



IRF24/27

Gateway determination report – PP-2023-2871

Amendment to Kyogle LEP 2012 to permit forestry
without consent on land zoned RU1 Primary
Production and RU4 Primary Production Small Lots

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Acknowledgment of Country

The Department of Planning, Housing and Infrastructure acknowledges the Traditional Owners and Custodians of the land on which we live and work and pays respect to Elders past, present and future.

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Table 1 Reports and plans supporting the proposal

Relevant reports and plans
Kyogle Shire Council Planning Proposal v1 and attachments (Dec 2023)
Planning report to Ordinary Council Meeting and Council resolution (14 Nov 2022, Item 13.3)

1 Planning proposal

1.1 Overview

Table 2 Planning proposal details

LGA	Kyogle Shire
PPA	Kyogle Shire Council
NAME	Amendment to Kyogle LEP 2012 to permit forestry without consent on land zoned RU1 Primary Production and RU4 Primary Production Small Lots (0 jobs, 0 homes)
NUMBER	PP-2023-2871
LEP TO BE AMENDED	Kyogle LEP 2012
ADDRESS	All Zone RU1 and RU4 lands within the Kyogle Shire
DESCRIPTION	Various properties
RECEIVED	19/12/2023
FILE NO.	IRF24/27
POLITICAL DONATIONS	There are no donations or gifts to disclose and a political donation disclosure is not required
LOBBYIST CODE OF CONDUCT	There have been no meetings or communications with registered lobbyists with respect to this proposal

1.2 Objectives of planning proposal

The planning proposal contains objectives and intended outcomes that adequately explain the intent of the proposal.

The objective of the proposal is to remove the dual Kyogle Council and NSW Local Land Services (LLS) consent requirements for Private Native Forestry (PNF) in Zones RU1 Primary Production and RU4 Primary Production Small Lots lands. The intent is that LLS has sole responsibility for the regulatory processes associated with PNF approvals, consistent with the majority of surrounding council areas.

The objective of the planning proposal is clear and adequate.

It is noted that Council's November 2022 resolution supporting the proposal applies only to Zone RU1. Council staff have confirmed this is an error in the resolution wording and have requested a Gateway determination that involves both Zone RU1 and RU4 consistent with the submitted planning proposal. This is considered appropriate and noting the use, size and extent of the Zone RU4 in the Shire is minimal (Figure 1).

1.3 Explanation of provisions

The planning proposal seeks to amend the Land Use Tables in the Kyogle LEP 2012 for Zones RU1 Primary Production and RU4 Primary Production Small Lots to list 'forestry' (which includes PNF) as a land use that is permitted without consent.

It is also noted that clause 6.7 Terrestrial Biodiversity of the Kyogle LEP 2012 must be considered by all development applications that occur on land mapped by Council's LEP as having potential terrestrial biodiversity (Figure 3). While no changes are proposed to the clause, it is noted that it will no longer have any application to PNF if 'forestry' becomes permitted without consent.

The planning proposal contains an explanation of provisions that adequately explains how the proposal's objectives will be achieved.

1.4 Site description and surrounding area

The proposal applies to land zoned RU1 Primary Production and RU4 Primary Production Small Lots in the Kyogle Local Government Area (LGA) (Figure 1). Some of these lands are mapped as containing potential high environmental value or are identified on the NSW Biodiversity Values Map (Figure 2).

Adjoining council areas such as Richmond Valley, Lismore, Clarence Valley, Tenterfield and Glen Innes Severn that have similar environmental characteristics, economies and communities all allow PNF without consent in the RU1 Zone (Figure 4). These councils also generally have very limited or no conservation zones in place that prohibit PNF.

