



# The Permanent Forest Sink Initiative

A consultation document on the proposed regulations, cost recovery methods and forest sink covenant

March 2007

Information about this consultation is available at [www.maf.govt.nz](http://www.maf.govt.nz) or by telephoning the Manager, Permanent Forest Sink Initiative (07 9213400 or 03 9433703).

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# Introduction

In this document you can read about the Ministry of Agriculture and Forestry's (MAF) proposals for:

- regulations for the Permanent Forest Sink Initiative (PFSI), including:
  - the application process and eligibility of land,
  - harvesting restrictions,
  - carbon accounting and participants' entitlements to units,
  - record-keeping requirements,
  - registering of certifiers;
- cost recovery methods and fees for the PFSI;
- managing the risks associated with the PFSI;
- a forest sink covenant.

MAF would like to receive feedback on these proposals. We will review any feedback before finalising the regulations, cost recovery methods, fees and covenant.

## Tell us what you think

To tell us what you think of our proposals, please complete the submission form at the end of this document and post it to:

PFSI Regulations Consultation  
Indigenous Forestry Unit  
Ministry of Agriculture and Forestry  
PO Box 25-022  
Christchurch

Alternatively, you can download the submission form from MAF's website <http://www.maf.govt.nz/forestry/pfsi/consultation-document/index.htm>, complete it, then email it to [ifu@maf.govt.nz](mailto:ifu@maf.govt.nz)

### **Please ensure your submission reaches us by 14 May 2007**

If you wish to discuss your submission with MAF officials please indicate this on your submission form.

Further information about this consultation and the PFSI is published in the *PFSI Bulletin*. If you would like to receive this bulletin, please email [ifu@maf.govt.nz](mailto:ifu@maf.govt.nz).

Please note that your submission 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 provided in your submission, please specify the material that you consider should be withheld, and the grounds for withholding it. Please note that even if you do identify specific material that 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 into account your views, we are not bound by them.

## Relationship with the Government's wider climate change policy consultation

In December 2006 the Government released the discussion document *Sustainable Land Management and Climate Change: Options for a Plan of Action*. This document discusses two options for encouraging afforestation. The first option is an afforestation grant scheme. Under this option, parties would be invited to tender for a grant for the establishment of new post-2007 Kyoto-compliant forests. The second option is to concurrently offer landowners the option of either an afforestation grant scheme or devolving sink credits and their associated liabilities for Kyoto-compliant forests established from 2007 onwards. The devolved credits and liabilities mechanism (DCL) could operate in a similar manner to the PFSI.

The PFSI could run alongside either of the afforestation options in *Sustainable Land Management and Climate Change*. It will proceed no matter what other policy options are chosen.

The Government has not decided what differences there may be between the PFSI and the DCL options, but key differences between them could be:

- harvesting restrictions;
- retention of credits (the Crown might retain a greater proportion of credits from participants in the DCL option to cover the risk to the Crown of people defaulting on their obligations);
- eligibility dates (only forests established from 2007 onwards would qualify to enter the DCL option);
- no ability to receive assigned amount units (AAUs) under the DCL option,<sup>1</sup> participants would receive removal units (RMUs).<sup>2</sup> The possibility of receiving AAUs under the PFSI is discussed in this paper.

*Sustainable Land Management and Climate Change* is available from [www.maf.govt.nz/climatechange](http://www.maf.govt.nz/climatechange)

## About the PFSI

The PFSI is a government initiative that promotes the establishment of permanent forests on previously unforested land.

The PFSI enables landowners to generate income through “carbon forestry” – removing carbon dioxide from the atmosphere and storing it in new forests. The

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<sup>1</sup> Assigned amount units are allocated to parties under the Kyoto Protocol based on their 1990 emissions.

<sup>2</sup> Removal units are generated from Kyoto-compliant forests.

owners of the new forests will be able to claim Kyoto-compliant emission units for increases in the amount of carbon stored in their forest.

Because carbon forestry does not necessarily require roads to be built or trees to be harvested, it is well suited to isolated or erosion-prone land.

The PFSI will be administered by MAF's Indigenous Forestry Unit (IFU). More information about the PFSI is available on MAF's website ([www.maf.govt.nz/forestry/pfsi/](http://www.maf.govt.nz/forestry/pfsi/)).

## Key features of the PFSI

- The initiative is voluntary.
- Participants in the PFSI will receive tradable Kyoto-compliant emission units.
- Participants will have to meet all costs associated with generating emission units and agree to replace any units if there is a decrease in the carbon stored in their forest.
- The rights and obligations of participating in the initiative will be formalised in a contract (covenant) between participating landowners and the Crown. The contracts will be registered against land titles and will bind all future owners of the land. A draft covenant is included in this document (see Appendix 1).
- To be eligible, land must be Kyoto compliant; that is it was unforested as at 31 December 1989. Other eligibility rules apply. These are described on page 5.
- Participants will be eligible for East Coast Forestry Project grants if their application includes target land on the East Coast.<sup>3</sup>
- To qualify for emission units, new forests must be “direct human induced ... through planting, seeding and/or the human-induced promotion of natural seed sources.”<sup>4</sup>
- Participants can harvest timber from new forests provided the forest maintains a continuous canopy cover.
- Participants who harvest more than the regulations allow will be required to replace emission units for the carbon dioxide released, plus make a penalty payment.
- Should the Kyoto Protocol no longer allow emission units to be generated from these forests, the harvesting restrictions will be removed. However, to the extent that carbon dioxide emission liabilities remain for units already received, these liabilities will need to be met by landowners if the carbon dioxide is released into the atmosphere at some future point.
- Forestry rights<sup>5</sup> can include the right to receive units based on carbon sequestration that are received in accordance with a forest sink covenant.
- The cost of administering the PFSI will be recovered from participants.

Part 3B of the Forests Act 1949 provides for the implementation of the PFSI. The legislation is available from [www.legislation.co.nz](http://www.legislation.co.nz).

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<sup>3</sup> Information about the East Coast Forestry Project is available from [www.maf.govt.nz](http://www.maf.govt.nz).

<sup>4</sup> Decision 16/CMP.1 Land use, land-use change and forestry.

<sup>5</sup> A “forestry right” is a legal right of ownership or cutting rights to forests growing on someone else's land registered as a covenant under the Forest Rights Registration Act.

# Proposed regulations

The regulations and the covenant cover different aspects of the PFSI. Landowners will need to understand both the regulations and the covenant in order to understand the operation of the PFSI.

## Application process and eligibility

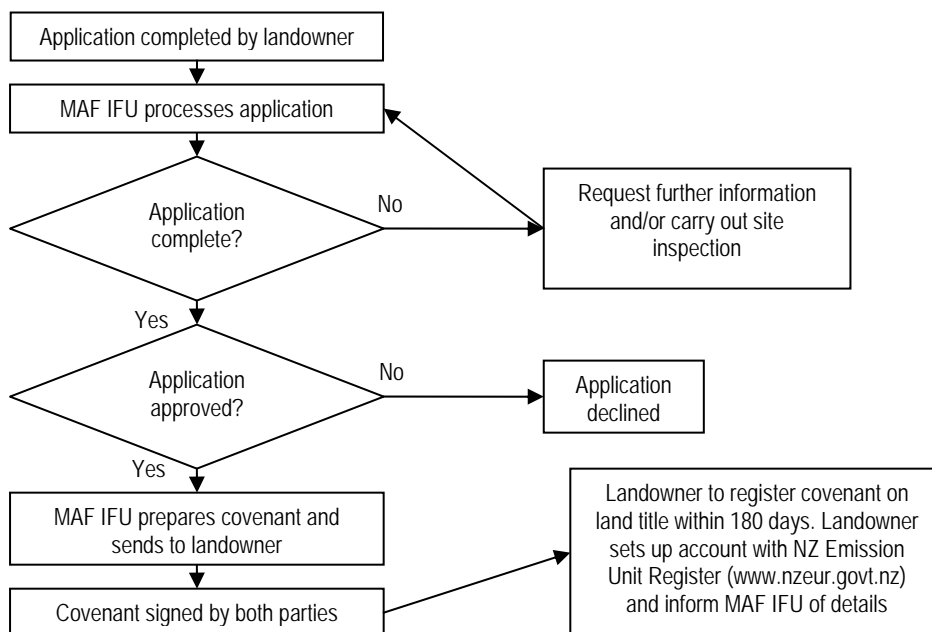
It is intended that the regulations for the PFSI will:

- specify eligibility requirements (what land is eligible and what forests are eligible);
- empower the Minister to enter into forest sink covenants – the Minister would be able to negotiate, enter into, vary and cancel a forest sink covenant with any landowner, but the Minister would not be required to negotiate or enter into such a covenant.

### *Application process*

Figure 1 details the proposed application process.

