31 October 2019

Freshwater Submissions
Ministry for the Environment
P O Box 10362
Wellington 6143

To whom it may concern

Submission on the Action for Healthy Waterways documents:
- Draft National Policy Statement for Freshwater Management
- Proposed National Environmental Standards for Freshwater
- Draft Stock exclusion Section 360 regulations

Submitter: Nelson Forests Limited

Thank you for the opportunity to make a submission on the above documents.

Nelson Forests Limited (NFL) owns and manages almost 80,000 hectares of plantation forest in the Nelson, Tasman and Marlborough regions. NFL holds Forest Stewardship Council (FSC) certification which requires active environmental management, including managing the effects of activities on waterways. This is a voluntary certification, which demonstrates that wood products are sourced from sustainable well managed forests (social, financial and environmental).

General comment
Nelson Forests Limited generally supports the objectives of the Essential Freshwater programme, but is concerned that some of the methods of implementation are problematic. Our submission addresses the questions raised in the consultation papers and includes comment where there have not be specific questions.

Note: NES-PF = National Environmental Standards for Plantation Forestry
1. Do you think the proposals set out in this document will stop further degradation of New Zealand’s freshwater resources, with water quality materially improving within five years?

Parts of the approach set out in this document should assist in halting further degradation of NZ’s freshwater, for example the proposed rules relating to feedlots, intensive winter grazing, stock holding, stock exclusion and wetland protection.

For the rules to be effective, they must be firstly be equitable across land uses to address particular issues, then implemented, monitored and enforced. NFL is extremely concerned with the proposed grand parenting approach to existing land uses, that essentially penalises (limits options) good performance while allowing poor performance to continue – this will be to the detriment of trying to improve freshwater quality. Any regulatory approach that rewards polluters and penalises those that have low losses of contaminants can only serve to discourage voluntary improvement.

2. Do you think the proposals will bring New Zealand’s freshwater resources, waterways and ecosystems to a healthy state within a generation?

If implemented effectively, the proposals should improve freshwater quality. Legacy issues (e.g. Nitrogen contamination already entrained in groundwater) could potentially take much longer. Similarly, sediment already deposited in freshwater systems over hundreds years since commencement of land clearance can take a very long time to work its way out of some freshwater systems, if at all.

Policy approaches that align with the principle of polluter pays are more likely to drive improvement than allocated limits in catchments.

4. What actions do you think you, your business, or your organisation would take in response to the proposed measures?

Our forestry operations are already regulated, through the National Environmental Standards for Plantation Forestry (NES-PF) or through rules in council plans. Through the NES-PF, there is a strong emphasis on the effects of forestry operations on waterways and wetlands, and in particular sediment production and controls. Any changes to the NES-PF at this stage would be premature and will not stop poor forestry practices – the regulatory councils and the forestry industry are implementing the new NES-PF, being a relatively new regulation (May 2018). It would be logical for the plantation forestry industry to continue to be regulated by the NES-PF and other primary land users be regulated by the NES-Freshwater.

Potentially, there could be a much greater emphasis on water quality monitoring, in addition to the compliance monitoring already undertaken, to prove compliance with water quality attribute limits once confirmed. It is currently unclear how this monitoring will take place, who will be expected to undertake it and how this will be funded.

5. What support or information could the Government provide to help you, your business, or your organisation to implement the proposals?

Regional Councils will require substantial resourcing to implement, monitor and enforce the policy and regulation, the cost of which will inevitably be borne by ratepayers and resource users. Every effort should be made to be efficient and streamline the development of processes and systems at a national level to support Regional Councils, as a high priority.
The Parliamentary Commissioner for the Environments report on Overseer, identifies that it is being used well beyond its’ intended purpose, and has not been well ground-truthed for numerous soil types and many land uses. A key priority is to improve (or replace) Overseer – for it to be a more accurate tool, fit for purpose and transparent.

