NEW ZEALAND LAW SOCIETY
NZLS EST 1869

Law Society Building, 26 Waring Taylor Street, Wellington,
DX SP20202, Wellington or PO Box 5041, Lambton Quay,
Wellington 6145, New Zealand

TEL +64 4 472 7837 • FAX +64 4 473 7909
E inquiries@lawsociety.org.nz
www.lawsociety.org.nz • my.lawsociety.org.nz

10 August 2015

Stuart Miller
Spatial, Forestry and Land Management
Ministry for Primary Industries
PO Box 2526
WELLINGTON 6140

Email to: NES-PFConsultation@mpi.govt.nz

Dear Stuart

National Environmental Standard for Plantation Forestry

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the consultation document *A National Environmental Standard for Plantation Forestry* (NES-PF).

2. The Law Society acknowledges that the draft rules are intended to convey the policy intent of the proposed NES-PF and that it is likely they will be subject to significant change or refinement. The Law Society provides the following comments.

Jurisdictional issues

3. The NES-PF's draft rules are divided into eight activity-specific parts[1] and one general part. Appendix 3 of the consultation document states:[2]

> Each table is divided into several sections … Broadly, these aspects are: … the local authority responsible for this matter (that is, with jurisdiction).
>
> …
>
> The jurisdiction column indicates whether each individual permitted activity condition is a district or a regional council function.

4. There is otherwise no particular guidance about how local authority responsibility for monitoring, compliance and consenting functions is to be divided or shared. This gives rise to several issues:

   - It is unclear how each of the identified forestry activities (and their constituent permitted activity conditions) relate to sections 9 to 15 of the Resource Management Act 1991 (RMA).

---

1 Relating to: afforestation, earthworks, harvesting, mechanical land preparation, pruning and thinning to waste, forestry quarrying, replanting, and river crossings.

2 Consultation paper, at page 60.

- It is unclear which local authority (or local authorities) is to be the consent authority where permitted activity conditions are not satisfied, especially where:
  - (a) permitted activity conditions that jointly[3] or severally[4] relate to regional/district functions are not satisfied, or
  - (b) a proposal is classified as fully discretionary and all aspects/effects of the activity can be considered.
- It is consequently unclear how monitoring and compliance functions are to be allocated between regional and district councils, although it is possible that a degree of pragmatic coordination and agreement is anticipated (e.g. through triennial agreements).

5. In the Law Society's view, the terms of the NES-PF should be framed so that the appropriate consent and enforcement authorities can be clearly identified.

6. In addition, the current draft rules may result in a need for multiple consents from different consent authorities, depending on which permitted activity conditions are not satisfied. This would be inconsistent with the underlying objectives of the NES-PF of improving certainty of RMA processes and contributing to the cost-effectiveness of the resource management system.[5] While constraints are imposed through the division of functions between regional and territorial authorities under sections 30 and 31 of the RMA, the potential complexity of consenting requirements arising under the NES-PF should be carefully evaluated as the draft rules are refined.

Use of notes

7. "Notes" are used throughout the NES-PF, to inform interpretation *and* impose substantive controls. Examples of notes that fulfil the latter function are:
   - the rules for afforestation include the statement "Note: consents in Orange Zone to be non-notified";[6]
   - the rules for earthworks include the statement "Note: maintenance and upgrade of existing earthworks is permitted in all zones (including Red Zone), provided the permitted activity conditions are met".[7]

8. This is problematic, as notes in other types of planning instrument are generally regarded as being only for informational purposes. To avoid doubt, notes should not be used to impose substantive controls.

---

3 For example, in relation to the earthworks activity, jurisdiction for the "Notice of commencement" permitted activity condition is ascribed to both district and regional councils: see page 65.

4 For example, in relation to the afforestation activity, a proposal could fail to satisfy the "Wilding tree risk" permitted activity condition (a district council matter) and the "Setbacks" permitted activity condition for a wetland (a regional council matter): see pages 62 and 63.

5 At page 8.

6 At page 64.

7 At page 65.

9. There is also inconsistent use of terminology in the NES-PF. For example, some notes are identified as "advice notes"[8] whereas others are simply "notes". A consistent approach should be taken to terminology used in the NES-PF.

