

# **Issuing relating to the regulatory framework for the Integrated Forestry Operations Approval process in NSW – a report to the Chief Executive Officer of Forests NSW**

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## Preamble

In February 2012 the CEO of Forests NSW (FNSW) engaged the consultant to undertake an environmental audit of the native forest operations conducted by FNSW in relation to the following terms of reference-

1. The processes around harvest plan development and their compliance with the Integrated Forestry Operations Approval (IFOA)
2. The processes around implementation and supervision of the Plan and compliance with the requirements of the harvest plan
3. The processes around on-site remediation during harvest and post-harvest audit and follow-up
4. The management system controlling training and education of harvest planners, supervisors and contractors

The findings of the audit are contained in the report *Environmental audit of native forest operations – a report to the Chief Executive Officer of Forests NSW (Wilkinson, June 2012)*.

In compiling the above report the consultant identified a number of issues that are outside of the direct terms of reference for the audit but which are relevant in the context of the broader regulatory framework under which FNSW is required to operate. These issues are presented in this second report.

## 1. Key findings and recommendations

1. The regulatory framework for the IFOA is unduly rigid, bureaucratic and adversarial in nature.

*Recommendation 1 – FNSW should seek a review of the regulatory framework with a view to incorporating the following principles and elements –*

- a. A participatory and cooperative approach to fostering high standards of environmental management, with an emphasis on training, education, planning tools and advice*
  - b. Agreed objectives for the management of environmental values within wood production forests*
  - c. Agreed management prescriptions and guidelines that can be developed, updated and applied in a fair and practical manner*
  - d. A focus on ongoing research and review, adaptive management and continuing improvement*
  - e. Transparent audit protocols and compliance standards*
  - f. Public reporting of the environmental standards that are being achieved.*
2. The EPA has little, if any, role in promoting improved practice through mechanisms such as training, education and advisory services. In particular, the EPA appears to have no process for developing and/or endorsing appropriate planning guidelines and tools. This has led to

the highly undesirable situation where basic planning processes used by FNSW are being challenged by the regulator through the adversarial and costly process of litigation.

*Recommendation 2 – FNSW should continue to liaise with the EPA and other regulators to seek a more cooperative approach to the development and endorsement of planning guidelines and tools for addressing regulatory requirements (see alternative model in this paper).*

3. The audits conducted by the EPA lack transparency and appear to be focussed on finding faults rather than on providing an overall assessment of environmental performance. The EPA appears to have adopted a 'letter of the law' approach that fails to take account of the level of seriousness of the non-compliance detected or the degree of environmental harm resulting from the non-compliance. There appear to be no published compliance standards that prescribe the assessment criteria and operational tolerances.

*Recommendation 3a - FNSW should encourage the EPA to develop and publish separate protocols for conducting investigations ('reactive audits') and for general compliance audits ('proactive audits').*

*Recommendation 3b – The investigation and audit protocols should include compliance standards that take account of factors such as operational tolerances and the level of seriousness of the non-compliance detected and consequent environmental harm.*

*Recommendation 3c– FNSW should encourage the EPA to conduct its audits and publish its findings in a manner that fairly and transparently provides an overall assessment of the environmental standards that are being achieved by FNSW.*

*Recommendation 3d – In the interests of fairness and transparency, FNSW should encourage the EPA to provide it with the formal right to respond to all potentially incorrect or adverse audit findings before audit reports are finalised.*

4. The audits conducted by the EPA appear to be restricted to a subset of the IFOA conditions. Some key elements of sustainability, such as retained basal area and forest regeneration, do not appear to be systematically assessed and reported.

*Recommendation 4a – FNSW should encourage the EPA to ensure that its audit protocols cover all licence conditions and prescribe the basis upon which each element shall be sampled, assessed and reported.*

## **2. Audit methods**

The observations made in this report are drawn from the audit evidence gathered by the consultant under the terms of reference (above). Meetings and field inspections were held as follows-

- 20-22 February 2012 – Regional Manager Daniel Tuan, staff and contractors of FNSW, Bateman's Bay
- 23 February 2012 – meetings with Steve Hartley and Greg Aboud, EPA, Sydney and Nick Roberts, CEO of FNSW and Dean Anderson, Director Native Forests, Sydney
- 16-19 April 2012 – Regional Manager Craig Busby, staff and contractors of FNSW, Coffs Harbour
- 24 April 2012 – telephone interview with Ross Garsden, NCS International auditor
- 22 May 2012 – post-audit meeting and discussion of draft report with Nick Roberts, CEO of FNSW and Dean Anderson, Director Native Forests, Sydney.