6. Can you think of any unintended consequences from these policies that would get in the way of protection and/or restoration of ecosystem health?
Grand parenting existing land uses that continue to have unacceptable discharges is contrary to the objectives of the fresh water package. Land use intensity is a major issue, with intensification having occurred to the point that some catchments are now intensified beyond what can be sustained by the environment. The ability to farm intensively has been allocated to those already undertaking those operations, with the greater losses a land user has, the greater land use options and flexibility going forward. Conversely, land uses such as forestry with very low contaminant losses are effectively “locked in” to their current land use, forgoing any land value gains associated with potential alternative land use. This approach unquestionably incentivises selected land users to pollute and continue to pollute, thereby maintaining potential land use flexibility. This directly affects land value.

7. Do you think it would be a good idea to have an independent national body to provide oversight of freshwater management implementation, as recommended by KWM and FLG?
There may be some merit in having independent national oversight to ensure the intent of this package is achieved. This comment is based on the premise that such an organisation has capable, knowledgeable and experienced individuals, with a broad geographical spread. They must ensure balanced representation across all land uses.

8. Do you have any other comments?
All sectors need clarity and certainty going forward. The essential freshwater package should be aimed at achieving a step change improvement in water quality, that should then be bedded in for a period of time to provide rural landowners certainty as to what they need to do and a chance to get on and work through and implement the requirements. Constantly changing regulations and moving goal posts creates uncertainty. For the forestry sector, the NES-PF has served to provide some level of clarity and certainty for the sector, at least for core activities. It is important that such national direction is given a chance to bed in, with reviews undertaken strategically, rather than constantly pulling on levers to address the issue of the day. It is imperative that the NPS FM and NES Freshwater by creating further variation, do not undermine the NES PF.

17. Do you support the proposal for a faster freshwater planning process? Note that there will be opportunity to comment on this proposal in detail through the select committee process on the Resource Management Amendment Bill later this year.
Faster freshwater planning processes will not necessarily give better outcomes. Managing water quality and who bears the cost of constraints, is extremely complex and has massive implications for all New Zealanders, both urban and rural. To get this right it takes time.

20. Do you think the proposed attributes and management approach will contribute to improving ecosystem health? Why/why not?
Setting of attributes and coming up with a management approach is one option. For water quality to improve, there must be sensible and equitable regulation, monitoring of both land use activities
and water quality, and enforcement to ensure the regulations are being followed. It is apparent that the current self-regulation of most land uses has resulted in degraded water quality.

23. Do you support the proposed fish passage requirements? Why/why not?
Fish passage has been mandatory since 1983 under the Freshwater Fisheries Regulations and again more recently for forestry under the NES PF.

The NES-PF and NES-Freshwater have similar but different requirements. All requirements for plantation forestry should be retained under the NES-PF to avoid having to reference two different sets of rules, with at times, different requirements.

With regards to the proposed provisions of the NES Freshwater:
Rule 21 (page 10) our comments are as follows:

- The proposed requirements to install culverts that are significantly wider than the natural streambed (rule 21(d)) are impractical. To meet the rule would require excavation into the stream banks to widen out the natural streambed which will often be impractical and in many instances undesirable, resulting in unnecessary soil disturbance and destabilising stream banks up and down stream.
- It is considered impossible to monitor or enforce clause (e) of rule 21 regarding timing (4/5 of the time). In the event material is flushed out of culverts during storm events, as worded this would put landowners in non-compliance with the rules which seems unreasonable. In such instances, the rule would require manual reinstatement of material into the culvert, resulting in sedimentation and increased bed disturbance. It would be more desirable to allow nature to take its course and gradually refill the culvert.
- Clause (e) has a different requirement to the NES PF (25% cf 20%). The NES Freshwater should be set at the same level as the NES PF.
- Clause (h) has different notice requirements to the NES PF. In general, the notice requirements are of little benefit to either the applicant or council. The NES PF and NES Freshwater notice provisions should be the same, and both should allow for practical timeframes – potentially allowing for multiple notifices to be made up to a year ahead to enable efficiency. The key focus should be that the information is passed to the council in a timely fashion and an understandable format.
- The NES-PF has a fish-spawning calculator - there is no reference to this in the NES Freshwater for general works in a stream. This is inconsistent with the NES PF. For consistency, the same requirements should apply to both NES’s.