The relationship between forestry activity-specific rules and general conditions

10. The "general conditions" commence with the following statement:[9]

> Notwithstanding specific activity rules, all forestry activities are permitted, provided the following conditions are met …

11. The Law Society understands the intent is for "general conditions" to apply to all forestry activities *in addition to* the relevant activity-specific rules. However, as the statement above is currently worded, the general conditions effectively apply *as an alternative to* the activity-specific rules. If that is not the intention, the statement should be amended.

Permitted activity conditions

12. One of the underlying tenets of the NES-PF is that, where possible, activities should be permitted, provided robust permitted activity conditions are met.[10] Accordingly, the bulk of the draft rules deal with permitted activity conditions. The following comments focus on several aspects of those conditions: scope, certainty, management plans, and permitted baseline implications.

Scope

13. The draft rules contain several provisions that do not usually appear in permitted activity conditions. These are conditions that provide for third party or consent authority approval (or, in some cases, the exercise of discretion) as a component of a permitted activity condition. For example:

- the first "setback" condition for afforestation states that the minimum horizontal set back distance is 10m, unless approval of the adjoining owner(s) has been obtained;[11]
- the "notice of commencement" condition for earthworks states that a local authority can waive the notification requirement, or alternatively reduce this notice period at their discretion.[12]

14. There does not appear to be any case law as to whether the ability to specify permitted activity rules/conditions under an NES is broader than that otherwise arising under a regional or district plan. In the absence of relevant case law, the usual common law principles applicable to permitted activity rules and conditions under regional and district plans are also likely to apply to the same sorts of rules when imposed through an NES. The rules will serve the same function and will be subject to the same machinery provisions in the RMA (e.g. as to the significance of an activity being classified as "permitted"). There is also nothing in sections 43 to 44A of the RMA that expressly contradicts this conclusion.

---

8 See for example the "advice note" in relation to replanting at page 82.

9 At page 83.

10 See, for example, page 20 of the consultation document.

11 At page 62 (emphasis added). This is presumably a reference to approval to a smaller setback distance, although this is not explicitly stated.

12 At page 65 (emphasis added).

15. In the context of regional and district plan rules, permitted activity conditions that purport to reserve discretion to the consent authority are generally regarded as *ultra vires* and invalid. That is a result of the principle that a person should be able to determine on the face of the planning document whether or not an activity is permitted, without the activity classification being subject to discretion on the part of the consent authority.[13]

16. There does not appear to be any case law that examines whether the reservation of a similar degree of discretion to a third party *other than* the consent authority is legitimate. Acknowledging that there is some uncertainty in the absence of relevant case law, the Law Society suggests that:

    - Permitted activity conditions that purport to reserve discretion to a consent authority (which will also be the enforcement authority) are consequently likely to be *ultra vires* and invalid.
    - In contrast, permitted activity conditions that refer to approval of, or the exercise of some discretion by, a third party other than the consent authority may be valid, so long as they are sufficiently certain to enable an assessment of whether an activity is permitted or not.

17. In relation to the second point, there would be little benefit (aside perhaps from the ability to impose consent conditions) derived from a situation where:

    - an activity requires consent because of, e.g. a breach of a setback control;
    - the adjoining owner affected by the breach consents to the reduced setback and provides a written approval accordingly;
    - the effects of the breach cannot be taken into account because of the written approval; but
    - consent is nevertheless required, even though there are no relevant effects to assess.

18. The permitted activity conditions in the NES-PF that make permitted activity status contingent on adjoining owner approvals are therefore likely to be valid. They are likely to be sufficiently certain, as it will be a clear yes/no evaluation as to whether a written approval[14] exists and how that correspondingly affects the application of permitted activity conditions.

19. However, because of their untested nature the permitted activity conditions, as drafted, may provide an avenue for challenge against decisions made in relation to the NES-PF (e.g. to take no enforcement action in response to a complaint, on the basis that an activity is permitted). This risk of litigation is a matter that should be taken into account when the costs and benefits of permitted activity conditions that refer to third party approvals are considered.

