**ALL ALL BEFORE THE MINISTER FOR THE ENVIRONMENT**

**IN THE MATTER OF** the Resource Management Act 1991 ('the Act')

**AND**

**IN THE MATTER OF** of the Draft National Policy Statement for Indigenous Biodiversity

# LEGAL SUBMISSIONS ON BEHALF OF THE NEW ZEALAND FOREST OWNERS ASSOCIATION INCORPORATED

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Presented for filing by:

Forest Owners Association
Venise Comfort
Forest Owners Association
9/93 The Terrace
Wellington 6011
T 04 473 4769
E venise.comfort

## INTRODUCTION

1 These legal submissions are filed on behalf of the New Zealand Forest Owners Association Incorporated (the FOA) on the Draft National Policy Statement for Indigenous Biodiversity (the NPSIB).

2 The FOA is the representative membership body for the commercial plantation forest growing industry. FOA members are responsible for the management of approximately 1.2 million hectares of New Zealand's plantation forests and over 80 % of the annual harvest.

3 These submissions should be read in conjuction with the expert evidence of Sally Strang (Plantation Forest Enviornment Manager) and Willie Shaw (Ecologist) filed together with and in support of the relief requested by FOA in these submissions.

## SCOPE OF LEGAL SUBMISSIONS

4 These submission address the following issues:

(a) Whether there is a better approach to maintenance of indigenous biodiversity values within plantation forest than that proposed in the draft NPSIB;

(b) Whether the Resource Management Act 1991 (the RMA) requires that the approach to protection of significant habitat of indigenous fauna needs to be the same as the approach currently applied to protection of areas of significant indigenous vegetation; and

(c) Whether the definition of "indigenous vegetation" and the criteria at Appendix 1 of the NPSIB for identification of indigenous biodiversity values requiring protection under section 6(c) RMA need to be amended to ensure that only values that are ecologically significant are identified.

## EXECUTIVE SUMMARY

5 FOA **supports** the purpose of the NPSIB to maintain indigenous biodiversity.

6 FOA **supports** the identification and protection of remnant indigenous vegetation that meets appropriate ecological criteria as significant natural areas. This approach is generally consistent with the how these areas are currently managed under regional and district plans.

7 FOA does **not support** the proposed approach to management of other indigenous biodiversity within plantation forest that is not remnant indigenous vegetation. Such indigenous biodiversity includes regenerating indigenous vegetation[1] and significant habitat for indigenous fauna within plantation forest.[2]

8 FOA considers that there is a fundlement flaw in NPSIB framework. The current approach that has been developed to manage areas of significant indigenous vegetation is well understood and works reasonably well. However the NPSIB seeks to extend this approach to significant habitat of indigenous fauna. There are important differences between these two types of indigenous biodiversity. When these differences are properly taken into account FOA considers that it would be better to treat them separately in the NPSIB rather than conflate the two under the omnibus term of "SNA".

9 FOA also considers the criteria at Appendix 1 of the NPSIB and the definition of "indigenous vegetation" are too broad and will result in the indentification, mapping and protection of indigenous vegetation that is not ecologically significant.

10 Overall, FOA considers that the proposed approach to maintainance of indigenous biodiversity within plantation forest is impracticable, prohibitively expensive, inequitable, disproportionate and potentially self-defeating.

[1] Regenerating indigenous vegetation includes vegetation that has established within or adjacent to planted forest during the current rotation including understory vegetation, vegetation that has grown within gaps and planted areas that have failed, and vegetation growing over roads and forest infrastructure used in the last rotation

[2] Indigenous fauna includes mobile and highly mobile fauna, and fauna that is not mobile

11 Consequently FOA considers the NPSIB as currently proposed is not the best way to achieve the broader objective of maintaining indigenous biodiversity where such biodiversity is located within plantation forest.

12 Through this submission FOA seeks to present an alternative approach to management of indigenous biodiversity in plantation forest that FOA considers is better than the approach proposed in the NPSIB.

## OBJECTIVES OF FOA

13 FOA's objectives in respect of this submission on the NPSIB are as follows:

(a) Targeting New Zealand's limited financial and human resources to achieve maximum biodiversity benefits;

(b) Retaining the requirement that local authorities are responsible for the cost of identification and mapping of significant biodiversity values but ensuring that such costs are affordable to the community and no more than necessary to achieve the objectives of the NPSIB;

(c) Managing indigenous biodiversity within plantation forest exclusively through national direction provided by the NPSIB and the NESPF; and

(d) Enabling day-to-day harvesting activities without need for resource consent triggered by indigenous biodiversity planning controls whilst maintaining important indigenous biodiversity values within plantation forest.

## PROBLEMS WITH THE NPSIB APPROACH TO INDIGENOUS BIODIVERSITY WITHIN PLANTATION FOREST

14 FOA acknowledges that the NPSIB contains some recognition that plantation forest should be treated differently from other land uses. However these provisions are limited in scope, their meaning is unclear and their relationship with other parts of the NPSIB is ambiguous

15 For example, Policy 3.10 provides that plantation forest identified as containing Significant Natural Areas (SNA) are deemed to be "plantation forest biodiversity areas" (PFBA). However, as currently drafted Policy 3.8 of

the Proposed NPS would require all SNA within plantation forest to be identified and mapped in district plans.

