



1 Processing resource consents under the NES-PF

The NES-PF enables *plantation forestry activities* to be undertaken as permitted activities when the risks are lower and where the relevant permitted activity conditions are met. In other situations, foresters will need to obtain a resource consent, which may be for one or more of the following reasons:

- **Inherent site risk and/or exceeding a threshold** – the NES-PF introduces a resource consent requirement for certain *plantation forestry activities* located in the orange or *red zone* because of the inherent erosion risk on this land. In most cases, the NES-PF also includes an area or volume threshold for these activities before resource consent is required. For example, *afforestation* proposed in any *red zone* requires resource consent when the area to be planted is more than 2ha in any calendar year.
- **Non-compliance with a NES-PF permitted activity condition** – to be permitted, all *plantation forestry activities* must comply with the relevant permitted activity conditions for that activity and any general provisions applicable to that activity.
- **Non-compliance with district or regional plan rules that apply to the activity** – this will be when either:
 1. There is a more stringent plan rule that applies to the activity and prevails over the NES-PF under Regulation 6; or
 2. The *plantation forestry activity* involves activities or will result in effects that are not addressed in the NES-PF (e.g. effects on cultural sites) and are dealt with by the plan.

This document focuses on the processing of resource consent applications required due to non-compliance with the NES-PF.

1.1 PROCESSING RESOURCE CONSENTS FOR CONTROLLED AND RESTRICTED DISCRETIONARY ACTIVITIES

When resource consent is required under the NES-PF, this will generally be for a controlled or restricted discretionary activity¹. Councils are familiar with how to process applications for these classes of activity in accordance with section 87A and 104-104C of the RMA:

- (a) **A controlled activity** – where consent must be granted, and any consent conditions imposed are restricted to matters over which control is reserved; or
- (b) **A restricted discretionary activity** – where consent can be granted or declined and council's powers in considering the application and imposing any consent conditions are restricted to the matters over which discretion is restricted to.

1.1.1 Matters of control and discretion

The NES-PF specifies the matters control is reserved over or discretion is restricted to, when resource consent is required. These matters of control and discretion ensure applicants and councils focus on the adverse environment effects likely to be generated by the activity due to non-compliance or site-specific risk factors. When councils process resource consent applications under the NES-PF, the assessment should focus on:

- **The matters of control or discretion that are relevant to the specific non-compliance** – the NES-PF provides a single list of matters of control and/or discretion for each activity when resource consent is required. Not all matters will be relevant to the

¹ A discretionary activity consent is required under two scenarios under the NES-PF: 1) *river crossings* not within the classes listed in Regulation 49; or 2) when permitted activity conditions relating to the disturbance of bed of a lake or river, or disturbance of a *wetland* (related to fish spawning) are not complied with (regulations 97(8) and (9)).



reason consent is required. Councils should focus their assessment on those matters that specifically relate to the reason consent is required, whether that be the location of the activity, or non-compliance with a permitted activity condition.

- **The specific aspect of the *plantation forestry activity* that is non-compliant with the permitted activity conditions, or the reason that resource consent is required** – for example, if *earthworks* do not comply with the water body setbacks in Regulation 29 then the assessment should focus on the potential adverse environmental effects of that non-compliance, such as increased risk of sedimentation due to the proximity of the earthworks to the water body (consistent with the matters discretion has been restricted to by Regulation 35(3)). Similarly, if a *plantation forestry activity* required resource consent because it was located on *red zone* land and exceeded a particular threshold (e.g. 2ha) then the assessment should focus on the risk of erosion and sedimentation due to its location on very high-risk erosion prone land (consistent with the matters discretion has been restricted to).

Table 1 demonstrates the link between a restricted discretionary activity under Regulation 35(1), the matters discretion is restricted to under Regulation 35(3), and the potential resource consent conditions that could be suitable.

Table 1: Link between matters for discretion and appropriate consent conditions.

