

Form 85 (version 3)

UCPR 6.2, 59.4

SUMMONS (JUDICIAL REVIEW)

COURT DETAILS

Court	Land & Environment Court of New South Wales
Class	4
Registry	Sydney
Case number	

TITLE OF PROCEEDINGS

Applicant	North East Forest Alliance Incorporated (INC1601738)
Respondent	Forestry Corporation of NSW
Number of Respondents	1

PROCEEDINGS BEING REVIEWED

1. Title	Braemar State Forest Compartments 6 and 7, Harvest and Haul Plan 2023.
Material date	30 May 2023
Decision of	Matthew Howat and Forestry Corporation of NSW
2. Title	Myrtle State Forest Compartments 10 to 16 Harvest and Haul Plan 2023.
Material date	16 May 2023
Decision of	Matthew Howat and Forestry Corporation of NSW

FILING DETAILS

Filed for	North East Forest Alliance Incorporated
Filed in relation to	So much of the decision as approved harvest, haulage, roading in Braemar and Myrtle State Forests.

Legal representative	Emily Long, Environmental Defenders Office
Legal representative reference	S5205
Contact name and telephone	Kimberley Hutchinson, (07) 2104 1480
Contact email	Kimberley.Hutchinson@edo.org.au

HEARING DETAILS

This summons is listed at [time, date and place to be inserted by the registry unless otherwise known].

TYPE OF CLAIM

Class 4 Judicial Review sections 20(2) and 3(a) of the Land and environment Court Act 1979 – Planning or Environmental Law – Part 5B of the Forestry Act 2012

ORDERS SOUGHT

1. In relation to the purported decision of Matthew Howat, or alternatively of the Respondent on 30 May 2023 to approve post-fire Harvest and Haul Plan 200002336:
 - (a) A declaration that Braemar 006-007 post-fire HHP 2023 is and was at all times invalid and of no effect;
 - (b) An order quashing the decision of the Respondent to approve Braemar 006-007 post-fire HHP 2023; and
 - (c) An order restraining the Respondent from proceeding in reliance on Braemar 006-007 post-fire HHP 2023.

2. In relation to the purported decision of Matthew Howat, or alternatively of the Respondent on 16 May 2023 to approve post-fire Harvest and Haul Plan 200001995:
 - (a) A declaration that Myrtle 010-016 post-fire HHP 2023 is and was at all times invalid and of no effect;
 - (b) An order quashing the decision of the Respondent to approve Myrtle 010-016 post-fire HHP 2023; and

- (c) An order restraining the Respondent from proceeding in reliance on Myrtle 010-016 post-fire HHP 2023.
3. An interlocutory order, until the claim is determined or until further order, in terms of paragraphs 1(c) and 2(c).
 4. An order (subject to any protective costs order made herein) that the Respondent pay the Applicant's costs of these proceedings.
 5. Such further or other order as the Court sees fit.

DETAILS OF DECISION

- 1 The decision maker with respect to the decision to approve Braemar 006-007 post-fire HHP 2003 was the Respondent by its employee and agent Matthew Howat.
- 2 The decision to be reviewed is the decision of the Respondent made on 30 May 2023 to approve Braemar 006-007 post-fire HHP 2003 so far as it relates to harvesting, haulage and roading.
- 3 The Applicant seeks relief from the whole of the decision referred to in the immediately preceding paragraph.
- 4 The decision maker with respect to the decision to approve Myrtle 010-016 post-fire HHP 2023 was the Respondent by its employee and agent Matthew Howat.
- 5 The decision to be reviewed is the decision of the Respondent made on 16 May 2023 to approve Myrtle 010-016 post-fire HHP 2023 so far as it relates to harvesting, haulage and roading.
- 6 The Applicant seeks relief from the whole of the decision referred to in the immediately preceding paragraph.

GROUND

Parties

- 7 The Applicant is a body corporate incorporated under *the Associations Incorporation Act 2009* (NSW).

8 The Respondent is a statutory corporation constituted under s 5 of the *Forestry Act 2012* (NSW) (the **Forestry Act**).

Background

9 Part 5B of the *Forestry Act* permits the granting of approval for the carrying out of forestry operations and provides that such approval is called an Integrated Forestry Operations Approval (IFOA).

10 Section 69L of the *Forestry Act* states that the purpose of Part 5B is to provide the framework for the authorisation of forestry operations in accordance with the principles of ecologically sustainable forest management and provides a definition of the principles of ecologically sustainable forest management.

11 Section 69P of the *Forestry Act* requires that an IFOA set out the conditions subject to which forestry operations are to be carried out, and provides that it may apply or adopt protocols, including protocols prepared by the NSW Environmental Protection Authority.

12 On about 16 November 2018 the Ministers for the Environment and for Lands and Forestry granted approval for the carrying out of forestry operations in the Coastal IFOA region, subject to conditions (the **CIFOA**).