16 The excessive breadth of the criteria for identifying SNA at Appendix 1 of the Proposed NPS means that large areas of plantation forest would be identified as SNA. The surveys required to complete this task would come at enormous cost and achieve little benefit in terms of maintaining indigenous biodiversity.

17 Policy 3.10 applies to PFBA and requires that adverse effects of plantation forestry activities on (a) threatened or at-risk flora must be managed, and (b) significant habitat for threatened or at-risk indigenous fauna must be managed, to maintain long-term populations of such fauna.

18 FOA is very concerned about what this means in practice. For example, its unclear how these values will be identified, and what requirements will be imposed on plantation forest owners to manage and maintain them.

19 With respect to other indigenous biodiversity within PFBAs, policy 3.13 and policy 3.15 require local councils to maintain indigenous biodiversity (including highly mobile fauna) by amending their plans to manage adverse effects of land use on such indigenous biodiversity. FOA is concerned that these policies could lead to new and stringent regulation of harvesting activities. FOA is very concerned about what this means in practice.

20 When a resource consent application is triggered by indigenous biodiversity controls, policy 3.19 contains onerous requirements for assessment of potential adverse effects which would be very expensive to complete in the context of large scale land use such as plantation forest harvesting activities.

21 Overall, FOA is concerned that the NPSIB in its current form will be relied upon to impose significant new restrictions on plantation forestry operations. Such measures would impose considerable additional costs on forest owners.

**IS THERE A BETTER APPROACH TO MAINTENANCE OF INDIGENOUS BIODIVERSITY VALUES WITHIN PLANTATION FOREST THAN THAT PROPOSED IN THE DRAFT NPSIB?**

22 A different approach to management of indigenous biodiversity within plantation forest is justified for the reasons discussed in the following sections.

**Distinguishing features of plantation forest**

23 Plantation forest is a tree crop deliberately established for production purposes with the intention that the trees will be harvested upon maturity (circa 25 years for radiata pine and 40 years for Douglas fir).

24 Prior to afforestation and replanting (on second and subsequent rotations) land preparation work includes removal of existing ground cover, other than remnant indigenous vegetation which is retained.

25 Subsequently, over time other indigenous biodiversity grows (regrowth) or occupies plantation forest (fauna) due to the favourable habitat that the planted trees provide as they grow to maturity.

26 The evidence of Ms Strang and Mr Shaw is that plantation forest is beneficial for the maintenance and restoration of indigenous biodiversity, and compares favourable against other extensive rural land uses.

27 FOA acknowledges that harvesting activities within a plantation forest can sometimes adversely affect indigenous biodiversity values.

28 The nature, extent and degree of adverse effect is highly dependent upon the indigenous values concerned and other factors that can vary significantly within and between plantation forests. However such effects are typically of short duration, limited in extent and do not cause any significant long term damage or disturbance to indigenous biodiversity values.

29 Consequently. indigenous biodiversity values affected by harvesting activities typically recover to pre-harvest levels over time. In addition the act of harvesting creates niche habitats for a number of indigenous species, most notably the Eastern and Bush falcon.

30 Accordingly the threat to indigenous biodiversity values from harvesting activities is relatively low. A range of measures to mitigate such threats are available and are already being applied (see following comments).

**“One size fits all” approach incorrect**

31 NPSIB incorrectly seeks to apply the existing regulatory approach developed for remnant indigenous vegetation to other types of indigenous biodiversity.

32 Areas of remnant indigenous vegetation can easily be identified and protected. The benefits of protecting these important areas and the relatively low cost of such protection on landowners readily justifies mapping and regulatory controls in district plans.

33 FOA notes the important point that under the existing approach no exotic forest has been deliberately mapped as a SNA, with the exception of one rare orchid reserve within a pinus nigra standard in Kaingaroa Forest (Iwitahi Orchid Reserve). However as discussed in the evidence of Ms Strang and Mr Willie, the “one size fits all” approach in the NPSIB conflates both s6(c) vegetation values with habitat values under the omnibus term of “SNA”. This approach would likely lead to large areas of plantation forest being mapped as SNA.

34 So the NPSIB as currently proposed is novel and represents a fundamental change in policy with respect to management of indigenous biodiversity within plantation forest.

35 Applying a “one size fits all’ approach to indigenous vegetation is unnecessary to achieve the NPSIB objectives for indigenous biodiversity and cannot be justified.

36 An alternative approach is required that is informed by expert evidence and quality information. The NPSIB already contains provisions that support an alternative approach, however, these should be developed into a clear and workable policy framework regarding indigenous biodiversity in plantation forest.

**Cost and feasibility of ecological survey of plantation forest**

37 The FOA considers that the significant implications and consequences of this change in policy have not been thought through or fully considered.

38 As discussed in the evidence of Ms Strang and Mr Shaw, the criteria for identification of SNAs at Appendix 1 are so broad that virtually all plantation forest would potentially qualify as an SNA.

39 Clause 3.8 requires territorial authorities to identify and map SNA using criteria at Appendix 1 of the NPSIB.

40 The ecological surveys of plantation forest required to give effect to clause 3.8 would be of a scale and level of complexity never previously undertaken within New Zealand.

