

NES-PF – Landowner Guidance

You have a forest on your land and are entering an agreement for another person or company to harvest the trees.

When considering which company to go with, as well as considering the commercial elements of your agreement, you should also consider the environmental outcomes and potential liabilities that you will inherit during the works and when the harvesting is complete.

The NES-PF

The Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 (NES-PF) sets out permitted activity requirements and a consenting framework for a range of forestry activities, including harvesting, earthworks, replanting, converting land into plantation forest for the first time (afforestation), river crossings and slash traps. The NES-PF applies to any forest of at least one hectare that has been planted specifically for commercial purposes and will be harvested. This means the Regulations do not apply to, for example, trees grown for fruit, nut crops, shelter belts or nurseries.

A number of forestry activities can be carried out as permitted activities (i.e. without consent) where certain requirements specified in the relevant NES-PF Regulations have been met. When the permitted activity Regulations cannot be met, a resource consent is required. As an example, a resource consent is required for harvesting when the harvesting will occur on highly erosion prone land, which is land that is defined as ‘red’ under the MPI Erosion Susceptibility Classification (ESC) tool.

A resource consent will include conditions that require the consent holder to undertake specified actions or seek to avoid, remedy or mitigate negative environmental effects. For example, a consent might require that slash is removed from high risk areas so that there is less chance it will fall into water bodies. Another condition might require slash to be placed on stable ground and require the management of water from storm events so that it does not undermine slash storage piles and make them more likely to collapse. Or if a slash trap is built, it must be inspected and accumulated debris removed following major rainfall events, and be maintained throughout its life.

Resource consents under NES-PF

Any person or legal entity can apply for and hold a resource consent. This means that, where a consent is required, either the landowner or the contractor may apply for a consent. If the landowner holds the consent, the harvesting and earthworks contractors can operate under these consents with the permission of the consent holder¹, and all will need to comply with the conditions of the consents. Alternatively, the forest manager or contractor may hold the consents. Where the landowner is not the applicant for a consent, their written approval for the proposed activity should be provided with the application.

¹ Section 3A RMA

Consents for forestry activities under the NES-PF are typically land use consents (e.g. for harvesting, replanting and earthworks). Most land use consents attach to the land and do not need to be transferred to a property's new owner or occupier. However, some resource consents (e.g. discharge permits and consents for the use of the beds of lakes or rivers) do not attach to the land and should be transferred if a property is sold. You should check the type of consents you hold, to be sure about whether they attach to the land or need to be transferred. If in doubt, please ask the Council.

If a consent is no longer needed or wanted, it may be surrendered in part or in whole by the consent holder. Acceptance of the surrender is at the Council's discretion, and may not be allowed in some circumstances. If it is surrendered, it will not absolve responsibility for any prior non-compliance with consent conditions. A person could also still be required to complete works that are necessary to meet the consent (for example, rehabilitation of landings or tracks). Some consents will have ongoing requirements and will need to stay in place after harvesting is completed. For example, a consent can be required for the ongoing use of river crossings and slash traps. There should be a clear agreement between the parties on who retains responsibility for these consents and their ongoing requirements. This should be made clear to the Regional Council through up-to-date contacts and transfer of consents where appropriate.

Understanding the obligations imposed by your resource consent, and/or permitted activity regulations will be important so you can be clear when engaging a contractor about who will undertake any relevant actions to ensure those obligations are complied with on an ongoing basis.

Liability under the RMA

Offences under the Resource Management Act 1991 (RMA) include using land or water, or discharging contaminants into air or water, in a way that is not allowed by a plan, resource consent or other regulation such as the NES-PF. A good example in a forestry context would be allowing slash to enter a waterbody (even if this occurred years after the slash pile was made).

As the landowner you may be held liable for the acts undertaken by those who you have employed or contracted to carry out work. Under the RMA you could be prosecuted for "permitting" the offence to occur, or by being vicariously liable for the actions of your employees or contractors.

A landowner could be found to 'permit' a breach of the RMA if they did not do enough to prevent an incident. So, for example, if an owner knew that a forest harvest contractor was operating on their property in a manner that was causing a significant sediment discharge to a river, and did not do everything they reasonably could to solve the problem, they may themselves be liable for that offence.

A landowner may be held responsible for the acts of their employees or contractors and those acting on behalf of the owner, if they should have known that the offence may occur.

It is expected that a landowner will do everything reasonably possible to ensure that the RMA requirements (e.g. permitted activity standards and/or resource consent conditions) are being complied with. It is recommended that landowners ensure, to the best of their ability, that the works are consistent with industry best practice and will meet any relevant regulatory requirements.

Prior to work starting

Rather than waiting until things go wrong, it is much better to make your own inquiries before work starts on your property. You should ask the forest contractor the following questions:

- What works will be undertaken, where and when? Ask to see the harvest and earthworks plans and make sure they match your understanding of your land, for example, that proposed roads avoid unstable slopes.
- Are resource consents required for the works, or will they be done under the permitted activity Regulations?
- Have any necessary resource consent or a certificate of compliance been applied for/or obtained?
- What do the conditions of any resource consent or Regulations require?
- Does the resource consent cover all, or just part, of the work that is to be carried out?
- Has the company operated in Hawkes Bay before? Do they have any local references that you can contact to discuss their previous performance?
- Does the company have documented environmental and/or engineering standards? How do they ensure that works are undertaken to meet these standards? For example, do they monitor and audit the quality of work and how 'hands on' are they in overseeing the works?
- What happens when harvesting is completed? How will landings, roads, tracks and slash piles be left?
- What ongoing maintenance do the roads and river crossings require? Who will be responsible for this?
- How long will the slash trap be in place? How often does it need to be checked and cleared? What equipment is needed for this?
- What are your expectations for slash removal?
- What will happen after harvest, will the land be replanted? Have the consents been obtained for replanting if they are required (e.g. in Red ESC areas)? What are the implications of not replanting the land²?

Where possible you should have responses to these questions documented in writing. The contract that you have with the contractor should also clearly set out responsibilities and expectations of each party.

If you do not take a proactive approach to resource management matters before work commences, and something goes wrong, you could end up sharing the legal responsibility.

The best price contract may not incorporate work that meets industry best practices and suitable environmental considerations and may just leave you responsible for costly ongoing remediation.

Post-Harvest

Council recommends that you undertake a detailed post-harvest inspection with the contractor or forest manager to ensure that things have been left in a good state, and as you expect. A post-harvest checklist should be produced and signed off by both parties. Remember, the easiest time to rectify issues is when contractors are still on the property and equipment and machinery is available to do the work.

² In some catchments you may not be able to easily convert forestry areas into a more intensive land use. A change in land use may lead to a farm plan and nutrient budget update, and a need to apply to change any existing land use (farming) consents.

If you are unhappy with what you see you should refuse to sign off on the works and agree with the contractor on what needs to be rectified. If this fails, you should seek legal advice, or if you suspect that the contractor has not complied with a condition of consent or a regulation, or you become aware of environmental issues, you should contact the Council to discuss the situation