



1 The NES-PF – existing consents and existing use rights

The NES-PF applies when a *plantation forestry activity* is undertaken. Regulation 5 (Application) sets out the *plantation forestry activities* regulated under the NES-PF and these are all defined in Regulation 3 (Interpretation) of the NES-PF.

At the commencement of the NES-PF, there are a range of existing *plantation forests* at various stages of the forestry lifecycle that will be operating under a range of different authorisations. Many *plantation forests* across New Zealand were established without the need to obtain a resource consent under the RMA. This may be because the establishment of the *plantation forest* pre-dated the RMA or because the activity was permitted under the relevant regional and district plans at the time it was established.

There are also *plantation forests* that hold existing resource consents that authorise their operation. The resource consents may relate to a number of *plantation forest activities* (as defined in the NES-PF) and may involve a mixture of land use consents under a district plan and regional permits under a regional plan¹. For example, a resource consent may authorise the *harvesting* of a particular *plantation forest* as well as the *earthworks* required to construct the *forestry roads* and *forestry tracks* needed to fell and remove the harvested trees.

At the commencement of the NES-PF, foresters and councils need to be aware of the relationship between the NES-PF and:

- *Existing plantation forestry activities* that are authorised by existing resource consents; and
- *Existing plantation forestry activities* that do not have resource consents but are able to be carried out as of right (e.g. as permitted activities or pursuant to existing use rights).

This section provides guidance on those relationships based on the relevant provisions in the RMA (refer to Appendix A of the [NES-PF Consenting and Compliance Guide](#) for these provisions in full).

1.1 RELATIONSHIP OF THE NES-PF WITH EXISTING RESOURCE CONSENTS

1.1.1 Existing land use consents granted under a district plan

The relationship between existing land use consents granted under a district plan and the NES-PF is set out in section 43B(5) of the RMA - **land use consents granted before the NES-PF was gazetted (3 August 2017) prevail over the NES-PF.**

For example, if an owner of a *plantation forest* holds an existing land use consent for *forestry quarrying*, this resource consent will prevail over the NES-PF *forestry quarrying* regulations that are relevant to territorial authority functions, regardless of whether the resource consent is more stringent or lenient.

The NES-PF will apply to the *plantation forestry activity* as soon as the activity authorised by the land use consent has been completed and/or the resource consent has lapsed or expired. For example, the NES-PF will apply to *forestry quarrying* when the authorised extent of *forestry quarrying* has been undertaken and/or the duration of the land use consent

¹ Section 87 defines the types of resource consents under the RMA as follows: – *In this Act, the term resource consent means any of the following: (a) a consent to do something that otherwise would contravene section 9 or section 13 (in this Act called a **land use consent**); (b) a consent to do something that otherwise would contravene section 11 (in this Act called a **subdivision consent**); (c) a consent to do something in a coastal marine area that otherwise would contravene any of sections 12, 14, 15, 15A, and 15B (in this Act called a **coastal permit**); (d) a consent to do something (other than in a coastal marine area) that otherwise would contravene section 14 (in this Act called a **water permit**); (e) a consent to do something (other than in a coastal marine area) that otherwise would contravene section 15 (in this Act called a **discharge permit**).*



has ended. The NES-PF will also apply to any activity or effect outside the scope of the existing resource consent.

Some foresters may hold land use consents granted under a district plan that authorise a *plantation forestry activity* or multiple *plantation forestry activities* in perpetuity². For example, the land use consent may authorise *afforestation* and *replanting* of a *plantation forest* on a specified piece of land over multiple forestry cycles with no specified end date. In this scenario, the forester could continue to rely on the land use consent without having to meet the relevant requirements in the NES-PF provided:

- They comply with all the relevant land use consent conditions.
- The activity remains within the scope of the land use consent.

The *plantation forestry activity* authorised by the land use consent may still need to comply with the regulations of the NES-PF within regional council functions (if relevant).

1.1.2 Existing coastal, water or discharge permits, and regional land use consents.

Sections 43B(6)(a) and (6A) of the RMA set out the relationship between NES and the following types of resource consents:

- **Coastal, water and discharge permits** – these are resource consents to do something that would otherwise contravene sections 12 (restrictions on use of coastal marine area), 14 (restrictions relating to water) and 15 (discharges of contaminants) of the RMA. In relation to *plantation forestry*, these types of permits are most likely to authorise *plantation forestry activities* that involve the discharge of *sediment*, *slash* or stormwater into water (including coastal water) or onto land in circumstances where it may enter water.
- **Regional land use consents** – these are resource consents to do something that would otherwise contravene sections 9 (restrictions on the use of land) or 13 (restrictions on certain uses of beds of lakes and rivers) of the RMA. In relation to *plantation forestry*, these types of consents are most likely to relate to *earthworks* and *river crossings*, or where the regional plan requires resource consent for soil conservation purposes.

