

**BEFORE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY THE
TIMARU DISTRICT COUNCIL**

IN THE MATTER OF

The Resource Management Act 1991 (**RMA** or
the Act)

AND

IN THE MATTER OF

Hearing of Submissions and Further
Submissions on the Proposed Timaru District
Plan (**PTDP** or **the Proposed Plan**)

AND

IN THE MATTER OF

Submissions and Further Submissions on the
Proposed Timaru District Plan by **Port Blakely
Limited**

**LEGAL SUBMISSIONS FOR PORT BLAKELY LIMITED REGARDING HEARING
STREAM D**

Dated: 4 November 2024

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INTRODUCTION

- 1 These legal submissions are filed on behalf of Port Blakely Ltd (**Port Blakely / Submitter**) regarding their submission (the **Submission**) on the Proposed Timaru District Plan (**Proposed Plan**).
- 2 The Submission raised issues regarding provisions which manage the effects of plantation forestry operations on indigenous vegetation, riparian margins, Visual Amenity Landscapes (**VALs**) and bat habitat protection.
- 3 The key issue raised by Port Blakely relates to the relationship between the Resource Management (National Environmental Standards for Commercial Forestry) Regulations 2023 (the **NES-CF**) and the indigenous vegetation clearance rules, earthworks in riparian margin rules and afforestation in VALs proposed by the Timaru District Council (the **Council**). The issue arises because Port Blakely considers these rules are more stringent than comparable rules in the NES-CF.
- 4 The case for Port Blakely is focussed on a narrow but important point regarding the Council's Section 32 evaluation. Port Blakely considers that the Section 32 evaluation is deficient because it fails to demonstrate that the more stringent forestry rules in the Proposed Plan are necessary and justified in the context of the Timaru District. The Section 42A Report recognises the deficiency of the Section 32 evaluation and recommends the Proposed Plan be amended to make it clear to plan users that the NES-CF has precedence over the Proposed Plan rules in relation to plantation forestry operations. Port Blakely supports the Section 42A Report's suggested amendments to the Proposed Plan.
- 5 In addition, these submissions address the Bat Habitat Protection rules in the Proposed Plan. Port Blakely considers these rules do not align with expert advice about known bat behaviour and methods to identify bat habitat. Port Blakely proposed amendments to these rules to address this concern.
- 6 Furthermore, these submissions address Port Blakely's response to recommendations of the Section 42A Report where the reporting officer responds to other submitters on the Proposed Plan.

- 7 Evidence in support of the relief sought by Port Blakely has been filed by Melissa Pearson, a statutory planner, Barry Wells, South Island Regional Manager for Port Blakely, and Zachary Robinson, environmental consultant.

KEY ISSUES

- 8 The key issues arising in this case are as follows:
- (a) Are the Proposed Plan rules more stringent than comparable rules in the NES-CF?
 - (b) Has the Council provided sufficient evidence to justify the need for greater stringency in the circumstances of the Timaru District?
 - (c) Do the bat protection rules in the Proposed Plan best meet expert knowledge about bat behaviour and bat habitat?
 - (d) Port Blakely's response to submissions filed by other parties.

THE SUBMISSIONS AND RELIEF SOUGHT BY PORT BLAKELY LIMITED

- 9 Port Blakely's Submission opposed rule ECO-R1(1)&(2) concerning clearance of indigenous vegetation, rule NATC-R3 concerning earthworks in riparian margins, rule NFL-R7 which governs afforestation in VALs and rule ECO-R4 which relates to clearance of trees in long-tailed bat habitat.
- 10 Upon reviewing the Section 42A Report's suggested amendments to the Proposed Plan, Port Blakely have modified the relief they seek to pursue at Hearing D. The case for Port Blakely is that the changes suggested by the Section 42A Report align with the relief requested by Port Blakely in their Submissions and Port Blakely support the changes suggested by the Section 42A Report.
- 11 Port Blakely filed a Further Submission in opposition to:
- (a) a submission by the Royal Forest and Bird Society (**Forest & Bird**) and the Director General of Conservation to include new rules to protect indigenous biodiversity inside any ecosystem or land environment considered rare or threatened. The Section 42A Report's response and Port Blakely's support for this response is addressed in paragraphs [48]-[50] below.

