MAY IT PLEASE THE COURT

Introduction

1 This Second Memorandum of Counsel is filed on behalf of Rayonier New Zealand Limited (**Rayonier**)

2 Rayonier has already lodged a memorandum seeking directions in respect of the relationship between the proposed plan and the NES-PF (**Rayonier's initial memorandum**). In particular the initial memorandum addresses two issues, namely:

(a) whether s32(4) is engaged in the circumstances of appeals on the proposed plan, and

(b) whether the Initial Planning Statement to be prepared by the respondent Council should include an examination of whether the rules in the pSWLP that are more stringent than the NES-PF are justified in the circumstances in the region.

3 The initial memorandum also flags a "wider issue" regarding whether the pSWLP gives effect to NES-PF in respect of rules that are not subject to appeal.[1]

4 The purpose of this Second Memorandum is to update the Court regarding the scale of this wider issue, the cause of the issue, its significance and possible remedies available to the Court, should the Court consider that this wider issue needs to be addressed through these proceedings.

Scale of the wider issue

5 Since the initial memorandum, Counsel for the Respondent has referred me to an analysis prepared by his client which identifies rules in the pSWLP that are or may be more stringent than the NES-PF (**the Council analysis**). A copy of the Council analysis is **attached** and filed together with this Memorandum.

6 This document runs to 22 pages and by my count identifies 74 rules that fall into this category. Counsel can advise that the scale of the wider issue is significantly greater than understood or contemplated when Counsel prepared Rayonier's initial memorandum. These circumstances have prompted the filing of this further memorandum.

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[1] Rayonier's initial memorandum at paragraphs 32-34 of

Cause of the issue

7 As outlined in my initial memorandum, the problem arises due to the timing of the amendment to the NES-PF. This has caused all the pSWLP rules that give effect to an objective developed to achieve the NPS Freshwater Management to become more stringent than the NES-PF, literally over-night.

8 Counsel for the Respondent says that because of this timing, his client doesn't need to complete a 32(4) evaluation in respect of these rules. I also understand my friend's position to be that the informal procedure provided by s44A (whereby plan rules that conflict with the NES-PF can be amended without using the Schedule 1 process) is not available.

The significance of the issue

9 The problem is that the pSWLP contains a large number of rules that purport to prevail over the NES-PF. However because a section 32(4) evaluation hasn't been completed, there is no qualitative assessment of whether this greater stringency is justified.

10 Consequently, the pSWLP doesn't properly speak to the NES-PF, in the sense the plan alignment process contemplated by the RMA hasn't been completed.

11 In my submission, the evaluation required at 32(4) is a critical step in the plan alignment process because it requires local authorities to genuinely and fairly consider whether the NES-PF rules are adequate or whether, given the circumstances of the affected district or region, they need to utilise the jurisdiction available at Reg 6 NES-PF to include more stringent rules in the proposed plan.

12 Given the number of pSWLP rules affected by this problem, in my submission the issue assumes considerable significance for these reasons:

(a) The outcome that has occurred is inconsistent with the purpose of the NES-PF, which is *"to increase the efficiency and certainty of managing plantation forestry activities"*;[2]

(b) The situation is prejudicial to the plantation forestry sector because it places a substantially greater regulatory burden on forestry activities than may be necessary or justified;

(c) It's also inconsistent with the hierarchy of documents contemplated by s66 RMA (which deals with matters to be considered when preparing a regional

[2] Initial memorandum at paragraph 20

plan) and s67 RMA (which provides that a regional plan must give effect to a national planning standard); and

(d) Overall, the difficulty for the Council (and the Court) is that it cannot say with any confidence that its proposed plan meets the purpose of the Act.

13 Given these matters, the justification for greater stringency and any consequential amendments to the proposed plan should be addressed sooner rather than later.

Possible remedies

14 In my submission, the Court has jurisdiction to require a s32(4) assessment in respect of pSWLP provisions challenged by Rayonier's appeal and s274 notice, which relate to a narrow issue regarding cultivation.[3]

15 However the position regarding the balance plan provisions, those not subject to appeal, is more complex. The bulk of the 74 more stringent rules fall into this category.

16 Counsel considers that the most appropriate method to address the problem with the balance plan provisions is through s293 RMA. This section confers on the Court jurisdiction to deal with matters arising on hearing of appeals on a planning instrument that are beyond the scope of an appeal.

17 Section 293 RMA provides as follows:

(1) After hearing an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan that is before the Environment Court, the court may direct the local authority to—

(a) prepare changes to the proposed policy statement or plan to address any matters identified by the court:

(b) consult the parties and other persons that the court directs about the changes:

(c) submit the changes to the court for confirmation.