*Figure 1: Proposed application process*



### *Proving eligibility*

To be eligible to enter the PFSI, land must be “Kyoto compliant”. Kyoto-compliant land is defined as land that was not covered by forest on 31 December 1989. A forest is defined as:

- exceeding one hectare;
- with tree crown cover (or equivalent stocking level) of more than 30 percent;
- greater than 30 metres wide; and either
- containing species capable of reaching five metres or more in height at maturity *in situ*;<sup>6</sup> or
- previously forested land awaiting replanting.

In addition, Kyoto-compliant land containing exotic forest is eligible to enter the PFSI only if the forest was established after 17 October 2002 (the date the PFSI was first announced). All Kyoto-compliant land containing indigenous forest is eligible to enter the PFSI.

Land that was actively farmed at 31 December 1989 and that contains areas of regenerating scrub may be eligible to enter the PFSI. This will be assessed on a case-by-case basis. A guide to the eligibility of land will be available on MAF’s website ([www.maf.govt.nz/forestry/pfsi/](http://www.maf.govt.nz/forestry/pfsi/)) in the near future.

In addition the forest establishment must be consistent with the New Zealand Forest Accord. In essence, this means that the establishment of planted forests will not involve the clearance of significant regenerating indigenous forest.

Applicants must provide evidence that shows an area of land is eligible to enter the PFSI. MAF proposes that acceptable methods of proving eligibility include:

- aerial photographs taken at or close to 1990 that clearly show land use at that date;
- oblique photographs taken of the land at or close to 1990 to support aerial photographs;
- farm records and plans that show the land was not forested prior to 1990;
- planting records or nursery receipts (for establishing compliance with the 2002 eligibility date).

MAF may require more than one of the above methods to prove eligibility. A site inspection may also be needed.

### *Identifying land area*

Accurately identifying the area of land in the application to enter the PFSI will:

- avoid the need to redefine, and disputes arising from redefining, areas in future when inaccuracies are identified;

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<sup>6</sup> Young natural stands and all plantations that have yet to reach a crown density of 30 percent or tree height of 5 metres are included under the definition of forest.

- avoid disputes over the intended area identified by applicants (as there may be a degree of subjectivity required when interpreting applicants' diagrams and maps);
- establish the area for carbon accounting purposes;
- avoid problems where two inaccurately defined boundaries overlap;
- reduce administration costs associated with digitising relatively complex land areas;
- maintain confidence in the PFSI mechanism.

MAF proposes that acceptable methods of identifying the area of land in the application include:

- GIS (geographic information system) data – an applicant will submit a geospatial data file (such as, ESRI shapefile or MAPINFO tab file) derived from GPS (global position system) track, ortho-corrected aerial photographs or a registered survey;
- ortho-corrected aerial photographs;
- GPS coordinates – an applicant could capture the boundary of an area using a handheld GPS receiver, and then submit the text file of bounding coordinates to MAF;
- survey plan – an applicant could submit a registered survey plan of the intended area and boundary.

Regardless of the method chosen, applicants would have to clearly identify what standardised coordinate system was used to identify the land (such as New Zealand Map Grid Projection, New Zealand Transverse Mercator Projection, latitude and longitude).

MAF proposes that hand drawn lines on Certificate of Title diagrams (or any other diagrams) would not be acceptable for identifying land area in an application. Such diagrams leave too much room for interpretation and could lead to unnecessary confusion or grievances from current or future owners of the land. Topographic maps on their own are unlikely to be acceptable for the same reasons.

MAF's preferred standard will be a GIS shape file which is consistent with the classification of Kyoto-compliant land.

Where MAF has to digitise boundaries into GIS shape files, carry out property inspections or carry out other work in defining the boundaries of Kyoto-compliant land, this may be considered a non-standard application and additional application fees may be charged on an hourly time and cost basis.

## Harvesting

It is intended that the regulations will describe approved harvesting practices that:

- set out the allowable harvesting levels;
- allow for case-by-case exemptions to the allowable harvesting levels in the event of natural disturbances;
- set out requirements for reporting harvesting activities;
- detail the penalty for breaching the allowable harvesting levels.

### *Allowable harvesting levels*

Participants will be allowed to harvest<sup>7</sup> up to 20 percent of the forest's basal area per hectare (applied to any given hectare). They will have to allow the forest to recover to the pre-harvest basal area before trees can be harvested again. This restriction will be removed from a forest after the forest has been part of the PFSI for 99 years.

### *Reporting and monitoring of harvesting*

MAF proposes that participants who wish to harvest must submit an "intention to harvest notice" to MAF prior to harvesting and keep records pertaining to the harvest. These records must be made available to MAF on request and retained for five years.

The intention to harvest notice would advise MAF of the name of the landowner harvesting, provide a map of the location of the forest and harvest site, and provide details of the harvesting method and intended timing of harvest. This will allow MAF to monitor harvesting and carry out audits.

MAF proposes that the harvesting records to be held by the landowner include:

- a map of harvest area;
- the date of harvesting;
- the area harvested (hectares);
- pre-harvest basal area raw data measurements from within the intended harvest area;
- post-harvest basal area raw data measurements (or the diameter at breast height of all trees harvested).

Measurements of pre- and post- harvest basal area are to be carried out using forest industry good practice inventory methods with an appropriate level of precision which will be determined in regulations.

Landowners who carry out harvesting will provide to MAF an annual harvesting return summarising the above harvesting information.

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<sup>7</sup> Harvesting includes the felling and removal of biomass.

MAF considers the above information to be the minimum level of harvest information that must be recorded and supplied to MAF to allow monitoring for compliance with the harvesting restrictions. There are penalties for breaching the allowable harvest levels. Landowners will need to safeguard themselves against unintentional over-harvesting carried out as a result of inadequate measuring and monitoring.

### *Penalties for breach of allowable harvesting levels*

Landowners who fell or harvest timber above the allowable harvesting level will breach the covenant and will be required to replace the units for the carbon released. Any harvesting above the allowable harvesting level may also incur a penalty. A penalty may be imposed only in respect of the proportion of forest on land subject to a forest sink covenant that is harvested in breach of the covenant.

The penalty payments will be in the form of additional emissions units calculated on the basis of an annual compounding rate of 10 percent applied to each year's sequestration, commencing from the earliest year in which the units were generated. This has been specified in legislation as the maximum penalty allowed under regulation.

MAF proposes that the penalty will be determined on the average carbon stock per hectare of the forest area subject to the covenant. Each year's sequestration will be assumed to be a linear sequestration rate from the previously assessed carbon stock level.

## **Carbon accounting and entitlement to units**

It is intended that regulations will set out:

- how participants will earn units;
- how and when units will be transferred to participants when carbon inventories have been verified;
- the carbon sequestration accounting methodology or methodologies that all participants must use;
- the circumstances in which participants are not entitled to receive units;
- the forms of unit the Crown is prepared to accept in the case of liabilities owing to the Crown;
- that the Crown may determine a price at which liabilities to the Crown can be paid in place of the transfer of units;
- a process for verifying carbon sequestration and emission assessments.

### *Entitlement to units*

A participant's entitlement to units will be based on an inventory and a report prepared by the participant or their agent. This report will need to:

- use the carbon sequestration accounting methodology or methodologies specified in the regulations;<sup>8</sup>
- be verified by a registered certifier.

The carbon sequestration accounting methodology will identify how changes in carbon stock on the area subject to the covenant are to be assessed. MAF proposes that all participants must use a standard carbon sequestration accounting methodology or methodologies that are transparent and auditable.

Subject to the terms of the covenant, units would be transferred to an account at the New Zealand Emission Unit Register (NZEUR).<sup>9</sup>

Subject to the terms of the covenant and verification, a participant will be entitled to receive one unit for each tonne of carbon dioxide sequestered (stored) in their forest that is in excess of the previously verified quantity sequestered. Carbon dioxide sequestered will be assessed as carbon stock changes.

As well, a participant will be liable for one unit for each tonne of carbon dioxide that is in deficit of the quantity of carbon dioxide previously verified as sequestered in their forest. In this instance, the participant will be required to transfer the appropriate number of units to the Crown.

### *Transfer of units*

PFSI forests generate removal units<sup>10</sup> (also known as RMUs or sink credits) for the Crown. Under the PFSI these removal units are devolved to landowners with forest sink covenants. MAF proposes that if the landowner wishes to receive assigned amount units (AAUs), the Crown may, if circumstances permit, transfer AAUs instead.

Difficulties could arise if the Crown were obliged to transfer AAUs to all landowners with forest sink covenants. For example:

- The rules of the Kyoto Protocol require the retention of 90 percent of the Crown's AAUs.<sup>11</sup>
- Annual assessment of carbon stock changes (as well as less frequent assessments) in this environment would create a first-in first-served allocation of AAUs that may not be equitable. For example, those who assess their carbon

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<sup>8</sup> This methodology is currently being developed by MAF. It is expected that this methodology will need to be updated over time.