Rule 24: Dams, fords and non-passive flap gates (page 11): The rules for fords in the NES Freshwater are significantly less stringent than the NES PF, with no restrictions on ford use. The two NES’s should have the same provisions.

24. Should fish passage requirement also apply to existing instream structures that are potentially barriers to fish passage, and if so, how long would it take for these structures to be modified and/or consented?
Existing instream structures should be modified over time to provide for fish passage. To require all existing culverts to be replaced that do not meet the NES Freshwater would result in an
enormous amount of work, cost and stream disturbance. This would need to apply to culverts all over New Zealand on public roads and private land. The benefits in many places would be marginal.

25. Do you support the proposal to protect remaining wetlands? Why/why not?
NFL supports initiatives to protect natural wetlands. However, plantation forestry will be disproportionately affected by the NES Freshwater regulations to protect wetlands, on the basis that it is one of the few (possibly only) productive land uses that virtually all remaining wetlands remain intact. NFL does not undertake land drainage.

The impacts of forestry activities on wetlands including planting setbacks are managed under rules in the NES PF for routine forestry activities, and Regional Plans for herbicide application. We support the proposal in the NES Freshwater, that the NES-PF prevails over the NES Freshwater in relation to wetlands. This will avoid duplication and is justified on the basis that threats and potential impacts on wetlands in plantation forests are entirely different to other land uses.

The requirement for councils to identify, manage and monitor wetlands down to 0.05ha in size is contrary to the NES-PF. To date SNA mapping in our forests, takes weeks of work ground-truthing required to verify the mapping accuracy.

With regard to the detail of the wetland protection rules in the NES Freshwater:

- Rule 5: Standard wetland monitoring obligation: It is somewhat unclear what the purpose of this rule is but it implies that this condition must be applied to any activity that could damage a wetland area. This is of concern in a large production forest that may contain hundreds of wetlands. A requirement to monitor and report annually on every wetland, regardless of potential impact on them, is impractical and excessive. The purpose of the rule needs clarification and limits to its application specified.

- Rule 8: Vegetation Destruction (page 5): As currently laid out the rule suggests that any vegetation destruction within 10m of any part of a wetland is a non-complying activity. It is only with reference to the definition that it becomes clear that the rule is referring to destruction of ‘significant indigenous vegetation’. This is inconsistent with the NES-PF.

- In the above rule 8, the term ‘significant’ is currently undefined – presumably it is referring to vegetation that has been mapped as ‘significant’ under a regional or district plan. Clearance of exotic production vegetation should be exempt from the rule (as is often the case under District Plan SNA rules), to allow for the situation where production forestry is incorrectly mapped as SNA, due to map boundary errors.

- The layout of rules 10-14 (pages 5-7) is somewhat confusing as it does not follow the usual plan rule layout of permitted activity rules followed increasing stringent activity rules. It is also currently silent on activities that are outside of those described. It is assumed that where there is no applicable rule the land disturbance activity is permitted (subject obviously to further rules in a Regional or District Plan). It would be helpful if that were made clear. A particular concern is general soil disturbance (eg harvesting or earthworks) that is outside of a wetland but within the setback distances (10m and 100m) and that is not for any of the reasons described (restoration, drainage, flood control, nationally significant infrastructure etc). If the activity does not result in drainage or any changes to the water level of the wetland, then presumably this activity should be permitted? Currently this is not clear.
The wetland rules will make it a non-complying activity to cross any wetlands even with limited ecological values. It is obviously preferable to avoid wetlands if practical, but in rural situations it is often impractical to avoid them. In our experience non-complying consents are extremely difficult to obtain. If crossing a wetland is not allowed it could render land inaccessible or alternatively push earthworks onto undesirable topography, to get around the wetland resulting in greater environmental impacts. Consideration should be given to a lower activity status (permitted or controlled) for localised damage to form a waterway crossing where no practical alternative exists. This rule is also inconsistent with the NES-PF.

There is no allowance for the maintenance of existing infrastructure across wetlands such as culverts. Consideration should be given to a permitted activity rule for the maintenance of existing infrastructure and for the replacement of existing crossings.

