



environmental defender's office new south wales

Submission to the NSW Department of
Environment and Climate Change and Water
(DECCW) on the *Review of New South Wales
Forest Agreements and Integrated Forestry
Operations Approvals*

November 2010

The EDO Mission Statement

*To empower the community to protect the environment through
law, recognising:*

- ◆ *the importance of public participation in environmental
decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good
environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of
the environment*
- ◆ *the importance of providing equitable access to EDO
services around NSW*

Contact Us

Environmental Defender's
Office Ltd

Level 1, 89 York Street
Sydney NSW 2000

Freecall 1800 626 239

tel (02) 9262 6989

fax (02) 9262 6998

email: edonsw@edo.org.au

website: www.edo.org.au

Submitted to:

Forest Agreement Review
59-61 Goulburn Street
PO Box A290
Sydney South NSW 1232

By email:

info@environment.nsw.gov.au; Steve.Hartley@environment.nsw.gov.au

Executive Summary

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to comment on DECCW's *Review of New South Wales Forest Agreements and Integrated Forestry Operations Approvals (Review)*. The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law. We have this year acted for a number of conservation organisations and Aboriginal people across NSW in respect of native forest management and its implications for the environment and Aboriginal heritage. The EDO and our clients are concerned about continuous breaches of the Forest Agreements and Integrated Forestry Operations Approvals (IFOAs), which point to systemic failings of forest management regimes. We consider that native forests are not currently being managed in a way that complies with the principles of ecologically sustainable development and the conservation of biodiversity, nor respects Aboriginal heritage values.

The EDO submits that the NSW Forest Agreements and IFOA's have been largely ineffective in ensuring the protection of forest species and forest habitats, despite the rhetoric on sustainable forestry and purported management in accordance with the principles of Ecologically Sustainable Forestry Management (ESFM).

This submission comments on specific parts of the Review and the numbering of the submission follows that of the Review document.

Key Recommendations

Recommendation 1:

The EDO recommends that the status of milestone 2.1 be amended to “ongoing”.

Recommendation 2:

The EDO recommends that a comprehensive independent assessment report be commissioned on the extent to which the targets in the ESFM plans have been, and are being met. The findings of this report should be used to inform the preparation of new updated ESFM plans where the lifespan of plans have expired.

Recommendation 3:

The EDO recommends that the status of milestone 9.1 be amended to “ongoing” and that the Private Native Forestry Code of Practice be amended to require pre-logging biodiversity assessments.

Recommendation 4:

The EDO recommends that the auditing processes be amended to increase the number of audits commensurate to the number of logging operations, and that the status of milestone 18.1 be amended to “ongoing”.

Recommendation 5:

The EDO recommends that the status of milestone 11.3 be amended to “ongoing”.

Recommendation 6:

The EDO recommends that the status of Milestone 11.7 be amended to “ongoing”, and that resources should be directed to updating AHIMS.

1. Background to the Review

1.3 Review terms of reference

In relation to the review of Forest Agreements and IFOAs, section 20(2) of the *Forestry and National Park Estate Act 1998 (FNPE Act)* provides that:

- (2) *A review is to be undertaken for the purposes only of assessing:*
- (a) *the implementation of the provisions of the agreement, and*
 - (b) *whether integrated forestry operations approvals are effective in achieving the purpose of those approvals.*

The EDO notes that the Review terms of reference set out at para 1.3 state that the assessment of whether IFOAs are effective in achieving their purpose is to be assessed through determining the extent to which the terms of the three licences have been successfully integrated, the extent of compliance with terms and conditions, and identifying where administration, enforcement and compliance can be improved. We are concerned that the terms of reference thereby constrain the assessment of “effectiveness” and narrow the review process contrary to what is required by section 20(2). This in our view raises real issues with the legal validity of the review. It also undermines the merits of the review, given the serious implications of forest management practices for threatened species, ecological communities and biodiversity generally, and Aboriginal heritage.