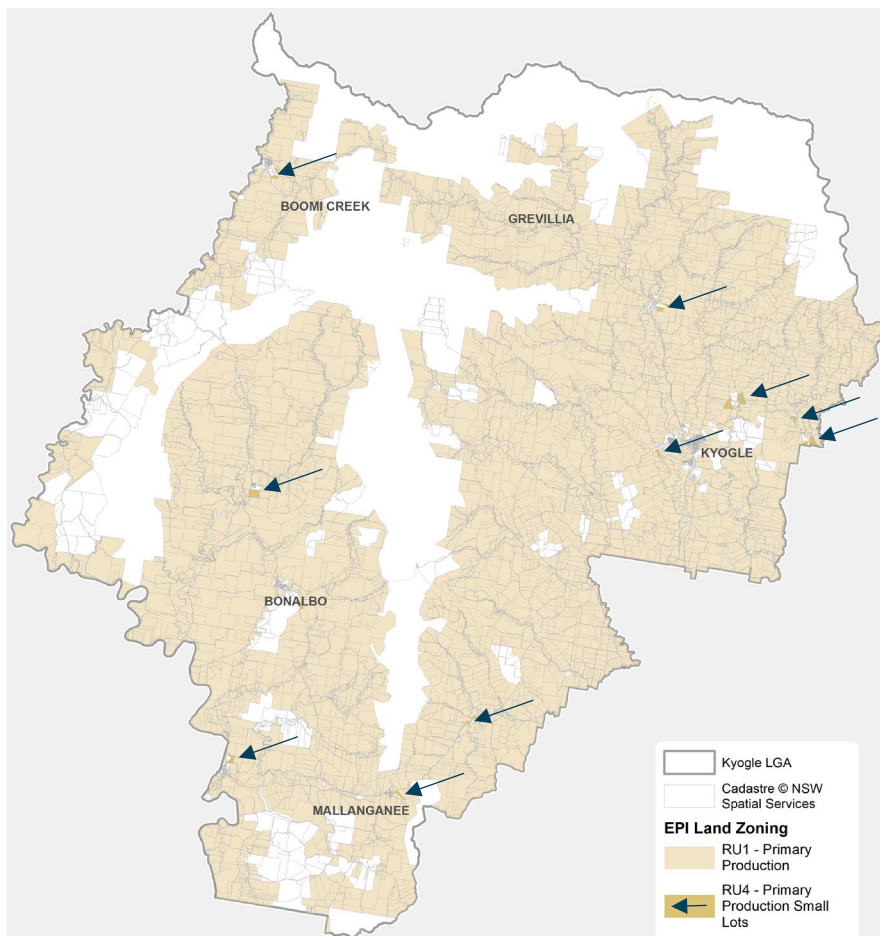


Figure 1: Subject land (source: DPHI)