Example activity	The <i>fill</i> used as part of <i>earthworks</i> will have more than 5% vegetation or wood content ² . <i>Fill</i> will not be used near a <i>riparian zone</i> or the coastal environment and no riparian vegetation will be impacted.
Non-compliance	Regulation 30(1), assuming that all other permitted activity conditions are complied with (including general provisions).
Applicable matters for discretion	35(3) - <i>Discretion is restricted to</i> - [matters potentially relevant to the non-compliance are underlined] <u>(a) the timing, location, and duration of the activity</u> <u>(b) the effects on ecosystems, fresh water, and the coastal environment</u> <u>(c) the effects on vegetation in the riparian zone</u> <u>(d) the method of stabilising soil disturbance</u> <u>(e) the method of sediment retention and run-off management</u> <u>(f) storm water control measures</u> <u>(g) the methods used to minimise erosion</u> <u>(h) the placement and management of cuts, fill, or spoil likely to cause slope instability</u> <u>(i) the preparation and content of the forestry earthworks management plan</u> <u>(j) the information and monitoring requirements.</u>
Potentially suitable consent conditions	Conditions imposed on the resource consent should only relate to the matters that are underlined above. In this example, the potential adverse effects relating to the non-compliance are primarily slope instability and potential erosion due to the high wood content of the <i>fill</i> . Suitable consent conditions should therefore focus on: <ul style="list-style-type: none"> • Where this type of <i>fill</i> should be avoided and areas where it may be used appropriately (matters (a), (b), and (h))

² It is expected that this condition will be generally be complied with as is fundamental to the ongoing stability of *earthworks*. If *earthworks* contain a significant quantity of organic material that will rot, it will create voids, settle unevenly and have areas that slough off, all of which affect the integrity of the road or *landing*.



	<ul style="list-style-type: none"> The methods used to stabilise this <i>fill</i> and minimise erosion (matters (d), (g) and (h)). <p>A condition may include a requirement for these methods to be included in the forestry earthworks management plan if not already included (matter (i)). It may also be appropriate to have a consent condition to monitor and report on the stability of the <i>fill</i> to ensure that the <i>fill</i> is performing appropriately (matter (j)).</p>
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1.1.2 Assessing objectives and policies

NES are regulations which have the effect of a rule in a plan – they do not contain objectives or policies. The NES-PF provides a nationally consistent set of standards that apply to *plantation forestry activities* and includes matters over which control is reserved or discretion is restricted to when a resource consent is considered and decided. In most cases, guidance from objectives and policies in the relevant district or regional plans or national or regional policy statements³ will not be needed when resource consent is required under the NES-PF. This is because the matters of control and discretion in the NES-PF are focused and relatively discrete, and council can only consider these matters when assessing the potential effects of the activity, determining the application, and imposing any consent conditions⁴.

For example, generic objectives and policies relating to the contribution of plantation forestry to economic and social well-being will not be relevant considerations as the matters of control and discretion in the NES-PF do not include these considerations.

However, councils will still need to consider if there are any relevant objectives and policies in their plan as part of their section 104(1)(b) assessment. Potentially relevant objectives and policies to consider in the assessment of resource consent applications required under the NES-PF include (by way of example):

- Objectives and policies that relate to a specific coastal receiving environment where the *plantation forestry activity* is located. This would be relevant to the matters of discretion in the NES-PF relating to the effects on the coastal environment.
- Objectives and policies that relate to the management of environmental effects of activities on specific waterbodies. This would be relevant to the matters of discretion in the NES-PF relating to the effects on fresh water.

1.2 PROCESSING RESOURCE CONSENTS FOR DISCRETIONARY ACTIVITIES⁵

There are two instances where resource consent will be required for a discretionary activity:

- Constructing, using, maintaining, or removing a *river crossing* where the *river crossing* is not within the *river crossing* classes listed in Regulation 46; and
- Disturbance of the bed, or vegetation in the bed, of a *perennial river* or lake or disturbance of a *wetland* associated with a *plantation forestry activity* that does not meet the applicable permitted activity conditions (Regulation 97(8)-(9)).

Both these regulations are regional council functions.

Councils are able to consider all relevant matters for discretionary activities when making their section 104 assessments and may decline or grant resource consent applications with

³ Being any relevant provisions of the documents listed under section 104(1)(b) of the RMA, which also includes other regulations, and the New Zealand Coastal Policy Statement.

