Guidelines to the Implications of the Supreme Court of Appeal Judgment on Existing Lawful Water Use for a Stream Flow Reduction Activity and Genus Exchange for the South African Commercial Forestry Sector

Final: Dr John Scotcher 2 April 2024

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1. Background

In 2019, Forestry South Africa (FSA) brought an application before the Cape High Court that revolved around two principal issues, namely, the verification of existing lawful water use (**ELWU**) for stream flow reduction activities, and the issue of genus exchange.

i. Existing lawful Water Use

The first issue concerned stream flow reduction activity (SFRA) as defined in the National Water Act, 1998 (**NWA**) being "the use of land for afforestation which has been, or is being established, for commercial purposes". SFRA was introduced into South African law by the NWA, and was founded on the principle that the government is the public trustee of water resources, which must be protected and utilised in a sustainable and equitable manner. Government has the authority to regulate the use, flow and control of all water. FSA sought a declaratory order that water use that is a SFRA is not subject to authorisation by or under any law which was in force immediately before the commencement of the Act in 1998.

Historically, FSA has always contended that ELWU in respect of a SFRA is not subject to the requirement of authorisation. This contention was finally brought before the courts in 2019.

ii. Genus Exchange

The second issue in respect of which FSA sought various declaratory orders was in respect of section 34 of the NWA, in summary, that SFRAs established prior to 1 October 1998 were not limited to the planting of specific species of trees (the Genus Exchange issue) – legally, there is nowhere in the Act that refers to Genus exchange.

On technical grounds, FSA has also always been of the view that any exchange of genera should be based on a one hectare for one hectare basis – in other words, the exchange from Pine to Eucalyptus in the same compartment should not affect the extent of the planted area. This was based on FSA's understanding of the shortcomings of the hydrological models used by the DWS to estimate stream flow reductions as a result of afforestation (*The development of models to quantify streamflow reductions caused by commercial afforestation in South Africa;* WRC Project No. K5/1110; Gush et al 2002 – the **"Gush 2002 report**").

The Statutory Authorities'[1] approach was to reduce the planted area
by an average of 30% when an application for a conversion from one genus to another was made, specifically for Pine to Eucalyptus, in the same compartment (farm level).

In response to a number of shortcomings raised in the **"Gush 2002 Report"** such as the need for a review and refinement of low flow components used in assessing stream flow reduction activity license applications, a study was completed to address this and other shortcomings *(Methods and Guidelines for the Licensing of SFRAs with particular reference to Low Flows* **WRC Report No. 1428/1/09;** Jewitt et al 2009 – the **"Jewitt 2009 Report"**).

The **"Jewitt 2009 report"** acknowledged that the modelling of low flows under typical South African conditions is extremely site specific and poorly understood at the conceptual level, and as a result, the confidence levels for the impacts on low flows were considerably lower than for the total flow impacts, and therefore the estimates are not appropriate for detailed on-farm decision-making, but are mainly suitable for broad preliminary national or regional planning.

The DWS use the "**Gush 2002" report"** for estimating exchange ratios between Pine and Eucalyptus at the farm level, which contradicts the findings that the model should only be applied at the Quaternary Catchment level. This was a compelling technical reason why FSA stood by its position of a one hectare for one hectare exchange basis.

Further, and as ruled by both the Cape High Court and the Supreme Court of Appeal, there is nowhere in the Act that refers to Genus exchange.

Finally and beyond the scientific discrepancies in the reports referred to above, it was established in 2016, that the DWS had committed a basic arithmetical error, which had caused them to arrive at the figure of 30%, when prescribing a reduction in area when switching genera. This was a defining moment in the process and as a factor on its own, should have led to the withdrawal of the genus exchange regulations in their entirety. The DWS in fact undertook at that time, to suspend the regulations but subsequently reneged on that undertaking. That action caused FSA to add this to the legal recourse which we had sought from the Courts on the matter of ELWU.

2. Court Case

In 2019, members of FSA were confronted by severely prejudicial interpretations of the NWA by some of the Statutory Authorities. FSA therefore lodged an urgent application on 19 November 2019 in the Cape High Court asking for certain declaratory orders in regards to ELWU, supplemented shortly thereafter to also include relief aimed at addressing the approach of the Statutory Authorities in relation to Genus Exchange. A court order was issued in terms of which the matter was postponed to 27 and 28 May 2020. A temporary interdict however, was granted on 19 November 2019 in terms of which the Statutory Authorities were not entitled to make determinations in terms of section 35(4) of the NWA regarding the extent of lawfulness of stream flow reduction activities as contemplated in section 36(1)(a) of the NWA. (**Declaration of stream flow reduction activities - the use of land for afforestation which has been or is being established for commercial purposes)**. However, these court

orders were ignored. Interlocutory orders were subsequently instituted by FSA on a number of separate occasions to enforce compliance with the 2019 interdict which included the cessation of the issuance of section 35 Notices (**Verification of existing water uses)** and the withdrawal of various section 35(4) Notices (**A responsible authority may determine the extent and lawfulness of a water use pursuant to an application under this section, and such determination limits the extent of any existing lawful water use contemplated in section 32(1) - Definition of existing lawful water use).**