## **3. Comments on the regulatory framework for the IFOA**

1. The planning requirements of the IFOA are complex and poorly integrated. Whilst some are highly prescriptive and rigid, others are poorly defined and open to interpretation. This presents challenges for developing a systematic and comprehensive set of planning tools.
2. The regulatory framework is rigid and unresponsive to scientific and operational developments. It appears to lack many of the attributes that are normally associated with contemporary systems of regulation, such as a commitment to the principles of continuing improvement and implementing new knowledge through adaptive management. As a result, both FNSW and the EPA find themselves obliged to meet licence conditions in a manner that can only be described as slavishly bureaucratic and inefficient. These inefficiencies incur unwarranted costs and divert valuable resources and expertise away from more useful work. For example, many of the resources required to meet the rigid licence conditions for surveys of marginal koala habitat could be better used through a more risk-based, scientific approach to population monitoring and impact studies.
3. The regulatory approach adopted by the EPA is perceived by FNSW to be adversarial in nature and focused on finding faults. The EPA appears to be constrained within the current regulatory environment from adopting a more participatory approach to the pursuit of improved environmental outcomes in the forests.
4. In some regulatory jurisdictions planning tools and guidelines (such as codes of practice) are developed by the regulator, usually in consultation and collaboration with key stakeholders, including land managers, industry practitioners, independent scientists and conservation bodies. Once these tools are endorsed by the regulator, they have the status of an agreed standard and compliance with the tools is accepted as meeting the test of 'due diligence', which provides a general defence with respect to any failure of the planning process. This is not the case with the IFOA, where the development of planning tools has largely been left to FNSW and the planning tools are not endorsed and in fact may be challenged by the regulator in instances of alleged non-compliance. A good example of this is the lack of any endorsed guidelines for the identification of Endangered Ecological Communities (EECs). In the absence of endorsed planning guidelines, FNSW has, in good faith, developed internal guidelines and used ecological experts to identify EECs. However, specific determinations by FNSW are being challenged by the regulator through the adversarial and costly process of litigation. This can only be seen as a chronic failure of regulatory process and as a very

inefficient way of developing acceptable operational guidelines and planning tools. An alternative model is presented in Box 1.

5. Under the current arrangements the EPA has no direct involvement in conducting training and education programs. It is understandable and appropriate that routine training for forest operators should primarily fall under the responsibility of FNSW and its contractors. However, it is clear that the EPA could be doing more to proactively foster improved forest management through training and education programs.
6. The compliance standards enforced by the EPA do not appear to be documented. Instead, the EPA appears to have adopted a very rigid 'letter of the law' approach to the requirements of the licence conditions. The key features of the EPA's approach can be summarised as follows-
  - a. The monitoring and investigation procedures used by the EPA are not published. This means that FNSW and the general public are not aware of the basis upon which the EPA undertakes its compliance activities.
  - b. The lack of endorsed planning guidelines (e.g. for EECs –above) further complicates the question of compliance standards and begs the question 'on what basis can the regulator assess compliance?'
  - c. The audit approach taken by the EPA does not appear to follow conventional audit procedures (e.g. for environmental auditing under ISO14001) with respect to audit checklists, pre-audit and post-audit meetings with the auditee etc. FNSW is not given a reasonable opportunity to participate in the audits or to respond to potentially adverse or incorrect audit findings. To a large extent, the audits are seen as adversarial in nature and lacking in transparency.
  - d. There appears to be no formal or published methodology for determining the level of seriousness of non-compliances and for taking account of factors such as the following-
    - i. The level of actual or potential environmental harm
    - ii. The reparability of any damage
    - iii. Public concern
    - iv. The degree of reporting and cooperation by the offender, including corrective actions taken
    - v. The previous history of performance by the offender.
  - e. In addition, the EPA appears to have no published 'compliance standards' that prescribe the defined tolerances for specific elements of regulatory requirements. Compliance standards are particularly relevant in an operational forest environment where elements such as buffer widths do not warrant the degree of measured precision that may be required in other fields, such as human health and manufacturing. Operational tolerances are often prescribed for the marking of elements such as stream buffers. For example, the tolerance used in the Tasmanian forest practices system is that the buffer should not be less than 10% of the prescribed width over more than 10% of the lineal length of the stream. Other licence conditions may have a 'zero tolerance' for non-compliant activities such as the dumping of petroleum waste in the forest.
  - f. In the absence of any procedures for determining the level of seriousness and the compliance standard, the EPA has adopted an approach of reporting all non-compliances with the licence conditions, including matters that relate to relatively minor administrative processes. Very few of these non-compliances appear to be related to serious actual or potential environmental harm but the large number of reported non-compliances, and the lack of recognition of operations that achieve good

environmental outcomes, paints a very damaging and potentially misleading picture of FNSW's overall environmental performance.

