IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 48

IN THE MATTER	of the Biosecurity Act 1993
AND	of an application under s76 of the Act
BETWEEN	GEOFFREY IAN TUDOR EVANS
	(ENV-2020-CHC-105)
	Applicant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge P A Steven Environment Commissioner S Myers
Hearing:	in Blenheim on 27 September 2022
Appearances:	Q A M Davies and J S Marshall for applicant M J Radich for respondent
Last case event:	8 November 2022
Date of Decision:	17 March 2023
Date of Issue:	17 March 2023

INTERIM DECISION OF THE ENVIRONMENT COURT

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A: The relief sought by Mr Evans seeking amendments to the RPMP 2020 to enable a site-led programme at Stronvar and to address concerns regarding erosion risk and maintenance of indigenous biodiversity values is granted.

B: We direct the parties, beginning with the applicant, to draft wording to be inserted within the existing framework for pest conifer species in section 5.22 of the RPMP 2020, providing for a site-led programme for Stronvar, where containment or reduction remain as the identified objective.

C: Options for providing for this within the RPMP 2020 include:

(a) the insertion of an "other measure" within the existing framework of the progressive containment programme, or
(b) alternatively by including a further intermediate outcome based on 'protecting values in places' incorporating and expanding on the objectives and measures for the progressive containment programme;
(c) a management plan for Stronvar could be developed with the involvement of Mr Evans, to address his concerns about the values of the land being protected, where any intervention is proposed on the land.

D: We leave it up to the parties to determine the details of how a site-led approach for Stronvar, based on Mr Evans' concerns, could be drafted and incorporated into the existing framework.

E: The draft wording is be circulated to the Marlborough District Council in 20 working days for comment and for further drafting as required.

F: The parties are to liaise with a view to providing a final copy to the court within a further 20 working days with a memorandum advising:

(a) whether there is any disagreement on the wording of the amendments;
(b) the position of each party;
(c) whether the parties seek a reconvening of the hearing or whether outstanding issues, if any, are capable of being resolved on the papers; and
(d) whether further consultation should be carried out on persons served with the original Notice of Motion filed with the court.

G: Costs are reserved pending the final decision.

REASONS

Introduction

[1] This decision concerns an application made under the Biosecurity Act 1993 ('the Act') by which amendments are sought to the Marlborough Regional Pest Management Plan 2020, operative 1 September 2020 ('RPMP 2020').

[2] This is the first fully contested application under s76 of the Act. The application is made by Geoffrey Evans, as beneficial owner of Stronvar Station ('Stronvar').

Background

[3] The following background information draws on an agreed statement of facts provided by the parties at the court's direction, prior to the commencement of the hearing, supplemented by the evidence given at the hearing.

[4] Stronvar has been in the ownership of the Evans family since 1944.[1] Stronvar is located in the head waters of the Waihopai. It is the only pastoral farm

[1] Mr Evans, EIC, dated 29 October 2021, at [4].

in this location, being surrounded by land that has been planted in pine; is in the process of conversion; or is in the ownership of the Department of Conservation ('DoC').

[5] Stronvar is immediately south of an area of land comprising 370ha within the Wye Catchment that had been planted out in a range of pest conifer species (referred to in some of the evidence as the Breezer and Turkey Nest plantings).

[6] Plantings had commenced in 1959 and continued through to the mid-1980s. We were told that the plantings were carried out by the (former) Marlborough Catchment Board ('the Board') for erosion control as part of the Wye Catchment Control Scheme.[2]

[7] Plantings were primarily *Pinus contorta* ('contorta pine') being the most aggressive spreading species of the introduced conifer species. Others included Dwarf Mountain Pine, Western Pine and Douglas Fir, all of which are pest conifer species.[3]

[8] Plantings occurred on high altitude land that is exposed to the winds. Over 7000ha of land to the east later became affected by the spread of these pest conifer species. The uppermost slopes of Stronvar over the ridgeline were the most affected areas, being closest to the seed source. These are fragile mountain lands rising 1524 metres above sea level.

[9] Mr Evans spoke to the history of the management of Stronvar, addressing challenges arising from these high-altitude areas, which he said have always been prone to erosion and sediment discharges. A 'run plan' agreement was entered into between his family and the Board under which 600ha of the higher slopes of Stronvar were retired from grazing. The objective was to minimise and repair the

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[2] The Council denied that plantings were for the purpose of erosion control although that is not a dispute we need to decide. It is sufficient that the plantings were carried out by a third party, not the applicant.

[3] Mr Ledgard, EIC, dated 2 November 2021, at [2].

high-altitude erosion and sediment discharge from the area, as well as improving biodiversity ('the retired land').

[10] That initiative was successful in enabling better management of the retired land, which according to Mr Evans, has been "healing, albeit slowly".[4] That land now comprises struggling indigenous vegetation cover with pest conifer species spread from the original Breezer and Turkey Nest plantings.

[11] Mr Evans (and his father) were given assurances that the Board and County Council ('the County') would eradicate any early spread of the conifers, if that was the landowner's wish.[5] However, the existence of this agreement was disputed by the Marlborough District Council ('the Council'), as Mr Evans was not able to produce any documentation establishing an enforceable obligation. Some conifer removal sorties were carried out with others planned, but later abandoned, due to the demise of the Board following the Local Government reforms in the late 1980s.[6]

[12] The planted conifer species had been recognised as a problem by the Marlborough District Noxious Plants Authority from 1979.[7] However, for the Council, Mr Underwood gave evidence that the seriousness of this invasion did not dawn on the community and/or the agencies until the early 2000s.[8]

[13] Mr Evans has made many approaches to the Council about his preferred response to these legacy issues. Over the years, he has continually sought to hold

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[4] Mr Evans EIC, at [6].

[5] Mr Evans, EIC, Appendix 1, report attached to letter from Marlborough District Noxious Plants Authority to Mr Geoff Evans, dated 20 February 1986, which states: "Where the Forest Service has planted or aerially seeded Pinus Contorta on mountain lands in recent times, the Forest Service will monitor the plantings and take steps to eradicate any early spread if that is the adjoining owner's wish".

[6] Regional Pest Management Plan Section 75 Report, dated August 2018, p 70.

[7] Mr Evans, EIC, Appendix 1, report attached to letter from Marlborough District Noxious Plants Authority to Mr Geoff Evans, dated 20 February 1986, which states: "between September 1979 and October 1984 efforts were made to have pinus contorta classified as a Class B noxious plant".

[8] Affidavit of Mr Underwood, affirmed 19 November 2021, at [13].

others, including the Council, accountable for addressing these legacy issues.

[14] He is opposed to a clear felling of the trees as is currently proposed by the Council (which he understands is to be by chemical boom spraying) due to the collateral damage to the areas of indigenous vegetation established amongst the conifer species. Erosion resulting from the cleared land is a further significant concern to Mr Evans. If these impacts are not able to be avoided or mitigated at an operational level of any clearance programme, containing these trees is his preferred outcome.

[15] In simple terms, he wants certainty as to how any clearance operations are to be conducted at Stronvar. He also wishes to maintain some control over the process so that he can ensure that the vulnerability of the land and the emerging indigenous vegetation are appropriately accounted for in any eradication operations.

[16] This decision determines which of the available programmes under the Act should apply to the affected part of Stronvar infested with the pest conifer species resulting from the historical plantings by others.

Our interim decision

[17] The relief sought by Mr Evans seeking amendments to the RPMP 2020 to enable a site-led programme at Stronvar and to address concerns regarding erosion risk and maintenance of indigenous biodiversity values is granted.

[18] We direct the parties, beginning with the applicant, to draft wording to be inserted within the existing framework for pest conifer species in section 5.22 of the RPMP 2020, providing for a site-led programme for Stronvar, where containment or reduction remain as the identified objective.

[19] Options for providing for this within the RPMP 2020 include the insertion of an "other measure" within the existing framework, or alternatively a further

immediate outcome based on 'protecting values in places'. We consider a management plan for Stronvar could be developed with the involvement of Mr Evans, to address his concerns about the values of the land.

[20] We leave it up to the parties to determine the details of how a site-led approach for Stronvar, based on Mr Evans concerns, could be incorporated into the existing framework.

[21] The reasons for our interim decision are set out below.

Overview of legal framework under the Biosecurity Act 1993

[22] As a unitary authority, the Council has responsibilities under the Act of a regional council in terms of s12B of the Act; powers of a territorial authority under s14 of the Act; and of a regional council under s13. This includes responsibilities and powers in respect of Regional Pest Management Plans ('RPMP') in terms of ss 68-78 of the Act.

[23] This application under s76 of the Act results from the Council's decision in making a RPMP under s75(3).

[24] Because the application includes challenges to aspects of the decision-making process leading to the RPMP, particularly, the outcome of that, we briefly set out further detail (in summary) the steps required to be taken by the Council and the matters to be considered.

Steps for making a RPMP

[25] Under the Act, the Council's s75(3) decision on the RPMP must be in the form of a written report on the plan, having satisfied itself of the matters set out in s74 (by s75(1)). Section 74 is one of six steps in making a RPMP, each of which must be complied with.