The regional consents outlined above granted before the NES-PF was gazetted (3 August 2017) will prevail over the NES-PF. This relationship applies until:

- The consent expires³; or
- A review of the conditions of the permit or consent under section 128(1)(ba)⁴ of the RMA results in some or all of the NES-PF standards prevailing over the permit or consent.

A forester can continue to rely on regional resource consents that prevail over the NES-PF provided that the activity remains within the scope of the consent. For example, the NES-PF will apply once the authorised extent of *earthworks* has been undertaken and the forester is proposing additional *earthworks* outside the scope of the regional land use consent.

The *plantation forestry activity* authorised by the discharge permits and regional land use consents may still need to comply with the NES-PF regulations that are within territorial authority functions (if relevant).

² Section 123(b) states that the period to which a land use consent is granted is unlimited unless otherwise specified in the consent.

³ Note that some resource consents (e.g. earthworks consents that contravene section 9 of the RMA) may have an unlimited duration (pursuant to section 123 of the RMA).

⁴ Section 128(1)(ba) - *A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent, in the case of a coastal, water, or discharge permit, or a land use consent granted by a regional council, when relevant national environmental standards or national planning standards have been made.*



1.2 RELATIONSHIP OF THE NES-PF WITH RESOURCE CONSENT APPLICATIONS BEING PROCESSED

Some resource consents will have been granted after the NES-PF was gazetted (3 August 2017) and prior to the NES-PF coming into force. The relationship between these resource consents and NES-PF is set out in section 43B(7) of the RMA. It is determined by the date that the decision whether to notify the application (section 95-95G of the RMA) was made:

- Decision on notification of the application was made **prior to 3 August 2017** - the **resource consent prevails over the NES-PF**; or
- Decision on notification of the application was made **after 3 August 2017** - the **NES-PF prevails over the resource consent**. In this situation, the *plantation forestry activity* was able to operate under the resource consent until 1 May 2018, but the activity now needs to be reconsidered under the NES-PF requirements.

1.3 RELATIONSHIP OF NES-PF WITH OTHER LAWFULLY ESTABLISHED ACTIVITIES

Existing use rights are provided for under the RMA through sections 10, 10A, 10B (for activities managed under a district plan) and section 20A (for activities managed under a regional plan). These rights apply to existing uses and activities that:

- Are lawfully established as a permitted activity or could have been lawfully carried out without a resource consent; and
- Now require a resource consent as a result of a rule in a plan or proposed plan becoming operative or taking legal effect.

Section 43B(9) of the RMA states that, where a NES requires a resource consent to be obtained for an activity, sections 10, 10A, 10B and 20A(2) apply to the activity as if the NES was a rule in a plan that had become operative. This guidance deals with existing use rights under district and regional plans separately as the consenting implications for *plantation forestry activities* are different under each:

- Existing use rights for the use of land under section 10 of the RMA continue, provided the effects of the activity are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified (and the land use is not discontinued for longer than 12 months).
- Existing use rights for regional activities under section 20A(2) of the RMA are limited in duration and a resource consent must be applied for within 6 months of a rule becoming operative when that rule requires a resource consent for that activity.

This section does not focus on existing use rights under sections 10A and 10B of the RMA as *plantation forestry activities* do not typically involve using the surface of lakes and rivers or the construction of buildings.

1.3.1 Existing use rights for land use under district plans – section 10

Section 10 of the RMA addresses existing use rights for the use of land managed under a district plan. Under section 10(1)(a) of the RMA, land may be used in a manner that contravenes a rule in a district plan or proposed district plan (i.e. a territorial authority regulation in the NES-PF) if:

1. The use was lawfully established before the rule became operative or the proposed plan was notified – i.e. the use of land for the *plantation forestry activity* must be lawfully established before the NES-PF comes into force; and
2. The effects of the use are the '*same or similar in character, intensity and scale to those which existed before the rule became operative or the proposed plan was notified*'; and



3. The use of land has not been discontinued for a continuous period of more than 12 months after the NES-PF comes into force, subject to the exception in section 10(2) of the RMA⁵.

There is extensive case law on existing use rights under the RMA, which should be considered when applying these provisions to *plantation forestry activities* regulated under the NES-PF. The case law confirms that it is the responsibility of the person using the land to demonstrate they have existing use rights.

1.3.2 Existing use rights for activities under regional plans – section 20A

Section 20A of the RMA addresses existing use rights for activities managed under a regional plan. Section 20A(2) of the RMA applies to certain **existing lawful activities** that require resource consent as a result of a regional rule becoming operative (i.e. resource consent is required due to a regional council regulation in the NES-PF).