(b) a submission by the Director General of Conservation on ECO-R7, asking that wilding conifers should be included within a rule prohibiting the planting of pest species. The Section 42A Report response and Port Blakely's support for the reporting officer is discussed at paragraphs [46]-[47] below.

12 On this basis Port Blakely seeks that the Proposed Plan rules be modified in line with the amendments suggested in the Section 42A Report.

THE NES-CF AND INDIGENOUS VEGETATION CLEARANCE, EARTHWORKS RULES AND VALS

Policy objective of the NES-CF

13 Ms Pearson was involved in the development of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 (**NES-PF**), which predate the NES-CF. She also supported the implementation by government officials. Her evidence provides a comprehensive overview of the NES-PF and indigenous vegetation clearance and earthworks.

14 Ms Pearson considers that¹:

A key driver for the NES-PF was to address unwarranted variation across regions and districts in the management of plantation forestry under the RMA. This variation was creating significant operational and regulatory uncertainty for the forestry industry and leading to uncertain and inconsistent environmental outcomes.

15 This is reflected in the policy objective of the NES-PF, which is to²:

a) Maintain or improve the environmental outcomes associated with plantation forestry activities nationally; and

b) Increase efficiency and certainty in the management of plantation forestry activities.

16 Ms Pearson explains that the NES-PF provides a nationally consistent set of provisions to manage eight core plantation forestry activities that cover the full forestry life cycle, as well as three ancillary forestry activities and general provisions that apply to all plantation forestry activities.³

17 Ms Pearson notes that the NES-PF includes comprehensive permitted activity standards which are more targeted and specific to plantation forestry activities

¹ Evidence of Melissa Pearson at paragraph 13.

² *Ibid.*, at paragraph 12.

³ *Ibid.*, at paragraph 15.

than existing regional and district plan rules, and which are deliberately comprehensive and robust to ensure they do not permit an activity with significant adverse effects.⁴

18 Overall, Ms Pearson's view is that⁵:

By providing a nationally consistent set of provisions that are specifically targeted to the environmental effects of different plantation forestry activities, the NES-PF creates both greater certainty for the plantation forestry sector while also 'raising the bar' (or at least maintaining it) in terms of environmental outcomes.

Port Blakely's Response to the NES-CF

19 Barry Wells has overall 28 years of practical forestry experience, 19 of those years are with Port Blakely and Mr Wells is currently Port Blakely's South Island Regional Manager. Mr Well's evidence is that the NES-CF is supported by Port Blakely because it provides certainty for Port Blakely as to how to manage the effects of its forestry operations on the environment.⁶

20 Considerable effort has been made by Port Blakely to ensure successful implementation of the NES-CF. Guidance documents to support the implementation have been prepared by the Ministry of Primary Industries (**MPI**), the New Zealand Forest Owners Association (**NZFOA**) and also Port Blakely.⁷

21 Port Blakely has created various strategies and plans to comply with the NES-CF and NZFOA Code of Practice. These documents are communicated to Port Blakely's operations team and are referred to in contracts with contractors employed to undertake forestry operations.⁸

22 Mr Well's evidence provides an overview of how the NES-CF regulations which protect Significant Natural Areas (**SNAs**), indigenous vegetation and riparian margins are relevant to the daily operations of Port Blakely in their forests in Timaru. He refers in particular to harvest management plans and explains the careful mapping and planning involved preharvest and special harvesting

⁴ Ibid., at paragraph 16.

⁵ Ibid., at paragraph 17.

⁶ Evidence of Barry Wells at paragraph xx.

⁷ Ibid., at paragraph 20.