- g. Field officers of FNSW are critical of the regulatory environment and they generally have little respect for the approach and competence of the EPA. They regard many of the audit findings of the EPA to be unfair and/or wrong and they see little point in challenging the findings due to a lack of responsiveness from the regulator. In at least one case, FNSW has paid a fine rather than dispute a finding simply to avoid the much greater cost of a legal challenge. Unfortunately this does little to allay a perception in the minds of the regulator and the public that FNSW has a poor record of environmental compliance.
- h. The absence of any consistent basis for determining the seriousness of non-compliances is a problem for both FNSW and for the EPA. The problem for FNSW is that even relatively trivial non-compliances expose it to ongoing allegations of poor performance, adverse audit findings, threat of prosecution and damage to its corporate brand. The problem for the EPA is that it faces relentless pressure to take legal action from lobbyists who are primarily concerned with making allegations of regulatory failure as a means to discredit and bring about an end to timber harvesting operations.
- i. The primary purpose of an audit should be to provide an objective and constructive measure of performance, identifying the elements that are done well and those where improvement is required. In focussing on the reporting of non-compliances, the EPA audit fails to provide an overall assessment of FNSW's environmental performance. It would be more useful for the EPA to report on the standards that are being achieved against all audit criteria. This should recognise the areas of good performance and identify areas where improvement is required. Reporting of 'non-compliances' should be limited to incidents that exceed a reasonable and practical compliance standard.
- j. The EPA's approach appears to be substantially influenced by pressure from ENGOS. Allegations of non-compliance from these groups substantially divert the resources of the EPA away from general compliance audits ('proactive audits') towards investigations of alleged non-compliance ('reactive audits'). Both of these two aspects of compliance monitoring are important but they should be kept separate. Random audits of environmental performance should be designed to provide an objective assessment of a representative sample of operations against pre-determined assessment criteria. Investigations into allegations of non-compliance should be governed by separate, well-documented procedures that are responsive to the rights of both the complainant and the accused, without undue allocation of resources on investigations for which there is insufficient *prima facie* evidence of serious actual or potential wrong-doing or environmental harm.
- k. In the absence of published audit protocols and on the basis of the evidence available, it would appear that the EPA audit does not systematically cover all of the licence conditions. The audit appears to be focussed on a subset of readily measured elements (such as stream crossings and the retention of slash near retained trees) or other matters raised by complainants. For example, there would appear to be no systematic post-harvesting assessment of the success or otherwise of regeneration and the degree of compliance with requirements relating to the retention of basal area. Both are these are fundamental to the principle of sustainable forest management yet they do not appear to be the subject of routine assessment by the EPA.

**Box 1: Alternative model for developing operational guidelines and planning tools for meeting regulatory requirements**

1. The regulator establishes and convenes an advisory body of key stakeholders as a forum for consultation on the development and endorsement of guidelines and planning tools (note: this is an advisory body, it has no mandate for approving or rejecting proposed planning tools)
2. Technical working groups, with relevant expertise and practical experience, may be established by the regulator to develop a draft guideline/planning tool.
3. The draft guideline/planning tool is reviewed by the advisory body and advice is provided to the regulator.
4. The regulator invites and considers submissions on the draft guideline/planning tool from stakeholders and, if appropriate, the general public.
5. The regulator makes a determination regarding the endorsement of the guideline/planning tool.
6. If necessary, an independent, expert panel is established to review any objections to determinations made by the regulator with respect to guidelines/planning tools.
7. The guideline/planning tool is introduced to its intended users through training and education programs conducted in a cooperative manner by the regulator and/or other bodies.
8. The guideline/planning tool is reviewed and revised (using the above process) as required in the light of new knowledge and operational experience.

## **Acknowledgments**

The consultant wishes to acknowledge the cooperation and assistance provided by FNSW Regional Managers Craig Busby and Daniel Tuan and their staff, FNSW Manager Planning and Environment Andy Stirling, EPA officers Steve Hartley and Greg Aboud and NCS International auditor Ross Garsden.

## **Declaration of auditor**

I undertook and completed this audit on behalf of the Forest Practices Authority (FPA), Tasmania as a consultant to FNSW. The FPA is an independent statutory authority responsible for the regulation of forest practices in Tasmania under the *Forest Practices Act 1985*. I hold the statutory position of Chief Forest Practices Officer and Executive Director of the FPA. I am an accredited Registered Professional Forester with recognised skills in forest policy and regulation, and I am an accredited Environmental Lead Auditor (RABQSA). I was employed by the Forestry Commission of NSW from 1972 to 1985 and I have held positions in forest research and forest regulation in Tasmania since then, as well as working as a consultant on national and international projects. I do not consider that I have any conflict in undertaking this audit.



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