41 FOA considers that the cost of completing such surveys would be exorbitantly expensive, unaffordable for many territorial authorities and untenable to ratepayers.

42 The cost of surveys to implement the NPSIB has not been accurately quantified in the Regulatory Impact Statement (RIS) or the Cost Benefit Assessment (CBA) accompanying the NPSIB. Mr Shaw's evidence is that such surveys will involve very considerable cost. FOA considers the actual cost will be substantially more expensive than contemplated by these documents.

43 The evidence of Ms Strang discusses the additional compliance costs that forest owners will likely face under the NPSIB. Further, the submission lodged by PF Olsen Ltd contains a detailed analysis of CBS shortcomings. Both these documents highlight important flaws in the CBA that materially affect its reliability and accuracy

44 It follows that the NPSIB as it relates to plantation forest is predicated upon an inaccurate RIS and CBA that cannot be relied upon to inform the cost / benefit evaluation of the NPSIB required by s32 and s52(1)(c) RMA (see following paragraphs).

45 FOA is concerned that territorial authories may respond to the directive at clause 3.8 to map SNAs and the uncertain wording in clause 3.10 (to manage threatened or at-risk indigenous fauna and flora) with rules that transfer surveying or assessment requirements onto forest owners.

46 Attractive though it may seem, it is not appropriate for territorial authorities to shift this responsibility to private landowners via rules and resource consent processes.

47 Case law requires that local authorities should seek to internalise the cost of surveying or assessment to meet their RMA planning requirements and refrain from passing these requirements and costs onto private developers and landowners. This principle is expressed in the 2019 Environment Court decision in *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*[3]. Refer to **Appendix A** for further commentary on this decision.

**Accuracy of ecological survey of plantation forest**

48 As discussed in the evidence on Mr Shaw, the habitat value of plantation forest for indigenous fauna can change markedly over the period of rotation which can result in highly variable assessment of ecological significance depending upon when such assessment is completed.

49 This contrasts strongly with remnant areas of indigenous vegetation where the ecological significance and species composition of such areas is consistent over time. Accurate and durable ecological surveys of these areas can readily be completed.

**Potential for inequitable treatment of landowners**

50 Further, Mr Shaw explains that highly mobile fauna do not limit their habit to plantation forest. Many species have habitat that extends well beyond the forest boundary to include DoC land, adjacent pastoral farmland, rural lifestyle properties and sometimes urban areas. A consistent and fair approach is required to management of such fauna.

51 FOA is concerned that plantation forest will be unjustifiably singled out for land use control that is not required of other landowners that provide habitat for the same species of highly mobile fauna.

[3] *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 205 at [131] to [141]

**Existing use rights and plantation forest**

52 Policy 3.13 provides existing use rights protection for pastoral farming in respect of regenerating indigenous vegetation however similar protection is not expressly afforded under the NPSIB for plantation forest.

53 FOA consider this to be an anomaly because in many cases plantation forest would qualify for existing use rights to authorise disturbance or clearance of indigenous biodiversity within plantation forest. The collation of evidence required to establish the existence of such rights is challenging due to the scale of plantation forests, the length of time between rotations and because some forests are still in their first rotation. Consequently few forest owners bother to establish these rights.

54 Even so, existing use rights have been held to be available to forest owners regarding the clearance of SNAs, regrowth and other indigenous vegetation within plantation forest provided the requirements of s10 RMA are satisfied. This principle is expressed in *Mawhinney v Auckland Council*.[4] Refer to **Appendix B** for further commentary on this decision.

55 It is noteworthy that the same case observed that under the common law and New Zealand's planning and resource management laws it is accepted that *"…permission to plant an exotic forest implies permission to harvest*".[5] This principle is based on the concept that the majority of forestry activities are indivisible, meaning the activities are linked in a way that each activity is necessary for the entire cycle to occur.

56 The National Environmental Standards for Plantation Forestry (NES PF) were published on 3 August 2017 and came into force on 1 May 2018. FOA considers that the NES PF provides reasonable recognition of existing use rights and the implied permission to harvest in the form of regulations that permit clearance of indigenous vegetation that is regrowth (refer evidence of Sally Strang for further details).

[4] [2018 NZ Env C 15

[5] Supra at para 74

57 However no such recognition is provided in the NPSIB. FOA considers this potentially imperils these important NES PF regulations as there is currently no policy support for them in the NPSIB.

**National direction and policy coherence**

58 The proposed approach will not achieve policy coherence with the NES PF which contains regulations controlling plantation forestry activities within SNA (e.g. afforestation and replanting are not permitted within SNAs).

59 Ms Strang's evidence is that the NES PF was drafted on the assumption that SNA related primarily to remnant vegetation . This has two important implications.

60 First, Ms Strang considers that the above provisions will not make sense if the forest itself is identified as a SNA due to the presence of regenerating indigenous vegetation or its importance as fauna habitat.

61 Secondly, FOA draws attention to regulation 6(2)(b) of the NESPF. Once an area is identified as a SNA the relevant territorial authority can impose more stringent rules than the NES PF. This outcome would result in a confusing mix of local rules controlling forestry activities that undermine the objective of the NESPF to provide a nationally consistent framework for plantation forest.