⁴ Section 87A(2)(b) for controlled activities and section 87A(3)(a) for restricted discretionary activities.

⁵ Note that the guidance in this section is only applicable to *plantation forestry activity* applications that only require consent under the NES-PF. If a *plantation forestry activity* requires consent under a regional or district plan, council should process that component of the application in the same way it does currently.



or without conditions (section 87A(4) of the RMA). It will be up to the relevant regional council to decide whether any of the objectives or policies in the regional plan are relevant to the application (along with the provisions of the other planning documents under section 104(1)(b) of the RMA). For example, the regional plan may include objectives and policies relating to structures in the beds of rivers or may contain specific *river crossing* objectives and policies that may be relevant considerations.

1.3 PRINCIPLES OF APPROPRIATE RESOURCE CONSENT CONDITIONS

When granting resource consents under the NES-PF, it is the responsibility of the consent authority to determine whether resource consent conditions are required and, if so, set appropriate conditions in accordance with section 108 of the RMA. Appropriate resource consent conditions are important to ensure actual or potential adverse environmental effects are appropriately avoided, remedied or mitigated.

The permitted activity conditions in the NES-PF were drawn from regional plans and commonly used resource consent conditions. Any consent conditions imposed on resource consents granted under the NES-PF should therefore be constructed with consideration of the site-specific risks of the activity, rather than being generic.

There is a large body of guidance and case law on resource consent conditions. This has established that good consent conditions must be⁶:

- Within a council's powers under the RMA.
- For a valid resource management purpose.
- Clear, certain and self-contained.
- Within the matters of control or discretion;
- Fair, reasonable and practical.
- Relevant to the subject matter of the consent.

Section 108(1) also requires that consent conditions are appropriate. The last bullet point is particularly relevant under the NES-PF as it is divided into activity specific sub-parts and each plantation forestry activity is treated separately. For example, councils should not use a resource consent for an activity such as *harvesting* as an opportunity to impose consent conditions relating to a different *plantation forestry activity* (i.e. *replanting*⁷).

The Courts have confirmed that a resource consent condition may be invalid if:

- It is unreasonable⁸.
- It involves a delegation of local authority duties.
- Is uncertain or unenforceable⁹.

⁶ Refer to Quality Planning guidance on consent conditions: <http://www.qualityplanning.org.nz/index.php/consents/conditions>

⁷ Refer to *Banks v Waikato Regional Council* PT Hamilton A031/95, 20 April 1995 which held that a condition about replanting in the Tararua forest would not fairly and reasonably relate to the subject matter of the application to harvest existing trees; there would be an ulterior object of controlling a possible future activity on the same land.

⁸ For examples of unreasonable or inappropriate conditions, see *Reeves v Waitakere City Council* PT W068/95, 26 May 1995, *Fletcher Challenge Forests Ltd v Whakatane District Council* EnvC Auckland A093/99, 10 September 1999 or *Arrigato Investments Ltd v Rodney District Council* EnvC Auckland A145/02, 5 July 2002.

⁹ *Palmerston North City Council v New Zealand Windfarms Ltd* [2015] NZEnvC 70, see also Salmon Environmental Law commentary – 'Conditions should be enforceable, require specificity and clarity and accuracy of expression leading to a measure of certainty. Any guidelines imposed should not contain an undue measure of discretion, and techniques used should produce results that provide a reasonable guide for enforcing the condition'. Also refer *Wood v Selwyn DC* C035/94 citing *Bitumix v Mt Wellington BC* [1979] 2 NZLR 57, and *Ferguson v Far North DC* [1999] NZRMA 238 and *Cookie Muncher Charitable Trust v Christchurch City Council* NZEnvC W090/08



- It frustrates the grant of consent.

When developing resource consent conditions, it is generally good practice to discuss these with the applicant prior to the decision being made. This will help ensure that the consent conditions are clear, achievable and relevant from the perspective of the consent holder. It will also reduce the likelihood of an appeal or objection to the consent conditions.

