SUBMISSION FORM

DRAFT FORESTRY ALLOCATION PLAN

Please use this form to comment on the Draft Forestry Allocation Plan.

For background information refer to the MAF information document *Draft Forestry Allocation Plan and Deforestation Exemption Policies for Pre-1990 Forest Land* (11 October 2008). Further information can be found in MAF's *Forestry in the Emissions Trading Scheme Guide* (October 2008) and other information available on the MAF website www.maf.govt.nz/sustainable-forestry

Please post your feedback to:

FAP Submissions
Ministry of Agriculture and Forestry
PO Box 2526
Wellington 6140

Or fax to: 04 894 0743

By: **28 February 2009** 30 April 2009

WHO ARE YOU?

Name Steve Wilton

Company/Organisation (if relevant): Forest Enterprises Ltd as Manager of Eligible Forests

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Please indicate your sector(s)/interest(s)/type(s) of organisation:

☐ Agriculture · description/type:

☑ Forestry – description/type: Owner of land under pre-1990 Forest

☐ Māori – description/type:

☐ Local government – description/type:

☐ Other – description/type:

NB: Make sure you save a copy of your submission for your own records.

Note, the following matters are fixed in the Act and therefore no comments are sought on them:

- the period for which allocation plan must be in force (1 January 2008 to 31 December 2021);
- aspects of the tests or thresholds that a person must meet to be eligible for an allocation of New Zealand units (ownership);
- the number of New Zealand units for allocation (21 million units in 2008 to 2012 and 34 million units in 2013 to 2021), reduced by the emissions from deforestation of land exempt from the Act;
- the total number of New Zealand units that each person will be allocated (18 units, 39 units or estimated 60 units per ha) and the cut-off change of ownership date.

The matters specified in the Draft Forestry Allocation Plan, which comments are sought on, are outlined below.

1. The criteria and methodologies to determine the number of New Zealand units that each person will be allocated (18 units, 39 units or estimated 60 units per ha)

The matters the Government is seeking submissions on are:

1.1 Eligibility to receive the higher rate of allocation of an estimated 60 units per hectare requiring commonality of at least 49% in the ownership interests in an entity between the dates of 1 November 2002 and the date the finalised Forestry Allocation Plan is issued.

Comments:

Refer to attached sheet.

1.2 The use of the “settlement date” as the date to determine when ownership was transferred for pre-1990 forest land and hence establishing the entitlement to the higher allocation of units to be allocated.

Comments:

As noted in the comments for 1.1 under the heading 'Not All Transfers of Land Result in a Change of Registered Proprietor', the present wording does not always result in the settlement date as the date to determine when ownership was transferred.

1.3 That transfer of forest land only includes land that is or has been bought and sold (in other words, does not include land transferred via transmission other than by vesting under a statute where the vesting occurs on a settlement date).

Comments:

As noted in the comments for 1.1 under the heading 'Treatment of Transfers', the present wording does not always correctly capture land that has been bought and sold.

2. Rules for allocation of differently dated units

That the 34 million units relating to the period after 2013 cannot be surrendered or converted until after 1 January 2013 is fixed in the Act.

The matters the Government is seeking submissions on are:

2.1 That the 34 million units relating to the period after 2013 will be 'post-dated' in the following manner:

- 21 million units will only be able to be surrendered or converted on or after 1 January 2013.
- 13 million units will only be able to be surrendered or converted on or after 1 January 2018.

Comments:

Refer to attached sheet.

2.2 The tranche that landowners will receive their New Zealand units from, and therefore the date that these units can be surrendered or converted will depend on the age of their trees according to the following approximate age classes:

i) the youngest 24% of the exotic forest species growing on the eligible land will receive units that cannot be surrendered or converted on or after 1 January 2018; and

ii) next oldest 38% of the exotic forest species growing on the eligible land will receive units that cannot be surrendered or converted on or after 1 January 2013; and

iii) the oldest 38% of the exotic forest species growing on the eligible land will receive units that can be immediately surrendered or converted.