62 Further, the NES PF already contains measures to mitigate potential adverse effects on regenerating indigenous vegetation and the nesting sites of threaten and rare indigenous bird species.

63 This is achieved under the NES PF as a permitted activity (subject to compliance with performance standards) without need for detailed ecological survey of the plantation forest or biodiversity mapping.

64 In addition, the evidence of Ms Strang and Mr Shaw is that there are numerous non-regulatory positive steps undertaken by forest owners to maintain and enhance indigenous biodiversity in plantation forest.

65 The alternative approach proposed by FOA supports and builds on the existing national direction provided by the NES PF with respect to indigenous

vegetation and fauna. It also supports the non-regulatory work being done by forest owners.

**Risk of unintended adverse consequences**

66 FOA considers there is significant risk of unintended adverse consequences for indigenous biodiversity in plantation forest arising from the NPSIB.

67 Ms Stang's evidence is that the requirement to identify, map and manage biodiversity values will be perceived by landowners as likely to result in regulation constraining land use (e.g. harvesting activities).

68 Ms Stang explains that the NPSIB as drafted will disincentivise forest owners from undertaking non-regulatory steps to protect and restore indigenous biodiversity as this work may result in additional cost, constraint and delay in harvesting activities.

69 The cost of this outcome should not be underestimated as forest owners undertake substantial restoration activities in plantation forest (see following paragraphs).

**Forest owners initiatives to maintain and restore ecological biodiversity in plantation forest**

70 Ms Stang's evidence explains that many of FOA members have a range of biodiversity initiatives underway in their forests, both for voluntary reasons (desire to contribute positively to biodiversity outcomes) and to meet the requirements of FSC and/or PEFC certification. This point is also made in the evidence of Mr Shaw.

71 Forest owner biodiversity initiatives are wide ranging from undertaking species surveys, to threatened species restoration projects, wetland restoration, predator control, research funding and in some instances financial or in kind support for local biodiversity initiatives.

**Features specific to plantation forest**

72 The above features are specific to plantation forest deliberately planted for production purposes. This factual context is critical to informing an

appropriate policy response to achieve the NPS IB purpose of maintaining indigenous biodiversity.

73 FOA has taken this factual context into account when developing the alternative proposal discussed below.

**Targeting NZ's limited financial and human resources to achieve maximum biodiversity benefits**

74 FOA considers it is critical that New Zealand's limited financial and human resources are appropriately prioritised and targeted to achieve maximum biodiversity benefits. This outcome is better achieved by the alternative approach discussed below because it reduces mapping and compliance costs and encourages non-voluntary measures to maintain and enhance biodiversity.

**SHOULD THE APPROACH TO PROTECTION OF SIGNIFICANT HABITAT OF INDIGENOUS FAUNA BE THE SAME AS THE APPROACH CURRENTLY APPLIED TO PROTECTION OF AREAS OF SIGNIFICANT INDIGENOUS VEGETATION?**

75 Note that for ease of reference the following sections have used the abbreviation "SNA" to refer to areas of significant indigenous vegetation and the abbreviation "SHIF" to refer to significant habitats of indigenous fauna.

76 FOA considers that there is a fundlement flaw in NPSIB framework. The current approach that has been developed to manage areas of significant indigenous vegetation (SNA) is well understood and works reasonably well. However the NPSIB seeks to extend this approach to significant habitat of indigenous fauna (SHIF). The evidence of Ms Stang and Mr Shaw is that there are important differences between these two types of indigenous biodiversity.

77 When these difference are properly taken into account FOA considers that it would be better to treat them separately in the NPSIB rather than conflate the two under the omnibus term of "SNA".

78 In support of this submission, FOA relies on the evidence of Ms Strang and Mr Shaw which discuss this matter in some detail. Reference should also be

made to the discussion in the above section entitled *"One size fits all" approach incorrect.*

**Case law does not prescribe mapping of all values requiring protection under s 6(c) RMA**

79 FOA also considers that case law does not prescribe mapping of all values requiring protection under s 6(c) RMA for the reasons discussed below.

80 Existing case law requires the identification and mapping of biodiversity values under s6(c). See *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council [2017]*[1] *(**RF&B No.2**)* and *Royal Forest & Bird Protection Society of New Zealand Inc v Auckland Council [2018]*[1] *(**RF&B No.3**).* These case are discussed in more detail in the caselaw commentary at **Appendix C**.

81 However that case law is not of universal application. The High Court findings in *RF&B No.3* are expressly based on the facts of that case and the Court was careful to limit the intended effect of its judgement.

82 Further, the Court held that the objective of the planning provisions in question may require consideration of "other planning imperatives", in which case the dicta in the decision may have limited, if any, application.

83 In particular, the Court stated -

> *However, if the object of the provisions is to provide a planning outcome considering the full context, including other planning imperatives that achieve the sustainable management purpose of the Act, then the dicta may have limited, if any, application*.