<sup>9</sup> Information about the NZEUR is available from [www.nzeur.govt.nz](http://www.nzeur.govt.nz)

<sup>10</sup> Removal units are the official name for the carbon credits generated from forests. They are also known as forest sink credits.

<sup>11</sup> The Crown will be allocated 309 464 979 AAUs. It must retain at least 278 518 481 AAUs. 7 500 000 AAUs have already been allocated to the Projects to Reduce Emissions (PRE).

more frequently would receive AAUs, and those who assessed less frequently may miss out.

- Devolving AAUs would limit the Government's flexibility to devolve these units under other policy options.

If the Government were to decide to allow landowners to receive AAUs under the PFSI, then a fair basis for allocating these AAUs would need to be developed.

#### *Date of transfer of units*

Participants will be able to submit their first carbon inventory after their covenant has been registered against their land, but not before 1 January 2008. For example, applications made in 2010 will not be eligible for carbon stock changes back-dated to 1 January 2008.

The PFSI carbon sequestration accounting methodology will be aligned with New Zealand's national accounting approach under the Kyoto Protocol. A landowner will be entitled to have RMUs transferred no earlier than 31 December 2012.

New Zealand has opted to account for carbon at five-yearly intervals under the Kyoto Protocol. New Zealand expects to receive RMUs following the submission of its 2012 national inventory report in April 2014. This report should be reviewed within a year of submission (by 15 April 2015). If a country that is party to the Kyoto Protocol is assessed as not being in compliance with its Kyoto Protocol obligations, there is a "true-up" period of 100 days in which a country can bring itself into compliance (for example, by purchasing first Commitment Period Units).

Following the Crown's receipt of units, the Crown should be able to transfer these units to PFSI participants. The Crown will not be able to devolve RMUs before 2012 as New Zealand will not have received any RMUs to devolve.

RMUs should be able to be transferred in this 100 day "true-up" period. Participants will not be prevented from forward selling units. However, this would be a private matter between the participant and the purchaser of the units. The Crown gives no guarantee as to the tradability or value of the units.

#### *Circumstances in which there is no entitlement to receive units*

MAF proposes that a participant will not be entitled to receive units if:

- the participant has failed to pay any fee, levy or charge under the regulations;
- the participant has breached a regulation;
- the participant is in breach of any provision of the covenant;
- the Crown is unable for whatever reason, including inability to obtain access to the forest sink, to verify a report of the carbon sequestered by the participant.

Units will not be transferred to a participant until a carbon assessment report has been completed, signed off by a certifier and approved by MAF.

### *Acceptable forms of units to transfer to the Crown in the case of liabilities*

MAF proposes that the regulations will list the forms of unit the Crown is prepared to accept in the case of liabilities owing to the Crown. This list will not include temporary certified emission reduction units and long-term certified emission reduction units.

### *In the case of liabilities, payment of money in place of units*

MAF proposes that the regulations state that the Crown, at its sole discretion, may determine a price at which liabilities to the Crown can be paid in place of the transfer of units.

## Record keeping and certifiers

It is intended that the regulations will set out:

- record-keeping requirements for participants;
- that landowners will be required to make returns to MAF;
- MAF's ability to register and deregister individuals as carbon accounting certifiers.

### *Record-keeping requirements*

MAF proposes that participants will be required to keep accurate and up-to-date records relating to their involvement in the PFSI for a given period of time. These records would have to:

- accurately represent the events, measurements and activities that they purport to represent or could reasonably be expected to represent;
- be complete;
- be reliable;
- be transparent.

MAF proposes that these records include:

- NZEUR account details;
- all carbon measurement records, including:
  - raw data/field measurements of site/forest statistics,
  - collection technique,
  - persons conducting the collection;
- information about any harvesting, including:
  - raw data/field measurements of basal area,
  - maps showing location and boundaries of harvest areas,
  - date of harvesting;
- change of land ownership;
- record-keeping requirements set out in the forest sink covenant;
- details relating to how the forest has been established.

### *Returns and information to be provided*

MAF proposes that landowners will be required to send returns to MAF that include:

- registry account details including any change in the nominated account(s) at NZEUR;
- initial and subsequent certified carbon stock assessments;
- notice of intention to harvest;
- annual harvest summary reports;
- change of land ownership;
- any requirements set out in the forest sink covenant;
- details of any agent acting on behalf of the landowner;
- details for accessing the land – such as how access can be gained and who to contact if access is sought.

### *Certifiers*

MAF proposes that it will register experts (certifiers) in the area of carbon accounting assessment. This should reduce the cost-recovered MAF administration costs associated with the PFSI and provide an independent assessment of carbon stocks.

All returns of carbon stocks would require certification by a registered certifier before MAF would accept and record them. Certifiers would have to maintain relevant competencies to undertake and/or sign off various tasks, including:

- carbon assessments;
- on-site audits;
- harvest assessments/ basal area measurements.

Certifiers would have to maintain independence and impartiality from participants. The independence and impartiality of these certifiers would provide confidence to the buyers of the units generated from the PFSI.

MAF would audit a proportion of the work undertaken by these certifiers. The level of audit will be reassessed over time and adjusted according to levels of compliance. MAF may also contract certifiers for various tasks, rather than rely on in-house provision of services.

MAF proposes that certifiers must be New Zealand Institute of Forestry (NZIF) registered forestry consultants<sup>12</sup> (or have appropriate competencies). This should:

- provide an additional level of confidence in the mechanism;
- assist in reducing the time MAF spends ensuring the quality of certifiers;
- provide a means of dispute resolution that is impartial and fair;
- provide a code of ethics for certifiers.

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<sup>12</sup> Further information regarding NZIF and NZIF registered consultants can be found at [www.nzif.org.nz](http://www.nzif.org.nz).

Forestry officers employed by MAF and appointed under the Forests Act 1949 would also be able to undertake the functions of a certifier. All work undertaken by these officers in the capacity of a certifier would be cost recovered.

MAF proposes that there will be powers to deregister certifiers. For example, certifiers may be deregistered if they omit information considered material to MAF's assessment, or provide misleading statements in order to influence decisions regarding carbon sequestration.

### Questions about the proposed regulations

1. How reasonable is the proposed application process for the PFSI?
2. What are your suggestions for streamlining the application process?
3. How reasonable are the proposed methods of proving land eligibility?
4. Do you have alternative or additional suggestions/methods for proving land eligibility?
5. How reasonable are the proposed methods of identifying the land area that an application relates to?
6. Do you have suggestions for alternative or complementary methods of identifying the land area that an application relates to?
7. How reasonable are the intended procedures for administering the approved harvesting practices?
8. How could the proposed procedures for administering the approved harvesting practices be simplified while still preserving MAF's ability to monitor harvesting for compliance?
9. How fair and reasonable is the proposed method of applying the harvesting penalty if harvesting restrictions are breached?
10. How reasonable are the proposed requirements for record keeping and supplying returns to MAF?
11. How appropriate is the proposed role of registered certifiers?
12. How appropriate is the proposed method of appointing registered certifiers?
13. How appropriate are the proposals for entitlement to and transfer of units?
14. Do you have any suggestions for the allocation of assigned amount units (AAUs) if these are made available?
15. If you wish to make any further comment on the proposed regulations or explain your answers to questions 1–14, please do so.

# Cost recovery

The costs of administering the PFSI will be fully recovered from applicants, participants and certifiers.

The administration of the PFSI is expected to be relatively similar to the administrative processes used for the approval and monitoring of sustainable indigenous forestry under Part 3A of the Forest Act 1949. These administrative processes have been used as a guide to the likely costs of administering the PFSI.

## Options for cost recovery mechanisms

Part 3B of the Forests Act 1949 sets out the following options for recovering the costs of administering the PFSI:

- fixed fees or fixed charges;
- fees based on a scale or hourly rate, or similar formula;
- fees utilising a formula, or similar method of calculation;
- fees or a charge reflecting actual and reasonable costs – provided the charge is associated with the performance or service provided;
- estimated fees or charges – fees can be based upon estimates followed by a reconciliation and further payment or refund after the provision of the service;
- levies;
- any combination of the above.

In determining the most appropriate method of cost recovery the Minister must have regard, as far as is reasonably practicable, to the following criteria:

- **Equity:** Funding for a particular function, power or service, or a particular class of functions, powers or services, should generally, and to the extent practicable, be sourced from the users or beneficiaries of the relevant function, power or service at a level commensurate with their use or benefit from the function, power or service.
- **Efficiency:** Costs should generally be allocated and recovered in order to ensure that maximum benefits are delivered at minimum cost.
- **Justifiability:** Costs should be collected only to meet the actual and reasonable costs (including indirect costs) for the provision or exercise of the relevant function, power or service.
- **Transparency:** Costs should be identified and allocated as closely as practicable in relation to tangible service provision for the recovery period in which the service is provided.