Comments:

Refer to attached sheet.

3. Years of transfer of New Zealand units allocated under the Forestry Allocation Plan

The matters the Government is seeking submissions on are:

3.1 Persons who are entitled to receive approximately 60 units per hectare will be transferred 95% of the units allocated to them in the year of the determination under the plan - likely to be 2009. Subject to any new determination, they will be transferred the remaining 5% of the New Zealand units 2 years after that date.

Comments:

Subject to the comments made in respect to 2.1 and 2.2, the 5% retention for 2 years is an acceptable solution to allow management of the total allocation within the maximum total number of units to be allocated.

4. Requirements for provision of data and information

The matters the Government is seeking submissions on are the nature of the data and the information that an applicant must supply in order to receive an allocation of New Zealand units.

Comments:

No comment.

5. Record keeping requirements

The matters the Government is seeking submissions on are that any person receiving an allocation of New Zealand units in relation to their eligible land must keep for 7 years, copies of all information provided to MAF and required to create the shapefile and the schedule submitted with the application.

Comments:

This is a reasonable requirement consitent with other official record keeping requirements.

6. Any other comments you would like to make on the Draft Forestry Allocation Plan:

Comments:

Comment has not been requested on the quantum of the allocation. To avoid any incorrect inference that we agree with the total allocation, we record unreservedly that we do not. The actual present reality is that since enactment of the Climate Change Response (Emissions Trading) Amendment Act 2008, the value of land under pre-1990 forests has reduced materially for the reasons set out in the 2.1 and 2.2 comments. This reduction is more than the value of the estimated higher allocation of 60 units. However, as soon as the offsetting option provided for in section 182 (and section 165) of the Amendment Act 2008 comes into force, the reduction in value will more closely align with the value of the higher allocation.

Feel free to add more sheets.

Please note: Officials will summarise feedback received on this matter. Your feedback will be subject to the Official Information Act 1982 and may need to be publicly released. If you object to the release of any material you have provided, please specify the material that you consider should be withheld, and the grounds for withholding. Please note that even if you do identify specific material you consider should be withheld, we cannot guarantee that we will withhold this material. All requests under the Official Information Act need to be assessed in terms of the Act and while we will take your views into account, we are not bound by them.

1. The criteria and methodologies to determine the number of New Zealand units that each person will be allocated (18 units, 39 units or estimated 60 units per ha)

The matters the Government is seeking submissions on are:

1.1 Eligibility to receive the higher rate of allocation of an estimated 60 units per hectare requiring commonality of at least 49% in the ownership interests in an entity between the dates of 1 November 2002 and the date the finalised Forestry Allocation Plan is issued.

Comments:

Serious and Perverse Consequences

There are serious and perverse consequences contradictory to the objective of the eligibility criteria resulting from the present definition of 'landowner' and 'eligible person' and the wording of clause 5(1)(b) in the draft Forestry Allocation Plan.

In clause 2:

landowner—

(a) in relation to Crown land, means the appropriate Minister (as that term is defined in section 2(2) of the Crown Minerals Act 1991); and

(b) in relation to land other than Crown land, means—

(i) the legal owner of a freehold estate in the land; or

(ii) if the land is Māori customary land (as defined in section 4 of Te Ture Whenua Māori Act 1993), the person or persons who have title to the land as determined under Te Ture Whenua Māori Act 1993; or

(iii) if the land is Māori freehold land (as defined in section 4 of Te Ture Whenua Māori Act 1993), the legal owner of the land

'Eligible person' is defined in clause 4:

4. ELIGIBILITY CRITERIA

A person is an eligible person for the purposes of this allocation plan if the person -

(a) is the landowner of eligible land that has not been deforested on the issue date; or

(b) was the landowner of eligible land that was deforested between 1 January 2008 and the issue date, on the date the land was deforested; or

(c) is a person appointed by the Minister under section 72.

