

Submission

The Resource Management (Consenting and Other System Changes) Amendment Bill

Submission to:

The Environment Select Committee

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10 February 2025

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PART A

Introduction

The New Zealand Forest Owners Association Incorporated (FOA) and the New Zealand Farm Forestry Association (FFA) welcome the opportunity to make submissions on the Resource Management (Consenting and Other System Changes) Amendment Bill. Continuing reform of New Zealand's key environmental legislation is of critical importance to the forest industry.

The submitters

The New Zealand Forest Owners Association Incorporated (FOA) is the representative membership body for the commercial plantation forest growing industry. FOA members are responsible for the management of approximately 1.2 million hectares of Aotearoa New Zealand's plantation forests and over 70% of the annual harvest.

The New Zealand Farm Forestry Association (FFA) represents people who own small-scale private forests and/or are interested in the many values of trees. Currently we have over 1200 members representing a good cross-section of the approximately 15,000 entities owning private forests in Aotearoa New Zealand. Small forest owners represent more than 96% of the participants in the New Zealand Emissions Trading Scheme.

In 2023, the forest growing sector was worth \$6.6 billion in export value and has a 12% share of rural land use. It contributes 1.6% of New Zealand's GDP and employs between 35,000 and 40,000 people in wood production, processing, and the commercial sector.

Overview comments

Part A of these submissions sets out overarching issues of significant strategic importance to forestry interests. Part B is a table addressing specific clauses of the Bills.

General support

We support the broad intent of the bill to drive economic growth and increase productivity.¹ We understand that the bill is designed as a precursor to full replacement of the Resource Management Act (RMA) but proposes immediate amendments to create efficiencies in the short-term. Our submissions address the key matters of interest to forest owners and specific proposals where amendments are considered desirable.

Support for changes to further information requests

FOA and FFA members have many years of experience in submitting on plans, participating in hearings, mediations and regulation development. FOA and FFA members are regular applicants and submitters on resource consent applications.

Overall, we support the majority of the proposed changes to processing, particularly in relation to s92 requests which have developed a general reputation for being pedantic, onerous and most importantly, unlikely to improve consenting outcomes, while elongating processing times.

However, we have reservations about amendments to the need to hold hearings. With the majority of applications processed on non-notified or limited notified basis, proposals to limit public participation by reducing the need for hearings have the potential to further undermine the principle of public participation. In our members' experience the opportunity for third parties to produce evidence about a proposal is an important foundation of determining the conditions of a consent. We propose a middle ground which ensures an opportunity for submitters to provide evidence within a reasonable timeframe, after which the consent authority can determine whether a hearing is necessary.

Making wood processing consents more efficient is generally supported

Forest owners recognise that opportunities to facilitate wood processing activities in New Zealand will add value to the forestry industry. As such, FOA and FFA members generally support amendments designed to make wood processing consents more efficient, though we defer to the experience of the wood processors in relation to the nature of the amendments and whether those are likely to result in measurable improvements.

Restricting land use has implications for property rights

The proposal to decline land use applications where there are significant risks associated with natural hazards raises more questions than it does answers and we are concerned about the unforeseen use of these provisions to address forestry operations. We understand that the recent spate of floods has generated issues regarding the use of land in flood prone areas and has triggered the proposed amendment to restrict land use based on "significant risk" associated with future natural hazards. We note that the Regulatory Impact Statement (RIS) refers to residential developments.

1. Speech by the Rt Hon Chris Bishop introducing the Bill to the House.

In light of the broad definition of “natural hazard” which includes wind and sediment, as an industry we are significantly concerned that this provision could be broadly applied to forestry activities, including harvesting or afforestation. Concerningly, despite these amendments having the potential to undermine existing property rights without compensation the assessment process fails to recognise the potential for any injurious effect on land. The provisions reverse the presumption that if property rights are to be amended, clarity and certainty is required.

In the third parliamentary reading on the Resource Management Bill, the Hon Simon Upton, then Minister for the Environment said:

“Current law presumes that one can use land only in accordance with the provisions of the Law. Clause 7 [now s 9] intentionally reverses that presumption. That was a very important reversal that the authors of the Bill made right at the outset — that is, people can use their land for any purpose they like. The law should restrain the intentions of private land-users only for clear reasons and through the use of tightly targeted controls that have minimum side effects.”²

There appears to have been a lack of consideration about how the amendment will intersect with the National Environmental Standards for Commercial Forestry (the NES-CF). We stress that careful attention is required as to the potential implications of this amendment on the forest industry and whether this could (inadvertently) undermine the bill’s purposes by creating uncertainty of investment.