It is a very common activity in plantation forests to create fire-fighting ponds in perenniably wet areas, and due to the low flows it is also common for wetland vegetation to establish in such areas. Under the proposed rules, it will be a non-complying activity to maintain such water points (rule 11) and to extract water from them in event of fire (rule 17). This will result in an untenable situation of essential fire-fighting water sources becoming unusable creating risk to both the forest and the surrounding communities. A permitted exemption should be applied.

26. If the proposal was implemented, what would you have to do differently?
If the exemption for the NES-PF is not retained, and the rules are not well drafted to be clear as to where they apply, we will be required to obtain significantly more consents for routine activities within the vicinity of wetlands. This will affect our business, through time and money and unnecessary bureaucracy.

33. For deposited sediment, should there be a rule that if, after a period (say five years), the amount of sediment being deposited in an estuary is not significantly reducing, then the regional council must implement further measures each and every year? If so, what should the rule say?
The wording of this question implies that all sediment deposition in an estuary is detrimental, is controllable and that in their natural state no sediment deposition would occur. In reality most NZ estuaries were formed as a result of sea level rise or tectonic uplift of former river valleys which have then become infilled with sediment to form the estuary features we see today. This natural infilling occurred well prior to any human occupation of New Zealand. The level of ongoing sediment infilling is dependent both on ongoing delivery of sediment to the estuary and the estuary dynamics causing sediment to either flush or accumulate. While studies of estuaries have demonstrated that in some instances sediment deposition has increased as a result of human activity in the catchment, others show limited accumulation due to natural flushing taking place. Even where studies have confirmed accelerated sediment accumulation is occurring there are typically numerous causes including:

- significant storm events causing erosion and sediment runoff from both productive and non-productive land (refer picture below)
- bank erosion
- impacts of past land use activities in the catchment (such as native logging and land clearance) that has built up reservoirs of deposited sediment in the catchment still working its way through the system
- effects of flood protection schemes that have cut off the natural sediment deposition zones of the flood plains resulting in direct delivery of water borne sediment to estuaries
Not all of these sources can be controlled. A requirement to simply reduce sediment deposition without consideration of individual estuary dynamics could result in productive land uses bearing the cost of reducing sediment sources that are not in all cases the result of that productive land use or in fact controllable.

Due to the complexity and variability of deposited sediment and the many unique factors influencing sediment deposition, it is preferred that deposited sediment is managed under Appendix 2B (attributes requiring action plans) rather than being hard limits under Appendix 2A. Is it feasible to accurately measure deposited fine sediment to the precision implied by the values in Table 18?

34. Do you have any comments on the proposed suspended sediment attribute?

We support the approach of dividing waterways into bands based in geology, climate and topography, recognising that natural levels of sediment in rivers varies across New Zealand. However, in some instances the NIWA map shows some rather odd results with individual waterways apparently transitioning from one suspended sediment attribute class to another. In some situations, this is explained by changing topography or geology. This becomes particularly problematic where waterways are transitioning from significantly higher suspended sediment bottom lines, to lower ones, as illustrated in the following diagram from the NIWA model of streams draining the Mt Richmond Forest Park (red) and then flowing through some of our plantation forest areas (green):
There needs to be some clarity as to how Regional Councils are to apply the limits where there are changing classes within a waterway and therefore bottom lines (as for the example above).

The use of turbidity, as the proposed measure of suspended fine sediment, is also questioned. NFL monitors suspended sediment by visual clarity (typically using clarity tubes). Turbidity probes are prohibitively expensive and require regular calibration. They also have a reasonable degree of inherent error, with two different probes potentially giving significantly different results for the same water. The obvious advantage of using turbidity is the ability to produce a continuous record monitored remotely. It is to be the adopted measure, it would be helpful to have relationship graphs provided to correlate between turbidity, suspended sediment and clarity for particular waterway classes, to enable landowners and community groups to undertake monitoring using simpler and cheaper equipment.