[26] By s74, the Council must be satisfied, in relation to the plan prepared under s73, that the RPMP is not inconsistent with the following matters:

(a) the national policy direction; or
(b) any other pest management plan on the same organism; or
(c) any pathway management plan on the same organism; or
(d) any pathway management plan; or
(e) a regional policy statement or a regional plan prepared under the Resource Management Act 1991; or
(f) any regulations.

[27] The Council must also be satisfied that:

(a) the benefits of the plan outweigh the costs, for each subject of the plan, after taking account of the likely consequences of inaction or other courses of action and (s74(b)); and
(b) for each subject of the plan, persons who are to meet directly any or all of the costs of implementing the plan –
    (i) will accrue, as a group, benefits outweighing the costs; or
    (ii) contribute, as a group, to the creation, continuance, or exacerbation of the problems proposed to be resolved by the plan (s74(c)); and
(c) for each subject of the plan, that there is likely to be adequate funding for the implementation of the plan for the shorter of its proposed duration, and 5 years (s74(d)); and
(d) that each rule will –
    (i) assist in achieving the plan's objectives; and
    (ii) will not trespass unduly on the rights of individuals, by s74(e).

[28] Section 73 is a lengthy provision which need not be set out in full beyond noting the more relevant matters that are to be specified in the RPMP:

(a) the pest or pests to be eradicated or managed;

(b) the plan's objectives and the principal measures to be taken to achieve the objectives;
(c) monitoring means;
(d) powers in Part 6 to be used in the implementation of the plan, including rules, if any and (specifically) if they are good neighbour rules;
(e) the management agency; and
(f) actions to be taken by the local authorities to implement the plan including in contributing towards the costs of implementation.

[29] The purpose of rules able to be included in the RPMP are identified in s73(5)(a)-(s). Relevantly, by s73(6):

> A rule may–
> Apply generally or to different classes or descriptions of persons, places, goods, or other things
> ….
> Apply throughout the region or in a specified part of parts of the region with, if necessary, another rule on the same subject matter applying to another specified part of the region.

[30] For completeness, we note that the first two steps to be taken are set out in ss 70 and 71 of the Act, commencing with a person initiating a pest management proposal. Such persons are not confined to the Council. The first steps trigger the Act's consultation requirements under s72.

[31] By s73(2), the Council must also decide which body is to be the management agency, which must be one of the following bodies:[9]

(a) a department;
(b) a council;
(c) a territorial authority;

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[9] By s100(1) of the Act.

(d) a body corporate.

The Council's plans

[32] In early 2000, the Council had commissioned reports regarding the strategies to control conifers and the impacts in the catchments of Upper Wye and Waihopai.[10] This included a report from Mr Ledgard in 2002, jointly commissioned by the Council and DoC. Mr Ledgard was a witness at the hearing called by Mr Evans.

[33] The Ledgard report was adopted by the Council although recommendations made in the report were not immediately actioned. Mr Ledgard had made recommendations for the management of these legacy issues, favouring containment for large areas of infested land, including Stronvar.

[34] In 2007, the Council adopted a Regional Pest Management Strategy ('RPMS 2007') containing a programme to manage pest conifer species.[11] Part of the RPMS 2007 created an area that allowed infill of the pest conifer species referred to as a Containment Control Zone ('containment zone').

[35] The programme included within the RPMS 2007 based upon recommendations from technical experts, including those in the 2002 report prepared by Mr Ledgard. It was selected due to the lack of other suitable control techniques and resources to address the infestation. Active control efforts at the time were concentrated on preventing establishment outside the containment zone, although within the zone boundary, infill was left to continue.[12]

[36] The containment zone covered 8000ha of land, of which, 900ha belonged to Mr Evans, including the retired area at Stronvar. At that time, there were few

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[10] Mr Ledgard, EIC, at [12].
[11] Affidavit of Mr Evans, affirmed 28 July 2020, at [8]; Affidavit of Mr Underwood, at [16]-[17] and [20].
[12] Affidavit of Mr Underwood, at [21].

wilding pines present on the land, although without further intervention, further spread was inevitable as the area had been fenced and grazing was no longer occurring.[13] The containment zone was maintained in the Regional Pest Management Strategy for Marlborough 2012 ('RPMS 2012').[14]

[37] Both strategy documents were supported by Mr Evans.

[38] In 2012, the Biosecurity Law Reform Act 2012 amended the Act, replacing the former regime of regional pest management strategies with regional pest management plans (relevantly).

[39] The National Policy Direction ('NPD') for Pest Management was issued in 2015. Shortly thereafter the Council began consultation about transitioning from the 2012 strategy into a new RPMP developed under the amended Act and the NPD. New approaches to some of the RPMS 2012 programmes, including for wilding pines, were consulted on at the level of broad principle.

[40] At that time, commencement of the National Wilding Conifer Control Programme ('NWCCP') was impending.[15]

National Policy Direction for Pest Management 2015 ('NPD')

[41] The NPD was issued pursuant to s56 of the Act. Its purpose "is to ensure that activities under this Part provide the best use of available resources for New Zealand's bests interests and align with one another, when necessary, to contribute to the achievement of the purpose of that Part".[16]

[42] The NPD clarifies requirements for Part 5 regulatory instruments (which includes an RPMP) and ensures consistent application of these requirements

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[13] Affidavit of Mr Evans, at [9].
[14] Affidavit of Mr Evans, at [10].
[15] Affidavit of Mr Underwood, at [28], [31].
[16] Section 56(2) of the Act.

nationally and between regions, as appropriate.[17] For each subject (defined as a pest organism) the RPMP must:[18]

> (a) state the particular adverse effect or effects of the pest on matters listed in s54(a) of the Act that the plan addresses; and
> (b) state the pest management intermediate outcomes that the plan is seeking to achieve, being one or more of the following intermediate outcomes:
> (i) 'exclusion' which means to prevent the establishment of the subject that is present in New Zealand but not yet established in an area;
> (ii) 'eradication' which means to reduce the infestation level of the subject to zero levels in an area in the short to medium term;
> (iii) 'progressive containment' which means to contain or reduce the geographic distribution of the subject to an area over time;
> (iv) 'sustained control' which means to provide for ongoing control of the subject to reduce its impacts and it's spread to other properties;
> (v) 'protecting values in places' which means that the subject that is capable of causing damage to a place is excluded or eradicated from that place, or is contained, reduced or controlled within the place to an extent that protects the values of that place.

[43] For the first four of these outcomes,[19] the RPMP must specify:[20]

> (a) the geographical extent to which the outcome applies; and
> (b) the extent to which the outcome will be achieved (if applicable); and
> (c) the period within which the outcome is to be achieved.

[44] For the fifth of the stated outcomes,[21] the RPMP must also include a description of a place to which the outcome applies at a level of detail so that landowners and occupiers know which outcome applies to them.

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[17] Purpose of the NPD, p 3.
[18] Clause 4(1)(a)-(b) of the NPD.
[19] Set out in cl 4(1)(b)(i)-(iv) of the NPD.
[20] Clause 4(1)(c) of the NPD.
[21] Clause 4(1)(b)(v) of the NPD.

Permissible programmes under the NPD

[45] By cl 5 of the NPD, a programme must be based on "one or more" of these outcomes, using the specific names for the programme set out in cl 5(1)(a)-(f).

[46] Most of the programmes match the descriptions for the options for 'intermediate outcomes' except for the site-led programme. This would apply where the intermediate outcome selected for inclusion is "protecting values in places" in terms of cl 4(1)(b)(v) of the NPD. A 'site-led programme' is available where the intermediate outcome is that:[22]

> … the subject….that is capable of causing damage to a place is excluded or eradicated from that place, or is contained, reduced, or controlled within the place to an extent that protects the values of that place.

[47] The management control options are (broadly) similar to that in the 'progressive containment' programme in that each refer to containment or reduction. The essential difference is that the driver for selection of the site-led programme is related to the values of a place, rather than the locational spread of the subject (pest) that is the target of the progressive containment programme. As to each, it is for the Council to determine the boundaries of the geographic areas selected for each of the programmes ultimately selected.

Benefits and costs

[48] The NPD specifies the factors to be considered when determining the "appropriate level of analysis of benefits and costs" when formulating the plan in cl 6.[23] Further detail is provided on the proposed allocation of costs in cl 7. The list of relevant matters to be considered is lengthy although relevantly, this includes to:

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[22] Clause 5(1)(e) of the NPD.
[23] Clause 6(1) of the NPD.

(a) identify (and estimate) direct and indirect costs;

(b) identify beneficiaries;

(c) identify active and passive exacerbators;[24]

(d) consider the legislative responsibilities and rights of beneficiaries and exacerbator;

(e) if a beneficiary is to bear any costs of the plan, consider how each group of beneficiaries will benefit and whether that outweighs the cost they bear;

(f) fairness and reasonableness of cost allocation.

The Council's proposals – post 2012 legislative amendment

[49] In 2016, the Council reviewed the RPMS 2012, including a "sustained control" programme for pest conifers[25] in the Regional Pest Management Plan – Proposal (November 2017) ('RPMP 2017 proposal'). The RPMP 2017 proposal shifted away from the use of containment zones as used in the 2007 and 2012 RPMS, where the objective was to prevent the spread of Contorta Pine from the containment areas which included Stronvar.