---

13 See *TL & NL Bryant Holdings Limited v Marlborough District Council* [2008] NZRMA 485 (HC), at paragraph 50.

14 Which must be unqualified, on the basis of the usual case law about approvals.

Certainty

20. The Law Society considers many of the NES-PF's draft rules lack sufficient certainty.

21. The principle that a person should be able to determine on the face of the planning document whether or not an activity is permitted means that provisions within the planning document must be sufficiently certain. Permitted activity rules or conditions that require some form of evaluative judgement are often (although not always) found to offend against that principle and to be invalid. As Judge Sheppard observed in *Friends of Pelorus Estuary Incorporated v Marlborough District Council*:[15]

> There are practical disadvantages in adopting conditions requiring evaluation to determine whether or not a proposal is a permitted activity. Rules by which permitted activities are defined in such a way are regrettable, and might be questioned when the instrument is open for submissions and appeals. But they are not as a matter of law automatically invalid simply because they call for evaluation.

22. A more recent discussion of the principle appears in *Rawlings v Pilcher*,[16] where Judge Hassan found that the use of the word "dependent" in the phrase "accommodation for a dependant relative" introduced an impermissible degree of discretionary judgement, as it required a subjective evaluation of dependency. While language that requires a degree of evaluative judgement is possible, this decision (and others like it) indicates that judicial tolerance for it is low.

23. Many of the NES-PF's permitted activity conditions involve elements of subjective evaluation. For example, one of the permitted activity conditions for 'slash and debris management' from the harvesting activity is:[17]

> Whenever safe and practicable to do so, remove potentially unstable slash that has the potential to mobilise under flood flows from water bodies, and:
>
> - block or dam stream flow; or
> - divert flow into stream banks in a way that is likely to cause erosion; or
> - damage downstream infrastructure, property or receiving environments; or
> - cause significant adverse effects on aquatic habitat.

Subjective elements within this condition include:

- determining whether it is "safe and practicable" to do something;
- evaluating the meaning of "potential" and whether it is a threshold that is triggered;
- determining whether erosion is "likely" to be caused;
- evaluating whether adverse effects on aquatic habitat will be "significant".

24. The Law Society submits that these matters involve too much subjective discretion or judgement to properly be the subject of permitted activity conditions. If they are enacted in this form (or something substantially similar), there is a material risk that they will:

- be successfully challenged as being beyond the legitimate scope of permitted activities under the RMA and therefore invalid; or

---

15 EC Christchurch, C04/08, 24 January 2008, at paragraph 101.

16 [2014] NZEnvC 49 (EC).

17 At page 72.

- result in conflicting judgements between forestry operators, consent or enforcement authorities, and other interested persons that may lead to enforcement action.

This would be inconsistent with the NES-PF's objectives of improving the certainty of RMA processes and environmental outcomes.

Management plans

25. The permitted activity conditions variously provide for the preparation of erosion and sediment control plans (ESCPs), harvesting plans (HPs), and quarry management plans (QMPs). These generally need to be provided to local authorities within certain timeframes before activities start, or on request. However, there is no requirement in the NES-PF for local authority approval or certification of the plans. Similarly, there is no express ability for a local authority to compel someone to amend a plan that is deemed to be inadequate, as long as it satisfies the minimum requirements set out in the relevant permitted activity conditions.

26. A requirement for local authority approval or certification would necessitate a consent process, as (for the reasons set out above) such a process could not legally be part of a permitted activity condition. The absence of any approval/certification requirement may encourage a "minimum necessary to achieve compliance" approach. Without the need to persuade a local authority that the content of a plan is adequate, the success of this mechanism is dependent on industry goodwill or engagement in the plan creation processes.

27. If the preparation and submission of management plans is to be retained as a permitted activity condition, then the Law Society questions whether the mandatory content of the plans is described with sufficient certainty.[18] For example, the requirements for a QMP are relatively broadly framed and include matters such as: "heavy rainfall response and contingency measures" and "revegetation requirements". The condition provides for the level of detail provided in the QMP to vary according to the "scale and complexity of the operation". Forestry operators, enforcement authorities, and other interested people (such as nearby property owners) may have different views about the scale and complexity of a particular operation and the level of detail that consequently needs to be provided in a QMP. There will likely be a high degree of uncertainty about whether or not a QMP is sufficiently detailed to satisfy the permitted activity condition. Where a QMP is framed with a low level of detail, there may also be uncertainty about whether physical works constructed as part of an operation comply with the QMP or not.