Clause 5(1)(b) states:

5. ALLOCATION OF UNITS PER HECTARE

(1) An eligible person is eligible for an allocation under this allocation plan of the following number of New Zealand units in respect of eligible land of which the person was the landowner at the relevant date in clause 4(a) or (b), (or in the case of the person appointed under section 72 the eligible land in respect of which the person is required by that section to apply for an allocation of New Zealand units):

(a) 18 New Zealand units per hectare in respect of eligible land that was Crown forest licence land on 1 January 2008; and -

(i) has been transferred to iwi as part of a Treaty of Waitangi settlement on or after 1 January 2008 but before the issue date; or

(ii) has not been transferred to iwi as part of a Treaty of Waitangi settlement by the issue date:

(b) 39 New Zealand units per hectare in respect of eligible land that was transferred to that person –

(i) on or after 1 November 2002; or

(ii) prior to 1 November 2002, if the eligible person is a body corporate whose ownership has changed by more than 51% between 31 October 2002 and the issue date:

In relation to land other than Crown land or Maori land, 'landowner' is defined in (b)(i) as the legal owner of a freehold estate in the land. Clause 4(a) establishes that the eligible person is the landowner (the legal owner). Clause 5(i)(b)(ii) restricts the number of units to 39 if the eligible person is a body corporate which acquired the land prior to 1 November 2002 but whose ownership has changed by more than 51% between 31 October and the issue date.

This sequence of wording would appear to capture Custodian Trustee Companies and apply the ownership change test to the Custodian Trustee as a body corporate, rather than the beneficial owners.

Where the eligible land is held by a Custodian Trustee, the first anomaly of this wording arises if the beneficial ownership of the land vests in a body corporate and the shareholding in that body corporate itself changes by more than the target of 51%. The present wording would not restrict the beneficial owner body corporate to the intended 39 units.

The second anomaly of this wording arises when the shareholding of the Custodian Trustee, a body corporate itself, changes by more than 51%. This wording captures Trustees Executors Limited who acts as Custodian Trustee for 58 Forest Enterprises investments, including 14 investments which are owners of pre-1990 forests.

On 1 August 2003 (a date after the trigger date of 1 November 2002) Tower Limited sold Trustees Executors, then known as Tower Trust Limited, to Sterling Grace (NZ) Limited. This 100% sale transaction means that Trustees Executors is caught by clause 5(1)(b)(ii). As a result, 14 investments managed by Forest Enterprises will be inappropriately restricted to receiving 39 units per hectare.

Trustees Executors could well be Custodian Trustee for many other owners of pre-1990 forest so we suspect that this unexpected consequence could similarly adversely affect many other pre-1990 forest owners.

The logical solution is to require 'look through' of Custodian Trusteeship ownership arrangements so that the test in clause 5(1)(b)(ii) is applied to the beneficial owners and not the Custodian Trustee.

The 'look through' solution will have consequential change implications to the required information specified in clause 8.

Not all Transfers of Land Result in a Change of Registered Proprietor

Where land is held by a Custodian Trustee, there can be a change in the ownership of the land without any change in the registered proprietor on the title. Forest Enterprises has had two land transfers since 1 November 2002 with no change in the registered Proprietor (Trustees Executors as Custodian Trustee).

These transfers have involved the transfer of ownership from partners in an ordinary partnership to a partnership of companies. The transfer was recorded in a Sale and Purchase Agreement but was settled by the retirement of one custodianship arrangement with Trustee Executors and the completion of a second custodianship arrangement with Trustee Executors.

As presently worded this transaction would not be deemed a transfer caught by clause 5(1)(b)(i). It would be caught by 5(1)(b)(ii) as the land was transferred to Trustees Executors in the 1970's. Assuming full 'look through' from Trustees Executors to the shareholders in the companies the comparison of shareholders would run from 1 November 2002, rather than from the later sale date and consequentially potentially capture more changes than should be included in the 51% test.