1.4 WHEN RESOURCE CONSENT IS REQUIRED UNDER THE RELEVANT REGIONAL OR DISTRICT PLAN

A *plantation forestry activity* may comply with the permitted activity conditions in the NES-PF but there may be district or regional plan rules that apply to the activity. This will occur under two scenarios:

1. The relevant plan contains a more stringent rule that applies to the activity and this prevails over the NES-PF under Regulation 6; or
2. The *plantation forestry activity* involves activities or will result in effects that are not addressed in the NES-PF and are dealt with in the plan.

In these scenarios, the consent application should be processed in the same way as council currently processes resource consent applications under their plan. The resource consent decision and any conditions will be focused on those aspects of the activity that are not regulated under the NES-PF. For example, if *earthworks* are located within a *significant natural area* identified in the district plan where resource consent is required for any land disturbance activity, the resource consent decision and any conditions will be focused on effects on that *significant natural area*. The assessment should not extend to any other potential adverse effects of *earthworks* when the activity complies with the relevant permitted activity conditions for *earthworks* in the NES-PF (which deal with these other potential adverse effects).

1.5 BUNDLING OF APPLICATIONS

In some situations, foresters may apply for resource consents for a range of *plantation forestry activities* at the same time which may be a mixture of controlled, restricted discretionary and, less commonly, discretionary activities. This will generally occur when foresters are seeking to do multiple *plantation forestry activities* and it is most efficient and practical for foresters to apply for all the required consents at the same time. For example, a *harvesting* activity may require consent as a controlled activity but may also involve *earthworks* and the formation of a *river crossing* that both require resource consent as a restricted discretionary activity. In this scenario a forester is likely to seek resource consent for all three activities at the same time.

There is some discretion to 'bundle' activities in such circumstances and apply the most restrictive activity status. This is done when multiple elements of the same proposal require resource consent and, for processing and decision-making purposes, those consents are 'bundled' by the consent authority and are considered together. This would mean that the resource consent applications for *harvesting*, *earthworks* and a *river crossing* are 'bundled' together and processed as one application, applying the most restrictive activity status.

However, case law¹⁰ has emphasised that the approach of 'bundling' applications with different activity statuses is not appropriate where:

¹⁰Refer [South Park Corporation Ltd v Auckland City Council](#) [2001] NZRMA 350, [Urban Auckland Society for the Protection of Auckland City and Waterfront Inc v Auckland Council](#) [2015] NZRMA 235, and [North Canterbury Gas Ltd v Waimakariri District Council](#) EnvC A217/02



- One of the consents sought is for a controlled activity or restricted discretionary activity and where the scope of the consent authority's discretion in respect of one or more of the consents is relatively restricted.
- The effects of exercising the two consents would not overlap or have consequential or flow-on effects on matters to be considered on the other application.

These situations could apply under the NES-PF as the matters of control and discretion in the NES-PF are relatively confined and specific, and the effects of some types of *plantation forestry activities* do not have much overlap. For example, the effects of exercising a resource consent for *harvesting* and the construction of a *river crossing* may have limited overlap.

In other situations, the reasons for consent may be more closely linked and 'bundling' the activity status may be more appropriate. For example, *earthworks* undertaken just prior to and during *harvesting* is linked to the *harvesting* activity and both activities can have similar effects relating to *sediment* discharge in receiving environments. Councils will need to consider whether it is appropriate to bundle applications on a case-by-case basis with reference to the tests above.

Section 4.1 of the [NES-PF User Guide](#) provides guidance on the 'bundling' of *plantation forestry activities* that require resource consents with different activity status due to the activities occurring across a mixture of ESC zones.

1.6 PERMITTED BASELINE

Permitted baseline is a concept provided for under section 104(2) of the RMA that allows a council to disregard adverse effects of an activity on the environment if a plan or a national environmental standard permits an activity with that effect.

Once the NES-PF comes into force, it may form part of any permitted baseline. A council might therefore exercise its discretion to apply the NES-PF when assessing the adverse environmental effects of a *plantation forestry activity*. This may be relevant to an assessment of the adverse effects of an activity for notification purposes (in terms of both public and limited notification) as well as when making the substantive decision on the resource consent application (sections 95D(b), 95E(2), and 104 of the RMA).