28. These concerns may be mitigated by the provision of template management plans. However, these are not consistently referred to in the NES-PF. For example, there is no reference to a template in the requirements for an ESCP under the "earthworks" activity,[19] whereas the requirement for an ESCP under the "harvesting" activity does refer to the use of a "prescribed template".[20] Similarly, there is no reference to a template in relation to QMPs. A consistent approach should be taken to the use of prescribed templates across all of the different types of management plan.

---

18 At pages 66, 71 and 78.

19 At page 62.

20 At page 69.

Permitted baseline implications

29. The consultation document acknowledges concerns raised during previous consultation rounds on the relationship between permitted activities under the NES-PF and the permitted baseline in the context of other activities.[21] In particular, concern was expressed that overly lenient NES provisions might create a correspondingly broad permitted baseline that could undermine other planning controls.

30. The consultation document responds to that concern with the observation that the permitted activity conditions in the NES-PF confine the scope of permitted activities. There is also a recognition that application of the permitted baseline is discretionary at notification stage (which also applies to the substantive assessment of resource consent applications).

31. The Law Society considers that all of these points are valid. The NES-PF does have the capacity to expand the permitted baseline and decision-makers will need to pay careful attention to the permitted activity conditions and consider the discretionary nature of the permitted baseline.

32. The consequences of an expanded permitted baseline are significant and are the result of a NES that explicitly seeks to make activities permitted where possible. As the permitted baseline will apply nationwide, it is likely to alter the permitted baseline established by existing planning instruments in many regions or districts.

33. In addition, it is unclear whether the apparent breadth of some of the permitted activities created under the NES-PF is intentional. For example, the (apparently) broad scope of the "river crossings" activity is of concern. As currently described, the activity is imperfectly linked to forestry activities.[22] On its face, it applies to river crossings generally and may have a significant impact on riparian areas in a permitted baseline sense. The potential consequences of this on matters of national importance identified in section 6 of the RMA is discussed below.

Transitional arrangements and implications for existing resource consents/existing use rights

34. The consultation document indicates the NES-PF would come into force (if it proceeds) six to twelve months after being publicly notified in the *New Zealand Gazette*.[23] An indicative date of late 2016 is consequently given.

35. This timeframe for local authorities to review and adjust existing planning instruments and processes to accommodate the NES-PF is likely to be challenging. In addition to identifying and deleting plan provisions that are inconsistent with the NES-PF (other than in areas where greater plan stringency is allowed), local authorities will need to evaluate how the remaining plan rules operate and, where necessary, advance plan changes to make any consequential adjustments.

---

21 At page 100.

22 From page 88.

23 At page 44.

36. As noted below, the relationship between the NES-PF and forestry activities authorised under existing resource consents or existing use rights also needs to be considered.

The NES-PF and existing resource consents

37. Land use consents for forestry activities granted before the NES-PF is notified in the *Gazette* will prevail over the NES-PF.[24] This means that activities may continue to be carried out under existing consents (or may be commenced under an existing consent that has not lapsed), irrespective of the new controls imposed through the NES-PF. It will be a question of fact in each case what components of a forestry activity are covered by an existing consent (e.g. one consent may relate only to afforestation, whereas another may relate to afforestation, harvesting and replanting).

38. To the extent that components of an activity are not the subject of an existing resource consent, compliance with the NES-PF will be required. This may result in some unusual conflicts which will need to be addressed on a case by case basis, and this may lead to inconsistency.

The NES-PF and existing use rights

39. Where the NES-PF imposes a consent requirement for an otherwise permitted activity, sections 10 – 10B and 20A(2) of the RMA apply as though the NES-PF were a rule in a plan that has been made operative.[25]

40. Existing use rights will be preserved for forestry activities that satisfy the requirements of those provisions (as relevant). Where there is evidence of the long-term, cyclical afforestation, harvesting, and replanting of forests, the significance of this may be profound.[26] It is also not clear that the extent of these existing use rights has been factored into the cost-benefit analyses that underpin the justification for this legislative intervention.