[50] Following the consultation phases on the RPMP 2017 proposal, the RPMP 2018 became operative in October 2018, replacing the RPMS 2012.[26] The RPMP 2018 omitted provisions for pest conifers, as at the relevant time, there was no "clear way forward". Much uncertainty existed as to the availability of NWCCP funding.

[51] In his submission to that proposal, Mr Evans requested that the Council reinstate the containment zone. However, the Council responded that the use of

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[24] Defined in cl 3(1) of the NPD as "a person who contributes to the creation, continuance, or exacerbation of the problems proposed to be resolved by a pest or pathway management plan".

[25] A collective term used in the plan for wilding conifers, wilding pines and high risk conifer species.

[26] Affidavit of Mr Evans, at [11]; Affidavit of Mr Underwood, at [39].

that programme was no longer appropriate following 2012 amendments to the Act.[27]

The latest proposal – the Regional Pest Management Plan Review Proposal, August 2019 ('RPMP 2019 Proposal')

[52] In 2019, the latest proposal was notified for consultation containing a programme of "progressive containment" for pest conifers within the Marlborough region. Following consultation, the amended proposal was notified incorporating the programme for pest conifers.[28]

[53] The programme is explained in Objective 5.22.1 RPMP 2020 which is:

> … progressively contain pest confers through containing and reducing, where feasible, the geographic distribution of pest confers within the Marlborough region to reduce adverse effects on the environment, enjoyment of the natural environment and economic wellbeing.

[54] Principal measures to achieve this objective are (in summary):[29]

(a) provision of "regional leadership" by the Council in facilitating, establishing and subsequently supporting collaborative programmes for the on-ground management of pest conifers, "inspection and/or service delivery" by the Council, and in conjunction with others, "advocacy and education";

(b) implementation of the NWCCP: a central government funded initiative operating on a national level.[30] The NWCCP is said to be dependent upon ongoing successful Crown budget support to continue, with "substantial investment" being prioritised for an area

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[27] Affidavit of Mr Underwood, at [64]-[65].

[28] Affidavit of Mr Underwood, at [52].

[29] PRMP 2020.

[30] From the Ministry for Primary Industries, Department of Conservation and Land Information New Zealand.

identified in the RPMP as the High Risk Conifer Management Area ('HRCMA').[31] The HRCMA is a vast area encompassing the retired area within Stronvar.[32]

[55] We heard little about the NWCCP beyond what is said about it in the RPMP 2020, although the Council's witness, Mr Underwood, provided a little more on it when questioned about the functional aspects the programme.

[56] The RPMP 2020 states that the 'progressive containment' programme for pest conifer species is envisaged to cost $2,345,000 per year, being approximately one-third of the budget spent on biosecurity programmes covered by the RPMP in the Marlborough Region.[33] Approximately $2 million of this cost is assumed to be funded through the NWCCP programme.[34]

[57] The notified proposal contained rules formulated in accordance with s73(5) of the Act, a key rule being Rule 5.22.2.1 which in summary, required landowners to maintain land clear of pest conifer species where control operations had occurred on the land.

Mr Evans' submission to the RPMP 2019 Proposal

[58] Mr Evans submitted on that proposal (in writing). His submission recited the history of his submissions to the Council seeking reinstatement of the containment zone for the contorta pine as was contained in the RPMS 2007 and the RPMS 2012. As he had always done, Mr Evans objected to having to bear the cost of dealing with these legacy issues.

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[31] For which further funding (for at least two more years) had been provided for in the Budget 2019 announced in late May 2019.
[32] RPMP 2020, Map 10, p 67.
[33] RPMP 2020, p 106.
[34] RPMP 2019 Proposal, p 21.

The Council decision on the submission from Mr Evans

[59] The Council decision was to decline to make the changes sought by Mr Evans. The decision was to accept the recommendations of the Panel to retain the notified version of the RPMP 2020 maintaining a progressive containment programme for the HRPCPA land, including Stronvar.

[60] However, changes were made to the wording of two of the rules as after the hearings, further information had been sought by the Panel as to the "functional ways" in which Mr Evans' concerns could be addressed.

[61] This resulted in amendments to each of Rules 5.22.2.1 and 5.22.2.2, excluding land within the HRPCPA from the ambit of these rules.

[62] As to the remainder of Mr Evans' concerns, the Council's decision includes the following additional comments:[35]

> 16. Finally, the panel drew attention to the historical planting of pest conifers in the 1970's (sic) by the Crown and the Marlborough Catchment Board (MCB). At the time, the Crown and MCB assured landowners of their commitment to control any wilding pine spread from those plantings. Over the years some control work has been carried out, but this has been minimal and overall ineffective. The result of the spread necessitated the inclusion of high risk areas on properties in South Marlborough.
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> 17. As there is currently little evidence to suggest that control or eradication work would be undertaken on affected lands subject to this historic issue, or land adjacent to them, the Panel wished to emphasise that if the policy framework was to change in the future, these legacy issues should be strongly considered and landowners provided ongoing assurance that they will not be penalised for actions outside their control.

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[35] Decision Report, Regional Pest Management Plan – Amendment (Pest Conifers), dated 25 June 2020, at [16] and [17].

Agreed statement of issues

[63] The parties had been unable to agree on a statement of issues. Prior to the hearing the applicant identified the issues as being:[36]

> (a) should the Regional Pest Management Plan recognise preservation of indigenous vegetation cover on the upper slopes of Stronvar which have been retired from grazing be preserved in order to maintain biodiversity and minimise downstream sedimentation?
> (b) should the Regional Pest Management Plan recognise the commitments that the Council and the Council's predecessors have made to the owners of Stronvar that the Council and its predecessors would control the spread of pest conifers on Stronvar?
> (c) should the Regional Pest Management Plan identify the Council as the responsible party for appropriate management of pest conifers within Stronvar?
> (d) what additional policies and what changes to the rules are required to give effect to the findings in points (a) to (c) above?
> (e) has the Council complied with the procedural requirements of the Biosecurity Act when preparing the proposed amendment to the Regional Pest Management Plan?
> (f) is the proposed amendment to the Regional Pest Management Plan consistent with the Act and National Policy Direction?

[64] The Council's position was stated as being:[37]

> The Regional Pest Management Plan properly and completely discharges Council's responsibilities under the Act, which responsibilities require the management of pest species to be undertaken on a regional and not property-specific basis.

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[36] Joint memorandum of counsel setting out agreed statement of facts and agreed statement of issues, dated 23 September 2022, at [15].
[37] Joint memorandum of counsel setting out agreed statement of facts and agreed statement of issues, dated 23 September 2022, at [14](a).

Further issues identified at the hearing

[65] By the time the hearing had started the applicant had sought to refine the changes being sought to the RPMP 2020. That lead to the identification of further issues by the Council:[38]

> Certain of the relief the Applicant is now seeking is outside the scope of the application … the Applicant has not previously raised issues of alleged procedural defects and the issue of procedural defects is not properly before the court, in terms of the pleadings or the evidence.

[66] In opening, the applicant addressed what appeared to be a further dispute as to the nature of the court's jurisdiction in making a decision under s76(8) of the Act.[39] Mr Davies submits that the jurisdiction is appellate, although he opened on the basis that this was not entirely clear in the wording of the Act.

[67] That position was opposed by the Council who contended that the court could only intervene if the decision was in error of law. However, counsel was reluctant to describe the court's jurisdiction beyond stating that it derives from and is constrained by the wording in s76.[40]

[68] The Council also submits that the amendments sought by Mr Evans go beyond the scope of his original submission and the Notice of Motion (the scope issue).[41]

[69] Before we address these jurisdictional issues, we set out the amendments sought to the RPMP 2020 by Mr Evans.

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[38] Joint memorandum of counsel setting out agreed statement of facts and agreed statement of issues, dated 23 September 2022, at [14](b).
[39] Applicant's opening submissions, dated 27 September 2022, at [49]-[56].
[40] Memorandum of counsel for the respondent raising preliminary issues in advance of hearing, dated 26 September 2022, at [13].
[41] Respondent closing submissions, dated 1 November 2022, at [3].

Changes sought to RPMP 2020 in the application

[70] In the Notice of Motion, Mr Evans sought the following changes to the RPMP 2020:[42]

> (a) Instating a containment area for Contorta Pine with objectives and rules to the same effect as the Contorta Containment Areas in the Pest Management Strategy for Marlborough 2012 ("RPMS12");
> (b) The relief in terms of the applicant's submission to the respondent;
> (c) Equivalent relief that the Court think[s] fit; and
> (d) Costs.

Refinements to changes

[71] Prior to the hearing, Mr Evans refined his relief in a memorandum of counsel.[43] Relief was being limited to Stronvar by way of the inclusion of property-specific provisions. The containment area was limited to land and is described as the Stronvar Retirement Area.

[72] Modifications to the principal measures to meet Objective 5.22.1 were sought in the form of additional provisions for the Stronvar Retirement Area that read:[44]

> (3A) Stronvar
> Council will:
> (a) Recognise that the preservation of indigenous vegetation cover within the Stronvar Retirement Area needs to be prioritised, in order to maintain biodiversity and minimise downstream sedimentation;
> (b) Recognise the commitments that the Council and the Council's predecessors have made to the owners of Stronvar that they will control pest conifers; and

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[42] Notice of Motion, dated 29 July 2020, at [1](a)-(d).
[43] Memorandum of counsel for the applicant on refinement of case, dated 21 September 2022.
[44] Memorandum of counsel for the applicant on refinement of case, dated 21 September 2022, at [3].