Accurately judging cost recovery levels is difficult because there are still a number of uncertainties that may impact on the levels of cost recovery. These uncertainties include:

- level of interest in and uptake of the PFSI;
- potential economies of scale in the administration of a large number of applications;
- size of areas applying to enter the initiative;
- the exact methodology for carbon measurement;
- the exact nature of the final regulations;
- the quality of the applications received.

This will mean that cost recovery levels will need to be reviewed and adjusted over time. Adjusting methods or levels of cost recovery requires consultation with affected persons.

### Proposed cost recovery mechanism and fees

MAF's proposals for the mechanisms and fees for recovering the administration costs of the PFSI are detailed in Tables 1 and 2. All fees exclude GST. Costs specified as annual levies are likely to be combined into a single levy. They are broken down here for transparency.

*Table 1: Costs recovered from applicants and participants*

Activity	What the activity includes	Proposed method of cost recovery	Proposed fee/levy	Alternative methods of cost recovery
Application processing (standard application)	<ul style="list-style-type: none"> <li>• Checking for completeness and acknowledging application, fee received/receipted/banked, file opened/database entry, processing of application</li> <li>• Preparation and signing of covenant</li> <li>• Recording of information in database</li> <li>• Transfer of data to national carbon accounting system</li> </ul>	<ul style="list-style-type: none"> <li>• One-off application fee per hectare, with sliding scale and provision for actual time and cost charges for non-standard applications</li> </ul>	<ul style="list-style-type: none"> <li>• \$8 per hectare for 1–150 hectares</li> <li>• \$6 per hectare for next 250 hectares</li> <li>• \$4 per hectare for next 600 hectares</li> <li>• \$2 per hectare for each hectare over 1000 hectares</li> <li>• Minimum of \$500</li> </ul>	<ul style="list-style-type: none"> <li>• Fixed fee per application</li> <li>• Hourly time and cost</li> </ul>
Initial carbon measurement and auditing	<ul style="list-style-type: none"> <li>• Receipt, review and recording of details</li> <li>• Transfer of data to national carbon accounting system</li> <li>• On-site audit of a proportion of sites</li> </ul>	<ul style="list-style-type: none"> <li>• Fixed fee per verification, plus a fee per hectare for audit</li> </ul>	<ul style="list-style-type: none"> <li>• Fixed fee of \$232, plus audit fee of \$4.64 per hectare with a minimum of \$100</li> </ul>	<ul style="list-style-type: none"> <li>• Fixed fee per audit</li> <li>• Hourly time and cost</li> </ul>
Subsequent carbon measurements and auditing	<ul style="list-style-type: none"> <li>• As with initial carbon measurement, but in addition includes submission of details to NZEUR for transfer of units</li> </ul>	<ul style="list-style-type: none"> <li>• Carbon measurement/audit fee per hectare</li> </ul>	<ul style="list-style-type: none"> <li>• Fixed fee of \$406 plus audit fee of \$4.64 per hectare with a minimum of \$100</li> </ul>	<ul style="list-style-type: none"> <li>• Fixed fee per audit</li> <li>• Hourly time and cost</li> </ul>

Cont...

...Table 1 cont

Activity	What the activity includes	Proposed method of cost recovery	Proposed fee/levy	Alternative methods of cost recovery
Administrative tasks	<ul style="list-style-type: none"> <li>• Responding to public enquiries and handling covenant queries</li> <li>• Information bulletins and website maintenance</li> <li>• Maintaining files and database; ownership and contact details</li> <li>• Receipt and recording of harvesting details</li> <li>• Invoicing and financial records</li> </ul>	<ul style="list-style-type: none"> <li>• Annual levy per hectare</li> </ul>	<ul style="list-style-type: none"> <li>• \$3.87 per hectare per year</li> </ul>	
Recovery of PFSI establishment costs and maintenance of carbon accounting system	<ul style="list-style-type: none"> <li>• Recovery of development costs and maintenance of carbon accounting system</li> </ul>	<ul style="list-style-type: none"> <li>• Annual levy per hectare</li> </ul>	<ul style="list-style-type: none"> <li>• \$2.27 per hectare per year</li> </ul>	
Miscellaneous charges	<ul style="list-style-type: none"> <li>• Processing poorly documented/complex/non-standard applications</li> <li>• Negotiating non-standard clauses in covenant</li> <li>• Special audits</li> <li>• Investigations</li> <li>• Other contingencies</li> </ul>	<ul style="list-style-type: none"> <li>• Hourly time and cost</li> </ul>	<ul style="list-style-type: none"> <li>• \$115 per hour</li> </ul>	

*Table 2: Costs recovered from certifiers*

Activity	Proposed method of cost recovery	Proposed fee	Alternative methods of cost recovery
Registration of certifiers	<ul style="list-style-type: none"> <li>• One-off application fee</li> </ul>	<ul style="list-style-type: none"> <li>• \$300 per application</li> </ul>	
Maintenance of register of certifiers and technical support	<ul style="list-style-type: none"> <li>• Annual fee per certifier</li> </ul>	<ul style="list-style-type: none"> <li>• \$180 per year</li> </ul>	
Training of certifiers	<ul style="list-style-type: none"> <li>• Fee per course</li> </ul>	<ul style="list-style-type: none"> <li>• Fees based on time and cost (\$115 per hour), number attending</li> </ul>	<ul style="list-style-type: none"> <li>• Combine into annual levy for Certifiers</li> </ul>

### Questions about cost recovery

16. How supportive are you of the proposed methods of cost recovery?
17. Do you think alternative methods of cost recovery would be more appropriate? If so, what do you propose and why?
18. What do you think of the proposed level of the fees?
19. How could the proposed administration be simplified to create cost-savings?
20. If you wish to make any further comment on cost recovery or explain your answers to questions 16–19, please do so.

# Risk management

The Government needs to minimise its fiscal risks in situations where participants default on payments. For example, there is the risk that a participant may clear-fell a forest and abscond, leaving the Government with the liability from carbon emissions. Standard forestry insurance will not cover the risk of the participant clear-felling and absconding. This is a key risk that the Crown wishes to cover.

The Government has the regulation-making power to prescribe requirements for a participant to provide a guarantor or insurer, or any other risk management arrangement that the Minister considers appropriate, to meet any obligations of the participant under Part 3B of the Forests Act 1949 or the forest sink covenant in the event of the participant's default.

MAF is proposing that one method of meeting this regulatory requirement is for the covenant to contain a default risk management provision relating to the permanent retention of 5 percent of the units by the Government. In the event of liabilities, landholders would still be liable for 100 percent of the liabilities.

The proposed covenant is in Appendix 1. Risk management is covered in clause 8.1 (c).

If the Government retains a proportion of the units:

- the administrators of PFSI would not have to continually monitor risk management arrangements;
- the cost of participating in the PFSI could be lower, as the lack of certainty of the potential liability and the long-term nature of the obligation would mean that insurance, if available, would probably be expensive;
- participants would avoid the difficulty of renewal of insurance arrangements.

Participants should still manage their risks through standard forestry insurance and/or other risk management strategies.

## Questions about risk management

21. How appropriate are the proposed risk management arrangements in the covenant?

# Forest sink covenant

A draft of the forest sink covenant has been developed by MAF (see Appendix 1). We welcome your feedback on the covenant. You may want to comment on a specific clause and/or the covenant's relationship with the regulations. For example, you may want to suggest that certain clauses could be included in the regulations as opposed to the covenant or visa versa.

## Questions about the covenant

22. What do you think of the interrelationship between the proposed regulations and the draft of the forest sink covenant?
23. Feedback is welcome on any part of the covenant. If you want to comment on a specific clause or the covenant's relationship with the regulations, please do so.