41. Against this background, the grandfathering of existing river crossings in the draft rules[27] is unclear. It purports to establish a *de facto* existing use right regime for existing river crossings. However, the Law Society submits that right will likely exist *in addition* to rather than *in substitution* for any existing use rights preserved under the RMA. Its effectiveness is consequently doubtful.

Relationship between the proposed NES-PF and matters of national importance identified in section 6 of the RMA

42. The first stated objective of the NES-PF is to "remove unwarranted variation between councils' planning controls for plantation forestry". The second stated objective is to "improve certainty of RMA processes and outcomes for plantation forestry stakeholders **while**

---

24 RMA, section 43B(5).

25 RMA, section 43B(9).

26 On the basis of the Court of Appeal's finding in *Rodney District Council v Eyres Eco-Park Limited* [2007] NZCA 13 (CA) that existing use rights must be considered in the context of an activity's usual operational cycle, rather than a 'snapshot' taken when a new rule comes into effect.

27 At page 88.

maintaining consistency with the purpose of the RMA" (emphasis added).[28] Those objectives are not necessarily complementary.

Outstanding Natural Features and Landscapes, and Significant Natural Areas

43. There is potential for the proposed NES-PF to significantly alter the interpretation and application of existing regional and district plan provisions relating to matters identified in section 6 of the RMA as being of national importance. This is particularly an issue in respect of outstanding natural features and landscapes (ONFL), and significant indigenous vegetation and significant habitats of indigenous fauna (collectively known as significant natural areas or SNAs), which sections 6(b) and (c) of the RMA require to be recognised and protected as matters of national importance in giving effect to the sustainable management purpose of the Act. The NES-PF provides for forestry related activities such as ground preparation, and plantation forestry planting, which in many districts or regions will be subject to regional or district rules designed to protect ONFL and SNAs. Development of such rules, and the criteria for (or maps) identifying ONFL or SNAs often involve substantive legal process, including appeals to the Environment Court and beyond. Collaborative processes are also utilised extensively, and the outcomes frequently reflect significant community and stakeholder interests.

44. Care is required to ensure that the NES-PF does not have the effect of inadvertently undermining this significant investment by communities, councils and the courts, in developing plan provisions to give effect to the requirements of section 6 to recognise and provide for the protection of SNAs and ONFL. Such an outcome would be inefficient, in terms of the substantial investment made by communities in existing plan provisions, and could lead to litigation.

Impact of different approaches to the control of permitted activities on ONFL and SNAs

45. In the context of land use activities, the Law Society is aware that district or city councils often take different approaches to the control of permitted activities. Some councils (such as Queenstown Lakes District Council) follow the presumption inherent in section 9 of the RMA: activities are permitted unless a rule says otherwise. A council that takes this structural approach in its district plan will logically impose specific rules where necessary to protect the matters described in section 6(b) and 6(c) of the RMA. This may or may not be accompanied by mapping or other means of identifying, for example, ONFL or SNAs.

46. Other councils (such as Dunedin City Council) effectively reverse the section 9 presumption by including a catch-all rule that defaults all activities to a particular activity classification (usually discretionary or non-complying) unless specifically provided for as a permitted activity. Councils that take this approach are less likely to have rules that clearly address section 6(b) or 6(c) matters, as those interests are protected by the blanket requirement for resource consent for activities not specifically identified as permitted. The Law Society understands that the provisions of the NES-PF are intended to apply in relation to the forestry related activities identified in the NES-PF, but that councils may impose more stringent requirements in relation

[28] Consultation document, p8.

to these activities in respect of ONFL or SNA areas that are **identified in their plans** (emphasis added).

47. The Law Society interprets the phrase "identified in plans", as meaning "mapped", as mapping will be explicitly required in relation to at least SNAs. However, many councils that take the second approach to the control of permitted activities have not mapped ONFL or SNAs in their plans. As stated above, many councils list criteria in their plans for identifying ONFL or SNAs on a case by case basis, rather than comprehensively surveying all ONFL or SNAs. In addition, some plans adopt a mix of both approaches, mapping some ONFL and/or SNAs in the district/region, but also including criteria for identification of others that may not have been mapped.