(c) The Council is, with landowner permission, to strategically control pest conifers on Stronvar by:

(i) Removing pest conifers from Stronvar other than within the Stronvar Retirement Area consistent with (a).

(ii) Within the Stronvar Retirement Area, investigate methods of pest conifer removal consistent with (a).

[73] That was accompanied by a map depicting Stronvar and the Stronvar Retirement Area (referred to as Map 10A).

Further changes at close of case

[74] Further changes were sought by the applicant in closing submissions. These were prompted by the court having heard from the parties as to the prospect of the applicant's relief being provided for in the RPMP 2020 as a 'side-led programme'. The applicant agreed in closing submissions that Stronvar could be a site-led programme with the principal measures based on Mr Evans' concerns, which are:[45]

(a) to ensure that the indigenous biodiversity values within Stronvar are maintained in the long term (in particular within the Stronvar Retirement Area);

(b) that any method to contain or remove pest conifers does not cause substantial erosion or sedimentation on Stronvar; and

(c) that the applicant (or any successor in title) is not burdened with the substantial costs of containment or removal of pest conifers on Stronvar and rather those costs are allocated in an enforceable way to the exacerbators including Council. If Council is able to identify and obtain funding from other agencies to assist in containing and removing pest conifers, Mr Evans is agreeable to that.

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[45] Applicant closing submissions, dated 13 October 2022, [1](a)-(c).

The hearing

[75] At the hearing, evidence was given by the following witnesses:

(a) for the applicant:
  (i) Mr Geoff Evans, the applicant and one of the owners of Stronvar Station;
  (ii) Mr Vern Harris, retired forestry consultant;
  (iii) Mr Nicholas Ledgard, who is a scientist with extensive practicing experience as a researcher specialising in the use of trees in the hill and high country of New Zealand.
(b) for the Council:
  (i) Mr Underwood, Biosecurity Manager at the Council.

Summary of the applicant's position

[76] In support of his application, Mr Evans swore an affidavit describing the large quantity of wilding conifers near the upper boundary of land formerly in the containment area.[46] Without adequate control, he states that the pines threaten to spread to other, more productive parts of Stronvar. However, removal would create a significant risk of uncontrolled erosion whereas the nearby workable land needs protecting from future spread of the pest conifer species.

[77] Mr Evans was critical that the opportunity was lost to control the further spread across Stronvar, and said that meaningful control is now virtually impossible, such that containment and enforcement at the boundaries is the best option for the wider environment and the catchment.

[78] Mr Evans is not opposed to the objective of progressive containment contained within Objective 5.22.1 of the RPMP 2020, which as Mr Davies put it,

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[46] Affidavit of Mr Evans, at [16].

in simple terms, means that:

(a) pest conifers are going to be contained;
(b) where feasible, they are to be reduced.

[79] The issue for Mr Evans is that little is said about the measures to achieve that action, particularly in relation to Stronvar. Measures are described in administrative but not functional terms[47] and there is a failure to identify "other measures" which could be included within the RPMP such as:[48]

(a) The circumstances when containment of pest conifers is a likely approach and circumstances where reducing the geographic distribution of pest conifers may be more appropriate;
(b) When measures might be adopted to avoid excessive sedimentation, erosion or loss of indigenous biodiversity;
(c) What rights and responsibilities landowners will have; and
(d) The circumstances where the Council and other exacerbators might be responsible for the containment and/or the reduction in geographic extent of pest conifers.

[80] A further complaint relates to cost allocation. Mr Evans is critical that documents prepared by the Council in the steps leading to the RPMP 2020 do not identify the Council or the Crown as exacerbators, a term that is defined in the NPD as "a person who contributes to the creation, continuance, or exacerbation of the problems to be resolved by the [RPMP]"[49] except as an occupier of land that contains an infestation.

[81] His view is that responsibility for the control measures should lie with the Council and/or the Crown as exacerbators.

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[47] Applicant's closing submissions, dated 13 October 2022, at [43].
[48] Applicant's closing submissions, dated 13 October 2022, at [53] and [54].
[49] NPD at [3](1).

Mr Harris

[82] Mr Harris gave evidence of his opposition to the proposed control measures which would desiccate all vegetation and return the slopes to their denuded state, which posed a risk to the return of erosion and sedimentation into the Waihopai River.

Mr Ledgard

[83] Mr Ledgard spoke of his involvement in providing advice to the Council and DoC culminating in his report in 2002. He was familiar with the fragile nature of the land at Stronvar, supporting a future management aim of using woody spaces to stabilise eroding soils as an effective management technique.[50]

[84] He referred to a draft plan[51] produced by the Council for budgetary purposes which had been provided to Mr Evans at an early stage of the RPMP process. This referred to chemical boom spraying as a means of controlling the pest conifer species across the region, including at Stronvar, although he did not support that method.[52] Mr Underwood further explained at the hearing that a 10-year strategy was developed for the area to determine the best approach to manage infestations and to estimate costs for the NWCCP budget process.[53]

[85] Mr Ledgard's evidence was that a problem arises from the risk of killing non-target species, which he observed as making "good recovery" on Stronvar, particularly on less surface-mobile parts of the land where wildings are making little contribution to slope stability.

[86] Mr Ledgard supports the objective of progressive containment, provided it

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[50] Affidavit of Mr Ledgard, at [18].
[51] *The Management and Control of Wilding Conifers in the Waihopai Management Unit, 2021-2032*, by Andrew Macalister.
[52] Affidavit of Mr Ledgard, at [19].
[53] NOE, p 165.

addresses the specific circumstances for Stronvar, stating:[54]

> … There needs to be a principle that on the relevant parts of 'Stronvar' wilding conifers do not need to be removed, due to their role in land stabilisation – an objective agreed to by the Board in the mid-1980s. In addition, along the same lines, the Plan needs a principle that it will carry out (and pay for) wilding control outside the Containment area on 'Stronvar'. …

Summary of the Council's position

[87] The Council was opposed to a property-specific (or site-led) programme primarily on grounds of scope, which we turn to further in this decision.

[88] These concerns are said to relate to the consequential effects on the integrity of the Environment Court's process from being asked to consider granting relief which has not been the subject of evidence or through the evaluative and participatory processes required under the Act and the NPD.

[89] Its position is that the only choices available to the court are:

(a) to retain the RPMP; or
(b) to substitute the progressive containment programme for one of containment as sought in the applicant's original submission, or some equivalent to that;
(c) as an avoidance of doubt measure, to include an acknowledgement within the RPMP that the costs of achieving progressive containment on and around Stronvar will be the responsibility of the management agencies and not the landowner.[55]

[90] In his evidence, Mr Underwood explained the change in the policy approach to the wilding conifer programmes brought about by (initially) the RPMP

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[54] Affidavit of Mr Ledgard, at [27].
[55] Respondent's closing submissions, dated 1 November 2022, at [79].

2017 Proposal, and later, the RPMP 2019 Proposal. These had introduced a regional scale approach to the issues following the 2012 amendments to the Act and the issuance of the NPD. He considered that a requirement of the amended regulatory framework under the Act.

[91] He was opposed to the property-specific methods proposed by Mr Evans as they are "inappropriate for high level regional policy instruments" such as the RPMP.[56]

[92] His evidence addressed the reasons why a singular programme with regional coverage was favoured. However, we understood his evidence to be that the region-wide approach (supported by rules) was primarily for the purposes of protecting investment by the NWCCP into the management activities on the ground and, accordingly, it had the support of the Ministry for Primary Industries.[57]

[93] Although we understood the Council's position to be that this region-wide approach is mandated by the NPD, nothing in that instrument supports that contention. We have proceeded to determine the application on that basis.

[94] As to the operational matters regarding specific locations, Mr Underwood explained that these would be addressed through the various on-ground operational planning and engagement processes with those delivering programmes, including landowners within that area. He stated that:[58]

> … These process (of which will be very detailed) would be driven by the respective control operations under the NWCCP, the Council itself or other initiatives such as those led by community organisations.

[95] Mr Underwood stated that vegetation controlled by boom spraying is used

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[56] Affidavit of Mr Underwood, at [84].
[57] Affidavit of Mr Underwood, at [44].
[58] Affidavit of Mr Underwood, at [51].

to control dense conifer infestations and is very targeted to the conifers. The vegetation would not immediately desiccate as it would take some years to break-down. He also considered that the Upper Waihopai Valley has naturally high rates of erosion, due to the natural geomorphology. Accordingly, he considered that addressing the highly invasive conifer risk and removing the seed source had a greater priority than the risk to biodiversity or to the soil from erosion.

[96] Mr Underwood explained the current operative programme under the NWCCP that is already operating across the whole of New Zealand. Management units have been identified that encompass relatively large-scale areas of conifer infestations that are feasible to work with.

[97] He stated that Stronvar is included in the Waihopai Management Unit which encompasses most of Waihopai Valley over into the Wye being the source of the infestation, and the downwind land through the Ferny Gair conservation area.