# Appendix 1: Forest sink covenant

## [FOREST SINK COVENANT TERMS AND CONDITIONS]

*[These terms and conditions will either be registered under section 155A of the Land Transfer Act 1952 or annexed to the instrument creating a covenant which is registered under the Land Transfer Act 1952]*

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### 1. DEFINITIONS AND INTERPRETATION

#### 1.1 Definitions: In this Covenant the following terms have the following meanings:

“Act”	means the Forests Act 1949;
“Approved Harvesting Practices”	has the meaning given in the Regulations; <b>[This is intended to cover continuous cover forestry, traditional Maori purposes and any other relevant</b>

**exceptions that may arise]**

<b>“Approved Person”</b>	has the meaning given in the Regulations;
<b>“Business Day”</b>	means a day other than a Saturday or Sunday on which banks are open for business in Wellington (or, for the purposes of clause 15 only, the place to which a notice is sent);
<b>“Carbon Loss”</b>	has the meaning given in the Regulations;
<b>“Carbon Measurement Date”</b>	means the later of 1 January 2008 and the date on which this Covenant was entered into with the Initial Landowner;
<b>“Carbon Sequestered”</b>	has a corresponding meaning to “ <b>carbon sequestration</b> ”, as such term is defined in the Act;
<b>“Change”</b>	includes, in relation to any change in the Control of a person, any gain of Control where previously there was no Control, and any cessation of Control;
<b>“Control”</b>	<p>in relation to a person means the ability of another person to ensure (directly or indirectly) that the activities and business of the first person are conducted in accordance with the wishes of that other person, and a person shall be deemed to have control of a body corporate if that person:</p> <ul style="list-style-type: none"><li>(a) possesses or is entitled to acquire greater than 50% of the issued share capital of the body corporate;</li><li>(b) has the ability to ensure that the board of directors of the body corporate is composed in accordance with the wishes of that person; or</li><li>(c) has the ability to ensure that greater than 50% of the votes entitled to be cast at general meetings of the body corporate are cast in accordance with the wishes of that person;</li></ul>
<b>“Covenant”</b>	means this agreement, including the Schedules to it;
<b>“Effective Date”</b>	has the meaning given in clause 2.1(a);
<b>“Eligible”</b>	<p>means, in respect of a Forest Sink on the Forest Sink Area, that:</p> <ul style="list-style-type: none"><li>(a) the Forest Sink Area is Eligible Land; and</li><li>(b) the Forest Sink on the Forest Sink Area complies with:<ul style="list-style-type: none"><li>(i) all the requirements of a Forest Sink under the Regulations; and</li><li>(ii) any other requirements of the Regulations;</li></ul></li></ul>

<b>“Eligible Land”</b>	has the meaning given in the Regulations; <b>[This will define land which is eligible to be a Forest Sink]</b>
<b>“Felling”</b>	means cutting down Timber;
<b>“Forest Sink”</b>	has the meaning given in the Regulations;
<b>“Forest Sink Area”</b>	means the part of the Land identified in Schedule 2;
<b>“Forest Sink Mechanism”</b>	means the mechanism relating to the establishment of Forest Sinks set out in the Act, the Regulations and all “forest sink covenants” (as such term is defined in the Act), including this Covenant;
<b>“Forest Sink Plan”</b>	means the plan contained in Schedule 3, as amended: <ul style="list-style-type: none"> <li>(a) by the written agreement of the parties; or</li> <li>(b) in accordance with the Regulations;</li> </ul>
<b>“Initial Landowner”</b>	means the Landowner with whom the Crown first entered into this Covenant;
<b>“Land”</b>	means the land identified in Schedule 1;
<b>“Landowner”</b>	means the registered owner or owners from time to time of the freehold estate in the Land;
<b>“New Zealand Government”</b>	has the meaning given in clause 8.8;
<b>“Performance Security”</b>	means a guarantee, payment bond or other form of security for the performance of the Landowner’s obligations under this Covenant, and in particular under clause 5, which is satisfactory to the Crown (acting reasonably) in all respects (including as to the provider, the amount (if applicable) and the terms of the security for performance);
<b>“Protocol”</b>	has the meaning given in the Climate Change Response Act 2002;
<b>“Registry”</b>	has the meaning given in the Climate Change Response Act 2002;
<b>“Regulations”</b>	means [the Forest (Permanent Forest Sink) Regulations 2007], the [Forest (Permanent Forest Sink Levy) Order 2007] and any other regulations made by the Crown pursuant to section 67Y of the Act or any other Act relating to the Forest Sink Mechanism;
<b>“Reports”</b>	means any reports or returns which the Landowner is required to provide under the Regulations;
<b>“Restricted Period”</b>	has the meaning given in the Regulations; <b>[This is intended to cover the period of 99 years from the Effective Date]</b>

<b>“Timber”</b>	has the meaning given in the Act; and
<b>“Units”</b>	means, in each case, the relevant units prescribed by the Regulations, where “units” has the meaning given in the Climate Change Response Act 2002.

1.2 **Interpretation:** In this Covenant:

- (a) **Clauses and Schedules:** a reference to a clause or a Schedule is to a clause or Schedule of this Covenant;
- (b) **Currency:** a reference to any monetary amount is to New Zealand currency;
- (c) **Documents:** a reference to any document, including this Covenant, includes a reference to that document as amended or replaced from time to time;
- (d) **Headings:** headings are included in this Covenant as a matter of convenience and do not affect the construction of this Covenant;
- (e) **Negative obligations:** a reference to a prohibition against doing anything includes a reference to not permitting, suffering or causing that thing to be done;
- (f) **Person:** a reference to a person includes a corporation sole and also a body of persons, whether corporate or unincorporated;
- (g) **Related terms:** where a word or expression is defined in this Covenant, other parts of speech and grammatical forms of that word or expression have corresponding meanings;
- (h) **Schedules:** the Schedules form part of this Covenant;
- (i) **Singular and plural:** the singular includes the plural and vice versa;
- (j) **Statutes and regulations:** a reference to a statute or any regulations is a reference to that statute or those regulations as amended, or to any statute or regulations substituted for that statute or those regulations;
- (k) **Writing:** a reference to "written" or "in writing" includes all modes of presenting or reproducing words, figures and symbols in a tangible and permanently visible form; and
- (l) **No limitation:** the words “include”, “includes” and “including” shall be deemed to be followed by the phrase “without limitation”.

2. **TERM**

2.1 **Effective Date:** Subject to clause 2.2, this Covenant:

- (a) comes into effect on the date on which it is registered in accordance with section 67ZD of the Act (the “**Effective Date**”); and
- (b) except to the extent it is terminated or cancelled in accordance with its terms, shall remain in full force and effect in perpetuity.

2.2 **Automatic expiry if not registered:** This Covenant shall expire automatically without liability to either party if it has not been registered in accordance with section 67ZD of the Act within 180 days of the date on which this Covenant was entered into with the Initial Landowner.

### **3. ESTABLISHMENT OF A FOREST SINK ON THE LAND**

- 3.1 **Forest Sink:** Subject to clause 4, the Landowner must establish and maintain, or maintain, (as applicable) a Forest Sink on the Forest Sink Area in accordance with the Forest Sink Plan.
- 3.2 **Compliance with law:** The Landowner must:
- (a) pay to the Crown (or any person stipulated by the Regulations) any costs, fee, levy or charge in relation to this Covenant or the Forest Sink Mechanism prescribed by the Regulations; and
  - (b) comply with all applicable law relating to this Covenant, the Forest Sink Mechanism or the Land, including the Act and the Regulations.
- 3.3 **Regulations do not limit Covenant remedies:** Unless expressly provided otherwise in the Act or the Regulations, nothing in the Act or the Regulations shall limit any rights of the Crown arising at law or under this Covenant as a result of any breach of this Covenant by the Landowner.

### **4. FELLING RESTRICTION**

- 4.1 **No Felling:** Subject to clause 4.2, the Landowner must not Fell any part of the Forest Sink on the Forest Sink Area during the Restricted Period except in accordance with Approved Harvesting Practices.
- 4.2 **Change of use of Land:** The Landowner shall not be in breach of clause 4.1 if:
- (a) prior to carrying out any such Felling, the Landowner on each separate occasion notifies the Crown of the intention to Fell and, if required by the Crown, either (at the Crown's option):
    - (i) provides the Crown with Performance Security; or
    - (ii) without prejudice to clause 5, transfers to the Crown sufficient Units to account for all of the estimated Carbon Loss that will occur as a result of such Felling; and
  - (b) any Timber that has been Felled is not removed from the Forest Sink Area (other than through burning or any other process which destroys the Timber).

If the Forest Sink on the Forest Sink Area is Felled under this clause 4.2 to the extent that the Forest Sink on the Forest Sink Area ceases to meet the requirements of a Forest Sink under the Regulations, all obligations of the Landowner under clauses 3.1 and 4.1 shall terminate, and the obligations of the Crown under this Covenant shall terminate, in each case from the date on which the Forest Sink on the Forest Sink Area ceases to meet the requirements of a Forest Sink under the Regulations.

- 4.3 **Expiry of initial Felling restriction:** Without prejudice to clause 4.2, from the end of the Restricted Period the Landowner may Fell all or part of the Forest Sink on the Forest Sink Area, provided that prior to carrying out any such Felling the Landowner on each separate occasion notifies the Crown of the intention to Fell and, if required by the Crown, either (at the Crown's option):
- (a) provides the Crown with Performance Security; or
  - (b) without prejudice to clause 5, transfers to the Crown sufficient Units to account for all of the estimated Carbon Loss that will occur as a result of such Felling.