Particulars

- (i) The "Coastal IFOA region" is defined in Protocol 13 made under the CIFOA by reference to the "Coastal_IFOA_Region" special data set.
- (ii) The Coastal IFOA region includes the upper north-east and lower north-east sub-regions.

13 Braemar State Forest is a state forest located near Rappville in north-eastern New South Wales.

14 Myrtle State Forest is a state forest located south of Braemar State Forest, also in north-eastern New South Wales.

15 Braemar and Myrtle State Forests are each within the Coastal IFOA area.

16 Condition 35 of the CIFOA provides that a forestry operation must not commence in an operational area unless an operational plan has been prepared for that forestry operation in that area.

- 17 Condition 53.4 provides that each operational plan must:
- (a) Address the conditions of the approval;
 - (b) Contain operational requirements in sufficient detail to enable the person proposing to undertake the forestry operation to comply with the conditions of the approval; and
 - (c) be approved and dated by an FC NSW Planning Supervisor.
- 18 Mr Matthew Howat is a FCNSW Planning Supervisor within the meaning of that term when used in Condition 53.4 of the CIFOA.
- 19 On 30 May 2023 Mr Howat, in his capacity as an FCNSW Planning Supervisor, approved a plan known as Braemar 006 and 007 post-fire Harvest and Haul Plan 2023, which has a plan ID no.200002336.
- 20 Braemar 006 and 007 post-fire HHP 2023 is an operational plan for the purpose of Division 4, and more generally for the purposes of, the CIFOA.
- 21 Braemar 006 and 007 post-fire HHP 2023 was made available to the public in accordance with Condition 53.5 on about 30 May 2023.
- 22 On 16 May 2023 Mr Howat, in his capacity as an FCNSW Planning Supervisor, approved a plan known as Myrtle 010-016 post-fire Harvest and Haul Plan 2023, which has a plan ID no.200001995.
- 23 Myrtle 010-016 post-fire HHP 2023 is an operational plan for the purpose of Division 4, and more generally for the purposes of, the CIFOA.
- 24 Myrtle 010-016 post-fire HHP 2023 was made available to the public in accordance with Condition 53.5 on about 16 May 2023.

Grounds

Ground 1 – Condition 53 of the CIFOA

- 25 Condition 53 of the CIFOA relevantly provides that any forestry operation must be conducted in accordance with an operational plan: Condition 53.1 and 53.2. Condition 53.4 addresses the content of such a plan, relevantly requiring that it:
- (a) Address the conditions of the CIFOA; and

- (b) Contain operational requirements in sufficient detail to enable the person proposing to undertake the forestry operation to comply with the conditions of the CIFOA.
- 26 The Braemar State Forest 006 and 007 post-fire HHP 2023:
 - (a) Does not address the conditions of the CIFOA, specifically it does not address Condition 14.1, which requires that any forestry operation be carried out in accordance with the principles of ecologically sustainable forest management;
 - (b) Does not contain operational requirements in sufficient detail to enable the person proposing to undertake the forestry operation to comply with the conditions of the CIFOA, and specifically to comply with the Condition 14.1 which requires such operations to be carried out in accordance with ecologically sustainable forest management.
- 27 Each of the matters identified in paragraph 26 (a) and (b) is a mandatory pre-condition to the power of the Respondent's planning supervisor to approve an operational plan in accordance with Condition 53.
- 28 Because of the failure of the Respondent, by its agent Mr Howat, to ensure that the purported operational plan complied with Condition 53.4, the purported operational plan is void and of no effect.
- 29 The Myrtle State Forest 010-016 post-fire HHP 2023:
 - (a) Does not address the conditions of the CIFOA, specifically it does not address Condition 14.1, which requires that any forestry operation be carried out in accordance with the principles of ecologically sustainable forest management;
 - (b) Does not contain operational requirements in sufficient detail to enable the person proposing to undertake the forestry operation to comply with the conditions of the CIFOA, and specifically to comply with the Condition 14.1 which requires such operations to be carried out in accordance with ecologically sustainable forest management.

30 Each of the matters identified in paragraph 29 (a) and (b) is a mandatory pre-condition to the power of the Respondent's planning supervisor to approve an operational plan in accordance with Condition 53.

31 Because of the failure of the Respondent, by its agent Mr Howat, to ensure that the purported operational plan complied with Condition 53.4, the purported operational plan is void and of no effect.

Ground 2 – Mandatory Relevant Consideration

32 Further and in the alternative, because of the operation of s.69L of the *Forestry Act 2012* and the operation of the conditions of the CIFOA, particularly Conditions 14 and 53, the ability of a person carrying out forestry operations in accordance with an approved operational plan, to comply with the principles of ecologically sustainable management is a mandatory relevant consideration for a planning supervisor considering a proposed operational plan.