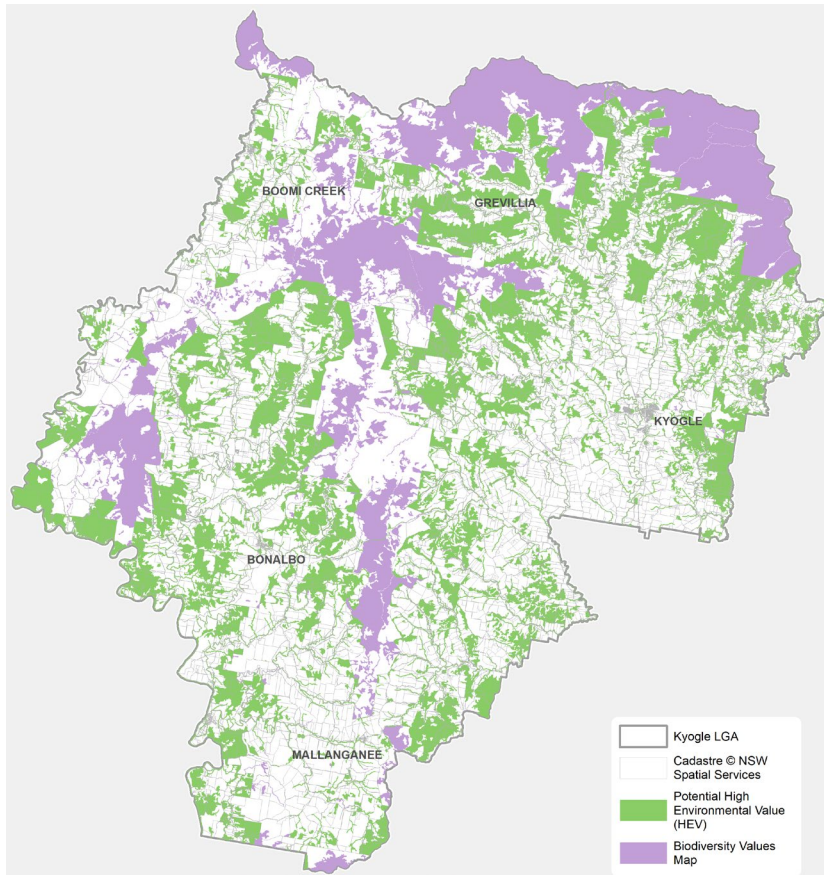


Figure 2: Potential High Environmental Value land and Biodiversity Values Map (source: DPHI)

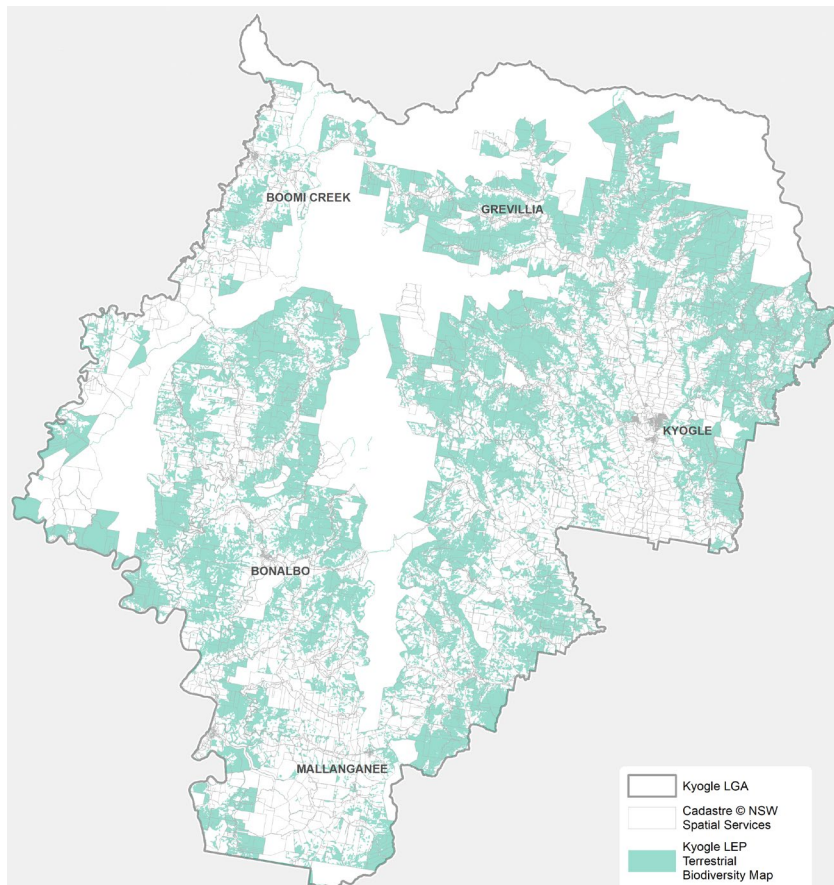


Figure 3: Kyogle LEP 2012 Terrestrial Biodiversity Map (source: DPHI)