## 5. LANDOWNER'S LIABILITY FOR CARBON LOSS

- 5.1 **Liability for Carbon Loss:** From the Carbon Measurement Date the Landowner is responsible in perpetuity for, and must account to the Crown for, any Carbon Loss from the Forest Sink on the Forest Sink Area (excluding, for the avoidance of doubt, any Carbon Loss which relates to Carbon Sequestered on the Forest Sink Area after the date of any termination of the Landowner's obligations under clause 3.1). The Landowner must account for such Carbon Loss by:
- (a) transferring Units to the Crown in accordance with the Regulations; or
  - (b) as otherwise required by the Regulations.
- 5.2 **Crown's right to take action to restore the Forest Sink:** Without prejudice to the Crown's other rights and remedies under this Agreement or the Regulations, if the Landowner commits any breach of clauses 3.1, 4.1, 4.3, 5.1 and 11.6 the Crown may at the Landowner's cost enter the Land for the purposes of, and take any action necessary to, restore, replant, replace, reinstate, re-establish, or maintain (in accordance with the Forest Sink Plan or otherwise), any part of the Forest Sink on the Forest Sink Area.

## 6. ACCESS TO THE LAND

- 6.1 **Access to Land:** The Landowner must, subject to the conditions in clause 6.2 being met, grant the Crown and its employees, agents or contractors (including Approved Persons) access to the Land (and where necessary procure access across neighbouring land) to:
- (a) verify Reports, and otherwise verify and monitor the quantity of Carbon Sequestered on the Forest Sink Area;
  - (b) monitor the Landowner's compliance with this Covenant;
  - (c) investigate any non-compliance with this Covenant;
  - (d) exercise its rights under clause 5.2; and
  - (e) undertake any other activities for which access to the Land is required under the Regulations.
- 6.2 **Conditions of access:** The conditions referred to in clause 6.1 are that:
- (a) the Landowner has been given not less than 48 hours' notice, specifying:
    - (i) the full name of the person(s) accessing the Land;
    - (ii) the time and date they will be entering the Land; and
    - (iii) approximately how long they intend to remain on the Land; and
  - (b) any person(s) accessing the Land carry and, at the Landowner's request, show, evidence of their identity.
- 6.3 **Landowner's assistance:** The Landowner must provide at its own cost all reasonable assistance and co-operation to the Crown to enable the Crown to exercise its rights under clause 6.1 to the fullest extent.
- 6.4 **Rights not affected:** Nothing in this clause 6 shall limit any rights the Crown may have at law or any actions the Crown may take in connection with an application for urgent relief before a court.

## 7. LANDOWNER'S INDEMNITY, WARRANTIES AND OTHER OBLIGATIONS

- 7.1 **Indemnity:** The Landowner agrees to indemnify and hold harmless the Crown against all loss, damage, liability or costs (including legal costs on a solicitor-own client basis) suffered or incurred by the Crown or New Zealand as a result of, or in connection with, any breach by the Landowner of this Covenant (including, for the avoidance of doubt, any costs incurred by the Crown in exercising its rights under clause 5.2).
- 7.2 **Initial Landowner's Warranties:** The Initial Landowner represents and warrants to the Crown that:
- (a) the Initial Landowner has obtained written consent to enter into this Covenant from each person with a registered interest in the Land;
  - (b) all information provided by the Initial Landowner to the Crown in connection with this Covenant prior to the Effective Date was at the time it was provided, and is at the Effective Date, accurate, complete and not misleading; and
  - (c) the Initial Landowner will notify the Crown as soon as practicable if the Initial Landowner becomes aware at any time that any of the above warranties are or become untrue.
- 7.3 **Landowner's Warranties:** The Landowner represents and warrants to the Crown that:
- (a) the Landowner has full capacity, power and authority to enter into and perform this Covenant and has taken all necessary action to authorise the entry into and performance of this Covenant;
  - (b) once the Covenant is executed, the Landowner's obligations under this Covenant will constitute valid and binding obligations on the Landowner in accordance with this Covenant;
  - (c) the Landowner is the registered owner of the freehold estate in the Land;
  - (d) the Landowner will not vary this Covenant without first obtaining the written consent of each person with a registered interest in the Land; and
  - (e) all information contained in Reports or otherwise provided to the Crown in connection with this Covenant during the term of this Covenant will be, when provided, accurate, complete and not misleading.
- 7.4 **Obligations to notify:** The Landowner must notify the Crown as soon as practicable upon becoming aware that:
- (a) any material Carbon Loss has occurred or is likely to occur on the Forest Sink Area;
  - (b) any circumstance has occurred or is likely to occur that will or is likely to make the Landowner unable to comply with its obligations under this Covenant, including by being in breach of any of the warranties contained in clause 7.3; or
  - (c) any Change in Control of the Landowner (or, where the Landowner consists of more than one owner of the freehold estate in the Land, any such owner) is likely to occur or (without prejudice to clause 12.4) has occurred.
- 7.5 **No double selling:** The Landowner must not during the term of this Covenant receive payment, payment in kind, or consideration in any form in respect of Carbon Sequestered on the Forest Sink Area:
- (a) after the Effective Date; and

(b) prior to any termination of the Landowner's obligations under clause 3.1, other than under this Covenant.

7.6 **Joint and several liability:** Where at any time the Landowner consists of more than one owner of the freehold estate in the Land, each owner of the freehold estate in the Land shall be jointly and severally liable for the obligations and liabilities of the Landowner under this Covenant.

## 8. CROWN'S OBLIGATIONS

8.1 **Obligation to transfer Units:** Provided that:

- (a) the Forest Sink on the Forest Sink Area is Eligible at all relevant times prescribed in the Regulations;
- (b) the Landowner has not committed a breach of this Covenant (other than a breach which has been remedied to the Crown's satisfaction); and
- (c) subject to clause 11, the Crown will, in respect of Carbon Sequestered on the Forest Sink Area since the Carbon Measurement Date, transfer to the Landowner 95% of such type and number of Units at such times as are prescribed, in each case, by the Regulations. To avoid doubt, the Crown does not accrue any liability in respect of the transfer of Units until the time prescribed in the Regulations at which the Crown is obliged under this Covenant to transfer such Units. **[The full mechanism for calculating the number of Units etc will be set out in the Regulations]**

8.2 **Return by Landowner of Units transferred in error:** Subject to clause 8.3, the Landowner must promptly return to the Crown any Units transferred by the Crown to the Landowner pursuant to clause 8.1 if it is subsequently established that the Landowner was not entitled to those Units.

8.3 **Change of interpretation by the Crown:** Clause 8.2 shall not require the Landowner to return any Units to the Crown solely as a result of a change in the Crown's interpretation of the criteria for assessing whether or not the Forest Sink on the Forest Sink Area was Eligible at all relevant times prescribed in the Regulations.

8.4 **Sole remedy for breach of obligations:** The Landowner acknowledges that the Crown's only obligation under this Covenant is the obligation on the Crown to transfer Units contained in clause 8.1. The Landowner agrees that its sole remedy under or in connection with this Covenant for any breach of this obligation by the Crown shall be the Landowner's right to require the Crown to transfer to the Landowner in accordance with the Regulations any Units to which the Landowner is entitled under this Covenant.

8.5 **No representations or warranties:** The Landowner acknowledges and agrees that the Crown makes no representations or warranties in respect of the subject matter of this Covenant or the Forest Sink Mechanism save as expressly set out in this Covenant.

8.6 **Tradeability of Units:** The Landowner acknowledges and agrees that the Crown:

- (a) makes no representations or warranties or guarantees of any nature to the Landowner or any third party with respect to the value or tradeability of Units; and
- (b) accepts no liability whatsoever to the Landowner or any third party for any inability to trade Units or any change in value of Units, including any such inability to trade Units or change in value of Units that is caused directly or indirectly or in whole or in part by any act or omission of the Crown.

8.7 **Rights of Crown not affected:** The Landowner acknowledges and agrees that nothing in this Covenant shall in any way affect, or be construed in such a way as to affect, the rights

and powers of the New Zealand Government, as such term is defined in clause 8.8. For the avoidance of doubt and without prejudice to the foregoing, the Landowner acknowledges and agrees that nothing in this Covenant shall restrict, prevent or limit, or be construed in such a way as to restrict, prevent or limit, the New Zealand Government from promoting, enacting, implementing, repealing, replacing or amending any legislation (including the Act and the Regulations) or procuring or attempting to do the same, adopting any policy or position, making any election, or taking any decision, in respect of the Protocol, the Forest Sink Mechanism, New Zealand's international obligations relevant to the permanent forest sink initiative, or in respect of climate change issues generally, including in relation to:

- (a) elections under the Protocol;
- (b) administrative, operational or technical decisions in relation to the Protocol;
- (c) any dispute resolution or tribunal relating to the Protocol or New Zealand's international obligations, whether in relation to climate change or otherwise;
- (d) negotiations for a new commitment period (or equivalent) under the Protocol, or for any other international climate change agreement;
- (e) any decision whether or not to remain a party to, or comply with, the Protocol, or to join any other international climate change agreement; and
- (f) any other position the New Zealand Government may adopt or any other action or decision the New Zealand Government may choose to take in any international forum.