[1] The Minister of Water and Sanitation, Director General of the Department of Water and Sanitation, Inkomathi-Usuthu Catchment Management Agency, Breede-Gouritz Catchment Management Agency and the Chairman of the Water Tribunal

Full details on subsequent court events have no place in this Guideline but suffice it to say that the Statutory Authorities, since the commencement of the urgent litigation, consistently failed to comply with the court order time frames and have time and time again failed to provide proper explanations of the cause of their delays. The Statutory Authorities furthermore frustrated the finalisation of the litigation at the different stages by relying on technical *in limine* objections.

In May 2022 the Cape Town High Court reached its judgment which did not find in FSA's favour in terms of existing lawful water use, but appeared not to have fully comprehended the issues. They did however find in FSA's favour as far as Genus Exchange was concerned.

The judgment from the Cape Town High Court was subsequently appealed separately by the Applicant (FSA) and the Respondent (the Statutory Authorities) and the appeal was heard in August 2023 at the Supreme Court of Appeal (SCA) in Bloemfontein - judgment was received in November 2023 and found in favour of FSA on both the interpretation of existing lawful eater use and Genus exchange. The DWS appealed the SCA judgement to the Constitutional Court in January 2023 to which FSA replied with an answering affidavit. On 6 August 2024, the Constitutional Court refused leave to appeal, stating that it was "not in the interests of justice to grant leave to appeal. The effect was that:

- ✓ plantations in existence during the Qualifying Period (30 September 1996 to 1 October 1998) were an existing lawful water use, irrespective of the period of establishment
- ✓ Genera can be exchanged without having to seek authority from the DWS, for example from Pine to Eucalyptus or any other commercial forest species.

3. Objective of this Guideline

The purpose of this guideline is to summarise the orders of the SCA (endorsed by the Constitutional Court) in a manner that clarifies the practical outcomes for timber farmers in South Africa.

The judgement however, need to be seen in relation to relevant sections of the NWA to fully comprehend the orders which may affect commercial forestry owners differently depending on each grower's particular set of circumstances. For example, some commercial forestry owners may not have registered their water use (area of plantations) as required under the NWA.

This Guideline therefore begins with the Registration of Water Use as provided for in terms of Section 26(1)(c) and then proceeds to deal with the verification process and the issue of Section 35 Notices.

NOTE: Throughout this guideline, reference will be made to what is known as the Qualifying Period. This period was adjudged by both the Cape Town High Court and the Supreme Court of Appeal as being I October 1996 to 30 September 1998.

4. Registration of water uses (Authority to continue with an Existing Lawful Water Use – section 34)

The NWA allows for a person, or that person's successor-in-title, to continue with an existing lawful water use (section 34(1) but subject to certain conditions) and the responsible authority may also require the registration of an existing lawful water use (section 34(2)). This requirement to register was gazetted for the 19 Water Management Areas as there were at that time (2000/2001 – see below)

The purpose of registering the different water uses is for the DWS to determine whether water use is lawful or not, as well as to obtain information on the geographical location and extent of the water uses. This allows the regulators to:

- effectively manage the water resources
- allocate water fairly
- charge water users for the water use

Note that the registration is **NOT** an acknowledgement of an entitlement to the registered water use. It simply records the information provided to the regulator by the land owner. For commercial forestry, this would be the extent or area of land managed by a landowner for commercial forestry purposes.

i. If you registered your water use

The requirements to register specific water uses were gazetted at different times and different defined geographical areas from January 2000 to January 2001. Each landowner with a commercial forestry plantation was required to register (Form DW764 available on the DWS website (www.dws.gov.za/Projects/WARMS/Registration/registrationforms.aspx) within a specified period which was different in each geographical area. At that time, there were 19 Water Management Areas (WMA).

The period for the registration of water uses in all 19 Water management Areas was extended to 30 June 2001 through a Government Gazette dated 6 April 2001.

In due course, water users who had registered would have received a **National Register of Water Use Registration Record** (National Registration Certificate) based solely on the information each landowner had submitted to the DWS. Each Registration Certificate had a **unique number, e.g., 21172954**. The Registration Certificate reflected, among other details, the extent of commercial forestry on each title deed and/or subdivision.