Enhanced ability to have regard to “non-compliance” should be deferred to the Phase 3 reforms

Various provisions of the Bill address increased options for managing non-compliance issues. Given that these provisions are not targeting growth constraints, we consider that the majority require more detailed consideration and should be deferred to the phase 3 reforms.

Our overarching concern is that some of these changes are potentially punitive and retrospective, with the potential for resource consents to be reviewed or modified based on historical actions and / or consideration of small-scale fines issued via infringement notices. While some of these concerns are readily remediable, we consider that fuller consideration of the approach to enforcement anticipated by the phase 3 reforms is appropriate for all aspects of the amendments to address compliance issues.

Transitional provisions and additional amendments

In part B we identify several transitional provisions which require amendment to ensure that the provisions of the bill do not offend against the presumption that legislation should not be applied retrospectively to the actions of parties. We also identify some minor amendments to improve the day to day working of the bill in relation to minor amendments to resource consents and a change to the abatement notice provisions to clarify a legal issue.

2. Cited in *Infinity Investment Group Holdings Ltd v Canterbury Regional Council*, [2017] NZEnvC 35, [2017] NZRMA 479, 2017 WL 1104559

Submissions on specific clauses of the Bills are set out in Part B below.

PART B

Clause No	Section No	Topic	Issues	Recommendations (if any)
Amendments to Part 1 of Principal Act				
4	2	Definition of “wood processing activity”	A new definition for wood processing activity is relevant to the provisions relating to consenting processing. The inclusion of the new definition is supported but to be effective needs to include associated ancillary activities integral to wood processing operations such as wastewater treatment systems and debarking activities.	Expand the definition to refer to ancillary operations.
Amendments to Part 4 of Principal Act				
10	36	Administrative Charges New clauses 36 (1)(caaa), (caab) and (caac)	<p><u>Cost recovery for compliance investigation</u></p> <p>It is not clear from the RIS whether the problem identified regarding recovery of costs for compliance investigations is limited to permitted activities or extends to resource consents. We note that our experience is that any investigations associated with compliance of a resource consent are already addressed as part of the monitoring function already provided for in s36 (1)(c).</p> <p>Notwithstanding, to the extent that the proposed reform is intended to address permitted activities, and / or activities operating under the auspices of a consent, FOA / FFA are concerned that the ability to obtain cost recovery for investigations under cl 36(1)(caab) will incentivise “fishing expeditions” and result in unplanned costs for businesses. The proposal is to provide that the regulator “may” require a person to pay any reasonable costs incurred by the regulator in, investigating whether there has been a contravention of the Act.</p> <p>The RIS states that cost recovery is recommended so that those causing the need for an activity by the Council contribute most towards its cost.³ However, the RIS also acknowledges that “Cost recovery is not appropriate in all situations, for example, it would not be appropriate for RMA regulators to recover the cost of investigation where the investigation revealed that no offence had been committed, or the party subject to that investigation was not responsible for the offending.⁴</p>	<p>Avoid cost recovery for compliance monitoring unless charges are successfully brought for an offence.</p> <p>Ensure that “double dipping” is avoided through the use of targeted rates in conjunction with the ability to recover costs under the RMA.</p>

3. see RIS at [69].

4. See RIS at [78]

Clause No	Section No	Topic	Issues	Recommendations (if any)
			<p>Reasonable costs would include the costs of investigation, supervision, and monitoring of the adverse effect on the environment, and the costs of any actions required to avoid, minimise, or remedy the adverse effect.</p> <p>The RIS appears to suggest use of the annual and long term plans to define when it would be “reasonable” to impose costs. FOA / FFA are concerned that these processes are cumbersome, difficult to challenge and participation imposes significant time and resource costs on businesses. Members advise that they are unlikely to be allocated more than 5 minutes to provide information on any submission they lodge.</p> <p>FOA / FFA do not agree that extending the ability to cost recover to investigations of non-compliance is consistent with the polluter pays principle in situations where there is no “pollution” or breach or that it is appropriate to rely on the Council’s unfettered discretion to enforce reasonable costs.</p> <p>Rather than rely on the annual and long term plan process, to clarify that it would not be appropriate for RMA regulators to recover the cost of investigation where the investigation revealed that no offence had been committed, or the party subject to that investigation was not responsible for the offending, FOA / FFA proposes that the legislation provides for cost recovery of investigations only where a non-compliance by the entity or person undertaking the activity can be proven.</p> <p><u>Permitted Activity Charges</u></p> <p>In the forestry sector reg 106 of the NES-CF already provides for cost recovery associated with monitoring some forestry activities that are permitted.</p> <p>The NES Freshwater 2020 which regulates farming activities includes a similar mechanism for charging for the monitoring of those activities permitted by the regulations (reg 75).</p> <p>The RIS appears to establish only that the issue is associated with cost recovery relating to some permitted activities, without specifying which activities. It is not clear that from the RIS that there is a regulatory issue arising that should be addressed.</p> <p>Under the Local Government Act 2002 councils can apply targeted rates for the monitoring of permitted activities on a specific group or area. FOA / FFA are concerned about examples of double dipping, (i.e. targeted rates and permitted activity charges being applied to cover the same activities). This occurs in the Waikato Region where targeted rates are applied to permitted activities in rural areas over a certain hectareage, in addition to charging for permitted activities.</p>	