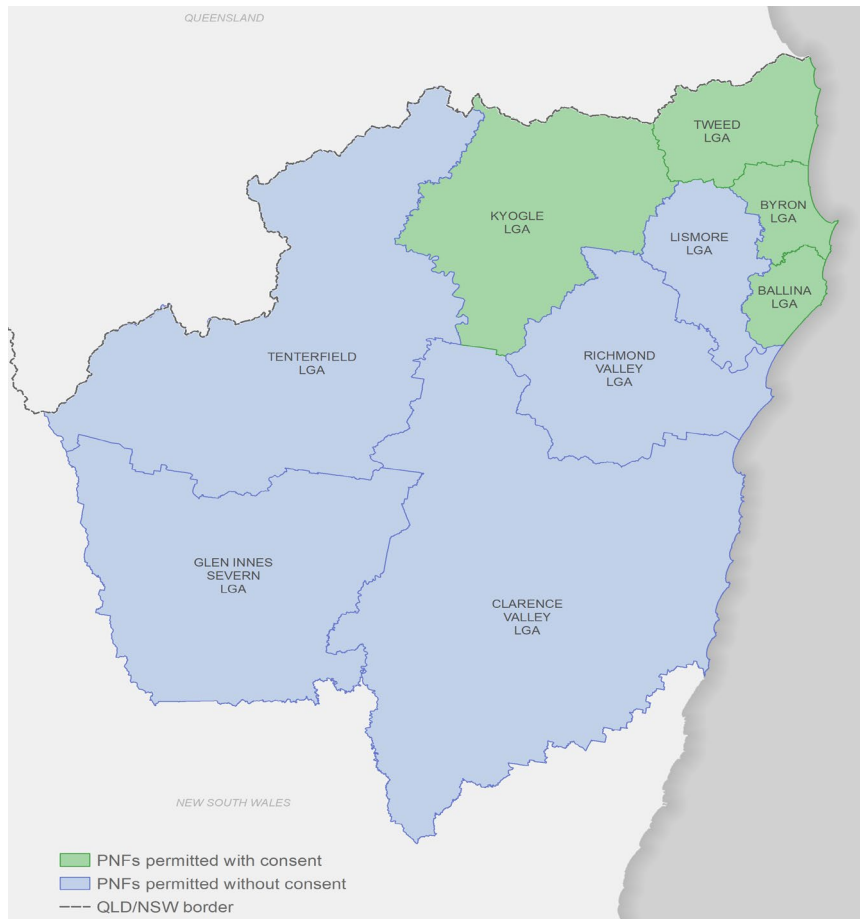


Figure 4: Zone RU1 permissibility of PNF in surrounding council areas (source: DPHI)

1.5 Mapping

There are no map amendments required to the Kyogle LEP 2012 as a result of the planning proposal.

1.6 Background

Prior to commencement of the Kyogle LEP 2012, Council's former Kyogle and Terania Interim Development Orders (IDOs) permitted 'forestry' without development consent in the Shire's non-urban zones. Approvals for clearing native vegetation were issued under the *Native Vegetation Act 2003* and compliance matters relating to forestry operations were dealt with by the NSW Environment Protection Authority (EPA).

The provisions that permitted 'forestry' without development consent under the former IDOs were inadvertently not carried over to the Kyogle LEP 2012 by Council when the IDOs were repealed.

As a result, landowners wishing to conduct PNF in Kyogle LGA are currently required to obtain a PNF Plan approval from LLS under the *Local Land Services Act 2013* and development consent from Council under the *Environmental Planning and Assessment Act 1979*. PNF Plan approvals last for a maximum of 15 years and the EPA is responsible for compliance and enforcement. Councils are not consulted during the PNF Plan assessment process and only receive notification from LLS when a PNF Plan has been approved.

At its 14 November 2022 Ordinary Meeting, Kyogle Council resolved to prepare a planning proposal to amend the Kyogle LEP 2012 to return to its former planning regime by making PNF permitted without consent. Council also resolved to commit to progressing an LGA-wide

biodiversity and heritage study with a view to introducing conservation zones into LEP 2012 to protect land with high environmental or heritage value in future.

Council has advised that around half of all privately owned forest in the LGA is subject to an approved PNF Plan, and of the 146 approved Plans, it appears approximately 133 commenced after LEP 2012 came into force, however no DAs have been lodged with Council for assessment and determination. Due to the unintended changes that occurred under the adoption of the Kyogle LEP 2012, Council had not been aware that these established PNF operations should have also sought and received Council's DA approval prior to commencement.

On 21 June 2023, Council submitted a Scoping Proposal and requested a scoping meeting with State agencies to discuss prior to lodging a planning proposal for a Gateway determination. Should a gateway determination be issued to allow the proposal to proceed, the planning proposal should be amended prior to exhibition to specify the correct date for lodgement of the Scoping Proposal.