Note that while the Registration form (DW794) required the area of different species to be provided, the final National Registration Certificate only records the total hectares planted.

ii. If you didn't register your water use?

Failure to register a water use or failure to timeously register within the extended period would subject the water user to **a late registration fee**, and run the risk of losing their status of the water use being an ELWU. In each case of failure to register, the following would apply:

- an administration fee equivalent to the **amount of water use charges outstanding at the date of registration.**
- R300.00 (three hundred Rand) OR 10% (ten percent) of the annual water use charges outstanding at the date of registration, whichever is the greater
- action may also be proceeded with in terms of section 54 of the NWA to suspend or withdraw any water use entitlement not registered - this would effectively mean that you are not entitled to the water used by your plantation – not exactly something that can be practically implemented for a SFRA, but that is what the law states

The implications of non-registration would mean that the lawfulness of your plantation can only be determined after you have applied for registration retrospectively. To rectify this situation, you will need to register using form DW764 obtainable on line (www.dws.gov.za/Projects/WARMS/Registration/registrationforms.aspx).

Members who may never have registered their water use are advised to do so and must accept that there will be a late registration fee as described above.

It may be that over time and/or due to the change of land ownership, that the existence of a Registration Certificate cannot be located. However, if you are paying for your water use (invoices are sent out twice a year by the DWS), then this is a clear indication that your water use has been registered on the DWS WARMS system. It is not possible to receive an invoice if you have not registered your water use. Your Registration Certificate Number can be found on your invoice under the heading **Customer No. 21172954** as an example.

iii. Concluding remarks on Registration

Water uses that actually took place at the date of registration that are based on the commercial plantation area during the Qualifying Period (1 October 1996 to 30 September 1998) may have been lawful or unlawful – it is not the existing lawful water use that was registered – lawfulness is determined through the verification process – see below. It may be that a land owner registered a larger plantation area than was present during the Qualifying Period, in which case the verification process may determine that over-registration had occurred.

The Registration Certificate is the first document that paves the way for determining whether your water use is lawful and this is then followed by the Verification process.

5. Verification of Existing Lawful Water Use (Section 35 (1) to (4))

ELWU is a temporary measure that allows people or organisations who were using raw water for commercial purposes before the new Act came into effect to carry on using that water until such time as they are called upon to have their water use verified. Such users must have registered the use of all water specified in section 21 of the NWA and must apply for verification of this water use when asked to do so by the DWS through the issue of a Section 35(1) Notice – see below for an explanation.

Verification is thus the process to check the area of land under plantations registered by existing users and its lawfulness under previous legislation, or as in the case of a SFRA whether the commercial plantation was in existence during the qualifying period, so as to confirm the extent of ELWU. For commercial forestry, this would be the extent of the plantations during the qualifying period as registered by yourself on the form DW764 and recorded by the DWS on your Registration Certificate. Raw Water Charges are based on the planted area recorded on your Registration Certificate.

Verification is managed through the implementation of Section 35 of the NWA. Verification of the extent of existing lawful water use is based on the information provided by you during the registration process, and that the onus was on water users to provide correct information.

Important Note Verification is needed only for water used for commercial forestry purposes before October 1998. Anyone who started using water (established a commercial forestry plantation) after that needed to have applied for a water use licence (**WUL**); if that licence has already been issued under the National Water Act, you will not be invited to apply for verification. In addition, registration is automatic when new licences are issued.

Section 35(1) Notice

In order to verify the lawfulness or extent of an ELWU, the DWS, by written notice in terms of section 35(1) of the National Water Act (**Section 35(1) Notice**) addressed to all commercial forestry growers, required a landowner claiming an entitlement to that water use (area of land under commercial Forestry plantations) to apply for a verification of that use. Section 35(1) Notices would have been issued at various times for the different water management areas from about 2010 onwards. The Section 35(1) Notice would have included a Table 1 which described the property, the name of the water user and a specific Departmental Register Number – the same number that occurs on your National Registration Certificate and Invoice for Raw Water Charges. In the case of a SFRA, this would be the area of land under commercial plantation, or land that was still being used for commercial forestry purposes, such as harvested land that had not been replanted during the two-year Qualifying Period. While the Registration Form (DW764) asks for the species, this information appears to be unnecessary as it is only the total area of your plantation that is required during the verification process.