This is not intended and is inequitable. The suggested solution is to accept an executed Sale and Purchase Agreement dated after 1 November 2002 as creating a deemed transfer for the purpose of clause 5(1)(b). Rule 5(1)(b)(i) would therefore apply.

Treatment of Transfers

A transfer need not result in a 51% or more change of beneficial ownership however as currently worded, any transfer recorded on the title is caught by clause 5(1)(b)(i).

Example 1 - Company A sells to Company B. Company B could comprise more than 49% of the same shareholders as Company A, and would not have been caught by clause 5(1)(b)(ii) by the same effective shareholding change.

Example 2 –Partnership A sells to Company B. Company B could comprise more than 49% of the Partners from Partnership A, and would not have been caught by clause 5(1)(b)(ii) by the same effective shareholding change.

Forest Enterprises has two pre-1990 forest owners in the Example 2 situation, further complicated by the fact that the transfer was to multiple companies, giving rise to other issues discussed under the heading 'Need for Clarity' below.

The equitable solution is to deal with all transfers after full 'look through' to the beneficial transferors and transferees and to compare the commonality of the two groups of persons in terms of the 51% rule in clause 5(1)(b)(ii).

Treatment of Associated Persons

As currently worded, when determining the outcome of the test in clause 5(1)(b)(ii), and when analysing a sale transfer as contemplated in Examples 1 and 2 above under the heading 'Treatment of Transfers', there is no accommodation for associated persons.

Clause 5(1)(3)(b) does provide for transmission –

(3) For the avoidance of doubt, for the purposes of subclauses (1)(b) -

(a) the date eligible land is to be treated as transferred is the settlement date; and

(b) transfer does not include transmission[7] other than by vesting under a statute where the vesting occurs on a settlement date

[7] Note – transmission includes devolution of a deceased person's estate or interest in land to that person's executor or administrator, acquisition of land by survivorship, vesting of land in the Official Assignee on bankruptcy and vesting of land by virtue of an order of a Court.

It is logical and reasonable that associated persons (maybe as defined in the Income Tax Act 2007) be deemed the same person for the purposes of the test in clause 5(1)(b)(ii) and when analysing a sale transfer as contemplated in Examples 1 and 2 above under the heading 'Treatment of Transfers'.

To not accommodate associated persons will lead to undesirable outcomes. For example, as presently worded the transfer of land owned by a husband to his wife would be caught by clause 5(1)(b)(i). Similarly, the transfer of land owned by a husband and wife to their children would be caught by clause 5(1)(b)(i).

Need for Clarity

Clarification 1

In certain circumstances the landowner (or beneficial landowner) may comprise multiple body corporates. Forest Enterprises manages 44 investments which comprise a partnership of companies. These multiple companies are in some cases registered on the title and in others the Custodian Trustee is registered on the title and the multiple companies are the beneficial owners.

An interpretation of the present wording is that the test in clause 5(1)(b)(ii) applies only when the landowner is 'a body corporate', being one body corporate, therefore does not apply when multiple body corporates own the land. If this is the intended interpretation, for the avoidance of doubt, it would be desirable to clarify this point.

An alternative interpretation of the present wording is that the test in clause 5(1)(b)(ii) would capture this multiple company situation. This interpretation is more likely to be the case if the suggested 'look

through' solution to the serious and perverse consequences addressed earlier in this submission is implemented. In this situation it needs to be clear that the test is to be applied collectively as though the shareholders of the multiple companies were shareholders in one company, and that failure of the test by one or more of the multiple companies does not taint the collective position.

Clarification 2

In partnership situations it is not unusual for land to be owned by a mix of individuals and body corporates, either legally or beneficially. Forest Enterprises manages a number of investments where this is the case.

An interpretation of the present wording is that the test in clause 5(1)(b)(ii) applies only when the landowner is 'a body corporate', being one body corporate, and not when one or more of the multiple owners is a body corporate. If this is the intended interpretation, for the avoidance of doubt, it would be desirable to clarify this point.