During July to September 2023, internal State Government agency consultation occurred on the Scoping Proposal with representatives of Local Land Services (LLS), the Department's former Biodiversity and Conservation Division (now NSW Department of Climate Change, Energy, the Environment and Water – Biodiversity Conservation and Science), and the Department of Primary Industries (DPI) Agriculture to provide input to the preparation of a planning proposal.

During these meetings LLS strongly supported the proposal noting that their PNF approval and plan assessment process was reviewed by the Natural Resources Commission and approved by State Cabinet. Likewise, BCD raised concerns that removing the need for development consent may lower the current level of required environmental assessment.

Since June 2023, the Department has also received 34 written submissions from community members objecting to the proposal largely on the basis of environmental concerns and requesting that the proposal be rejected.

Should a Gateway determination be issued to allow the planning proposal to proceed, relevant State agencies, landowners, and the wider community will be formally consulted and given an opportunity to submit written comments. This formal feedback will be essential in making an informed decision before the planning proposal is finalised.

2 Need for the planning proposal

The planning proposal is not the result of a strategic study, report, or Department approved strategy. Council has initiated the proposal as it believes the dual consent requirement for PNF unnecessarily duplicates the assessment and regulatory processes of LLS and places an unreasonable regulatory and financial burden on Council resources and landowners for little benefit.

As previously noted, prior to commencement of the Kyogle LEP 2012 'forestry' was permitted without consent under Council's former Kyogle and Terania IDOs. Council has advised that requiring consent for forestry in LEP 2012 was not intentional and was a drafting oversight at the time of preparing the LEP.

Should this amendment proceed and be finalised, Council will not be required to assess DAs for PNF. Council will also not be required to take any potential compliance action against approximately 133 PNF operations that have been approved by LLS since commencement of LEP 2012, and for which Council has not received any corresponding DAs for assessment and determination.

The planning proposal also notes that Council is currently seeking consultants to prepare a biodiversity study for the LGA, which is expected to be conducted in stages over a 3 to 4 year period. The first stage involves assessing and documenting environmental values, for which the

Council has allocated a budget. Once the biodiversity study is prepared, a planning proposal will be required to include any proposed Conservation Zones into the Kyogle LEP 2012.

Council's approach in amending the LEP is considered to be the best means of achieving the intended outcome of the planning proposal.

3 Strategic assessment

3.1 Regional Plan

The following table provides an assessment of the proposal against the relevant aspects of the *North Coast Regional Plan 2041*:

Table 3 Regional Plan assessment

Regional Plan Objectives	Justification
Objective 3: Protect regional biodiversity and areas of high environmental value	<p>Under the <i>LLS Act 2013</i> the rules for conducting PNF are set out in the <i>PNF Code of Practice for Northern NSW</i>. The planning proposal notes that the code does not permit PNF in areas of old growth forest, rainforest, wetlands, threatened ecological communities, or areas of declared outstanding biodiversity value; and includes protections for threatened species, habitat trees, and riparian areas.</p> <p>Prior to issuing a PNF Plan approval, LLS must determine whether a PNF operation can be conducted in accordance with the Code. A PNF Plan must not commence until a Forest Management Plan (FMP) that outlines how PNF operations will be undertaken has been approved by LLS. The FMP cannot be approved unless it is consistent with the Code. All PNF Plan approvals are subject to compliance checks by the NSW Environment Protection Authority.</p> <p>The <i>Northern NSW PNF Code of Practice</i> was approved by the Minister for Agriculture in May 2022, following extensive consultation, review by the Natural Resources Commission, and with the agreement of the Environment Minister and State Cabinet. The Code has been designed to ensure PNF operations are conducted in an ecologically sustainable manner, and the LLS approvals process under the Code is expected to provide sufficient environmental protections to support the proposal.</p> <p>It is also understood that identification on the NSW Biodiversity Values Map (Figure 2) would exclude PNF operations and this avenue is also available to the NSW Department of Climate Change, Energy, the Environment and Water – Biodiversity Conservation and Science, should they have issues in PNF occurring within any particular areas within the Kyogle LGA.</p> <p>It is considered appropriate that the planning proposal proceed, subject to further consultation with the NSW Department of Climate Change, Energy, the Environment and Water – Biodiversity Conservation and Science (BCS), to confirm the suitability of the proposal in relation to this objective. Until this consultation has occurred, consistency with this objective will remain unresolved.</p>