8.8 **Definition of New Zealand Government:** In this Covenant, the “**New Zealand Government**” means:

- (a) Her Majesty in right of New Zealand; and
- (b) all Ministers of the Crown and all Government Departments,

but does not include an Office of Parliament, where:

“**Government Departments**” means any department or instrument of the executive government of New Zealand, or any branch or division of any such department or instrument, but does not include an Office of Parliament; and

“**Office of Parliament**” means the Parliamentary Commissioner for the Environment (and that Commissioner's office), the Office of Ombudsmen, the Auditor-General and the Parliamentary Counsel Office.

## 9. CROWN'S LIABILITY

9.1 **Limitation of liability for breach:** To the maximum extent permitted by law, the Crown's liability for any breach by the Crown of its obligations under this Covenant shall be limited as set out in clause 8.4. Without prejudice to clause 8.4, in no circumstances shall the Crown be liable to the Landowner, whether in contract, tort (including negligence and breach of duty) or otherwise at law or in equity, for any business interruption, loss of use, loss of profits, loss of contracts, loss of a chance or an opportunity, loss of production or revenue, failure to make anticipated savings, or for any special, consequential or indirect loss or damage of any kind (even if the Crown knew or should have known of the possibility of such loss or damage), in each case arising under or in connection with this Covenant.

9.2 **No liability for actions of the New Zealand Government:** Without prejudice to clause 9.1, the Landowner acknowledges and agrees that the Crown shall have no liability to the Landowner or any third party under or in connection with this Covenant as a result of any

exercise by the New Zealand Government of any of the rights and powers or other matters referred to in clause 8.7.

## 10. TAX

10.1 [ ]

## 11. TERMINATION

11.1 **Default termination rights:** The Crown may terminate its obligations under this Covenant together with the obligations of the Landowner under clause 3.1 immediately on written notice to the Landowner if the Landowner (or, where the Landowner consists of more than one owner of the freehold estate in the Land, any such owner):

- (a) commits a breach of this Covenant and, where such breach is capable of being remedied, fails to remedy such breach within 30 Business Days of being required to do so by the Crown in writing;
- (b) is placed into bankruptcy, liquidation, administration, receivership or statutory management or if an official assignee, liquidator, receiver, trustee, manager, administrator, statutory manager or similar is appointed in respect of the Landowner or all or any of the Landowner's business or property;
- (c) is unable, or presumed to be unable, to pay its debts as they fall due;
- (d) enters into an assignment for the benefit of, or enters into or makes any arrangement or composition with, the Landowner's creditors;
- (e) is subject to a resolution or any proceeding for winding up or liquidation (whether on a voluntary or involuntary basis) other than for a bona fide solvent reconstruction; or
- (f) is subject to any event which is analogous to those listed in sub-clauses (b) to (e).

11.2 **Protocol and other termination rights:** The Crown may terminate its obligations under this Covenant together with the obligations of the Landowner under clauses 3.1 and 4.1 immediately on written notice to the Landowner if any of the following events occur:

- (a) New Zealand withdraws from the Protocol;
- (b) the Protocol ceases to exist or be in force;
- (c) Forest Sinks no longer qualify to earn Units under the Protocol, including without limitation due to any election made by the New Zealand Government under the Protocol;
- (d) without prejudice to clause 8.2, the Crown becomes aware that the Forest Sink on the Forest Sink Area is not Eligible;
- (e) the New Zealand Government is in breach of its obligations under the Protocol for a period in excess of [60] days; or
- (f) performance of the Crown's obligations under this Covenant is or would be, in the Crown's opinion, in breach of New Zealand's international obligations, including its obligations in relation to the World Trade Organisation's rules on illegal subsidies; or
- (g) any event prescribed by the Regulations that gives the Crown the right to terminate its obligations under this Covenant together with the obligations of the Landowner under clauses 3.1 and 4.1,

including, in each case, where such event occurs wholly or in part, or directly or indirectly, as a result of any act, omission or decision of the New Zealand Government (whether of a type described in clause 8.7 or otherwise).

- 11.3 **Automatic suspension of Crown's liability:** From the date on which a right to terminate the Crown's obligations under this Covenant arises under clause 11.2, the Crown's liability in respect of its obligations under this Covenant is automatically suspended, whether such liability is accrued at such date or arises subsequently. The Crown may bring an end to the suspension of all (but not part) of such liability at any time on written notice to the Landowner, and from the date of such notice all of such liability shall resume in full force and effect, provided that:
- (a) the Crown shall have no additional liability to the Landowner as a result of any delay in the transfer of Units caused by the period of such suspension; and
  - (b) if the Crown has not ended such suspension within [6 months] from the commencement of such suspension, the Landowner may terminate its obligations under clauses 3.1 and 4.1, in which case all of the Crown's obligations under this Covenant shall also be terminated.
- 11.4 **Termination by Landowner for Crown's default:** Save as provided in clauses 4.2 and 11.3, the Landowner has no right under this Covenant to terminate this Covenant or any of the obligations of either party under this Covenant. Any right of the Landowner to terminate this Covenant at law shall be limited to a right to terminate the Landowner's obligations under clauses 3.1 and 4.1 together with all of the obligations of the Crown under this Covenant.
- 11.5 **Effect of termination on Crown's obligations:** Termination of the Crown's obligations under clause 11.2 shall also terminate all accrued liabilities of the Crown under this Covenant. In all other cases, termination of the Crown's obligations under this Covenant shall not affect any accrued liabilities of the Crown under this Covenant.
- 11.6 **Pre-conditions to Felling after termination:** On termination of the Crown's obligations under this Covenant together with the Landowner's obligations under clauses 3.1 and 4.1 pursuant to clauses 11.2, 11.3 or 11.4, the Landowner must not Fell any or all of the Forest Sink on the Forest Sink Area other than in accordance with Approved Harvesting Practices unless, prior to carrying out any Felling, the Landowner on each separate occasion notifies the Crown of the intention to Fell and, if required by the Crown, either (at the Crown's option):
- (a) provides the Crown with Performance Security; or
  - (b) without prejudice to clause 5, transfers to the Crown sufficient Units to account for all of the estimated Carbon Loss that will occur as a result of such Felling.
- 11.7 **Crown's accrued rights not affected:** Any termination of any of the Landowner's obligations under this Covenant shall be without prejudice to any accrued liabilities of the Landowner to the Crown.
- 11.8 **Cancellation following full accounting for Carbon Loss:** If:
- (a) any of the obligations of the parties under this Covenant have been terminated pursuant to clauses 4.2 or 11;
  - (b) the Landowner has accounted to the Crown in accordance with clause 5.1 for Carbon Loss (or potential Carbon Loss) which amounts or relates to loss of the total stock of Carbon Sequestered on the Forest Sink Area at the date on which the obligations referred to in (a) were terminated; and

- (c) there are no other outstanding obligations on either party under this Covenant (including, if any Felled Timber from the Forest Sink on the Forest Sink Area remains on the Forest Sink Area, the obligation contained in clause 4.2(b)),

the Landowner shall give the Crown notice that this is the case and, unless the Crown notifies the Landowner of any reasonable objections the Crown has to the cancellation of this Covenant within [90] days of receipt of such notice, this Covenant shall be deemed to be cancelled in accordance with clause 16.3 [90] days from the date of the Crown's receipt of the Landowner's notice.

## 12. ASSIGNMENT

12.1 **Restriction on transfer of Land:** The Landowner may not transfer the Landowner's interest in the Land unless the Crown is satisfied, acting reasonably, that:

- (a) the transferee is:
  - (i) capable of establishing and maintaining, or maintaining, a Forest Sink on the Land (as applicable), or procuring that a Forest Sink be established and maintained, or maintained, on the Land (as applicable); and
  - (ii) capable of meeting any liabilities that would be owed by the transferee to the Crown under this Covenant; or
- (b) the transferee has provided a guarantor, or put in place insurance or other arrangements, which are an adequate alternative to the Crown being satisfied under (a),

(such a transferee being an "**Approved Transferee**").

12.2 **Restriction on assignment of Covenant:** Subject to clause 12.3, the Landowner may not transfer or assign any of the Landowner's rights, interests and obligations under this Covenant.

12.3 **Automatic transfer of Landowner's right and obligations:** Without prejudice to clause 12.1, the rights and obligations of the Landowner under this Covenant automatically transfer to a transferee of the Landowner's interest in the Land, and from the time of such transfer the transferee shall be the "Landowner" for the purposes of this Covenant.