Clause No	Section No	Topic	Issues	Recommendations (if any)
11	37	Power of waiver and extension of time limits	<p>This provision provides that a consent authority must not extend, under subsection (1)(a), the time period for processing and deciding an application for a resource consent for a wood processing activity or specified energy activity.</p> <p>The intent of this provision is generally supported subject to the ability for the applicant to determine whether the timeframes can be increased.</p>	
Amendments to Part 6 of Principal Act				
27	87A	Classes of activities	Cross reference comments on s106A.	
28	88	Making an application	FOA/ FFA generally support provisions designed to increase the efficiency of consenting processes.	
29	88BA	Wood processing activities	<p>This section provides that certain consents, including consents for wood processing activities must be processed and decided no later than 1 year after lodgement</p> <p>FOA / FFA generally support provisions that facilitate operation of the wood processing industry; however it considers that option 3B is generally preferable as it allows for timeframes to be extended if requested or agreed by the applicant. Where the entities listed in ss 88BA(3) wish to defer processing consideration of delay is a matter (and any associated risk of not delaying) is most appropriately managed by the applicant.</p> <p>We are concerned about the potential for renewal consents to be adversely affected by the maximum processing timeframe of two years, if that could lead to applications losing protection under s124 of the Act.</p>	<p>Delete s88BA(3)</p> <p>Amend s124 to ensure renewal applications are not penalised.</p>
30	92	Further information, or agreement may be requested	<p>This section requires a consent authority to apply additional considerations to the need for further information before making a request.</p> <p>Further information requests are a significant impediment in the processing of consents. We agree with the matters identified by the wood processing sector in para 64 of the RIS.</p> <p>The use of external consultants for consenting not only creates a situation where those reviewing the application may have no experience with the situation for which consent is sought but also an incentive to add cost to the process.</p>	Retain the proposals.

Clause No	Section No	Topic	Issues	Recommendations (if any)
			<p>FOA / FFA agree that efficiency gains could be made by limiting councils' ability to request information to situations where the information is essential to make a decision.⁵ While we agree that the proposed tests will be a largely subjective assessment, the rigour required by the test will impose an additional discipline on the council to the processing of such questions, without simply passing them on.</p> <p>There is a risk that different standards will be applied to the tests by different councils but good practice guidance could mitigate this.</p>	
34	100	Consent authority must not hold hearing unless it determines further information needed	<p>FOA / FFA members may apply for consents or submit on applications made by third parties. A balance needs to be struck between efficient processing and public participation that improves consenting outcomes.</p> <p>The RIS notes that currently councils are required to hold a hearing if an applicant or submitters requests to be heard, "even if there is already sufficient information to make a decision."</p> <p>Elsewhere the RIS notes that most applications are not notified so hearings are not held, unless at the applicant's request. As such, it is not clear whether there is a significant problem that requires redress.</p> <p>Whether there is already sufficient information to make a decision overlooks the role that submitters can have in ensuring consent conditions are crafted to address the externalities of resource use. It also overlooks the role that hearings can play in providing a social licence.</p> <p>FOA / FFA are concerned that without hearings it may be difficult for a consent authority to understand whether there is additional evidence that needs to be heard that may affect either the grant of consent or specific conditions of consent.</p> <p>The proposals are unclear about when and how submitters would be able to provide evidence. This is an aspect could be improved to ensure that submitters have the opportunity to make submissions and subsequently file evidence within a reasonable timeframe, noting that any requirement to include evidence with primary or secondary submissions is unrealistic, will result in compromised planning outcomes and is a barrier to public participation.</p>	<p>Amend the provisions to allow applicants to request a hearing.</p> <p>Make provision for a reasonable timetable for the exchange of evidence from submitters prior to consideration of whether there is sufficient information to determine whether a hearing is required.</p>
36	104	Consideration of applications	<p>There are several provisions relating to non-compliance. These include the ability to:</p> <ol style="list-style-type: none"> a. consider non-compliance history, irrespective of the nature of prior offending. 	Defer the consideration of compliance issues until the Stage 3