Regional Plan Objectives	Justification
Objective 4: Understand, celebrate and integrate Aboriginal culture	<p>This objective aims to avoid harm to Aboriginal objects and places or areas of significance to Aboriginal people.</p> <p>The planning proposal notes that the <i>Northern NSW PNF Code of Practice</i> prescribes minimum buffer requirements to scarred or carved trees, known burial sites, and known Aboriginal objectives or places to mitigate the likelihood of harm to Aboriginal cultural heritage as a result of PNF operations.</p> <p>It is not expected that the proposal will cause impact to Aboriginal cultural heritage. Nevertheless, consultation with the Muli Muli, Gugin Gudduba, and Jubullum Local Aboriginal Lands Councils (LALCs) is considered appropriate.</p>
Objective 8: Support the productivity of agricultural land	<p>This objective aims to support long-term agricultural production and help avoid the potential for land use conflicts and land fragmentation.</p> <p>The proposal does affect some land that is identified as important farmland. However, changing the PNF planning pathway and relying on LLS Plan approval under the PNF Code is not expected to reduce the preservation of important farmland or increase the likelihood of land use conflict or land fragmentation. Nonetheless, it is considered appropriate that consultation occur with the NSW Department of Primary Industries - Agriculture.</p>
Objective 10: Sustainably manage the productivity of our natural resources	<p>Streamlining the approval process for PNF is not considered to be inconsistent with the regional plan's objective of promoting sustainable management of natural, mineral, and forestry resources in the region.</p>

3.2 Local

The planning proposal states that it is consistent with the following local plans. It is also consistent with the strategic direction and objectives, as stated in the table below:

Table 4 Local strategic planning assessment

Local Strategies	Justification
Kyogle Local Strategic Planning Statement (LSPS) 2020	The planning proposal is considered to be consistent with the themes and planning priorities of the LSPS and in particular, <i>Priority A4: Create the right conditions to support enterprise and innovation</i> , relating to supporting development in key sectors including agriculture, horticulture and forestry.
Kyogle Community Strategic Plan (CSP) 2032	The proposal aligns with the CSP's focus area on 'Prosperity' and strategy to advocate for policies that enable sustainable growth in the timber, forestry, and allied value-adding industries.

3.3 Section 9.1 Ministerial Directions

The planning proposal is considered to be consistent with all relevant section 9.1 Directions, except as discussed below:

Table 5 section 9.1 Ministerial Direction assessment

Directions	Consistent/ Not Applicable	Reasons for Consistency or Inconsistency
1.1 Implementation of Regional Plans	Unresolved	<p>The proposal is potentially inconsistent with this direction and the North Coast Regional Plan 2041 as it affects land containing potential high environmental value, likely Aboriginal objects or places and important farmland.</p> <p>It is considered appropriate that this direction remain unresolved until consultation is undertaken with NSW Department of Climate Change, Energy, the Environment and Water – BCS, the Muli Muli, Gugin Gudduba, and Jubullum Local LALCs; and NSW Department of Primary Industries - Agriculture.</p>
3.1 Conservation Zones	Unresolved	<p>The proposal is potentially inconsistent with this direction as it does not include provisions that facilitate the protection and conservation of environmentally sensitive areas.</p> <p>The aim of the planning proposal is to streamline the approval process and remove the need for Council's development consent to undertake PNF. This will also eliminate an assessment of any PNF operations under clause 6.7 Terrestrial Biodiversity of the Kyogle LEP 2012.</p> <p>While it is expected that any inconsistency would be of minor significance due to the restrictions and regulations of the PNF Code, it is considered appropriate that consistency with this direction remain unresolved until consultation with NSW Department of Climate Change, Energy, the Environment and Water – BCS has been undertaken.</p>
3.2 Heritage Conservation	Unresolved	<p>This direction states that a planning proposal must contain provisions that facilitate the conservation of heritage and Aboriginal cultural significance.</p> <p>While any inconsistency is considered likely to be minor as the PNF Code prescribes conservation protection measures, it is considered appropriate that consistency with this direction remain unresolved until consultation with Muli Muli, Gugin Gudduba, and Jubullum LALCs has occurred.</p>