84 The Court cautioned that "*in an area as complex, intuitive and evaluative as environmental law, some care must be taken before laying down a fixed binary approach to resource management."*

85 FOA considers that the factual context in present case is markedly different from that considered in the above cases and that there are important other planning imperatives in play with respect to the NPSIB that should properly be taken into account.

86 In particular, FOA refers to the following matters-

(a) The above cases relate to identification of areas of indigenous vegetation under s6(c) (SNA) whereas the issue of concern to FOA is identification of habitats of significant indigenous fauna under s6(c) (SHIF).

(b) The evidence of FOA is that identification and mapping of SHIF will involve very considerable cost.

(c) FOA considers mapping SHIF is not economically or practicably feasible. (FOA understands this point is made by many other submitters including several territorial authorities).

(d) The evidence of FOA is that identification and mapping of SHIF is not essential to protection of SHIF, whereas identification is nessary for protection of SNA.

(e) The evidence of FOA is that the objective of the NPSIB will be better achieved without requiring identification and mapping of SHIF. Put another way, FOA considers that SHIF can be successfully maintained by methods that do not require mapping of these areas.

(f) The planning context is entirely different. The High Court decisions related to narrow appeals on a specific question in circumstances where the objectives and policies of the Auckland Unitary Plan had already been settled. Here, the NPSIB is in its infancy and all sections of the document are available for review via the submission process.

(g) Questions of cost and practical feasibility are highly relevant to the the section 32 assessment required to be completed before the NPSIB can be adopted.

87 For the above reasons, FOA considers the findings of the above cases can be distinguished on the facts and further that the other planning imperatives in play regarding the NPSIB justify a different approach with respect to SHIF.

## ARE THE DEFINITION OF "INDIGENOUS VEGETATION" AND THE CRITERIA AT APPENDIX 1 FOR IDENTIFICATION OF INDIGENOUS BIODIVERSITY VALUES REQUIRING PROTECTION UNDER SECTION 6(C) RMA TOO BROAD?

88 FOA considers the criteria at Appendix 1 of the NPSIB and the definition of "indigenous vegetation" are too broad and will result in the indentification, mapping and protection of indigenous vegetation that is not ecologically significant.

89 In support of this submission, FOA relies on the evidence of Ms Strang and Mr Shaw which discuss this matter in some detail.

## ALTERNATIVE APPROACH PROPOSED BY FOA

90 FOA proposes an alternative approach to address the issues discussed above. The alternative approach builds upon the concept of Plantation Forest Biodiversity Areas already proposed in the NPSIB. FOA considers this approach is consistent with the objective of the NPSIB, aligns with the intention expressed at Section C3 of *He kura koiora i hokia* (the NPSIB discussion document) and FOA's objectives mentioned above.

91 FOA proposes the following changes to the NPSIB. (Note that the comments below are an expression of intent rather than actual wording to be inserted into the NPSIB):

91.1 Insert new policy to support a bespoke framework for management of indigenous biodiversity within plantation forest;

91.2 Distinguish between s6(c) values that are areas of significant indigenous vegetation (refer to these areas as SNA) and significant habitat of indigenous fauna (refer to these areas as SHIF) throughout the document by amending definitions, objectives, policies and Appendices;

91.3 Insert a bespoke framework for plantation forest into clause 3.10 as follows:

(a) Delete the definition of PFBA and insert new definition for "Plantation Forest" that is the same as that in the NESPF.

(b) Amend heading to clause 3.10 to read "Indigenous Biodiversity within Plantation Forest" and rewrite clause 3.10 generally as follows:

(c) Regarding SNA within plantation forest;

(i) clause 3.8 (Identifying SNA) applies, subject to changes to Appendix 1 discussed below

(ii) the adverse effects to threatened or at-risk flora from plantation forestry activities must be managed provided that-

(A) edge disturbance effects caused by harvesting activities may occur within SNA, and

(B) clearance of understorey regrowth may occur within SNA;

(C) clearance of a forestry track as described at Reg 93(1) and 93(2)(d) NESPF may occur in a SNA.

(d) Regarding SHIF within plantation forest;

(i) If it will help manage SHIF, a territorial authority may (where feasible) include in its district plan a map or description of the location of the SHIF and highly mobile fauna areas;

(ii) Plantation forestry activities must be managed over the course of consecutive rotations to maintain significant populations of Threatened or At Risk indigenous fauna that reside in or utilise plantations for all or a significant part of their life cycles,

(iii) The Forest Owners Association in conjunction with species relevant experts continuing todevelop and document best practice techniques for managing adverse effects on any SHIF. The Department of Conservation may wish to participate in prioritising and developing such guidance, and with the funding of any necessary research to inform such guides.

(iv) The best practice techniques referred to above may include regulatory and/or non-regulatory measures as appropriate

taking into account the different attributes and management requirements of the fauna concerned to maintain SHIF.

(e) Regarding other indigenous vegetation outside SNA within plantation forest, require that such vegetation is to be maintained provided that:

(i) clearance of indigenous vegetation may occur as described at Reg 93(2) and (3), and

(ii) incidental damage of indigenous vegetation may occur as described at Reg 93(4) and (5)

(f) To avoid confusion and ensure consistency, require that any regulation required to give effect to the above changes is to occur through the NES PF rather than via district or regional council planning instruments. (NB It is anticipated that this would result in removal of Reg 6(2)(b) from the NESPF).