5. See RIS [107]

Clause No	Section No	Topic	Issues	Recommendations (if any)
			<p>b. decline a resource consent application on the basis of previous non-compliance.</p> <p>c. review a consent based on non-compliance.</p> <p>d. apply to the Court to revoke or suspend a consent on the basis of a poor compliance history.</p> <p>FOA / FFA consider that large entities may be unreasonably penalised by the considerations relating to prior enforcement action. The concept of being declined a consent because the company may not comply, judged on whether or not it has received, for example, an abatement notice somewhere in New Zealand and somewhere in the past, is unjust. The proposals in effect impose a further penalty over and above the enforcement penalties provided by the legislation.</p> <p>For example, the ability to consider prior non-compliance when granting a consent is inconsistent with other related legislation such as the Health and Safety at Work Act. Non-compliance with this Act does not impose further penalty with regard to continuing to operate.</p> <p>As considerations about prior behaviour are already currently taken into account in terms of the management of monitoring conditions, it is not clear how this clause will be applied and what the implications are for the reasonable use of land.</p> <p>The check and balance on repeat offenders is found within the enforcement process itself. MfE provides guidance to councils on how to provide for a fair and just enforcement system. In July 2018 it produced its "Best Practice Guidelines for compliance, monitoring and enforcement under the Resource Management Act". In accordance with the guidelines Councils have developed policies on compliance which involve risk assessment with non-compliance. The practical result of this is that any risk of non-compliance can be dealt with by more monitoring, (paid for by the person / entity undertaking the activity).</p> <p>As such, the most appropriate way to manage potential non-compliance is through monitoring conditions, as provided for under the RMA.</p> <p>For FOA and FFA, the key issue arising from the drafting of these provisions is the lack of definition of "non-compliance". New s104(2EA) refers to matters the council may consider as part of a resource consent application with such matters including infringement notices.</p> <p>An infringement notice is a written notice accompanied by a fee, which informs a person that an offence has been committed under the RMA. The purpose of infringement fees is to deter conduct that is of relatively low seriousness and that does not justify the full imposition of the criminal law. No criminal convictions can be imposed through infringement notices.⁶ Although best practice requires an assessment of whether the information is sufficient so as to be satisfied that an offence has been committed, the tests may not be consistently applied. The practical reality is that</p>	<p>reforms are introduced so that there is a clear package of reforms.</p> <p>Delete the words "infringement notices" from new section 104(2EA).</p> <p>Define non-compliance and exclude infringement notices from any definition.</p> <p>Ensure that any consideration of non-compliance is not retrospective.</p>

Clause No	Section No	Topic	Issues	Recommendations (if any)
			<ul style="list-style-type: none"> ▪ There is no definition of significant risk. For example, could harvesting of forests or afforestation in areas deemed susceptible to shallow landslides in Gisborne or prone to erosion in Wairoa be declined land use consents? ▪ The section is fundamentally inconsistent with the NES-CF; ▪ The relationship with the NES-CF is unclear. Note regulations 5(4) and (5); and ▪ The assessment fails to acknowledge any injurious effect on land such as the ability to make reasonable use of land. <p>There is no requirement to map areas or include policies relating to the “significant risk”. The section overrides the matters for discretion or control applied to controlled or restricted discretionary activities under the NES-CF.</p> <p>The RIS signals that there is a gap that currently prevents decision makers from considering natural hazards where there is no discretion to do so.</p> <p>In FOA / FFA’s view the costs of the proposal have not been accurately quantified. While it is acknowledged that residential developments, for example in flood zones have identified a legislative gap following recent events, at least some of the issues to be addressed by the amendments are already able to be addressed through the subdivision provisions of the RMA.</p> <p>In the meantime, we consider that the appropriate next step is for plans to spatially map and identify locations where there is deemed to be “significant risk”. Otherwise, the broad definition of “natural hazard” means that this provision applies well beyond areas that are susceptible to flooding or coastal erosion.</p> <p>If flooding and coastal erosion are the key drivers of this policy, then s106A and associated amendments should relate to those issues on an interim basis until spatial planning fills the gap in the manner anticipated.</p>	
38	New 107G	Review of draft conditions of consent	This is a positive change which reflects current best practice.	Retain s107G.
Amendments to Part 12 of Principal Act				
59	New 314A	Environment Court may revoke or suspend resource consent	While FOA / FFA are not necessarily opposed to allowing the Environment Court to revoke or suspend a resource consent for significant or repeated non-compliance on application by the local authority or EPA, the term “non-compliance” must be more clearly defined for the reasons outlined above. We note that wording used in new clause 104(6A) (relating to the consent authority’s ability to decline a consent) has greater clarity and certainty, and propose that it is replicated in new	Amend s314A(1) Limit the ability of the Court to revoke or suspend a consent to significant or repeated non-compliance with a requirement under the Act that