48. The NES-PF's requirement for ONFL and SNAs to be identified or mapped before more stringent criteria can be provided is likely to have particularly significant implications for planning instruments that take the second approach. They are likely to lack the degree of focus anticipated by the NES-PF's provisions that describe the ways in which plan rules can be more stringent than the NES-PF. This will likely lead to inconsistencies in how the NES-PF is applied to ONFL and SNAs around the country, contrary to the objective of the NES-PF to remove unwarranted variation.

49. Where councils have not mapped ONFL or SNAs, there may be no ability to apply more stringent criteria to protect ONFL and SNAs from the adverse effects of plantation forestry activities. This will likely lead to conflict between the provisions of the NES-PF, and the requirements of section 6 of the RMA, in respect of the protection of ONFL and SNAs as matters of national importance.

50. In addition, the NES-PF provides that where ONFL or SNAs are mapped, councils *may* impose more stringent requirements. The Law Society understands, therefore, that councils will not be obliged to do so, even if existing rules in district or regional plans currently provide more stringent requirements in respect of protection of ONFL or SNAs, than are proposed under the NES-PF.

51. As noted earlier, many existing ONFL and SNA provisions in plans have been developed through lengthy legal processes. These processes may be collaborative, or they may be contested. In some instances, the Court has found a council's proposed plan provisions to be lacking, and directed councils to make amendments to give better effect to the Act's requirements.

52. The Law Society is concerned that the approach in the proposed NES-PF of leaving the making of more stringent rules in respect of identified ONFL or SNAs at the discretion of a council, may have the effect of enabling councils to avoid existing, settled rules to protect ONFL and SNA.

Potential conflicts between the NES-PF and other section 6 matters

53. Section 6(a) of the RMA requires the preservation of (inter alia) wetlands, and their protection from inappropriate development, as a matter of national importance. The proposed NES-PF places emphasis on the National Policy Statement for Freshwater Management (NPS-FM) as a

means of ensuring that implementation of the NES-PF will not adversely affect wetlands. However, at present the NPS-FM is largely silent in respect of wetlands, providing objectives and attributes for rivers and lakes only (although it is understood this omission will be addressed in future).

54. Unless the relationship between the NES-PF and section 6 matters is clearly and unambiguously defined, there is also a real risk that the implications could go well beyond the forestry sector. If the NES-PF establishes permitted forestry related activities within ONFL, SNAs (whether or not they have been mapped in district or regional plans), wetlands or other areas which are subject to existing rules in plans designed to recognise and provide for section 6 matters of national importance, then it is likely that this will be cited as a permitted baseline against which a range of other, non-forestry related activities, should be assessed. Land clearance, earthworks and even some structures could be argued to be analogous to the effects of plantation forestry related activities. Again, there is the potential for the NES-PF to undermine existing rules, create uncertainty, and lead to litigation. That risk will be heightened where highly valued natural environments may be affected.

55. One possible solution to avoiding the potential conflict between the NES-PF and the requirements of section 6 would be to state expressly within the NES-PF that the provisions of the NES-PF do not have the effect of overriding existing rules in a district or regional plan which are more stringent and which protect areas of significant indigenous vegetation, significant habitats of indigenous fauna, or outstanding natural features or landscapes. From a drafting perspective, section 86B(3) RMA is noted in this respect.

56. This approach would be consistent with the rationale expressed in the consultation document[29] that setting levels for clearance and conversion of valuable indigenous vegetation which has not been specifically classified as "significant" in plans, is most appropriately determined at a local level. This is because values, including habitat values, vary from case to case; and setbacks from significant wetlands, rivers or lakes will be established at council level, because the appropriate distance will depend on the water body in question.