(g) As a consequential change to implement the above amendments, require that clause 3.9 (Managing adverse effects on SNAs), clause 3.13 (General rules applying outside SNAs), clause 3.15 (Highly mobile fauna) and clause 3.19 (Assessment of environmental effects) do not apply to indigenous biodiversity within plantation forest.

91.4 Amend Appendix 1 to;

(a) reduce scope of criteria relating to SNA so that criteria captures only indigenous vegetation that qualifies as ecologically significant

(b) to recognise existing use rights of production forest, insert an exclusion into the criteria to avoid understory of plantation forest being identified as SNA, and

(c) remove criteria regarding SHIF from Appendix 1.

91.5 Insert criteria regarding SHIF into new Appendix 1A.

91.6 Make any consequential or other amendments required to give effect to the above

## COST / BENEFIT EVALUATION OF FOA APPROACH

92 Section 52 RMA deals with consideration of recommendations and approval or withdrawal of a national policy statement.

93 Section 52(1)(c) requires that the Minister –

> *must undertake an evaluation of the proposed national policy statement in accordance with section 32 RMA and have particular regard to that evaluation when deciding whether to recommend the statement.*

94 Section 32 requires an examination of whether the provisions (policies, rules and other methods[6]) are the most appropriate way of achieving the objectives of the proposed planning instrument.

95 This requires, among other matters, an assessment of the effectiveness and efficiency of the provisions in achieving the objectives. The assessment must also identify and assess the benefits and costs of the environmental, economic and social and cultural effects that are anticipated from implementation of the provisions.

96 Section 32 is a comparative evaluation in that it seeks to find the most appropriate outcome. In the context of FOA's submission, the comparison is between the outcome promoted by the NPSIB and the outcome that would result from FOA's proposed alternative approach.

97 To date, s32 case law has interpreted 'most appropriate' to mean "suitable, but not necessarily superior".[7] This means the most appropriate option does not need to be the most optimal or best option, but must demonstrate that it will meet the objectives in an efficient and effective way.

97.1 Section 32 requires a broad exercise of judgement and does not require a detailed economic analysis carefully recording and weighing costs and benefits, as might be undertaken by an economist.[8]

98 In summary, what is required is an overall broad judgement determining which outcome is most appropriate for achieving the purpose of the RMA. In

[6] Refer RMA section 2, definition of "provisions"

[7] *Rational Transport Soc Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC)

[8] *Contact Energy Limited v Waikato RC* CIV-2006-404-7655, para 92

short, whether the notified NPSIB is better than FOA's proposed alternative approach.

99 Overall, FOA considers that its alternative approach is far more efficient and effective because it reduces the amount of district council resources required to survey and map biodiversity values, reduces unnecessary RMA consent compliance costs for forest owners, achieves alignment of national planning and policy direction regarding plantation forest, recognises the significant efforts made by the forestry sector and better supports biodiversity goals. Importantly it will remove from the NPS IB the strong disincentive for forestry companies to undertake voluntary initiatives to improve biodiversity outcomes.

**CONCLUSION**

100 In conclusion, for the reasons identified throughout this submission and the evidence filed in support by Ms Strang and Mr Shaw, FOA considers that its proposed alternative approach will provide an overall better outcome for maintainance of indigenous biodiversity than the NPSIB as notified.

**Chris Fowler**
Legal Counsel for New Zealand Forest Owners Association

Dated this 13th day of March 2020

**Statements of evidence**

The following documents are filed together with these submissions:

(a) Statement of exert evidence from Sally Strang, and

(b) Statement of expert evidnce from Willie Shaw.

**APPENDIX A**

**Case law commentary regarding *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council [2019] NZEnvC 205***

1 Case law requires that local authorities should seek to internalise the cost of surveying or assessment to meet their RMA planning requirements and refrain from passing these requirements and costs onto private developers and landowners. This principle is expressed in the 2019 Environment Court case of *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*[9] *(**Upper Clutha Environmental Society**)*.

2 The issues in *Upper Clutha Environmental Society* arose as an appeal against the Queenstown Lakes District Plan (**QLDP**) review decision on the Rural Landscapes Chapter and in particular the mapping of landscapes of high significance such as Outstanding Natural Features, Outstanding Natural Landscapes (referred to collectively as **ONL/F**) and Rural Character Landscape (**RCL**).

3 The Queenstown Lakes District Council (**QLDC**) sought to protect these ONL/F and RCL landscapes from inappropriate use, development or subdivision through provisions in the QLDP, to give effect to the statutory directive in section 6(b) of the RMA. A key concern in the appeal was QLDC's crude approach to mapping these ONL/F and RCL landscapes; which shifted the burden of identifying and delineating individual areas of ONL/F and RCL landscapes from QLDC to would-be resource users during the resource consent stage.

4 The maps created by QLDC through a desktop analysis showed a generic ONL notation over 97%[10] of the district's planning maps. A large amount of the remaining 3% was mapped generally as RCL. In most areas of the district, the QLDC did not identify particular values, features or areas identified it sought to protect with the ONL mapping[11].