Tables 2 and 3 then describe the water use entitlement and water uses for abstraction/storage and a SFRA respectively. These two tables were populated by the DWS based on information provided by the landowner during the Registration process as well as information taken from permits, aerial photographs, etc. For a SFRA, Table 3 would have described:

i. SFRA (ha) – Qualifying Period – the extent of the planted area (including harvested land not yet replanted to trees) during the Qualifying Period based on information provided by the landowner - this would include pre-1972 plantations and any other land planted between 1972 and 1998, **whether through a planting permit or not**. **Note: this was one of the most important judgments handed down by the SCA, viz. that authorisation did not have to be proven for the use to be recognised as an ELWU.**

ii. SFRA (ha) – Permitted Area – the extent of the planted area established with a **planting permit** between 1972 and 1998 – based on the information provided by the landowner and included in the Registration form by the landowner or the DWS

iii. Registered SFRA (ha) – the extent of the planted area that had been registered by the landowner and reflected in his/her **Registration Certificate**

Once a Section 35(1) Notice had been issued, all users in a specific area were invited to a public meeting (by email provided in the Registration Certificate, through notices in the press, correspondence from the local farmer associations, etc.) at which the water use information contained in the Registration Certificate and validated by the DWS was made available to all stakeholders. Draft Water Use Tables would have been shown to the landowner describing the extent of each registered water user's existing lawful use, i.e., extent of planted area. The process of validation and verification and the timeframes for the process were then explained to stakeholders who were encouraged to ask questions on how the data were collected.

The landowner would thus have been able to confirm contact details, the extent of commercial plantations on his/her land, and where the information captured in the Section 35(1) Notice was incorrect or differed from the data provided in the Registration Certificate.

Section 35(2) Notice

The NWA allows the DWS to request further clarification of water use through a Section 35(2) Notice, although this may not be necessary, in which case no Section 35(2) Notice will be issued. However, this

does not prevent you from supplying your own additional data to correct information presented in a Section 35(3) Notice.

Section 35(3) Notice:

The Section 35(3) Notice is the penultimate Notes before an ELWU in a Section 35(4) Notice is verified. The Section 35(3) Notice:

i. allows the applicant to obtain and provide the DWS with other information, in addition to the information contained in the Section 35(1) and, if relevant, any Section 35(2) Notice
ii. allows the DWS to conduct its own investigation into the lawfulness of the water use in question – they would use information available on their Water Authorisation and Registration Management System (WARMS) which includes a collation of information from your Registration Certificate, permits, aerial photos, personal consultation, etc.)
iii. must afford you an opportunity to make representations on any aspect of the application in this Section 35(3) Notice. The landowner must sign off on the Section 35(3) Notice but only if he/she agrees with the area of land under afforestation, as well as the property details. Note that by signing the Section 35(3) Notice, you have agreed that the land under plantation reflected in that Notice is a true reflection of what you know to be the case. If not, then you must make the necessary amendments, and resubmit to the DWS.

Section 35(4) Notice

Only once a registered water use has been verified will the DWS issue you with a Section 35(4) Notice or what may sometimes be commonly referred to as a certificate of verification outlining the extent of an ELWU. A Section 35(4) Notice is NOT a WUL.

Anyone wishing to appeal the determination of the extent of existing lawful use contained in a Section 35(4) Notice may apply to the Water Tribunal.

Section 35 (5) Notice

No person who has been required to apply for verification in respect of an existing lawful water use may exercise that water use after the closing date specified in the Verification Notice (section 35(1), if that person has not applied for verification. From a practical point of view, this is not possible for a SFRA but the implications can only be conjecture.

Section 35(6)

A responsible authority may, for good reason, condone a late application and charge a reasonable additional fee for processing the late application

The Reason for the Court Case

In 2019, FSA had an enquiry from a large number of its members on receipt of a Section 35(4) Notice. As described above, a Section 35(4) Notice verifies the extent and lawfulness of existing lawful water use – in the case of a SFRA, this would be the extent in hectares of plantation forestry based on the information provided in:

i. The Registration Certificate

ii. The Section 35(1) Notice
iii. Further information collated by the DWS contained in their WARMS data base (Section 35(2))
iv. The meetings held by the DWS/consultants and the landowner where the opportunity was provided for the correction of the Section 35(1) Notice as informed by additional information, if necessary, as allowed for in Section 35(2)
v. The Section (35(3) Notice in which the landowner confirmed the extent of land under plantations; **or** if incorrect, where the landowner indicated as such to the DWS and therefore did not, or should not have, signed off on the Section 35(3) Notice.

The Section 35(4) Notice should therefore confirm the following:

i. SFRA (ha) – Qualifying Period – that had taken place during the Qualifying Period based on information provided by the landowner and other information provided by to the DWS (this would include pre-1972 plantations and any other land planted between 1972 and 1998, whether in terms of a planting permit or not)
ii. Registered SFRA (ha) - that had been registered by the landowner and reflected in his/her Registration Certificate – this could include pre-1972 plantations and plantations established with or without a permit between 1972 and 1998
iii. Existing lawful water use – all commercial plantations that were planted during the Qualifying Period (pre-1972 and between 1972 and 1998 with or without a permit) and the Registered Water Use.