A related issue is in respect of the many milestones that make up this Review. Most of the milestones assess compliance in quantitative terms, restricting the ability to comment on whether the goals of ESFM are actually being achieved. Our experience indicates that ESFM is not being achieved. Our clients have reported numerous breaches of the IFOAs and the annexed licences under the *Threatened Species Conservation Act 1995* (TS licences) and *Protection of the Environment Operations Act 1997* (PEO licences). Common breaches that we are aware of include: the failure to mark up trees to be retained prior to logging operations, failure to carry out koala surveying where evidence of koala has been discovered within 400 metres of a compartment, the logging of rocky outcrops or failure to observe rocky outcrop exclusion zones, failure to retain recruitment and habitat trees, logging within stream exclusion zones, and the piling of debris around habitat trees. These breaches may be a consequence of the complexity of the regulations or enforcement resourcing constraints. However, on the basis of the number and type of breaches being reported by our clients, we consider that breaches of the IFOAs evidence systemic problems, such that it is not possible to conclude that Forests NSW is operating in a way that is consistent with ESFM.

1.5 Links to other processes: Review of RFAs

The EDO made a submission to DECCW on the *Draft Report on Progress with Implementation of the New South Wales Regional Forestry Agreements* on 15 September 2009 (See

Appendix 1). In that submission we commented on a number of flaws in the Regional Forestry Agreement (RFA) process that underlies the NSW Forest Agreements and IFOAs. We reiterate our earlier concerns, in particular that there are problems with the scientific assessment that underpinned the RFA process and creation of reserves at that time, and the RFAs fail to address the impacts of climate change. Also the RFA process is heavily focused on the economic benefits of timber extraction and, in our view, does not adequately promote the pricing of forest resources in a manner that assigns economic value to the environmental costs of timber production. There is currently therefore, no imperative to value and compare the non-timber uses of forests such as: public recreation, tourism, ecosystem services, water catchment and carbon sequestration. Moreover, there is no pricing of the environmental externalities of harvesting operations. As a result, economic analyses of RFA operations do not take account of the value of free provision of a publicly owned resource and remain biased towards timber harvesting.

2. Review of forest agreement milestones

Milestone 2.3 - Forests NSW to produce ESFM plans

This milestone states that progress of the milestone is complete, based on the fact that plans for some forest regions were finalised in 2005. We do not consider the milestone complete, rather the milestone status should be “*ongoing*”. The approach taken is inconsistent with the requirements set out in para 2.10.1 of the Eden Forest Agreement, that ESFM is the guiding philosophy for forest conservation and management, that it must be promoted, and that there will be ongoing review and subsequent implementation of its legislation, policy, plans, codes and prescriptions to ensure ESFM objectives can be achieved in a more efficient regulatory environment. It is also inconsistent with the principle of adaptive management, which is fundamental to achieve ecologically sustainable development. We note that the 5-year lifespan of the ESFM plans for Upper North East, Lower North East, Southern (South Coast), Southern (Tumut) and Eden have all expired (acknowledging that they remain in force until replaced) and the expectation is that new updated plans will be made.

Recommendation 1:

That the status of Milestone 2.1 be amended to “ongoing”.

Milestone 2.4 - Report on meeting targets in ESFM Plans

It is unsatisfactory that a process for reporting on the indicators in the ESFM plans is still being developed five years after many of the plans were published. Attempt is made to rely on the separate forest agreement annual reporting process to alleviate concerns about non-compliance with the reporting requirement. However, we do not consider this to be an adequate response. There are separate requirements for review under the FNPE Act; section 20 requires a five-yearly review of forestry agreements and IFOAs and section 21(1) requires an annual report on each forest agreement which is required to report on ESFM in the region and compliance with any IFOA. The forest agreement progress reports have been prepared only up to the 2006-2007 period. Therefore, no reporting on whether ESFM targets are being met has been completed for the past three years. This is of particular concern given that the 5-year lifespan of many ESFM plans

has expired, as discussed above. It is also inconsistent with the requirements set out in para 2.10.1 of the Eden Forest Agreement, as discussed above.

We also note that the forest agreement progress reports contain information gaps and are, therefore, not an adequate substitute for comprehensive reporting on whether the ESFM plan targets are being met. For example, the Forest Agreement report for 2006-7 states that data was not available on the number of pre-harvest (threatened species) surveys undertaken in Southern and Eden in 2006-7, at [19]. That report also states at [21] that, with respect to Indicator 1.3: Management measures in place to maintain species extent and abundance for Eden, no new data was available on this indicator for the 2006-7 reporting period.