⁸ Ibid., at paragraphs 24-28.

techniques to fell trees away from SNAs.⁹ In relation to earthworks carried out in riparian margins, management practices used to comply with the NES-CF include careful planning of roading layout to avoid being parallel to waterways, or choosing a site where vegetation is already damaged. Different techniques to intercept sediment are routinely used in line with best practice.¹⁰

- 23 Implementing these measures on a day-to-day basis to achieve compliance with the NES-CF creates additional costs for Port Blakely, which are also discussed in Mr Well's evidence.¹¹
- 24 It is apparent from Mr Well's evidence that the NES-CF has raised the bar in terms of regulation of protection of SNAs, indigenous vegetation and sediment and erosion control and that the NZFOA and Port Blakely has responded in a positive and comprehensive way to the need for more and better management of these matters. ECan inspections of Port Blakely's forests in Timaru have shown full compliance with their resource consent conditions and thereby, the NES-CF regulations.¹²

THE LEGAL RELATIONSHIP BETWEEN NATIONAL ENVIRONMENTAL STANDARDS AND DISTRICT RULES

- 25 District Councils are tasked with a wide range of functions including the requirement to control the use of land in order to maintain indigenous biological diversity.¹³ To undertake these functions the RMA provides that district councils may create district plans including district rules to implement district policies and objectives.¹⁴ Such plans must be prepared by district councils in accordance with their obligations to prepare an evaluation report in accordance with s32 RMA, and they must have particular regard to that report.¹⁵
- 26 The RMA also authorises the Governor-General, by Order in Council, to make regulations known as national environmental standards.¹⁶ In this case the

⁹ *Ibid.*, at paragraphs 31-33.

¹⁰ *Ibid.*, at paragraph 37.

¹¹ *Ibid.*, at paragraphs 45-52.

¹² *Ibid.*, at paragraph 44.

¹³ RMA section 31(1)(b)(iii), and section 31(1)(e).

¹⁴ RMA section 73(1) and section 75(1).

¹⁵ RMA section 74(1)(d) and (e).

¹⁶ Pursuant to section 43 RMA.

nature of the NES-CF is such that there is considerable potential for duplication, overlap and conflict between the national standard and the Proposed Plan rules.

- 27 The relationship between national environmental standards and rules is governed by 43B RMA which (relevantly) provides that a rule that is more stringent than a national environmental standard will prevail over the standard, but only if the standard expressly says that a rule may be more stringent than it.¹⁷ A rule is more stringent than a standard if it prohibits or restricts an activity that the standard permits or authorises.¹⁸
- 28 The primacy of a national environmental standard over local authority plans and proposed plans is supported by s44A which deals with local authority recognition of a national environmental standard. It provides that if a plan or proposed plan conflicts with a provision in a national environmental standard, then the local authority must amend the plan or proposed plan to remove the conflict.¹⁹ A conflict arises if the rule is (a) more stringent than the standard, and (b) the standard does not expressly say that a rule can be more stringent than it.²⁰
- 29 The RMA also requires that district councils that propose more stringent district rules must explain why such rules are necessary in the particular circumstances of their district. This requirement is founded in councils' duties under s32 of the RMA, specifically s32(4), which provides:
- 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.*
- 30 In summary to this point, district rules that are more stringent than a national environmental standard are allowed, provided that such rules are expressly contemplated by the relevant standard and the district council has completed an evaluation report under s 32 RMA that explains why greater stringency is justified in the particular circumstances of the district.

¹⁷ RMA section 43B(1)(a).

¹⁸ RMA section 43B(1)(b).

¹⁹ RMA section 44A(3)-(5).

²⁰ RMA section 44A(2).

- 31 This requirement imposes an important constraint on the power of district councils to promulgate rules that are more stringent than a national environmental standard and supports the hierarchy of planning instruments provided by the RMA.

Recent High Court decision

- 32 The recent High Court decision of *Rayonier New Zealand Ltd v Canterbury Regional Council*²¹ explains how the above provisions apply in practice. The Court commented as follows regarding s32(4):

[135] A plain reading of s 32(4) ... establishes that there are two parts to it. The first defines when it is engaged and the second outlines what must be included in the evaluation report when it is engaged.