Genetically modified tree stock

57. The NES-PF rules state that afforestation utilising genetically modified tree stock is a permitted activity where that tree stock has gained the appropriate approval for deployment from the Environmental Protection Authority (EPA), and is subject to conditions imposed by the EPA.[30]

58. This submission does not address the merits of genetically modified organisms (GMO) generally or their use in plantation forestry in particular. It is also acknowledged that it is within the Minister of Primary Industry's remit to take a view that there are benefits to the utilisation of genetically modified tree stock that justifies their use, subject to evaluating whether the proposal is the most appropriate way of achieving sustainable management under section 32 of the RMA.

---

29 At pages 98 and 99.

30 At page 64.

59. The Law Society's comments focus on the utilisation of the EPA decisions as the "gatekeeper" for regulation under the RMA. This issue is similar to that addressed by the Environment Court in *Federated Farmers of New Zealand v Northland Regional Council* [2015] NZEnvC 89. We appreciate this decision is the subject of an extant appeal, but consider it appropriate to highlight the Environment Court's analysis in relation to the following:

- The Court's analysis of the HSNO and RMA regimes led it to the conclusion that the regimes have different functions. In the case of the Hazardous Substances and New Organisms Act 1996 (HSNOA), the regulatory scope is limited to the introduction and/or release from containment of new organisms to New Zealand (including GMO).[31] By contrast, the RMA is concerned with subsequent decisions about the use and protection of GMOs, along with other resources, to meet the purposes of that Act.[32] It is this latter subject that the EPA is not called upon to address in the exercise of its statutory functions under the HSNOA. The EPA's decision will therefore not necessarily be an appropriate proxy for RMA decision-making.
- The Court's analysis recognises that RMA decision-making has a wider scope and reach than that under the HSNOA. In particular, the Environment Court recognised that there may be particular communities that have special sensitivity in relation to cultural or economic concerns. Such concerns may point to a different regulatory response to GMO being appropriate for that community.[33] One example of an issue which might fall to be addressed is the potential for GMO pollen drift to have a negative impact on communities that have established an economic base around GMO-free food production. While these matters may not be relevant to the HSNOA statutory regime, there is obvious scope for them to be relevant at a regional or district level under the RMA.

60. The Ministers for Primary Industries and the Environment may well be aware of these issues and have taken them into account in preparing the proposed NES-PF. But a careful analysis of the differences between the HSNO and RMA regimes is not articulated in the consultation draft. Nor is it clear how the conclusion has been reached that there is no warrant for regional or local decisions to be made on the use of GMO tree stock in RMA plans.

61. The Law Society supports the Executive Summary statement that councils should take into account local environmental conditions and community priorities when setting planning rules. However, the NES-PF does not make provision for more stringent rules to be made about the use of GMO tree stock at the regional or district level. Regulating the use of GMO tree stock in plantation forestry is an example where local variation might be desirable.

62. The Law Society makes a final point in relation to restricted discretionary activities under the NES-PF. If the GMO permitted activity condition is not satisfied (because of non-compliance with conditions imposed by the EPA), the use of GMO tree stock then becomes a restricted discretionary activity – but GMO-related issues are not included in the matters over which a consent authority has restricted discretion. There is also no "catch-all" discretionary activity

---

31 See paragraph 45 of *Federated Farmers.*

32 See paragraph 49 of *Federated Farmers*.

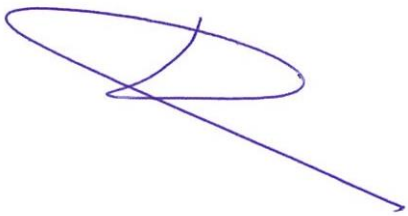
33 See paragraph 51 ibid, and the High Court's decision *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 at 243.

classification provided for under the “afforestation” activity. As the NES-PF is currently drafted, therefore, the use of GMO tree stock in breach of conditions imposed by the EPA becomes a restricted discretionary activity, but the breach is not a matter that can be considered by the consent authority. (As drafted, the authority’s discretion would be confined to wilding risks, setbacks, and erosion risk). The matters over which discretion is restricted should be expanded, to address this gap.

Conclusion

63. This submission was prepared by the Law Society’s Environmental Law Committee. The committee convenor, Phil Page, can be contacted through the committee secretary, Karen Yates on 04 463 2962, karen.yates@lawsociety.org.nz.

Yours sincerely



Mark Wilton
Vice President