The need for a permit to demonstrate authorisation was at the hub of the Court Case. FSA was of the view, supported by a legal interpretation, that the water use need only have taken place during the Qualifying Period for the water use to be recognised as an ELWU – with or without a permit. The DWS, on the other hand, countered this view by insisting that in terms of section 32 of the NWA, any water use that was in existence and exercised during the Qualifying Period needed to have been "authorised" to be considered as ELWU.

6. The Judgment in the Cape Town High Court and, subsequently, the Supreme Court of Appeal and the Relief claimed by FSA (Note that the Appeal by the DWS to the Constitutional Court was not upheld)

As alluded to above, in early 2019 members of FSA were confronted by severely prejudicial interpretations of the NWA by some of the Statutory Authorities, viz., the interpretation of ELWU by the DWS. In conjunction with our legal advisors, FSA lodged an application in the Cape High Court, asking for certain declaratory orders. The court papers were at a later stage supplemented to also include orders aimed at addressing the approach of the Statutory Authorities in relation to Genus Exchange.

Ultimately FSA applied for orders declaring that:

1. Existing lawful water use in respect of streamflow reduction activity, referred to in section 32(1)(a)(ii) of the NWA, which had been or was being established for commercial purposes as contemplated in section 36(1)(a) of the NWA, is not subject to the requirement of authorisation, as provided for in section 32(1)(a)(i) of the NWA

2. The obligations and conditions referred to in section 34(1)(a) of the NWA do not limit existing lawful water uses in respect of streamflow reduction activities for commercial afforestation to the planting of specific genera of trees *(Genus exchange is not a water use)*

3. In the process of verifying existing lawful water use as provided for in section 35 (Verification of Existing Lawful Water Use) of the NWA
    i. The current water use cannot be utilised to reduce the existing lawful water use which had taken place during the Qualifying Period
    ii. the 'Use-it or Lose-it' policy cannot be utilised in order to reduce the existing lawful water use which had taken place during the qualifying period

4. In the process of verifying existing lawful water use as provided for in section 35 of the NWA the interpretation of 'use of land for afforestation which has been or is being established for commercial purposes' is not restricted to 'trees in the ground' during the qualifying period

5. In the process of verifying existing lawful water use in respect of streamflow reduction activity, the Qualifying Period is 1 October 1996 to 30 September 1998 and not 1 October 1997 to 30 September 1999

6. On a proper interpretation of the previous forestry legislation and the planting permits issued in terms thereof, any reference to genera or species of trees in the planting permits does not limit such existing lawful water use to such genera or species

7. For the purposes of determining the lawfulness and extent of streamflow activities, the genera or species of trees, utilised for commercial afforestation established prior to the commencement of the qualifying period or was in the process of being established at any time during the qualifying period, cannot be taken into consideration

8. **The order will not affect specific permits containing provisions expressly described as conditions** prohibiting genus exchange without written approval from the relevant authority

9. The Statutory Authorities are not entitled to insist during the verification process that the area of land authorised for commercial afforestation must be reduced in extent, whenever genera or species of trees are changed

10. The exchange of genera or species of trees does not constitute a water use as envisaged in section 21 of the NWA

Practical Implications of the SCA for FSA Members

1. One cannot discount the possibility that the Statutory Authorities will rely, in the verification process in terms of section 35 (Verification of Existing lawful Water Use) of the NWA, to contend that references in forestry legislation permits to genus are relevant conditions or obligations. Members of FSA may be confronted by the Statutory Authorities with interpretations that cannot be sustained and will unfortunately have to consider carefully whether they are not negatively impacted by such future decisions of the Statutory Authorities that are not in line with the majority judgment of the SCA.
2. The majority of the SCA Judges, however, made it clear that:
    i. Legislation that was applicable to commercial forestry prior to the commencement of the NWA 'was rather modestly concerned with the regulation of commercial forestry and even less concerned with the effects of commercial forestry upon water use'

ii. Section 36 of the NWA defines a stream flow reduction activity with reference to land use and not the volume of water that is used.
iii. Under the regime of the old order forestry legislation, stream flow reduction activity was the use of land for commercial afforestation which constitutes an exercise of existing property rights.

Further relevant considerations are the following (ensure you read them all!!)