- 33 The Court looks further into the meanings of s32(4):

[136] "Examine" is not defined in the RMA, but the Oxford English Dictionary defines it as:

Examine, v.

Transitive. To seek understanding or knowledge of (a subject, situation, etc.) through careful consideration or critical discussion; to inquire into the truth or falsehood of (a proposition, statement, etc.); to investigate, analyse, study.

[137] "Justified" is not defined in the RMA either but is also defined in the Oxford English Dictionary as:

transitive. To make good (an argument, statement, or opinion); to confirm or support by attestation or evidence; to corroborate, prove, verify. With simple object, or (less commonly) clause as object, object and infinitive, or object and complement.

[138] Importantly, the examination of whether a proposed restriction is justified must be considered in the circumstances of the region in which it is to have effect. This means that local factors, rather than

²¹ *Rayonier New Zealand Ltd v Canterbury Regional Council* [2024] NZHC 1478.

matters generally of concern at a national level or of concern in other regions or districts, must be examined. In my view, this required the panel to be satisfied that there was good reason arising from the circumstances of the Canterbury region to impose greater restrictions on plantation forest activities that have the potential to cause sediment discharges than those that appear in the NES-PF.

- 34 The Court also comments on the requirement in s32(4) to give reasons and the degree of reasoning and analysis required:

[145] I agree that the panel addressed the consequences of its decision to recommend greater stringency by expressing its view that the Council should be able to address "all matters" on a discretionary basis. But the panel failed to address whether the stringency proposed was justified in respect of the sediment discharge rule as was required by s 32(4). There is no reference to any evidence justifying greater stringency in the Canterbury region and the absence of this is, in my view, fatal. The panel could not recommend that greater stringency was justified for sediment discharges from plantation forestry in Canterbury in the absence of such evidence.

- 35 The importance of evidence, reasoning and analysis to justify a departure from the NES-CF is discussed in the following paragraphs of the High Court decision:

[166] The requirement to give reasons must, in my view, depend on the factual circumstances that present themselves to a panel such as this, because the degree of reasoning required will depend on the facts and what is being assessed. In this case, it is important to recognise that the s 32(4) requirement for stringency creates an exception to the general hierarchy attached to statutory planning documents, namely that national standards take precedence over regional rules. It is also important to recognise the background to the NES-PF which was promulgated to avoid forestry companies, such as the appellants, having to deal with different rules about the same topics throughout New Zealand.

[167] I can well understand the rationale for national standards in relation to topics such as the appropriate parameters for permissible sediment discharges to water bodies from plantation forestry activities in high erosion risk areas. The important point is that the NES-PF had already considered these matters and had provided an approach which sought to resolve the potential problem of adverse sediment discharge effects from plantation forestry activities. A national approach was considered desirable to reduce costs and to provide certainty to forestry operators.

*[168] The fact that the stringency assessment is a departure from the normal rules regarding the hierarchy of statutory planning documents means that, in my view, greater care is required to be taken by a decision-maker when assessing stringency and a more careful reasoning process is required than that which was undertaken by the panel in this case. To use the Court of Appeal's phrasing in *Belgiorno-Nettis*, the "ambit" of the panel's duty to give reasons was necessarily widened.*

[170] I have briefly considered what degree of reasoning and analysis would have been required in this case. In my view, at the very least, there should have been evidence directly relevant to the Canterbury situation, explaining why the nation-wide approach set out in the NES-PF was not sufficient to address the harm sought to be prevented by the proposed sediment discharge rules in PC7. There should have been evidence comparing the NES-PF provisions with the proposed rules. Then, if a departure from the NES-PF was in the panel's view justified, reasons as to why a different approach should be taken ought to have been set out.

- 36 The *Rayonier* decision deals with the management of forestry within the Canterbury region. However, the reasoning and approach is equally applicable to the rules regulating forestry in the Proposed Plan.