The proposed attributes and bottom lines expressed to 1 decimal place, imply a level of precision that cannot be achieved by available field measurement equipment. A NIWA internal report (Andrew Hughes, R. Davies-Colley and S Heubeck (2019) Comparability of ISO 7027 compliant turbidity sensors. NIWA internal report), states that the repeatability between different makes of NEMS compliant turbidity probes (in calibration) is no better than 10%.\(^1\) Quoting from that paper (pages 5 & 6):

> The results from our experiment show that different ISO 7027 compliant sensors can output very different numerical FNU values on the same fine sediment suspension. At the highest suspended sediment concentration (SSC) of 339 mg l\(^{-1}\) tested in the experimental tank, the turbidity ranged five-fold – from 127.5 FNU on an Observer Anlite NEPS00 sensor, through to 648 FNU for a handheld Hach 2100Q unit. Previous authors have attributed differences in the outputs of different sensors to factors such as differences in spectral emission of light source, spectral sensitivity of detector, detector angle and beam configuration; combined with the very different optical properties of natural suspended particulate matter in comparison to formazin particles. The results of this experiment suggest that even very subtle differences (e.g., different tolerances used in the manufacture of components) in sensors compliant with the same international standard can influence turbidity sensor response.

> Our finding that nephelometric turbidity measurements are instrument-dependent, even for sensors of the same design, and sometimes the same make and model, has important implications. In particular, treatment of nephelometric turbidity as an absolute quantity should be abandoned. Instead, turbidity should be recognised as a valuable proxy for several sediment-related variables of interest in water quality, provided suitable local calibration occurs. We recommend that, instead of reporting FNU (or other turbidity unit), the turbidity record should be converted to the variable of interest – such as SSC, or visual clarity – based on empirical (local) correlations.

If there is variability of this magnitude between different instruments, how councils will monitor and enforce compliance with bottom lines expressed to one decimal place, using in field measurement devices?

The attribute for suspended sediment to be based on median values is supported, recognising that suspended sediment levels are extremely variable over time, with storm events delivering very high
turbidity levels for short periods of time. However, it is not at all clear in the attributes table (Table 10) that the intention is for the proposed attributes and bottom lines to be applied as median values. This needs to be made explicitly clear to avoid confusion and debate.

It is also unclear how the measures are to be monitored and enforced either spatially (in representative waterways or in every waterway) and over time (periodic or continuous). For forest owners this becomes particularly important in large forests with many waterways present, where monitoring every waterway would become costly and impractical. With regards to timing, the footnote to Table 10 implies the intent is to carry out monthly monitoring over a minimum period of 24 months however, it would be helpful to have guidance on this.

35. If the proposal was implemented what would you have to do differently?
Assuming the proposed attributes are realistic and robust, we anticipate that freshwater leaving plantation forests will meet the attributes and bottom lines, on the basis that monitoring typically shows freshwater from production forests to be similar to native forests during the growing phase. They key issue will be control of sediment at harvest time and runoff in response to significant storm events. Sediment is a major focus of plantation forestry management and regulation and under the NPS FM clearly this will continue, and if anything be a greater focus. We will continue to review and update practices in our forests to minimise sediment losses.

A key potential area of change is the level of monitoring required. It is not certain how monitoring will be undertaken to demonstrate compliance with the agreed attribute states under the NPS FM, both spatially and over time.

Potentially there could be a significant increase in the monitoring required, at significant cost to land users, either directly or indirectly (via rates).

41. What are your thoughts on the proposed technical definitions and parameters of the proposed regulations? Please refer to the specific policy in your response.
Please refer to previous answers:

- Some of the proposed attribute limits have a higher degree of accuracy than can practically be delivered by field measurement.
- We question the use of turbidity as the measure of suspended sediment, noting the cost and inaccuracy of field measurement equipment.
- The intention that the Table 10 (turbidity) attributes are intended to be applied as median measure needs to be made clearer. An alternative approach is that monitoring could be carried out at or below median flow level.
- The definitions for “bank full discharge” and “bank full width” should align with the NES-PF.