[98] This work is to inform the specific operational programmes once it is known what resource levels are available to the Council. Some forward-looking work had already been undertaken in formulating an approach to the management of these infestations, although that was for input into the Crown budget bid processes for the NWCCP.

[99] However, he stated that no clearance work had been undertaken for complex infestations such as that occurring on Stronvar. He described the planning required for this area as a "very complex planning process"[59] to determine how that would be undertaken, particularly if the ecological aspects have to be considered.

[100] He described experience with the Molesworth programme as being a thorough process where expertise was used to map out areas of significance and

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[59] NOE, p 162.

to assess the feasibility of treatment methods to ensure the best long-term prognosis.[60]

[101] We now address the jurisdiction issues raised by the parties.

Is an application to be treated as an appeal?

[102] The applicant had opened on the basis that the court's jurisdiction was appellate, although from the wording of s76 of the Act this was not entirely straightforward. Section 76 sets out the process and matters that may be subject to the Environment Court and states:

> (1) This section applies to the plan resulting from the council's decision under section 75(3)
> (2) The following matters may be the subject of an application to the Environment Court:
> (a) any aspect of the plan:
> (b) whether the plan is inconsistent with the national policy direction:
> (c) whether the process requirements for a plan in the national policy direction, if there were any, were complied with.
> (3) If consultation on the proposal for the plan was undertaken by way of public notification of the proposal and the receipt of submissions, a person who made a submission on the proposal may make an application to the Environment Court.
> (4) If consultation on the proposal was undertaken other than by way of public notification of the proposal and the receipt of submissions, the following persons may make an application to the Environment Court:
> (a) a person who participated in consultation during the preparation of the proposal and whose views were provided or recorded in writing:
> (b) a person who participated in consultation on the proposal and whose views were provided or recorded in writing:
> (c) a person who is likely to be affected by the plan and did not participate in consultation only because the person was not given an opportunity to participate.

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[60] NOE, p 162-165.

> (5) The application must be made within 15 working days after the date of the public notice.
>
> (6) The application is made under section 291 of the Resource Management Act 1991 and regulations made under the Resource Management Act 1991.
>
> (7) The court must hold a public hearing on the application.
>
> (8) The court must—
>
> (a) dismiss the application; or
>
> (b) direct the council to modify the plan, delete a provision from the plan, or insert a provision in the plan.

[103] In opening, the Council rejected Mr Davies' submission that the court was exercising a *de novo* jurisdiction due to the wording of both s291 of the Resource Management Act 1991 ('RMA') and s76 of the Act. Counsel submitted that the court must confirm the Council's decision unless it finds that it is in error of the law in terms of the requirement that the proposal is:

(a) "not inconsistent with" the NPD; or
(b) that the NPD process requirements were not complied with.

[104] During the hearing, having realised that jurisdiction was in contention, the court brought to the parties' attention the fact that prior to an amendment in 2012, the relevant section (s79E) referred to the proceeding lodged in the Environment Court (which was then made under s79D) as a 'reference' which was to be treated as "an appeal". The wording of these provisions prior to this amendment are set out in Appendix A.

[105] Section 76 of the Act underwent a significant redraft in 2012.[61] This section no longer refers to an application as being a reference and/or to its treatment as an appeal. However, the court's powers in determining the application (in former s79E) remains unchanged. The amended provisions are set out in Appendix B.

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[61] Part 5 (ss 54 to 100W) was substituted for Part 5 (ss 54 to 100A), as from 18 September 2012 by s39 of the Biosecurity Law Reform Act 2012.

[106] At the end of the hearing, the parties sought, and were provided with the opportunity, to file further submissions addressing the implications of these amendments and whether the court should continue to treat an application as an appeal, and if not, on what basis. Submissions were duly received.

[107] In opening submissions, Mr Davies had submitted that having regard to text, purpose and context, the court has an appellate jurisdiction. Counsel made the (intuitive) submission that the use of the express "any aspect of the plan" in s76(2) is inconsistent with the court having a review function, as this would include matters of merit.

[108] He further observed that the court lacks the primary remedy used in review jurisdictions, being to refer a decision back to a decision-maker for reconsideration. Mr Davies submitted that s291 of the RMA covers procedural matters and does not confer substantive jurisdiction.[62] Although that was ultimately accepted by the Council, its reason for resisting an appellate jurisdiction continued to revolve around the wording of s76 of the Act.

[109] Mr Davies referred to the history of the 2012 amendment, including the 2012 Bill, committee reports and Hansard, although these contained no discussion concerning the intended difference between the old and new procedures. He also referred to the Explanatory Note to the Supplementary Order Paper 27, released on 18 May 2012 which was introduced by the (then) Minister of Biosecurity, the Hon David Carter, noting that Explanatory Notes to Bills can be referred to in this interpretation context.[63]

[110] The Explanatory Note to that Supplementary Order Paper contains some discussion bearing on this issue when it refers to appeal rights being carried

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[62] He referred to s291 as the "Swiss Army Knife of procedural provisions" under the RMA. See the applicant's closing submissions, dated 13 October 2022, at [8].
[63] *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA).

through, where it states that.[64]

> The other key amendments relate to the right of appeal to the Environment Court. The Biosecurity Act 1993 provides a right of appeal to the Environment Court in relation to council decisions on regional pest management strategies. This appeal right has been carried forward into the new Part 5 of the Act, but the details of who has the right to appeal have had to be drafted differently, due to the greater flexibility in the process for developing plans. The Supplementary Order Paper makes changes to new sections 74 and 92, to provide greater clarity about who is entitled to appeals to the Environment Court, as follows:
>
> - in cases where the council has followed a public submission process, the right to appeal is confined to people who made a submission;
> - in other cases, the right to appeal is confined to people who have participated in consultation and whose views have been provided or recorded in writing.

[111] This was voted on and the amendments proposed in the SOP were agreed to.[65]

[112] The Council maintained its position in closing submissions, albeit with little explanation as to why the jurisdiction is not appellate. Counsel was critical of the applicant's 'mischaracterisation' of the jurisdiction exercised by the court as being a review jurisdiction. Counsel had opened on the basis that it was not a *de novo* appeal, and that position was reiterated in closing submissions as is revealed in the following paragraph:[66]

> Council submitted in opening, that the issues are two-fold and are whether:
>
> (a) The Council's proposal failed to meet the requirements of the Biosecurity Act; and the NPD; and
> (b) The Applicant's proposal is consistent with the Biosecurity Act and the NPD.

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[64] Supplementary Order Paper 2012 (27) Biosecurity Reform Bill (256-2) (explanatory note), p 36.
[65] 19 July 2012, 681 NZPD 3792.
[66] The respondent's closing submissions, dated 1 November 2022, at [40].

> It is not clear whether the Applicant agrees or disagrees with this proposition. The contentious point, if the appeal is a de novo, as of right, full merits appeal, as submitted by the Applicant would be the first proposition; that tis that the Applicant has to demonstrate that the Council proposal is flawed. What is not controversial, however, is that if the Applicant is correct, and this is a full merits based de novo appeal, this Court has to be satisfied (and it is the Applicant's responsibility to meet that burden) that its proposal is consistent with the Biosecurity Act or the NPD. …

Our consideration on jurisdiction

[113] We start by noting that there is no discussion in other cases addressing applications made under the Act as to of whether a s76(3) application is to be considered *de novo*.

[114] All applications that have previously come before the court have been resolved by consent of the parties.[67] Hearings had been held by the court as this is a requirement under the Act.[68] Parties had been put to formal proof in relation to the agreed outcome.

[115] Cases involved parties seeking a direction to modify the plan based on the changes that had been agreed.[69] Accordingly, it is apparent to this court that the jurisdiction was treated as being in the nature of a general appeal to be considered on a *de novo* basis in every case.

[116] There are no explicit matters to be considered in s76, although after holding a public hearing the court must (by s76(8)):

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[67] See e.g. *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of the Plenty Regional Council* [2021] NZEnvC 147, *Coney v Auckland Council* [2020] NZEnvC 30, *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council* [2018] NZEnvC 43 and [2018] NZEnvC 23.

[68] By former s79E(1) and (now) s76(7) of the Act.

[69] For example, *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of the Plenty Regional Council* [2021] NZEnvC 147.

(a) dismiss the application; or

(b) direct the Council to modify the plan, delete a provision from the plan, or insert a provision in the plan.

[117] Prior to the 2012 amendment, matters that could be referred to the court included (in summary):

(a) any provision proposed to be included or excluded in a proposed regional pest management strategy; or

(b) which a decision on submissions proposes to include or exclude.

[118] A consequence of the reference being treated as an appeal was that s290 RMA applied, although by former s79E, the court had essentially the same powers, conferred by s290 RMA, namely, the power to confirm, or direct the regional council to modify, delete, or insert any provision or matter which was referred to it.[70]

[119] Section 79E was also almost identical in its drafting to cl 15 sch 1 of the RMA as it stood between 1996 and 2003, as Mr Davies noted in his closing submissions.[71] Accordingly, prior to the amendment in 2012, there was little scope for any debate about the nature of the court's *de novo* jurisdiction.