If the intention is that the presence of a body corporate within the multiple ownership is to be caught by clause 5(1)(b)(ii), then a similar issue arises as in Clarification 1, namely that it must be clear that the test applies collectively to the multiple owners and that the failure of the test by one or more of the body corporate owners does not taint the collective position.

Clarification 3

If the intention of 5(1)(b) is to exclude all multiple ownership situations (which we assume will also include multiple owners who are body corporates), which it seems it is from the commentary on pages 8/9 under 'Changes in Shareholding', then this should be made abundantly clear. If not it needs to be clear when multiple ownerships are not excluded.

Where multiple ownership are intended to be excluded, a consequential clarification required would be that the 'look through' of body corporates (or multiple body corporates) would not result in deemed multiple ownership.

2. Rules for allocation of differently dated units

That the 34 million units relating to the period after 2013 cannot be surrendered or converted until after 1 January 2013 is fixed in the Act.

The matters the Government is seeking submissions on are:

2.1 That the 34 million units relating to the period after 2013 will be 'post-dated' in the following manner:

- 21 million units will only be able to be surrendered or converted on or after 1 January 2013.
- 13 million units will only be able to be surrendered or converted on or after 1 January 2018.

2.2 The tranche that landowners will receive their New Zealand units from, and therefore the date that these units can be surrendered or converted will depend on the age of their trees according to the following approximate age classes:

i) the youngest 24% of the exotic forest species growing on the eligible land will receive units that cannot be surrendered or converted on or after 1 January 2018; and

ii) next oldest 38% of the exotic forest species growing on the eligible land will receive units that cannot be surrendered or converted on or after 1 January 2013; and

iii) the oldest 38% of the exotic forest species growing on the eligible land will receive units that can be immediately surrendered or converted.

Comments

The allocation of units expressed in 2.1 and 2.2 does not reflect the fundamental underlying purpose for the allocation of units which is compensation for the real destruction of value of the land as a consequence of the imposition of the cost of the deemed carbon emission pursuant to change of land use.

That the allocation is compensation for reduction in land value is reinforced by the inclusion of the 1 November 2002 date. This date is used to determine the number of units allocated, with a lesser number to owners of land under pre-1990 forest purchased after 1 November 2002 because it is assumed that the later purchasers would have adjusted their price to reflect the land value reduction impact of the announced deforestation controls.

The Climate Change Response Act 2002 (the 'Act') requires a pre-1990 forest landowner wishing to deforest their land in order to change land use to a better and more economically efficient use of the land, to account for the deemed carbon emission resulting from the removal of the trees. For a fully mature Radiata pine plantation that deemed emission could be of the order of 800 tonnes of $C0^2$ per hectare.

Assuming a market price of $NZ20 per tonne of $C0^2$, the cost of this deemed emission to be met by the land owner would be $16,000 per hectare, at $NZ30 per tonne of $C0^2$ the cost of this deemed emission to be met by the land owner would be $24,000 per hectare. The Act also states that this cost is a capital transaction.

In all but exceptional circumstances, and probably only for very small areas of land, this cost is prohibitive and therefore has the effect of fixing the use of the land under pre-1990 forests in forestry forever. Since the Act became law, the land under pre-1990 forests has had a consequential material reduction in value to reflect a permanent forestry use. In many situations this reduction in land value will have been to zero and for some land to a negative value when using the Land Estimation Value (LEV) approach to land value determination. Under the LEV valuation methodology, the value of the land is the maximum price that may be paid to produce the targeted investment return required from the tree crop to be grown on the land.

Given that the allocation of units is compensation for this already experienced loss of land value, the total quantum of compensation should be paid immediately in one tranche and should be able to be converted into cash at the timing of the land owner. None of the allocation should be post dated, nor the timing determined by the age of the forest, as these factors have no relevance to the actual already experienced land value reduction.