1. It was not disputed that more than 70% of commercial afforestation in South Africa was established prior to 1972 when planting permits were introduced for the first time. In respect of all those plantations, there is no question of any obligations or conditions attaching to the use as contemplated in section 34(1)(a) of the NWA.
2. The Statutory Authorities are not entitled to regard the mere reference to genera and species of trees in permits as conditions relevant for verifying lawfulness under section 35 of the NWA, or to require a new application for a licence when the genus or species of trees are changed.
3. Despite FSA's success in obtaining the orders as explained above in the SCA, this does not have the effect that verification in terms of section 35 of the NWA is no longer necessary
4. The purpose thereof will be to verify that land was being 'used' for afforestation during the Qualifying Period (1 October 1996 to 30 September 1998) and what the extent of the being used land was. However, this does not mean that trees needed to be physically in the ground, but the land must have been actively managed as a plantation, whether preparation, cultivating or harvesting.
5. The Statutory Authorities cannot question the lawfulness in respect of a streamflow reduction activity based on reference to genus or species in old order permits (but see 10(iii) below)
6. Information provided by FSA members and reflected in their water use registration certificates could be of assistance in this regard, bearing in mind that if the certificate only indicates land where trees were planted as at the date that the information was submitted to the relevant authority, additional information may be requested regarding the extent of the land used during the qualifying period (not at the time when members were requested to provide information to register their water use which could have been 10 years or so after registration was required).
7. If it appears that some of the land was not being used for plantation forestry during the qualifying period, then the existing lawful water use may be limited to the extent of the land that was managed as a plantation during the qualifying period and as such, any FSA member using more land after the qualifying period than during the qualifying period will not have such additional land verified as an existing lawful water use.
8. In so far as Genus Exchange is concerned for plantations established pursuant to a water use licence issued under the NWA, it does not require the written approval of the relevant authority unless FSA members have a water use licence containing a condition that specifically requires written approval for genus exchange (this may have been the case in the early days of water use licences – 1998 to about 2018; in more recent years (2018 onwards), the DWS excluded the necessity to apply for an exchange of genera by estimating water use for a particular water use licence based on the genus Eucalyptus and stating in the licence that genera may be freely exchanged).
9. It is important to note that while the SCA made a specific finding that authorisation is not required to be proven in order to claim a stream flow reduction activity as an existing lawful water use, the Statutory Authorities are still empowered to determine the lawfulness of the existing lawful water use that is being claimed.

10. The correct approach in order to verify the lawfulness of an existing lawful water use in terms of section 35 of the NWA, is the following:

    i. Commercial forests established prior to 1972 (which accounts for more than 70% of commercial afforestation) are not subject to any conditions or obligations arising from law of application at the commencement of the NWA in respect of the planting of specific species or genera of trees. There are therefore no such conditions or obligations that can be taken into account by the Statutory Authorities when undertaking the verification process in terms of section 35 of the NWA. Incidentally, this may include plantations established in close proximity to water sources.
    ii. From 1972 to 1 October 1998, references in planting permits issued under the 1968 Forest Act, (as amended in 1972) and the 1984 Forest Act to species or genera of trees, without clear indications that these references establish conditions or obligations with which commercial foresters must comply, can also not be taken into consideration when undertaking verification in terms of section 35 of the NWA.
    iii. Where express conditions or obligations regulating the species or genera of trees which may be planted, have been imposed in planting permits issued under the 1984 Forest Act, commercial foresters must comply with such conditions, except if the Statutory Authorities consented in writing to the change of genera or species.
    iv. However, there are indications in the SCA judgment that the SCA supports FSA's position that the imposition of such conditions was not authorised by the old order forestry acts. Such conditions can therefore be taken on review or can be collaterally challenged by a refusal to comply therewith (see 10.v.)
    v. Collateral challenge is defined as follows: To raise a defence and refuse to comply with a coercive action taken or threatened against members of FSA by the Statutory Authorities, for example, relying on the invalidity of a condition specifying that genera may not be exchanged without written approval, even though the condition has not been set aside by a court.
    vi. There may be other legislation that was in operation at the commencement of NWA, for example the Soil Conservation Act 16 of 1969, the Conservation of Agricultural Resources Act 43 of 1983 and the Environment Conservation Act 73 of 1989, in terms of which conditions or obligations relating to the planting of specific species or genera of trees were imposed – this however, is unlikely

FSA members should seek legal advice if confronted by the Statutory Authorities with an interpretation that is not in line with the above

Supreme Court of Appeal Judgment on an Existing Lawful Water Use

Table 1. below provides landowners with the implications of the judgment of the SCA for a variety of situations.