Other decisions on applications

[120] *Selwyn District Council v Canterbury Regional Council*[72] observed the lack of procedure for the hearing of the appeal under the Act, however, it found that ss 269-298 RMA should govern the procedure for proceedings lodged under s79D

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[70] Examples of proceedings under s76D are *Contact Energy Ltd v Otago Regional Council* C35/2009, *Maniototo Pest Management Company v Otago Regional Council* C 79/2008 and *Selwyn District Council v Canterbury Regional Council* C138/2004.

[71] Applicant's closing submissions, at [18]-[19].

[72] C138/2004.

RMA.[73] That decision pre-dates the 2012 amendments to the Act.

[121] Similarly, *Contact Energy Ltd v Otago Regional Council*[74] ('*Contact Energy*') states that Part 11 RMA applied to the appeal under s79D of the Act. As a hearing was mandatory by s79E(1) of the Act, the parties had been required to file affidavits as to the merits of the agreed solution and how it meets the legislative requirements.

[122] *Contact Energy* says little about those requirements beyond stating that the affidavit "concludes that the proposed amendments to the Strategy will better achieve the purposes of the Act and the objectives of the Strategy in respect of lagaropsiphon".

[123] *Far North Holdings Ltd v Northland Regional Council*[75] dealt with an application under s96 of Act after the 2012 amendments. The decision identifies matters to be considered (referred to as the relevant tests) that appear to originate from s91 of the Act.[76]

[124] We note that s91 details the second of the six statutory steps to be followed by the Council in the preparation of a Regional Pathway Management Plan. The steps for a Regional Pathway Management Plan are similar to those which apply to the preparation of an RPMP in ss 70-75.

Our determination on jurisdiction

[125] Having had the benefit of comprehensive legal submissions on this issue, we agree with Mr Davies that the application is to be treated as an appeal as it was under the pre-2012 legislation. We are reluctant to infer that the application is no longer to be treated as an "appeal" to be heard on a *de novo* basis in the absence of

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[73] *Selwyn District Council v Canterbury Regional Council* C138/2004, at [5].
[74] C35/2009.
[75] [2018] NZEnvC 57.
[76] *Far North Holdings Ltd v Northland Regional Council* [2018] NZEnvC 57, at [25].

an express reference to an alternative jurisdiction.

[126] We agree with Mr Davies that the changes made to the Act can be ascribed to changes in drafting styles rather than substance, incorporating an end of the concept of 'references' to the Environment Court.[77]

[127] We further note that other proceedings are frequently commenced in the Environment Court by a Notice of Motion filed in accordance with the s291 procedure, including under:

(a) section 85 (a challenge to the plan where land is incapable of reasonable use);
(b) section 86D (an application for rule to have legal effect);
(c) direct referrals; and
(d) on application under s292 to fix mistakes and defects in the plan.

[128] However, in each of these proceedings, the court is exercising a first instance jurisdiction, there being no first instance decision giving rise to the application. In contrast, an application made to the court under the Act follows a council's 'first instance' decision.

[129] Under Part 9 of the RMA, a "submission" is able to be made under s291 to the court on a proposed Water Conservation Order under s209 RMA, however, by s210 RMA, that application expressly triggers an inquiry.[78]

[130] Our approach is consistent with a purposive approach to Part 5 of the Act whereby applications enable the court to act as a check and balance to the power

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[77] By an amendment to the RMA in 2003, plan provisions were no longer "referred" to the Environment Court under cl 15 of sch 1 of the RMA: they were appealed. See s92 of the Resource Management Amendment Act 2003.

[78] Section 210 RMA states: If 1 or more submissions are lodged with the Environment Court in accordance with section 209, the court shall conduct a public inquiry in respect of the report to which the submissions relate.

of the Council in:

(a) the development of effective and efficient instruments for pest management; and
(b) making an appropriate distribution of costs associated with these instruments and measures.

[131] We agree with Mr Davies that a jurisdiction limited to a review oversight is inconsistent with this purpose, as would an appeal right limited to questions of law. If Parliament had intended the jurisdiction to be other than (fully) appellate it would have said so.

[132] Accordingly, we are not limited to considering whether the Council's decision is in error of the law as the Council submitted.[79] We acknowledge that an application is able to be made on grounds that the subject matter of the application is alleged to be inconsistent with the NPD, and/or the process requirements for a plan in the NPD (if there were any) were complied with.

[133] These reflect the statutory requirements for a plan prepared under the Act, however, an application is able to be about any aspect of the plan. That may entail an entirely merit-based evaluation of the matters raised in the application, not being confined to errors of law.

[134] In coming to our decision, we have the same power, duty and discretion under the Act as the Council in determining this application in terms of s76, notably those in s74 of the Act. To the extent that an application raises defects in the procedure followed by the Council, these are cured by a *de novo* hearing.[80] That being so, we do not need to address the applicant's case to a review standard, despite receiving comprehensive submissions from Mr Davies prepared (in the

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[79] Although we are able to do that to the extent that it is pleaded in the application.

[80] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *Calvin v Carr* [1979] 1 NSWLR 1; *A J Burr Limited v Blenheim Borough* [1982] 2 NZLR 1 and *Love v Poirua City Council* [1984] 2 NZCR 308.

alternative) on that basis.[81]

Scope of permissible changes - the caselaw

[135] The defined relief sought by the Council was opposed on scope grounds, as was the further refinement made in the applicant's closing submissions.

[136] For the Council, Ms Radich submitted that the containment area sought in the application was a concept that was familiar to all parties, having been through previous Biosecurity Act evaluation and hearing procedures. However, counsel contends that the refined relief is entirely new in form and substance.

[137] Ms Radich was critical that "for the very first time", the applicant sought to place the entire operational cost burden of managing pest conifers on Stronvar, on the Council. Counsel observed that the refined relief had not been notified to the 21 parties that the applicant and the Council considered were entitled to be notified of the application at the time it was made, referring to the joint memorandum of counsel dated 18 August 2020. That memorandum referred to the Ministry for Primary Industries ('MPI') and iwi with interests in the subject area.

[138] Counsel contended that it was entirely conceivable that any one of these parties, including MPI, would wish to comment on an outcome materially different from the Containment Area which was sought in the original application, and which takes responsibilities away from the Crown and places those (including the costs) on the Council. Counsel also contended that the refined relief was not supported by the applicant's expert Mr Ledgard, who supported progressive containment. However, Mr Ledgard's evidence is irrelevant to the scope issue.

[139] Early authorities (going back to the Town and Country Planning Act ??year) are discussed in the Council's submissions, notably the (former) Tribunal's

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[81] Mr Davies had addressed the applicant's case to a merit standard and a review standard in his closing submissions.

decision in *Green & McCahill Properties Limited v North Shore CC* ('*Green & McCahill*')[82] and *Proudlock v Mt Maunganui Borough*[83] which is discussed in *Green & McCahill*.

[140] The essential objection in each of these cases was that when considered in light of the original submission, the outcome proposed by the appellant was "markedly different on its face", noting that objection in relation to the refinements to the relief sought by Mr Evans.

[141] Counsel also refers to early RMA decisions on scope, (notably, *Countdown Properties (Northlands) Ltd v Dunedin City Council*[84] *('Countdown')*) where the court noted the statutory constraints posed by the submission and appeal process, ruling on the relevant sch 1 provisions as they were then drafted. These decisions had endorsed a pragmatic approach based upon fairness and reasonableness.

[142] The question was whether or not the amendments were fairly and reasonably within submissions.[85] Although cl 10 sch 1 of the RMA was later amended, *Countdown* remains a relevant guiding authority on scope in the context of a council's RMA decision-making powers.

[143] Subsequent cases continue to be guided by these principles although the potential for tension between a pragmatic approach with the principles of fairness and reasonableness is also acknowledged, including in the related context in *Palmerston North City Council v Motor Machinists Ltd*[86]*('Motor Machinists')*. *Motor Machinists* considers the scope of permissible submissions, that is, whether submissions are 'on' or 'about' the plan change.

[144] These later decisions confirm that scope is a matter of fact and degree, in

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[82] PT Auckland, A135/91, 19 December 1991.
[83] PT Auckland, A74/89, 14 September 1989.
[84] [1994] NZRMA 145.
[85] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.
[86] [2013] NZHC 1290.

every case, although the question will also be one of natural justice, considering both the effects of the change being sought, and the opportunity for those affected to participate in the process.[87]

Our consideration of scope

[145] We observe that the statutory purpose of Part 5 of the Act differs from the purpose of the RMA, as does the nature and regulatory effect of the instruments promulgated under each statute. More relevantly, the consultation process prescribed in the Act differs markedly from that in sch 1 of the RMA.

Differing Consultation requirements

[146] Although remaining an important component of the early statutory steps to be undertaken by the Council in the plan preparation process under the Act, consultation is to be decided by the Council, both in terms of how that is to be conducted and (beyond those persons identified in the Act) as to who is to be consulted.

[147] Persons who are directly affected by a proposal must be consulted.

[148] On this occasion, the Council had approved a Consultation Plan that included public notification, receiving submissions and holding hearings if requested. Mr Evans duly participated in the ensuing submission and hearing process, following public notification of the proposal.

[149] He lodged his submission with the Council in writing.

[150] We have seen no evidence that the submissions to be lodged with the Council were to be specific as to the changes sought to the RPMP so as to justify

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[87] *Estate Homes Limited v Waitakere City Council* [2006] NZSC 112.

the Council's restrictive approach to this scope issue.