Clause No	Section No	Topic	Issues	Recommendations (if any)
		(for non-compliance)	s 314A. It is not appropriate for a council to take steps to revoke or suspend a consent unless it has itself taken successful enforcement proceedings.	has been or is the subject of an enforcement order or conviction under the Act.
64	331aa	Emergency Response Regulations	FOA / FFA support the proposals to provide enabling provisions for regulations. The Severe Weather Emergency Legislation Act 2023 has indicated the need for such provisions. Rather than separate statutes after any emergency it is considered appropriate to provide enabling provisions by way of regulation. While some of the time limits for consultation are brief, they are adequate in times of emergency.	Retain the proposal for emergency response regulations.
New Part 8 of Schedule 12 – Transitional, savings and related provisions				
52	128	Amendments to s128	Clause 52 of schedule 8 provides that consent conditions may be applied to a consent granted before, on or after commencement of the Act but only in relation to a contravention of a condition of consent that occurred after commencement. There is no similar set of transitional provisions applying to those provisions of the Bill that otherwise deal with contraventions of consent conditions or non-compliances, with the inference that such actions that occur prior to the Bill may be considered for the purpose of, for example, revoking a consent condition. This offends against the principle against retrospectivity as outlined in the Legislation Guidelines, including that the legislation will punish a person or impose a burden or an obligation in respect of past conduct. It is not clear whether the relevant provisions of the Legislation Act 2019 apply or have been considered.	Consider transitional provisions in relation to non-compliance and ensure that the legislation does not have direct retrospective effect.
Additional amendments for consideration				
		Change or cancellation of consent condition	FOA / FFA propose an amendment to the bill to allow minor amendments to existing consents to correct errors or to reflect changes in circumstance. With complex consents, over time it is sometimes necessary to modify consent conditions to address minor issues, for example wording changes necessary to ensure clarity or a practical change in operating conditions (with no associated effects). Where these changes are minor and have no or reduced effects the process to change the wording can be unnecessarily cumbersome and inefficient. It would avoid significant cost if there was a clause which allowed for such changes to be	Amend the bill to allow for changes to be made by the consent authority where the change is minor and there are no or reduced effects associated with the change.

Clause No	Section No	Topic	Issues	Recommendations (if any)
			<p>processed by the Council at their discretion provided the tests of minor and no change and / or reduced effects were included.</p> <p>Such amendments would ensure greater processing efficiency and reduced costs to consent holders.</p>	
		Abatement notices	<p>An issue arises with respect to the management of abatement notices, particularly those that lack merit or are defective. In such situations although the consent holder can apply to cancel the notice or otherwise may appeal, there is no provision for the authority to withdraw the application. This leaves the potential for abatement notices to stay on a consent holders file and is a matter to which regard is had under s223((1)(f). Caselaw has also established that an application for a cancellation of a consent order can be appealed. Confusion regarding this issue is outlined in relation to RMA s325(3D) in the Westlaw commentary. For example, see <i>Wanaka Marina Ltd v Queenstown Lakes DC C049/92(PT)</i> and <i>Aokautere Land Holdings Ltd v Manawatu Wanganui Regional Council [2021] NZEnvC 199</i>.</p> <p>This is an opportunity to clarify that a defective notice can be withdrawn and, if necessary, reissued to correct the defect.</p>	Amend the Bill to allow for withdrawal of a defective notice.

CONCLUSION

Thank you for the opportunity to submit on these important issues. FOA / FFA wishes to be heard on this submission. We consent to our submission being public.



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