COMPARISON BETWEEN PROPOSED PLAN FORESTRY RULES AND THE NES-CF INDIGENEOUS VEGETATION CLEARANCE, EARTHWORKS AND VAL REGULATIONS

- 37 Ms Pearson's evidence includes a detailed analysis of the Proposed Plan provisions, whether the provisions have been sufficiently justified by the relevant Section 32 report, consideration of the Section 42A officer's assessment and how this relates to the relief requested by Port Blakely.²²
- 38 In summary, Ms Pearson makes the key point that the Proposed Plan fails to properly align with the NES-CF. This failure has resulted in provisions where²³:
- (a) There is no jurisdiction for the provision to be more stringent than the NES-CF;
 - (b) The Section 32 evaluation did not carry out a proper s32(4) analysis;
 - (c) A proper assessment as required by s32(1)(b) was not carried out, in that no consideration of why the Proposed Plan provisions were a more efficient and effective way to achieve the outcomes sought by Regulation 6 of the NES-CF, as compared to the equivalent provision in the NES-CF.
- 39 It is noteworthy that the Section 42A Report reaches the same or similar conclusion as Ms Pearson and recommends amendment to the Proposed Plan to address this problem.²⁴

Section 42A Report Recommendations

Indigenous vegetation clearance

- 40 Port Blakely submitted on rules ECO-R1(1) & (2), and seeks the rules be amended so they do not apply to plantation forestry activities. The Section 42A reporting officer recommends inserting an advice note underneath various rules affecting plantation forestry operations in the Ecosystems Chapter, stating that the rules do not apply to the clearance of indigenous vegetation associated with a commercial forestry activity regulated under the NES-CF.²⁵

²² Evidence of Melissa Pearson, at paragraphs 35 – 80.

²³ *Ibid.*, at paragraph 32.

²⁴ *Ibid.*, at paragraph 45. See also evidence of Melissa Pearson, at paragraph 51, 74 and 80.

²⁵ Section 42A Report: Ecosystems and Indigenous Biodiversity; Natural Character; and Natural Features and Landscapes, at paragraph 7.13.35.

41 Port Blakely supports the Section 42A Report's response.

Earthworks in riparian margins

42 Port Blakely submitted on NATC-R3, and seeks the rule is amended to permit earthworks associated with plantation forestry activities, provided they comply with the NES-CF. The Section 42A reporting officer considers the rule should not prevail over the NES-CF and recommends including a similar advice note to both NATC-R3.1 and NATC-R3.2, clarifying that the rule does not apply to the earthworks associated with a commercial forestry activity which is regulated under the NES-CF.²⁶

43 Port Blakely supports the Section 42A Report's response.

Afforestation in VALs

44 Port Blakely submitted on NFL-R7. NFL-R7 makes it a controlled activity to afforest in a VALs. Port Blakely's submission seeks that the matters of control should align with those contained in Regulation 15(4) of the NES-CF. The Section 42A reporting officer broadly agrees and recommends it is appropriate to amend NFL-R7 to align with the wording in the NES-CF.²⁷

45 Port Blakely supports the Section 42A Report's response.

Further submissions

46 Port Blakely made several further submissions in opposition to submissions made by other parties on the Ecosystems Chapter. The Director General of Conservation [166.47] submitted on ECO-R7. ECO-R7 makes the planting of certain pest species a non-complying activity. The Director General of Conservation seeks ECO-R7 is amended to include wilding conifers, given their potential for wilding spread.²⁸ Port Blakely opposed this on the grounds that the Proposed Plan should not impose stricter standards than the NES-CF, unless there is jurisdiction and justification for doing so. The Section 42A Report does not support the submission of the Director General of Conservation and stating that wilding conifers are not "planted", but self-seed

²⁶ *Ibid.*, at paragraph 8.11.26 and 8.11.28

²⁷ *Ibid.*, at paragraph 9.13.8 and at paragraph 9.13.11.