Persons able to make an application

[151] Section 76(3) sets out the persons who may make an application to the court, not being limited to persons who participated in the consultation process on the proposal. This section states:

> (3) If consultation on the proposal for the plan was undertaken by way of public notification of the proposal and the receipt of submissions, a person who made a submission on the proposal may make an application to the Environment Court.
>
> (4) If consultation on the proposal was undertaken other than by way of public notification of the proposal and the receipt of submissions, the following persons may make an application to the Environment Court:
>
> (a) a person who participated in consultation during the preparation of the proposal and whose views were provided or recorded in writing:
>
> (b) a person who participated in consultation on the proposal and whose views were provided or recorded in writing;
>
> (c) a person who is likely to be affected by the plan and did not participate in consultation only because the person was not given an opportunity to participate.

What can the application be about?

[152] An application made to the court may be about "any of the following matters":[88]

> (a) any aspect of the plan;
>
> (b) whether the plan is inconsistent with the national policy direction:
>
> (c) whether the process requirements for a plan in the national policy direction, if there were any, were complied with.

[153] Sub-section 76(3) is silent on whether a submitter to a publicly notified

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[88] Section 76(2) of the Act.

proposal must confine an application to the Council's decision on their written submission. However, an application by persons consulted under ss (4)(a) or (b), must be "based upon or about" the views expressed to (or recorded by) the council "in writing" as to the way in which they are affected by the proposal.

Comparison with schedule 1 of the RMA

[154] In comparison, sch 1 clauses are prescriptive as to the scope of original and further submissions able to be made to a proposal under the RMA, and as to the Council's power. Clause 14, sch 1 of the RMA restricts the range of persons who may appeal to the court together with the scope of that appeal, to circumstances where the person:[89]

> (a) … referred to the provision or the matter in the person's submission on the proposed policy statement or plan; and
> (b) the appeal does not seek withdrawal of the proposed policy statement or plan as a whole.

[155] The words "provision or matter" in cl 14(2) sch 1 of the RMA is to be given a liberal interpretation; as long as the submitter has "broadly referred to the provision or matter in issue, that is sufficient to give the court jurisdiction to consider the appeal".[90]

[156] While the corresponding provisions in the Act may arguably be less restrictive than the RMA sch 1 provisions, principles of fairness, reasonableness and natural justice remain applicable in this judicial process. Accordingly, we consider that an application made by a submitter to a publicly notified proposal may be about "any aspect of the plan", provided that aspect of the plan is "based upon or about" the matters raised in the submission.

[157] However, beyond that we see no reason to be bound by the rigour of the

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[89] Clause 14 sch 1(2)(a)-(b).
[90] *Option 5 Incorporated v Marlborough District Council* (2009) 16 ELRNZ 1 (HC), at [15].

RMA decisions on scope in this different legislative context. We prefer to take guidance from the principles underpinning these decisions in general terms only.

Our determination on scope

[158] We are satisfied that the changes now sought by Mr Evans are within the jurisdiction of the court to consider on this s76 application. Changes are all directed at what the RPMP 2020 provisions propose in relation to Stronvar. Indeed, the original relief extended to the whole of the HRCMA, seeking reinstatement of a containment zone for that land. The amended forms of relief had been subsequently narrowed in their reach.

[159] We consider that the Council is taking an unduly legalistic approach to Mr Evans' submission. It is a stretch to treat the current proposal as fundamentally different in nature to that originally sought in his submission or in the Notice of Motion. That is only true of the language and drafting styles but not of the central message Mr Evans has conveyed.

[160] We find that Mr Evans has been consistent in his messaging to the Council since these legacy problems first became apparent. Notably, his message appears to have been understood by the Panel making recommendations to the Council in the decision under appeal by this application.

[161] We find that all versions of the amended relief exhibit the salient features of the original submission, in that:

(a) the changes address the legacy issues associated with deliberate (historical) plantings (by others) of pest conifer species on vulnerable parts of Stronvar that had been retired from grazing;
(b) the changes account for the fact that these plantings, and subsequent infill and indigenous regeneration have served as an effective erosion control function;
(c) the changes address concerns as to the unacceptable environmental

consequences of clear felling these trees from the land, including if the boom spraying method is pursued at the operational stage of the NWCCP;

(d) the changes address what are considered to be a fair allocation of costs for the control measures proposed under the RPMP 2020 (we add that although Mr Evans requests changes that expressly allocate costs to the Council and to central government, his underlying concern is to avoid those costs being borne by him or his successors).

[162] The relief sought in the applicant's original submission was not limited to the affected area within Stronvar, and although the fact that the refined relief is now property-specific it does not take the changes outside the scope of the court's jurisdiction.

[163] Nor does the fact that the changes have been (or are to be) rewritten to follow the RPMP/NPD format and language. We consider that the property-specific changes sought in the refined relief are appropriately described as comprising a site-led programme, to use the NPD terminology, particularly if that is nested within the current progressive containment programme in the RPMP 2020.

[164] As to that, we acknowledge that Mr Evans "is less concerned about how [the relief] is documented" in the RPMP 2020.[91] We accept the submission from Mr Davies' reference to progressive containment, containment or the "Stronvar retirement area" or a site-led approach to Stronvar with the aim of (progressively) containing pest conifers are all different methods of stating the same fundamental concept.[92] We do not agree that in considering this form of relief we are going beyond our lawful powers under the Act as the Council submitted.

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[91] Reply submissions for the applicant, dated 8 November 2022, at [5].
[92] Reply submissions for the applicant, at [9].

Site-specific programmes

[165] During the hearing, the court had explored with Mr Underwood the extent to which a site-led programme would be permissible under the NPD, and in circumstances where it operated alongside the region-wide progressive containment programme addressing the same subject (pest conifer species).

[166] Mr Underwood agreed that this would be permissible.[93]

[167] He was also asked whether a site-led programme could account for the vulnerability of the land to sedimentation and erosion and the presence of indigenous biodiversity values, both in the planning and in any operation to remove the pest conifer species on his land. However, he was unsure how this could be achieved in the actual drafting of provisions.

[168] He stated that works were already being planned for the Stronvar land as it has one of the higher priorities in terms of vulnerability and invasiveness. He was confident that the Council would take into account the landowner's wishes before proceeding further, although he also gave evidence that the vulnerability of land to erosion had not thus far been assessed in preparing the RPMP 2020.

[169] In his opinion, the Act is specific as to the adverse effects able to be considered, including the economic, environmental, social, and cultural effects of the invasion by the pests themselves. Mr Underwood acknowledged that removal of vegetative cover was considered for other subjects (rabbits and wallabies) although that was because these pest species impact primary production by the removal of grazing pasture. He considered that erosion from tree removal is an effect of a different kind, being a consequence of the control to be included in the

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[93] We note that such an approach was also permissible prior to 2012 and was used for some of the pests controlled in the 2012 RPMS where the site possessed high natural and ecological value. In those earlier documents they were referred to as a site-led approach. See Regional Pest Management Strategy for Marlborough 2012, at 2.3.7.

RPMP which is able to be addressed at the time of operational delivery.

[170] Mr Underwood explained that the Council did not consider the consequences of concern to Mr Evans in the benefits and costs analysis required to be undertaken under the Act. Costs were confined to the direct or 'out of pocket' cost of the control operations being considered.

[171] We had allowed further submissions from the parties on whether a site-led solution could be considered after the hearing and submissions were duly received from other parties.

[172] For the applicant, Mr Davies reiterated the concerns of Mr Evans, that despite Mr Underwood's evidence the proposal contains nothing that would:

(a) at the operational stage, ensure that the Council take the concerns of Mr Evans into account;
(b) give a landowner/occupier the ability to challenge any planned approach to be taken by the Council in any particular case;
(c) address the conflicts between the benefits of removal of the pest conifer species and the costs imposed by their removal in terms of downstream sedimentation or indigenous biodiversity loss.

[173] He addressed Mr Underwood's evidence that the concerns of Mr Evans' would be considered at the stage of the operational plan after consulting with Mr Evans' although he drew the court's attention to the statutory requirement (s100B of the Act) to prepare an "operational plan" within three months of finalising the RPMP 2020.

[174] Mr Davies stated that only the Council, as management agency, is involved in preparation of that plan, and that Mr Evans has no statutory right to have input into it or to veto any operations intended to be carried out at Stronvar. On our reading of the Act, we find he is correct about that, other than noting the Minister for Biosecurity is able to disallow all or part of an operational plan if it is

inconsistent with the RPMP 2020.[94]

[175] Mr Davies referred to a reference to erosion in the Council's assessment of risks in the cl 6(3) NPD context. That requires an assessment of the risk that options will not achieve their objectives. The risk that compliance with other legislation will adversely affect implementation of the options, the plan states: [95]

> The control techniques and resulting destruction of large conifer stands could result in undesirable consequences with respect to soil erosion and water quality.

[176] That was a risk identified for a programme of eradication. The risk for progressive containment, which includes eradication as a possible outcome, identifies a reduced risk as moderate because "key programme targets would be to work back towards large intractable infestations …".[96]

Our findings

[177] We find the Council's brief consideration of the erosion risks identified with eradication on Stronvar are unsatisfactory. The impacts of pest conifers invading indigenous ecosystems are discussed briefly,[97] however risks to indigenous biodiversity do not appear to have been considered.