Recommendation 2:

The EDO recommends that a comprehensive independent assessment report be commissioned on the extent to which the targets in the ESFM plans have been, and are being met. The findings of this report should be used to inform the preparation of new updated ESFM plans where the lifespan of plans have expired.

Milestone 9.1 - Code for private native forestry to be put into place

Part 2.8 of the Forest Agreements provides for “a commitment to the conservation and management of private forests”. A Private Native Forestry Code of Practice has been established. However, it is argued that the Code is based on a legal fiction in that it provides that if a private logging operator carries out their activities in accordance with the Code then it is deemed to maintain or improve environmental values. However, an operator is not required to do any pre-logging surveys or assessments of biodiversity, unlike in public forest logging operations, so it is not possible to know what biodiversity is in those private forests prior to an operation occurring. We consider that the Code that is in place cannot, therefore, achieve the commitment to conservation required by 2.8 of the Forest Agreement. We consider that the status of this milestone should be changed to “ongoing” to reflect that adaptive management requires the Code to be monitoring to assess whether it is meeting the terms of the Forest Agreements, including conservation of private forests.

Recommendation 3

That the status of milestone 9.1 should be amended to “ongoing” and the Private Native Forestry Code of Practice should be amended to require pre-logging biodiversity assessments.

Milestone 18.1- External auditing processes and reporting results, review processes

The review provides statistics on the number of audits of compliance with the licences in each of the four regions. For the period 2008/9, in some cases only one audit has been done for each licence, with the highest number of audits being 4 for the Eden TS licence. We consider this level of auditing to be totally inadequate given the hundreds of logging operations conducted each year and in light of the many breaches being reported by the community. The only effective auditing is being conducted by conservation groups and the burden is therefore on the community instead of the regulator. The auditing process needs to be relative to the number of logging operations. Again, the status of this

milestone must be amended to “ongoing” to reflect the requirement for ongoing review of auditing processes.

Recommendation 4

That auditing processes should be amended to increase the number of audits commensurate to the number of logging operations, and the status of milestone 18.1 should be amended to “ongoing”.

Milestone 11.3 - Managing cultural values including NPWS reviewing its cultural heritage guidelines

This milestone states that progress of the milestone is complete but then acknowledges that the various policies are periodically reviewed, as required by the milestone. We do not consider the milestone complete, rather the milestone status should be “*ongoing*” to reflect the milestone’s ongoing management and review requirements. Again, for similar reasons as discussed for milestone 2.3, the approach taken is inconsistent with para 2.10.1 of the Eden Forest Agreement and with the principle of adaptive management, which is fundamental to achieve ecologically sustainable development.

To emphasise the importance of on-going review of this milestone and assessment of progress with it in future reviews, we highlight the logging of 6.5 hectares of the Biamanga Aboriginal Place in Eden between 29 March 2010 and 28 April 2010, in breach of section 90 of the *National Parks and Wildlife Act 1974* in its terms as at 28 April 2010. The forest area logged is within compartment 2135 of the Mumbulla State Forest, which is located within the gazetted Biamanga Aboriginal Place. We consider that this incident indicates that there are fundamental problems with the current cultural heritage management and consultation regime. We understand that this incident resulted in a review of current procedures and that changes have been made, though we have not been informed of the detail of these matters.

Recommendation 5:

The EDO recommends that the status of Milestone 11.3 should be amended to “ongoing”.

Milestone 11.7 NPWS to develop its information management system for indigenous heritage...

We take the opportunity to highlight that, though this milestone states that it is complete on the basis that the AHIMS has been set up, the AHIMS does not represent a comprehensive list of all Aboriginal objects and places and requires ongoing updating. Indeed this is required by at least the Eden Forest Agreement at 2.7. It is important to note that Forests NSW, in logging Compartment 2135, appears to have relied on the AHIMS report which did not include the Biamanga Aboriginal place. We consider that the status of this milestone must be changed to “ongoing” so that future reviews can assess the effectiveness of the information management system. Resources should be directed to updating AHIMS.

Recommendation 6:

That the status of Milestone 11.7 be amended to “ongoing”. Resources should be directed to updating AHIMS.

Attachment: *Submission to the NSW Department of Environment and Climate Change and Water (DECCW) on the Draft Report on Progress with Implementation of the New South Wales Regional Forest Agreements, 15 September 2009.*