51. Do you support interim controls on intensification, until councils have implemented the new NPS-FM? Why/why not?
NFL is opposed to the proposed controls on intensification, with the ability to intensify being based on past land use and past contaminant losses. While the controls are proposed as ‘interim’ there is no indication in the NES Freshwater that this is intended to be the case.
The approach is in effect grand parenting, rewarding those who have contributed most to water quality degradation with the greatest land use flexibility going forward, this directly affects land value. The approach also creates a perverse incentive for land users to maximise their contaminant losses within their current land use, to retain their land use options. By contrast, land uses such as forestry with very low contaminant losses will be effectively locked in forestry, losing significant land value on land with alternate land use options. NES Freshwater clause 35 is grand parenting.

53. How could these regulations account for underdeveloped land, and is there opportunity to create headroom?
These regulations clearly do not account for under developed land and penalise owners of such land for their low contaminant losses. Land owners of forest land recently returned to Maori ownership under treaty claims will be significantly affected.

Land should be treated like for like, with land of similar soils and land use capability facing the same constraints as their neighbours.

65. Do you support stock exclusion from waterways? Why/why not?
NFL supports stock exclusion. Plantation forest is required to be setback from waterways in accordance with the NES-PF; therefore, it would be equitable for stock exclusion, as a fundamental first step to improving water quality.

The fencing setbacks are less stringent than the equivalent regulations in the NES PF requiring 5 and 10m planting setbacks off all perennial waterways in all topography. Setbacks should be applied on an equitable basis.

79. Do you think there are potential areas of tension or confusion between the proposals in this document and other national direction? If so, how could these be addressed?
There is clear inconsistency between the NES Freshwater and the NES PF.

Currently the NES PF (regulation 6) provides the ability for councils to develop more stringent rules to give effect to the NPS FM. Given most of the activities regulated under the NES PF can have some impact on water, this effectively applies to all activities carried out under the NES PF.

The intent of regulation 6 was that the ability to be more stringent only be utilised where absolutely necessary:
- where a Council has developed attributes for FMU’s in their region, and the assigned attributes are not currently being met,
- forestry is identified as a significant contributor to a particular attribute not being met, and
- the where current NES PF provisions are considered inadequate to address the issues.

As indicated by the NES PF guidance document, it was anticipated a Council would document this process through undertaking a full section 32 analysis to justify the need for additional rules.

This has not been the case, with the few regional councils who have added rules, doing this with the simple justification that the rules relate to water quality. With the further development of the NPS FM to include sediment and the introduction of an NES Freshwater, the development of additional regional rules for forestry could proliferate, completely undermining the benefit of the NES PF providing for clarity and consistency. If every region develops a different set of rules over and above the NES PF we are effectively back where we started and the NES PF will become redundant.
The final NPS FM and NES Freshwater must dovetail with the NES PF in other to maintain a consistent approach. One way this could be achieved is for the NES PF to specifically articulate how the requirements of the NPS FM and NES F apply to plantation forestry. Potentially this could be achieved by regulations in the NES PF relating to compliance with freshwater attributes (once confirmed) for an FMU. This would then remove the need for greater stringency under the NES PF to give effect to the NPS FM. This issue is absolutely critical to the ongoing viability and workability of the NES PF.

Clear alignment and interface between national instruments will extend beyond forestry issues. Given the significant number of national direction documents being produced, in our view it is essential that every effort is made to align and integrate the documents to work together. If not the current inconsistency, duplication and contradictions existing at a regional and district level will be replaced by an additional layer of the same at a national level, leaving councils and communities grappling with how to make them work.

General Comment in relation to Discharges

The draft NPS FW and the proposed NES Freshwater fail to address the legal issue of how to deal with the diffuse and direct discharges of sediment from land where rural activities are undertaken.