[9] [2019] NZEnvC 205

[10] Ibid at [5]

[11] Ibid at [16]

5 The Court in *Upper Clutha Environmental Society* held, firstly, that it was difficult to identify significant natural lanscapes through mapping as, unlike natural features, landscapes are subtley defined often without clear boundaries. The Court went on to say that "*the [QLDC's] approach to to s 6(b) RMA, and its mapped ONF/Ls is a significant issue for this decision*".[12]

6 Judge Hassan accepted many of the concerns, raised by the various appellants, about the consquences of QLDC's unrefined mapping method for delineating ONF/Ls. One such concern is summed up in the following paragraph:

> *[138] A further important consideration is as to how the different options would allocate costs and benefits. As Ms Baker-Galloway has noted, the DV would transfer the costs of identifying landscape values to resource consent applicants. QLDC raise concerns about the potentially significant costs that would be imposed on participants in the current proceedings, were the court to direct scheduling in determination of these appeals, However, as we have noted, district plans have a statutory purpose of fleshing out and contextualising pt 2 RMA (including ss 6(b) and 7(c)). While there would be transactional costs for ratepayers in Sch 1 plan changes, those are as a consequence of the proper exercise of QLDC's planning authority responsibility.*

7 Ultimately the Court decided that QLDC's approach was innapropriate, and required QLDC to remediate the QLDP through plan changes[13].

[12] Ibid at [17]

[13] Ibid at [151] and [152]

**APPENDIX B**

## Case law commentary regarding *Mawhinney v Auckland Council [2018] NZEnvC 15*

1 The Environment Court decision of *Mawhinney v Auckland Council* [2018] NZEnvC 15 provides clarity that existing use rights (EURs) are available to the full cycle of plantation forestry activities provided that appropriate evidence can be adduced to meet the statutory tests at s10 RMA The applicant sought a declaration from the Court that the owners and others with an interest in the land have a right under s10 RMA to carry out the planting cycle of tree crops that had occurred since 1984.

2 In opposition, the Auckland City Council argued that the applicants had discontinued the use of the land for the cycle of harvesting pinus radiata for more than 12 months which meant that EURs had not been established. Consequently, the Council argued, the applicant would need to apply for resource consents for land disturbance to harvest the forest under the district plan.

3 EURs are statutory rights provided under the RMA that allow land to be used in a manner that does not comply with the rules in a city or district plan. They are intended to protect established activities from changes to planning rules and allow them to continue without the need for resource consent.

4 There are three key requirements for a landowner to prove that EURs exist:

1. The activity must have been lawfully established as a permitted activity prior to the new rules becoming operative;

2. The activity must not have been discontinued for longer than 12 months since the new rules became operative; and

3. The effects of the activity must be the same or similar in character, intensity and scale to the effects of the activity before the new rules became operative.

5 The onus is on the person who claims that EURs exist to provide evidence demonstrating that these requirements can be met. The required standard of proof is to the balance of probabilities (i.e. it is more likely than not that the requirements can be met).

6 Regarding (1) above, the Court considered a large volume of evidence and held that forestry was an established land use on the date that the relevant planning instruments first came into force. In terms of (3) above, the Court found that the character, intensity and scale of forestry activities were the same or similar to when the land was first used for forestry purposes.

7 Regarding the pivotal requirement at (2) above, that the activity must not have been discontinued for longer than 12 months, the Court noted that EURs can apply to cyclical and long-term activities. The Court found that in the context of forestry, EURs could apply to the entire cycle of forestry. This included preparation, planting, growing and maintenance, harvesting and removal of trees. In addition, ancillary activities were accepted as part of the land use, including construction of tracks, landings and roads and removal of understorey and adjacent vegetation.

8 The Court explained that for some species, such as pinus radiata, this cyclical process may take place over a 25 to 35 year period before the cycle can begin again. The Court held that:

9 *"The fact that there is a gap of (say) 30 years between the first planting and the second does not mean that the existing use has been discontinued under section 10(2) of the RMA. On the other hand, a gap of more than 12 months between termination of felling and new planting might trigger section 10(2) RMA."*

10 The Court declared that the applicant has EURs which gave them the privilege of undertaking the whole forestry cycle from planting to harvesting over 89 ha of forest. As a result the applicant was not required to obtain resource consents for land disturbance and vegetation removal to prevent contravention of rules in the district plan.

11 After noting the potential adverse effects of exotic forestry species recognised by the Auckland Unitary Plan, the Court commented that forestry

for harvesting also has beneficial medium-term effects on climate change in that trees absorb $CO_2$ from the atmosphere.

12 Further, in finding that growing of trees for timber is cyclical and runs with the land, the Court adopted the principle that *"… permission to plant exotic forest implies the permission to harvest"*. This principle has been accepted in earlier case law and is based on the concept that the majority of forestry activities are indivisible, meaning the activities are linked in a way that each activity is necessary for the entire cycle to occur.

13 Finally, the Court noted that if EURs include the removal of vegetation (not simply understorey) which is inside significant ecological areas, or is for the purpose of track maintenance or is within a riparian area, then it doesn't matter what the district plan rules say: the use may be continued as an existing use.