33 In purporting to approve each of the Braemar State Forest 006 and 007 post-fire HP 2023 and the Myrtle State Forest 010-016 post-fire HHP 2023, the Respondent failed to consider that mandatory relevant consideration.

Ground 3 – Condition 23.4

34 Each of the Braemar State Forest and the Myrtle State Forest was extensively burnt in bushfires occurring in late 2019 and early 2020. The fire damage was extensive and included:

- (a) Direct fire damage to the compartments the subject of the two HHP's challenged in this proceeding; and
- (b) Fire damage to neighbouring and nearby compartments, increasing the significance of unburnt portions of the forest including unburnt portions of the compartments subject to the HHP's, as refuge areas to support the recovery of the burnt areas.

35 Condition 23.4 of the CIFOA applies in circumstances where applying the conditions of the approval at a specific site would result in a poor environmental outcome, or if in a specific and unique circumstance FCNSW

would not be able to comply with the conditions of the approval. If either of those circumstances applies then:

- (a) Any proposed forestry operation is a 'restricted activity' and must be approved in accordance with Protocol 5; and
- (b) FCNSW may not commence a forestry operation unless the EPA has first granted a site-specific operating condition that specifies:
 - (i) the conditions of the approval that must be implemented at the specific site for the duration of the forestry operation; and
 - (ii) site-specific operating conditions that must be implemented at the specific site for the duration of the forestry operation in that area, or for another time period specified by the EPA.

36 Protocol 5 concerns Approvals for 'restricted activities' defined by reference to a table. Item 6 of Table 1 of the Protocol is as follows:

	Restricted activity	Reference in approval or protocol	Approval Body/person
6	Special provisions requiring a review or amendment to the approval at a specific site in a specific circumstance	Condition 23.4 of the approval	EPA

37 Condition 23.4 read in conjunction with Protocol 5 requires approval by the EPA before FCNSW carries out any relevant forestry operation which is a restricted activity.

38 Following the bushfires in 2019/20, FCNSW correctly formed the view that the circumstances described in Condition 23.4 applied to harvesting operations in native State Forests and from December 2019 sought and obtained SSOCs from the EPA for any harvesting in these forests.

- 39 When the SSOCs referred to in the preceding paragraph expired in 2021 FCNSW correctly formed the view that the circumstances described in Condition 23.4 continued to apply and sought new SSOCs.
- 40 Because they did not like the SSOCs proposed by the EPA, FCNSW withdrew its request for renewed SSOCs and purported to create voluntary additional conditions for harvesting operations in fire-affected state forests instead.
- 41 Because Condition 23.4 was triggered FCNSW had no power to approve HHPs in the Braemar or Myrtle State Forests without SSOCs being in place, and cannot lawfully carry out a restricted activity without approval in accordance with Protocol 5, which it has not sought or obtained.

Relief claimed

- 42 The Applicant claims the relief sought in paragraphs 1 to 5 under the heading "Orders Sought" above on the basis of s 20(2) of the *Land and Environment Act 1979* and s 66 and s 69 of the *Supreme Court Act 1970*.

#SIGNATURE OF LEGAL REPRESENTATIVE

This summons does not require a certificate under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014*.

I have advised the applicant that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Employed Solicitor for the Applicant

Date of signature

27 July 2023

NOTICE TO RESPONDENT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the relief claimed in the summons and for the applicant's costs of bringing these proceedings.

Before you can appear before the court you must file at the court an appearance in the approved form.

HOW TO RESPOND

Please read this summons very carefully. If you have any trouble understanding it or require assistance on how to respond to the summons you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the summons from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Level 4, 225 Macquarie Street, Sydney
Postal address	GPO Box 3565, Sydney NSW 2001
Telephone	02 9113 8200

[on separate page]

PARTY DETAILS**PARTIES TO THE PROCEEDINGS****Applicant****Respondent**

North East Forest Alliance Incorporated

Forestry Corporation of NSW

FURTHER DETAILS ABOUT APPLICANT**Applicant**

Name North East Forest Alliance Incorporated
 Address 15 Tallowood Crescent, Byron Bay,
 NSW 2481

Legal representative for Applicant[s]

Name Emily Long
 Practising certificate number 84526
 Firm Environmental Defenders Office
 Contact solicitor Kimberley Hutchinson
 Address 3/28 Donkin Street
 West End QLD 4101
 DX address
 Telephone 07 2104 1480
 Fax
 Email Kimberley.Hutchinson@edo.org.au
 Electronic service address Emily.Long@edo.org.au

DETAILS ABOUT RESPONDENT**Respondent**

Name	Forestry Corporation of NSW
Address	121-131 Oratava Avenue West Pennant Hills NSW 2125