The NES Freshwater uses terms such as ‘leaching’ and ‘contaminant loss’, rather than the RMA term ‘discharge’. Furthermore, there is no clear recognition that rural land uses have diffuse and direct discharge of sediment and other contaminants from the everyday land use activity of growing grass and running stock. Despite referring to modelling undertaken in the Horizons and Waikato regions as to sediment loss (Action for healthy waterways pg 65 Section 8.3 Improving farm practices through farm planning) there has been no reference to the research undertaken that clearly shows that there are sediment discharges from pastoral farms, just as from earthworks and or land clearance. We refer you to Waikato Regional Council Technical Report2012/02 (H Ritchie, Diffuse sediment in Waikato Waterways -Sources, practices for reduction and policy options). The executive summary on pages 3 and 4 states that:

“Sediment loss is driven mainly by precipitation, with geology and land use/land cover explaining much of the residual difference between sites. Climate change is expected to increase sediment loss. Pasture slopes generate 2-5 times more sediment than comparable forestry slopes, except during forestry harvest periods. Harvest causes a rapid peak in sediment generation, but with good practice in harvesting, sediment loss can return to pre-harvest levels within 1-2 years. A twelve-year monitoring study of paired pine and pasture catchments, including the harvest period, showed that the suspended sediment yield from pasture exceed that of the pine catchment by 1.5 times (Eyles and Fahey 2006). This figure would be higher over the whole forestry rotation as pasture yields would exceed forestry yields in all years except the immediate post-harvest period. Apart from consents associated with earthworks and forestry operations, sediment has not generally been managed through regulatory means.”

As the draft NPS FM and NES Freshwater are national directives, we would expect that there would be clarification as to how to legally deal with diffuse and direct discharges of sediment and other contaminants from farms. With regard to provisions for discharges from rural land use, the draft NES Freshwater is inconsistent with the NES PF. There should be consistency at a national level.
This is the opportunity to provide clarity in relation to land use and discharge rules. Part 3 of the NES Freshwater does not provide for any discharge regulation and in particular does not provide discharge regulations for the permitted activities. It is therefore assumed that the legal approach is that the activity regulations under Part 3 are empowered under section 30 (1) (c) (ii) and the effects of the discharges have been assessed to ensure the maintenance and enhancement of the quality of water in water bodies and coastal water and that no discharge regulations are required. This would follow the practical considerations arising from the findings of the Board of Inquiry into the Tukituki Catchment Proposal, meaning that it would not be appropriate or reasonably practicable to include discharge rules in the draft NES Freshwater pertaining to diffuse discharges from farming activities. Subsequent cases have relied solely on land use rules (under s 30(1)(c)(ii) of the RMA) to control the effects of farming activities on water quality (e.g. P & E Ltd and Mawhinney).

Part 3 makes no provision for a regulation for a permitted discharge of contaminants in compliance with section 70 of RMA and nor does Part 3 make any reference to resource consent for discharges associated with the farming activities.

The drafting of Part 3 confuses the assumption that the above legal position has been undertaken. The different confusing regulations are as follows:

a. Regulation 27 (3) (a) provides for a minimum permeability standard which must assume that there will be some discharge of contaminants. However, there is no reference to the regulation being an activity for a discharge rather than a land use activity.
b. Regulation 29 (2) (a) has a similar provision.
c. Regulation 29 (3) refers to measures to control run-off and contaminant loss but again no reference to the activity being an activity for a discharge rather than a land use activity.
d. Regulation 38 (Contents of FW-FP) j) refers to action points to reduce nitrogen discharges but there is no provision for a discharge regulation.
e. Regulation 38 (3) refers to contaminant losses but again there is no provision for a discharge permit for the contaminant losses.

The lack of clarity on this issue will lead to confusion when councils consider compliance with the NES Freshwater, when they consider the extent of any resource consent application and draft any related regional plans.

This could be clarified by:

a. A clear statement in Part 1 NES Freshwater that the regulations are undertaken under section 30 (1) (c) (ii) RMA and that resource consents for diffuse discharges of contaminants are not required as the effects have been dealt with under the activity regulations.
b. A clear statement in Part 1 that any direct discharge of a contaminant to land and or water under section 15 of the RMA will require a resource consent.
c. Regulation 38 (3) (d) and (h) to be amended to identify the management of diffuse discharge of sediment to water bodies. Note that this proposes an assessment beyond just diffuse discharge of sediment from land disturbance activities.
d. Add a section 6 to Part 1 as to identification of the matters where a section 15 discharge consent would be required for direct discharges of contaminants to water bodies.
For Nelson Forests Limited