Please note the following:

i. Approximately 70% of all forest plantations in South Africa were established during the period up to 1972 when there was no legislation regulating the planting of commercial forests. These plantations are regarded as an ELWU provided they were registered when required to do so (see above). There is no law that prevents exchange of genera. The lawfulness of these plantations will be established via the validation and verification (V&V) process.
ii. From 1972 until 1998 a permit to plant trees for commercial purpose was required from the then Department of Forestry for the establishment of a plantation. This permit expired after 5 (five) years unless an extension was applied for and subsequently granted (normally about 2 (two) years)). . It is estimated that approximately 25% of plantations in SA were established under the permit to plant trees.
iii. From the period 1998, the use of land for afforestation which has been or is being established for commercial purposes was declared a stream flow reduction activity (SFRA) under section 36(1)(a). The implication for the establishment of new plantations from 1998 meant that all applications to plant trees required a water use licence. It is estimated that less than 5% of plantations established in South Africa have been issued with a WUL.

SCA AND HIGH COURT ORDERS THAT ARE EFFECTIVE

IMPLICATIONS FOR PLANTATION OWNERS/MANAGERS

SCA and HC Court Orders	Implications for Plantation Managers
Existing lawful Water Use 1(a) An **existing lawful water use** in respect of a stream flow reduction activity referred to in section 32(1)(a)(ii) **(Definition of Existing Lawful Water Use)** of the National Water Act, 36 of 1998 ('the Act'), in respect of the use of land for afforestation which had been or was being established for commercial purposes as contemplated in s 36 (**Declaration of stream flow reduction activities)** of the Act, is not subject to the requirement of authorisation 'by or under any law which was in force immediately before the date of commencement of this Act', as provided for in s 32(1)(a)(i) (**Definition of Existing Lawful Water Use)** of the Act. **Note:** <u>Section 32(1)(a) - an existing lawful water use means a water use – (a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which –</u>	During the verification process (a process where the DWS/CMA verify whether plantations are existing lawful water uses), they only need to determine the extent of the existing plantations and area (hectares) of such plantations. This would be based on the National Registration Certificate completed by owners around 2000/2001) but the DWS/CMA may require additional information. They may request you to provide proof that the plantations were authorised, for example, by requesting permits or aerial photos to show that plantations existed prior to 1972. **Note** that the use of aerial photographs is not necessarily conclusive evidence of the existence or not of forest plantations. Aerial photography around the 1970s was intermittent, meaning some areas may not have been covered for a number of years.

(i) was authorised by or under any law which was in force immediately before the date of commencement of this Act; (ii) is a stream flow reduction activity contemplated in section 36(1)- (the use of land for afforestation which has been or is being established for commercial purposes)	
1(b) The obligations and conditions referred to in section 34(1)(a) (**Authority to continue with existing lawful water use)** of the National Water Act 36 of 1998 (the Act) do not limit **existing lawful water use** of stream flow reduction activities for commercial afforestation in respect of the planting **of specific species** or **genera of trees**, save in so far as such restriction attached to the rights to undertake these activities by reason of conditions or obligations arising from law of application at the commencement of the Act. **Note:** Section (43(1)(a) - **Authority to continue with existing lawful water use** (1) A person, or that person's successor-in-title, may continue with an existing lawful water use, subject to- (a) any existing conditions or obligations attaching to that use;	**Genera** referred to in **planting permits do not limit the existing lawful water use to such genera**. However, **if a planting permit specifically contains a condition (on page 2 of the permit under the heading "Conditions")** stating that the genera cannot be exchanged without the approval of the relevant authority, then **FSA members are advised to obtain legal advice, since they may challenge these conditions on review or by way of collateral challenge.** See paragraph 10 (v) above.
In the process of **verifying existing lawful water use,** the current water use cannot be utilised to reduce the "existing lawful water use" which had taken place during the qualifying period.	• In the process of verifying **existing lawful water use,** the current water use (hectares of land under a commercial forest plantation) cannot be utilised to reduce the "existing lawful water use" which had taken place during the qualifying period. • The land need not have been "planted to trees" during the qualifying period – it only needed to be part of an existing plantation that may have, coincidentally, been harvested during the qualifying period but, for whatever reason, had not been replanted.
In the process of **verifying existing lawful water use,** the application of the "Use-it-or Lose-it" policy is *ultra vires* and cannot be utilised to reduce the "existing lawful water use" which had taken place during the qualifying period.	If less land is being used now than was being used during the qualifying period, the extent of land cannot be reduced to that which is being used at the time that the relevant authority verifies the existing lawful water use (Section 35 Notices)
In the process of **verifying existing water use,** the interpretation of "use of land for afforestation" which has been or is being	Any land that was being actively managed as a plantation during the period 1 October 1996 and 30