[178] We agree that eradication of pest conifers without adequate erosion control would in the medium-term result in the problems that led to the initial plantings to control soil instability and erosion.

[179] We accept that in the absence of any guiding provision in the RPMP 2020, it would be difficult for Mr Evans to challenge any aspect of any operational plan by way of judicial review. Accordingly, if he is dissatisfied with the Council's

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[94] By s100B(4) of the Act.
[95] RPMP 2019 Proposal, p 24.
[96] RPMP 2019 Proposal, p 24.
[97] RPMP 2019 Proposal, p 15.

operational plan for Stronvar, he is left with no effective remedy.

[180] We do not agree that only the environmental effects of pest invasion are able to be considered, to the exclusion of the environmental effects of removing that invasion. These environmental effects come within the scope of s70(2)(e)(i) as an effect on the environment resulting from implementation of the plan.

[181] These effects should not be ignored in the plan preparation process. Indeed, before moving to the second step in s71, the Council must be satisfied that s70 requirements have been complied with. Even at the s71 step, environmental effects fall within the scope of analysis to be undertaken by the Council in s71(e). This states:[98]

> that for each subject, the benefits of the plan would outweigh the costs, after taking account of the likely consequences of inaction or other courses of action.

[182] We agree that there was a need for these effects to be considered in formulating a programme for inclusion in the RPMP 2020.

[183] We are mindful that the erosion susceptibility of land must be considered in a plantation forestry context under the RMA,[99] including where harvesting is proposed. Sediment must be appropriately managed and ground disturbance controlled. Management plans are required to be prepared and approved in that context.

[184] We accept that boom spraying does not directly involve ground disturbance, although we see no reason to require a lesser standard of management of the potential adverse effects in this different statutory context, particularly when the uncontroverted evidence is that the land is highly vulnerable to erosion and

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[98] Section 71(e)of the Act

[99] Pursuant to the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 (NES-PF) where forest has been planted specifically for commercial purposes and will be harvested.

due to its proximity to the Waihopai River catchment.

[185] We find that a nested site led programme operating within the region wide progressive containment would be permissible under the NPD. We do not agree that a single region-wide approach is mandated by the Act of the NPD as the Council contended.

[186] Objective 5.22.1 on progressive containment, which contemplates reduction **or** containment, is expressed as applying to all pest conifer species within Marlborough (spanning the HRCMA depicted in map 10). However, within that framework there is scope for a nested site-led programme for Stronvar as the applicant proposes, where containment or reduction remain as the identified objective.

[187] As earlier noted, both response options are within the scope of these two programmes as they are defined within the NPD, although the site-led programme would provide further detail as to when and how reduction is to be carried out in preference to containment in order to protect values at Stronvar. This could include principles to retain indigenous biodiversity and to minimise soil erosion.

[188] We have considered the Council's jurisdiction argument in opposition to this course of action, including submissions on the jurisdiction of the Environment Court under 293 of the RMA which the court is lacking in this jurisdiction.[100] However, we propose to leave the drafting to be carried out by the parties, commencing with Mr Davies.

[189] We consider that it would be feasible for a management plan to be prepared with the involvement of Mr Evans if control or eradication of pest conifers on the retired land is proposed, with the objective of recognising the values attaching to

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[100] Because s293 is only available where in the context of "..an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan that is before the Environment Court" which is limited in its application to RMA instruments.

that land.

[190] The options for providing for this within the RPMP include the insertion of an "other measure" within the existing framework.

[191] Alternatively, a further intermediate outcome based upon 'protecting values in places' could be inserted, supporting a 'site-led programme' for the retired land at Stronvar.

Is the Council an exacerbator?

[192] We address this issue for the sake of completeness although it has little bearing on the terms of our interim decision.

[193] From the outset Mr Evans has sought to persuade the Council to accept some responsibility for these legacy issues. A component of the relief sought in his application in that he seeks that the Crown and the Council be allocated the cost associated with any control of the legacy issues, relying on cl 7(2)(d) of the NPD for the purposes of complying with s71(e)(ii) of the Act.

[194] Mr Davies was critical that the Council did not identify itself as an exacerbator in the preparation of the RPMP 2020 except in its capacity as an occupier of land.[101] He acknowledged that as the Crown appears to be contributing $2 million of the 2.345 million cost of delivering the programme, the omission to identify the Crown specifically as an exacerbator is of little moment.

[195] However, we note that the Crown has been identified as contributing to the cause of the of these legacy issues. In the assessment undertaken in terms of s71(f)(ii) of the Act, it is stated that:[102]

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[101] NOE, p 156.
[102] RPMP 2019 proposal, p 20.

> The primary infestations in Marlborough are legacy sources occurring on Crown land planted in decades past by former local and central government agencies. As a result, the Crown funding as part of the NWCCP is in response to the crown being an exacerbator of the problem.
>
> In terms of the costs that occupiers may be required to bear to manage pest conifers; it is only in an instance where inaction may cause new infestations to establish. This is an exacerbation of the problem so is fitting in terms of meeting the cost.

[196] In response, Ms Radich was critical of the applicant for failing to raise the issue as to the Council's role as an exacerbator until closing submissions. However, counsel also acknowledged that:[103]

> …the Council has always been willing to and remains willing to enter into a private agreement with Mr Evans about the costs of wilding pine control on his property, but it does not consider that it's appropriate to put this in a regional planning document.

[197] An agreement following mediation was also referred to in closing submissions, although the agreement had not been produced to the court and privilege had been claimed by the Council during the hearing when Mr Davies sought to cross-examine Mr Underwood on its content.

[198] Mr Davies submitted that privilege does not attach to the agreement. That may be the position under s57(3) Evidence Act 2006, although by cl 7.3(k) of the Environment Court's Practice Note 2023, the alternative dispute resolution process is and ought to remain confidential including the outcome if the matter is not entirely resolved.

[199] That is, unless the parties each agree that the outcome is relevant to the issues to be decided by the court, in which event it ought to be introduced into the evidence. Accordingly, we intend to say no more about the agreement in this

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[103] NOE, p 182.

decision particularly as we have no understanding of how, if at all, it relates to the matters we are required to decide.

[200] It is sufficient to note that the applicant's position has consistently been that the costs associated with eradication and/or containment on Stronvar should be borne by the persons responsible for creating the situation.

[201] While we agree with that sentiment, we are unwilling to make a finding as to the Council's responsibilities as successor to the Board under the local body reforms, as that is beyond our jurisdiction to do so. Nor do we consider that we need to do that in order to properly determine the application.

[202] There was some probative evidence before the court of the involvement of the former Board in the initial plantings (for erosion control), however, we understand that many of the later plantings were carried out or managed by the New Zealand Forest Service. We received evidence as to the historical records referencing the stated intention of these organisations to monitor and eradicate any spread of Pinus Contorta from the Wye Soil Conservation Reserve.

[203] In this regard, we note the comments of the Panel earlier referred to at [63] of this decision. However, the remedy we propose in this interim decision avoids the need for these matters to be taken any further. Moreover, we query whether there is any justification for the acknowledgments as to the respective liability or involvement of the Board and/or the Council in the RPMP 2020 beyond an acknowledgement accepted by the Council as being on a "for the avoidance of doubt" basis.

Should there be further consultation on the site-led programme for Stronvar?

[204] As to the Council's concerns on consultation (or lack thereof) on the refined amendments, we have found that they are within the scope of Mr Evan's submission.

[205] However, we note that after consultation required under the Act has been undertaken, including if a hearing has been held to hear submissions, s72(6) of the Act loops back to s72(1) which requires the Council to be satisfied –

(a) that, if Ministers' responsibilities may be affected by the plan, the Ministers have been consulted; and
(b) that, if local authorities' responsibilities may be affected by the plan, the authorities have been consulted;
(c) that the tangata whenua of the area who may be affected by the plan were consulted through iwi authorities and tribal runanga;
(d) that, if consultation with other persons is appropriate, sufficient consultation has occurred.

[206] We have given some consideration to the question of whether the Minister's responsibilities would be affected by the amendments we propose to direct be made to the plan and whether there is a need for further consultation with iwi.

[207] We doubt that the Minister's responsibilities are so affected given that the amendments are confined in their application to Stronvar. It is true that the operational stage of any clearance work proposed by Stronvar will potentially be impacted, if boom chemical spraying had been or is currently proposed as the method of clearing the tree, although we doubt this impinges on the responsibilities of the Minister under the Act.

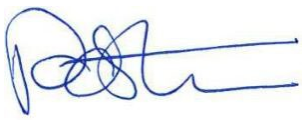
[208] In exercising our appellate jurisdiction, we stand in the position of the Council. In that regard, we must also be satisfied that there has been adequate consultation in relation to the amendments we consider that the Council should make to the RPMP 2020. We note that the Notice of Motion was served on all interested persons although none of those persons or entities elected to join.

[209] However, for the avoidance of doubt, in this interim decision, we reserve leave to hear further from the parties on whether there ought to be further

notification of the site-led programme for Stronvar on persons notified when the application was filed with the court.

[210] We reserve leave for further directions to be made about that.

For the court



P A Steven
Environment Judge
17 March 2023