²⁸ *Ibid.*, at paragraph 7.18.4.

and that the NES-CF already manages the risks from wilding spread from commercial forestry.²⁹

47 Port Blakely supports the Section 42A Report's response.

48 Various submitters³⁰ seek a rule is inserted into the Proposed Plan to protect indigenous vegetation outside of SNAs and sensitive environments. Port Blakely opposed these submissions on the grounds that the inclusion of a rule of this nature would impose stricter standards upon plantation forestry than those contained in the NES-CF. The NES-CF already manages indigenous vegetation clearance, see Regulation 93. Furthermore, the NES-CF does not permit District Councils to impose stricter standards in the kinds of environments which this new rule seeks to manage, see Regulation 6 of the NES-CF.

49 The Section 42A Report recommends the inclusion of a new suite of amendments to protect indigenous biodiversity outside of identified SNAs.³¹ However, the reporting officer also supports the inclusion of an advice note in ECO-R1(4), clarifying that the rule does not apply to the clearance of indigenous vegetation associated with a commercial forestry activity which is regulated under the NES-CF.³²

50 Port Blakely supports this approach the Section 42A Report's response.

Conclusion

51 Port Blakely supports the Section 42A officer recommendations as they address the concerns raised by Ms Pearson, are consistent with the High Court decision in *Rayonier* and achieve the outcomes sought by Port Blakely's Submissions.

²⁹ *Ibid.*, at paragraph 7.18.7.

³⁰ Forest & Bird, Director General of Conservation, and ECan.

³¹ Section 42A Report, a paragraph 7.1.17 and at paragraph 7.1.27.

³² *Ibid.*, at Appendix 1.

BAT ROOST PROTECTION RULES IN THE PROPOSED PLAN

Rules in the Proposed Plan

- 52 The evidence of Zachary Robinson includes a detailed analysis of the Proposed Plan ECO-R4 rule. Mr Robinson discusses whether the rule aligns with expert advice about known long-tailed bat behaviour and bat habitat. Mr Robinson then considers the Section 42A officer's assessment of this rule and how this relates to the relief requested by Port Blakely.³³
- 53 In summary, Mr Robinson considers the requirement for an ecologist to carry out a specialist assessment of the tree in question as a matter of discretion is unnecessary, is not aligned with the Department of Conservation Bat Roost Protocols (**DoC Protocols**), and will result in unintended consequences where tree removal will not be notified to minimise costs.³⁴

Section 42A Report

- 54 The Section 42A reporting officer recommends amending the matters of discretion in ECO-R4 to include the use of Automatic Bat Monitors, and to allow for trees that potentially provide bat habitat to be assessed by someone who is suitably qualified and experienced in identifying bat habitat.³⁵
- 55 Mr Robinson supports the Section 42A officer recommendations as they align with the DoC Protocols and with the most current information regarding long-tailed bat habitat.³⁶
- 56 The Proposed Plan rules are unnecessary to achieve effective long-tailed bat habitat protection and will impose greater cost on Port Blakely. The rules may have perverse and unintended consequences. By comparison Mr Robinson's amended rule achieves effective long-tailed bat protection based on expert advice and is more efficient than the Proposed Plan rule because it avoids unnecessary direct costs and potential for unintended adverse consequences.

³³ Evidence of Zac Robinson, at paragraphs 40-55.

³⁴ *Ibid.*, at paragraph 45.

³⁵ Section 42A Report at paragraph 7.10.14 and 7.10.19.

³⁶ Evidence of Zac Robinson, at paragraphs 51, 53 and 55.

CONCLUSION

57 The primacy of national environmental standards can only be departed from in limited circumstances, and only where such departure is supported by a robust s32 assessment. Section 32(4) in particular performs an important function in the statutory scheme of the RMA by constraining the circumstances when local rules may prevail over national environmental standards. In this way, the primacy of the national instrument is not undermined by unjustified local rules. Overall, there is no merit in making district rules that prevail over the NES-CF without proper justification, because doing so results in inconsistency between the districts and regions of New Zealand, which is one of the problems that the NES-CF was designed to overcome.

Dated: 4 November 2024



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