12.4 **Change of control:** If the Landowner (or, where the Landowner consists of more than one owner of the freehold estate in the Land, any such owner) is not a natural person, any transfer of shares or other arrangement which results in a Change in the Control of that Landowner (or owner) is deemed to be an assignment or transfer subject to clause 12.2, provided that this clause 12.4 shall not apply to any Change in Control which occurs as result of a transfer of shares in a body corporate if any shares in that body corporate are quoted on a registered exchange (as such term is defined in the Securities Markets Act 1988) or any reputable securities exchange outside New Zealand that is regulated as a securities exchange.

12.5 **Liability provisions of the Act:** The parties acknowledge that the provisions of section 67ZF of the Act shall apply to any person who has a landholding (as such term is defined in the Act) in the Land.

12.6 **No Contrary Intention:** For the purposes of sections 67ZF(1)(a) and 67ZF(2)(a) of the Act, nothing in this Covenant shall be construed as indicating a contrary intention to the full operation of those provisions.

### 13. DISPUTE RESOLUTION

- 13.1 **Dispute resolution procedure:** The obligations of each party under this Covenant shall remain in full force and effect during the period of any dispute resolution procedure (whether prescribed by the Regulations or otherwise).
- 13.2 **Urgent relief:** Unless expressly stated otherwise, nothing contained in any dispute resolution procedure prescribed by the Regulations shall preclude either party from taking immediate steps to seek urgent relief before a court.

### 14. FORCE MAJEURE

- 14.1 **Force majeure:** Subject to clause 14.2, neither party will be liable to the other for any failure to perform its obligations under this Covenant by reason of any cause or circumstance beyond the party's reasonable control including acts of God, communication line failures, power failures, terrorism, riots, strikes, labour disputes, fires, war, flood, earthquake or other disaster ("**event of force majeure**"), provided that the party affected:
- (a) notifies the other party in writing as soon as is practicable and provides full information concerning the event of force majeure, including an estimate of the time likely to be required to overcome that event;
  - (b) uses its best endeavours to overcome the event of force majeure and minimise the loss to the other party; and
  - (c) continues to perform its obligations under this Covenant as far as practicable.
- 14.2 **Certain obligations excepted:** Clause 14.1 shall not apply to the obligations of the Landowner under clauses 4, 5 and 11.6.

### 15. NOTICES

- 15.1 **Notice must be in writing and addressed correctly:** Subject to clause 15.4, any notice or other communication to be given under this Covenant must be in writing addressed to the recipient at the address or facsimile number from time to time notified by that party in writing to the other party. Until a change is so notified, the address and facsimile number of each party are those set out in this clause:

The Crown

Address: Ministry of Agriculture and Forestry  
Indigenous Forestry Unit  
PO Box 25-022  
Christchurch

Facsimile No: [insert]  
Attention: [insert relevant job title]

The Landowner

Address: [full name of the Landowner]  
[full postal address]  
Facsimile No: [insert]  
Attention: [insert]

- 15.2 **Delivery:** Subject to clause 15.4, delivery may be effected by hand, or by post with postage prepaid, or by facsimile. Subject to clauses 15.3 and 15.4, a notice or other communication will be deemed to have been received:
- (a) in the case of hand delivery, at the time of actual delivery to the recipient's address;

- (b) in the case of delivery by pre-paid post, on the second Business Day after posting; or
- (c) in the case of delivery by facsimile, at the time of transmission specified in a transmission report from the sending machine which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient.

15.3 **Next Business Day:** If a notice or other communication is received or deemed to have been received after 5 p.m. on a Business Day in the place to which it is sent, or on a day which is not a Business Day in that place, it will be deemed not to have been received until the next Business Day in that place.

15.4 **General notices:** Notwithstanding the other provisions of this clause 15, the Crown may give a notice or other communication to be given to the Landowner under this Covenant in any form permitted by the Regulations, and such notice or other communication will be deemed to have been received at the time provided for in the Regulations.

## 16. GENERAL PROVISIONS

16.1 **Variation:** Subject to clause 16.2, this Covenant may only be amended or varied by agreement in writing signed by the parties.

16.2 **Variation by the Crown:** The Crown may vary this Covenant in any manner on 90 days' written notice to the Landowner provided that such variation is necessary, in the light of any change in New Zealand's international rights and obligations related to the Forest Sink Mechanism or climate change, to retain or restore the balance of benefits and burdens intended by the parties as at the date on which this Covenant was entered into with the Initial Landowner.

16.3 **Cancellation:** The parties may by agreement in writing cancel this Covenant and all obligations contained in it at any time.

16.4 **Set off:** Either party may set off any obligation it has under or in connection with this Covenant and/or the Regulations to transfer Units against any right it has under or in connection with this Covenant and/or the Regulations to receive Units.

16.5 **No privity:** The parties acknowledge for the purposes of the Contracts (Privity) Act 1982 that none of the provisions of this Covenant confer a benefit on, or are intended to be enforceable by, any third party.

16.6 **Further assurances:** Each party agrees to execute and deliver any documents and to do all things as may reasonably be required by the other party to obtain the full benefit of this Covenant.

16.7 **Severability:** If any part of this Covenant is held by any court or administrative body of competent jurisdiction to be illegal, void or unenforceable, such determination shall not impair the enforceability of the remaining parts of this Covenant.

16.8 **No waiver:**

- (a) A waiver of any provision of this Covenant shall not be effective unless given in writing, and then it shall be effective only to the extent that it is expressly stated to be given.
- (b) A failure, delay or indulgence by any party in exercising any power or right in relation to this Covenant shall not operate as a waiver of that power or right. A single exercise or partial exercise of any such power or right shall not preclude further exercises of that power or right or the exercise of any other power or right.

16.9 **No partnership, joint venture or agency relationship:** Nothing in this Covenant shall evidence or be deemed to constitute a partnership or joint venture between the parties, nor will either party constitute an agent of the other party.

16.10 **Entire agreement:** This Covenant:

- (a) constitutes the entire understanding and agreement of the parties relating to the matters dealt with in it; and
- (b) supersedes and extinguishes all prior agreements and understandings between the parties relating to those matters.

16.11 **Governing law and jurisdiction:**

- (a) This Covenant shall be governed by and construed in accordance with New Zealand law.
- (b) Subject to clause (c) below, each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New Zealand for the purpose of hearing and determining any disputes or proceedings arising out of or in connection with this Covenant (“**Proceedings**”).
- (c) The Landowner agrees not to bring or attempt to bring any Proceedings against the Crown in any court outside New Zealand.

#### **SCHEDULE 1: Description of the Land**

**[This should be the whole title]**

#### **SCHEDULE 2: Description of the forest sink area**

#### **SCHEDULE 3: Forest Sink Plan**

# Submission form

PFSI consultation on regulation, cost recovery methods and forest sink covenant

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Please complete this submission form and post it to:

PFSI Regulations Consultation  
Indigenous Forestry Unit  
Ministry of Agriculture and Forestry  
PO Box 25-022  
Christchurch

Alternatively, you can download this form from MAF's website ([www.maf.govt.nz](http://www.maf.govt.nz)), complete it, then email it to [ifu@maf.govt.nz](mailto:ifu@maf.govt.nz)

**Please ensure your submission reaches us by 14 May 2007**

Please note that your submission 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 provided in your submission, please specify the material that you consider should be withheld, and the grounds for withholding it. Please note that even if you do identify specific material that 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 into account your views, we are not bound by them.

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**Name:** \_\_\_\_\_

**Company/organisation:** \_\_\_\_\_

**Address:** \_\_\_\_\_

\_\_\_\_\_

**Email:** \_\_\_\_\_

**Phone:** \_\_\_\_\_



4. Do you have alternative or additional suggestions/methods for proving land eligibility?

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5. On a scale of 1 to 5 (where 1 is 'very reasonable' and 5 is 'not reasonable'), how reasonable are the proposed methods of identifying the land area that an application relates to?

Very reasonable 1 2 3 4 Not reasonable 5

6. Do you have suggestions for alternative or complementary methods of identifying the land area that an application relates to?

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7. On a scale of 1 to 5 (where 1 is 'very reasonable' and 5 is 'not reasonable'), how reasonable are the intended procedures for administering the approved harvesting practices?

Very reasonable 1 2 3 4 Not reasonable 5



14. Do you have any suggestions for the allocation of assigned amount units (AAUs) if these are made available?

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15. If you wish to make any further comment on the proposed regulations or explain your answers to questions 1–14, please do so.

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*Cost recovery*

16. On a scale of 1 to 5 (where 1 is ‘very supportive’ and 5 is ‘not supportive’), how supportive are you of the proposed methods of cost recovery?

Very supportive

1

2

3

4

Not supportive

5

17. Do you think alternative methods of cost recovery would be more appropriate? If so, what do you propose and why?

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*The covenant*

22. What do you think of the interrelationship between the proposed regulations and the draft of the forest sink covenant?

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23. Feedback is welcome on any part of the covenant. If you want to comment on a specific clause or the covenant's relationship with the regulations, please do so.

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*Other comments*

24. If you wish to make any other comments, please do so.

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