**APPENDIX C**

**Caselaw commentary regarding *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council [2017][1] (RF&B No.2)* and *Royal Forest & Bird Protection Society of New Zealand Inc v Auckland Council [2018][1] (RF&B No.3)***

14 Each of these cases rely on dicta in *Man O'War Station Ltd v Auckland Council* [14] (***Man O'War Station Ltd***) so this commentary commences with a discussion of this High Court decision.

Man O'War Station Ltd

15 The *Man O'War Station Ltd* decision relates to a resource consent application to construct a coastal residential development on Waiheke Island. The Court of Appeal looked at whether the identification (including mapping) of an ONL for the purpose of section 6(b) is informed by, or dependent upon, the protection afforded to the landscape under the Act and/or the planning instrument. It was argued by the landowner that whether or not land qualifies as an ONL must be influenced by the consequences of making it an ONL in terms of what may take place on the land.

16 The Court disagreed and held that "… *the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) of the Act requires an essentially factual assessment based upon the inherent quality of the landscape itself."*[15]

17 The Man O'War Station Ltd case was applied in a series of High Court decisions relating to appeals against various decisions of the Auckland Council on the Proposed Auckland Unitary Plan (**the Proposed Unitary Plan**) regarding indigenous biodiversity.

RF&B No.2

18 This case was an appeal by Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest & Bird**) on the Proposed Unitary plan. In

[14] *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121.

[15] Man O'War Station Ltd, at [61].

particular Forest & Bird alleged that the Auckland Council erred in law by adopting the Independent Hearing Panel's (**the Panel**) recommendation to include exclusion indicators as criteria for the identification of significant ecological areas – marine (**SEA-M**).

19 During the hearing of submissions on the Proposed Unitary Plan the Panel developed a set of criteria for identifying new SEA-M's which included six inclusion indicators and four exclusion indicators. If one or more of the exclusion indicators were met then the area was to be excluded from consideration as a SEA-M.

20 On appeal the High Court was satisfied that an error of law had occurred. The Court discussed the above-mentioned *Man O'War Station Ltd* case and held that:[16]

> *The structure of s 6(b) and (c) is the same. I agree with the Society and the Council that the same principle must apply to the identification of an area as a significant ecological area qualifying for protection under s 6(c) notwithstanding modification.*

RF&B No.3

*21* This case discussed the Signification Ecological Area (SEA) overlay within the Proposed Unitary Plan. The alleged error of law related to a recommendation by the Panel to delete previously identified SEAs where it considered that "*other planning imperatives*" having economic or strategic importance to the region outweighed the identification of SEAs.

22 The issue considered by the High Court was the allegation by Forest and Bird that it was unlawful for the Panel to spatially modify or delete certain areas of the SEA overlay on the basis that some other planning imperatives outweighed their identification.[17]

23 The High Court relied on the dicta from *Man O'War Station Ltd* and the earlier High Court decision regarding the Proposed Unitary Plan (*RF&B*

[16] RF & B No.2, at [18]-[19].

[17] RF & B No.3, at [14](b).

*No.2*). The Court directly quoted relevant parts of the *Man O'War Station Ltd* decision[18] and then stated that (emphasis added):[19]

> *The central issue on appeal is whether the Panel was correct in law to delete the SEA overlay as it related to certain areas because of other "planning imperatives". The parties (except Federated Farmers) agree that the panel so erred, relying on the dicta in Man O'War Station Ltd and Wylie J's decision in RF&B No.2. I agree that* ***on the specific facts of this case****, the dicta in both those cases applies and the Panel erred by incorporating the rule making assessment into the SEA identification process.*

24 In addition the Court helpfully expressed the intended effect of this judgment (emphasis added):[20]

> *However, as foreshadowed to the parties in a draft version of this assessment section, I want to be clear about the effect of this judgment. I invited submissions on this issue. There is a broad (though not unqualified) consensus about the following. Whether and to what extent the principles stated in Man O'War Station Ltd and applied in RF&B No.2 apply in any given case will depend on the object of the provisions under scrutiny. If, as here, the clear object is to identify SEA areas that qualify for protection under s 6(c), then assessment is a factual one as stated in Man O'War Station Ltd and other planning imperatives have no direct role to play.* ***However, if the object of the provisions is to provide a planning outcome considering the full context, including other planning imperatives that achieve the sustainable management purpose of the Act, then the dicta may have limited, if any, application***.

25 In summary the Court applied the *Man O'War Station Ltd* case and found no reason to depart from the principles of that case on the basis that other "planning imperatives" had no direct role to play in the specific facts of this case.

26 Forest and Bird sought guidance from the Court as to the "dividing line" relating to how SNA identification decisions are properly made and to avoid

[18] RF & B No.3, at [17].

[19] RF&B No.3, at [31].

[20] RF&B No.3, at [32].

unnecessary litigation over whether a value or resource comes within the "factual assessment" or planning consequences assessment" class.

27 However, the Court was not prepared to make a hard and fast rule that would be binary or fixed on identification decisions. The Court cautioned that "*in an area as complex, intuitive and evaluative as environmental law, some care must be taken before laying down a fixed binary approach to resource management*".[21]

[21] RF&B No.3, at [33].