established for commercial purposes, is not restricted to "trees in the ground" during the qualifying period	September 1998 is considered an **existing lawful water use, whether planted to trees or not**
In the process of **verifying existing lawful water use** in respect of stream flow reduction activities the **Qualifying Period** for a stream flow reduction activity is **1 October 1996 to 30 September 1998.**	The **Qualifying Period** for a stream flow reduction activity is **1 October 1996 to 30 September 1998** and not 1 October 1997 to 30 September 1999 (as claimed by the Statutory Authority.
For the purposes of **determining the lawfulness and extent of existing lawful water uses** in respect of stream flow reduction activities in terms of the provisions of the NWA: On a proper interpretation of the 1984 Forest Act, alternatively the 1984 Forest Act and the 1968 Forest Act as amended in 1972 and of the planting permits issued in terms thereof, any reference **to genera or species** of trees in the planting permits **does not limit such existing lawful water use** to such genera or species.	• Any **permit** issued between 1972 and 1998 (valid for the planting of trees for a period of 5 years) for a particular genus **does not limit the permit holder to planting only that genus** – genera may be freely exchanged. • **<u>However</u>**, where **permits contain specific conditions** on page 2 under the heading "Conditions", that genus exchange requires the written approval of the relevant authority, then FSA members are advised to **obtain legal advice**, since they may challenge these conditions on review or by way of **collateral challenge**. (see 10 (v) above)
For the purposes of **determining the lawfulness and extent of existing lawful water uses** in respect of stream flow reduction activities in terms of the provisions of the NWA: The genus or species of trees utilised for commercial afforestation, which afforestation had been established prior to the commencement of the qualifying period or was in the process of being established at any time during the qualifying period, cannot be taken into consideration by the responsible authority to verify the lawfulness or extent of an existing flow activity, save that in determining lawfulness in terms of s 35 (**Verification of existing water uses)** of the National Water Act, a responsible authority may consider whether the activity was subject to any conditions or restrictions as to the genus or species of trees that may be planted, deriving from law that was of application at the commencement of the National Water Act and attached to the right to use land for afforestation, as provided for in s 36(1)(a)	• The **verification of a stream flow reduction activity as an existing lawful water use** relates to the **use of land for afforestation** and **not the species** of trees planted during the qualifying period. • As explained above, the **conditions or restrictions** as to **genus or species** of trees referred to in the amended order **must relate to law that applied at the commencement of the NWA**. As explained above, the references to genus or species in old order permits not specifically identified as conditions, is not relevant. If confronted by the Statutory Authorities with conditions or obligations rigidly falling under this order, then FSA members are advised to obtain legal advice, since they may challenge these conditions on review or by way of collateral challenge. See paragraph 10 (v) above

(the use of land for afforestation which has been or is being established for commercial purposes)	
The orders **shall not affect specific permits** containing provisions expressly therein described as **conditions prohibiting genus exchange without written approval** from the relevant authority and shall not be regarded as a review of these permits.	Where **permits contain specific conditions on page 2 under the heading "Conditions",** that genus exchange requires the **written approval** of the relevant authority, and this order cannot be regarded as a review and setting aside of such permit. Apparently, a limited number of such permits were issued during about 1997. If written approval was refused for the exchange of genera, this does not necessarily preclude an affected member from reviewing or collaterally challenging the imposition of such condition and the refusal to grant written approval (see 10.v) above The DWS/CMA are not entitled to insist during the verification process that the area of land used/managed as a plantation during the qualifying period be reduced in extent. See paragraph 10 above.
Whenever **genera or species** of trees used for commercial afforestation are **changed**, the Statutory Authorities are **not entitled to insist, during the verification process**, that the **area of land** authorised for commercial afforestation be **reduced in extent**.	Whenever **genera or species** of trees used for commercial afforestation are exchanged, the Statutory Authorities are **not entitled to insist during the verification process,** that the area of land authorised for commercial afforestation **be reduced in extent.** See paragraph 10 above
The Costs Orders: • H.C. Order 3: The Statutory Authorities are ordered to pay FSA's costs on a party and party scale, save for the cost associated with the two interlocutory applications heard on Friday 6 February and on 25 March 2020 respectively, which costs shall be paid by the second and third respondents on an attorney and client scale. All costs shall include the costs of two counsel where so used. • SCA Order 1.2 and 2.2: The Statutory Authorities are ordered to pay FSA's costs of appeal (n its own appeal as well as the	The Statutory Authorities have been ordered to pay substantial costs in respect of the litigation which commenced in 2019.

appeal lodged by the Statutory Authorities) such costs to include (a) the cost of the applications for leave to appeal and (b) the costs of two counsel, where so employed	

Final: Prepared by Dr John Scotcher 6 March 2024

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Revised 12 August 2024 following the Constitutional Court Order of 6 August 2024 that the application for leave to appeal by the DWS was not in the interest of justice to grant leave to appeal