Section 20A(2) enables these activities to continue provided the following requirements are met:

1. Prior to the NES-PF coming into force:
 - The existing activity was a permitted activity or otherwise could have been lawfully carried on without a resource consent
 - The existing activity was lawfully established
2. The effects of the activity are the '*same or similar in character, intensity, and scale to the effects that existed before the rule became operative*'; and
3. The person carrying out the activity has applied for a resource consent from the appropriate consent authority within six months of the NES-PF coming into force, and the application has not been decided, or any appeals are still to be determined.

Section 20A(2) therefore provides a six-month window from 1 May to 1 November 2018 for foresters to apply for any regional resource consents that are required as a result of the NES-PF coming into force. Resource consents do not need to be granted within the six-month timeframe – the application must be lodged prior to 1 November 2018 and the activity can continue operating past the six-month timeframe while the application is being processed.

1.4 CERTIFICATES OF COMPLIANCE AND EXISTING USE CERTIFICATES

1.4.1 Section 139 – Certificates of compliance

Section 139 of the RMA allows a person to request that a consent authority issue a certificate of compliance to confirm that an activity '*could be done lawfully in a particular location without a resource consent*'. Some foresters may hold a certificate of compliance to confirm that the *plantation forestry activity* was permitted at the time the activity commenced.

Once granted, a certificate of compliance is treated in the same manner as a resource consent under the RMA that contains the conditions specified in the applicable NES or plan (section 139(10) of the RMA). However, certificates of compliance issued prior to the NES-PF coming into force will not necessarily prevail over the NES-PF as these are subject to the standard existing use right provisions in the RMA. This is due to the following RMA provisions:

- Section 139(11) states that a certificate of compliance is to be treated as resource consent **subject to sections 10, 10A and 20A(2) of the RMA**. These sections

⁵ Under section 10(2) an activity can still have existing use rights after the use of land has been discontinued for a continuous period of more than 12 months when: a) an application has been made to the territorial authority within the first two years of the activity first being discontinued; and b) the territorial authority has granted an extension.



determine the status of a lawfully established use of land or activity when a rule that has been notified or become operative requires a resource consent for that activity

- Section 43B(9) states that if NES require a resource consent to be obtained for an activity, sections 10, 10A, 10B, and 20A(2) apply to the activity as if the standard were a rule in a plan that had become operative.

Councils may also receive and consider applications for certificates of compliance under section 139 of the RMA to provide written confirmation that the *plantation forestry activity* can be undertaken lawfully without resource consent. Foresters may choose to do this to receive confirmation that a *plantation forestry activity* they are planning to undertake is permitted under the NES-PF.

1.4.2 Section 139A – Existing use certificates

Section 139A of the RMA allows consent authorities to issue an existing use certificate to confirm that an activity was allowed by either sections 10, 10A or 20A on the date the consent authority issues the certificate. These certificates must specify the character, intensity and scale of the land use or activity and must also describe the period the activity is allowed if section 10A or 20A apply.

The purpose of these certificates is to confirm that the activity either has existing use rights under sections 10 and 10A or was an existing lawful activity under section 20A of the RMA on the date that the council issues the certificate. Section 2.3 of [NES-PF Consenting and Compliance Guide](#) provides more information on the existing use rights provisions in the RMA and how these apply to *plantation forestry activities*.

1.5 RELEVANCE OF THE NES-PF TO APPLICATION TO CHANGE CONSENT CONDITIONS

Foresters may apply, under section 127 of the RMA, to change or cancel the conditions of resource consents they hold for *plantation forestry activities*, which were granted prior to the commencement of the NES-PF. A section 127 application to change the condition of a forestry consent will be processed in the same way as they were prior to the NES-PF coming into force – the difference being that the NES-PF will be a relevant matter to consider under section 104(1)(b)(i). This process can be summarised as follows:

- The activity status of the application will be discretionary under section 127(3)(a), regardless of the activity status of the consent or the activity status under the NES-PF
- Councils will assess the effects of the change or cancellation of conditions in accordance with sections 88 to 121 of the RMA (section 127(3)(b))
- Councils are required to have regard to the relevant provisions of a NES under section 104(1)(b)(i) of the RMA.

For example, the NES-PF could be considered as part of the assessment of the 'permitted baseline' when considering a section 127 application that relates to a *plantation forestry activity*. Section 104(2) of the RMA enables the consent authority to disregard an adverse effect of the change or cancellation of conditions if the NES-PF permits the activity with that effect. Section 6.6 of the [NES-PF Consenting and Compliance Guide](#) provides more guidance on assessing resource consents under the NES-PF and the application of the 'permitted baseline'.