(2) The court—

(a) must state its reasons for giving a direction under subsection (1); and

(b) may give directions under subsection (1) relating to a matter that it directs to be addressed.

[3] The Court may also have jurisdiction regarding other proposed plan provisions that are challenged in other appeals.

(3) Subsection (4) applies if the Environment Court finds that a proposed policy statement or plan that is before the court departs from—

(a) a national policy statement:

(b) a New Zealand coastal policy statement:

(ba)a national planning standard:

(c) a relevant regional policy statement:

(d) a relevant regional plan:

(e) a water conservation order.

(4) The Environment Court may allow a departure to remain if it considers that it is of minor significance and does not affect the general intent and purpose of the proposed policy statement or plan.

(5) In subsections (3) and (4), departs and departure mean that a proposed policy statement or plan—

(a) does not give effect to a national policy statement, a New Zealand coastal policy statement, a national planning standard, or a relevant regional policy statement; or

(b) is inconsistent with a relevant regional plan or water conservation order.

18 There are criterion developed through case law that need to be satisfied in order for s293 to be invoked. The leading case regarding determining the jurisdiction of the Environment Court under s293 is the High Court decision in *Federated Farmers of New Zealand (Inc) Mackenzie Basin Branch v Mackenzie DC* [2014] NZRMA 52.

19 In brief summary, the High Court held that:

19.1 The fundamental purpose of s293 is to direct changes to a proposed plan which are not otherwise within the Court's jurisdiction due to the scope of the appeal before it. But the power is not unlimited and the Courts' have consistently held that section 293 is to be exercised cautiously and sparingly.[4]

19.2 As a matter of logic, if a district plan is not achieving the purpose of its existence, then it would be absurd to let that plan stand undisturbed by the limited planning role explicitly conferred upon the Environment Court.[5]

19.3 There is a clear tension between judicially enunciated principles concerning the dichotomy between appellant judicial functions and planning functions, and the

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[4] *Federated Farmers of New Zealand (Inc) Mackenzie Basin Branch v Mackenzie DC* [2014] NZRMA 52 at paragraphs 120 and 121
[5] Supra at paragraph 134

plain fact that Parliament has vested in the Environment Court, as an appellant body, what appears at first blush to be broad planning powers.[6]

19.4 In order to resolve this tension, matters sought to be addressed with section 293 must, ordinarily:[7]

(a) Be 'on' the plan change;

(b) Be within scope of the submissions to the local authority (and therefore form part of its decision);

(c) be within the scope of appeals and the relief sought.

19.5 However, in some circumstances there may be narrow exceptions to this general approach, such as:[8]

(a) An inadequate s32 report;

(b) A failure to comply with section 74 (including preparation in accordance with the provisions of Part 2)[9]; or

(c) A more than minor deviation from one of the matters referred to in section 293(2), whether or not raised in an appeal.

19.6 Any exception would normally be a condition precedent to validity of a plan change. In these situations, where the failure has a material bearing on the plan change, there would be some appropriate basis for the Court to determine to exercise its discretion.[10]

20 In my submission, prima facia section 293 appears to be available because the circumstances of this case fall within one or all of the narrow exceptions identified by the High Court at paragraph 19.5 above.

21 Counsel acknowledges that other parties and possibly the Court may have reservations about use of s293 given the potential for delay and complication of these proceedings. However, in my submission the issue involves very few participants and could be addressed in parallel with other steps required to resolve appeals on the pSWLP. Consequently, invoking s293 to address the problem identified above needn't hold up completion of the plan review.

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[6] Supra at paragraph 138
[7] Supra at paragraph 147
[8] Supra at paragraph 148
[9] The equivalent provision with respect to regional plans is section 66, which includes the obligation to prepare a regional plan in accordance with a national planning standard (refer s66(1)(ea))
[10] Supra at paragraph 149

22 In the alternative to the above, should the Court consider that it is inappropriate to invoke s293 then Rayonier could potentially seek a late amendment to its appeal pursuant to s281 RMA (which deals with waivers and directions) to increase the scope of its appeal, and hence the jurisdiction of the Court to respond to the problem.[11]

Directions requested

23 In light of the above matters, Counsel respectfully requests that after hearing from other parties regarding this matter the Court issue directions regarding the issue raised above.

DATED at Christchurch this 10th day of September 2018

Chris Fowler
Counsel for Rayonier New Zealand Limited

[11] The forestry activities that appear to be most affected by the more stringent provisions of the proposed plan are river crossings, discharge of sediment, and diversion of water associated with forestry activities. The proposed plan rules that cause greater stringency regarding these activities and seem to be triggered most frequently are Rules 4, 5, 6, 15, 38, 57, 58, 62, 66, 68, 69, 76, 77
Note also harvesting and rule 58 which is considered more stringent in terms of cable haul logging