Directions	Consistent/ Not Applicable	Reasons for Consistency or Inconsistency
4.3 Planning for Bushfire Protection	Unresolved	This direction applies as the planning proposal includes land mapped as bushfire prone. The direction requires that the relevant planning authority consult with the Commissioner of the NSW Rural Fire Service (RFS). Until this consultation has occurred, and a written response received, the inconsistency of the proposal with this direction remains unresolved.
9.2 Rural Lands	Unresolved	<p>The planning proposal is inconsistent with this direction as it affects land in a rural zone and does not address and satisfy all of the requirements listed in the direction. This includes:</p> <ul style="list-style-type: none"> - being consistent with any applicable regional plan. As consistency with direction 1.1 is currently unresolved, consistency with this direction will also remain unresolved until agency consultation is undertaken; - considering the significance of agriculture and primary production to the State and rural communities. While some of the land contains regionally significant farmland, the proposal to streamline the PNF approval process is not expected to adversely impact the agricultural viability of the land or cause land use conflict to areas of important farmland. Consultation is recommended with the NSW Department of Primary Industries - Agriculture; - identifying and protecting environmental values including biodiversity and the protection of native vegetation and cultural heritage. Consultation with the NSW Department of Climate Change, Energy, the Environment and Water – BCS and the Muli Muli, Gugin Gudduba, and Jubullum Local LALCs will ensure that the proposal complies with the intent of this direction.

3.4 State environmental planning policies (SEPPs)

The planning proposal is not considered to be inconsistent with the provisions of any SEPPs.

4 Site-specific assessment

4.1 Environmental

Before this planning proposal was submitted, some members of the community have expressed concern about the lack of Conservation Zones in the Kyogle LEP 2012 and the potential for ecological impacts and the loss of koala habitat should Council's role in assessing PNF be removed. In pre-lodgement discussions, the former BCD also supported the retention of dual consent to ensure an environmental assessment of PNF impacts under the *Biodiversity*

Conservation Act 2016. No evidence was provided however to support BCD's view that the LLS process may be inadequate and result in poor environmental outcomes.

As previously noted, the *PNF Code of Practice for Northern NSW* was approved by the Minister for Agriculture in May 2022 after extensive consultation, review by the Natural Resources Commission, and with the agreement of the Environment Minister and State Cabinet. In addition to prohibiting PNF in old-growth forests, rainforests, wetlands, threatened ecological communities, and areas of declared outstanding biodiversity value, the Code includes a range of inbuilt environmental protections, such as minimum basal area retention requirements, protection of key landscape and habitat features, strict standards for forestry infrastructure to protect the landscape and waterways, and threatened species protections.

The Code also prohibits PNF on land identified as core koala habitat in a Comprehensive Koala Plan of Management (CKPoM) prepared by councils and approved by the Department. For council areas without a CKPoM, such as Kyogle, the Code includes mapped areas of 'high koala habitat suitability' provided as a 'PNF Koala Prescription Map' with PNF Plan approvals. Forestry operations must follow the Code prescriptions to protect koala habitat where land is identified on a PNF Koala Prescription Map, or where there is a record (less than 20 years old) of a threatened species.

In order to obtain PNF Plan approval, LLS must also assess the potential for any negative impact on environmental values, and if such impact exists, determine whether these impacts can be mitigated, or if the land should be excluded from operations. Therefore, while the planning proposal involves land mapped as containing potential high environmental value, the intent to streamline the regulatory process for PNF in the Shire is not expected to cause any adverse environmental impacts as all existing environmental values will remain adequately protected under the PNF framework.

Unless a change across the State occurs that makes it no longer appropriate to permit PNF without consent, it is considered reasonable to allow the PNF industry in Kyogle to operate similarly to surrounding LGAs.

Notwithstanding the above, should a Gateway determination allow the proposal to proceed, it is considered appropriate that further consultation occur with the NSW Department of Climate Change, Energy, the Environment and Water – Biodiversity Conservation and Science (BCS). A condition to the effect is recommended as part of the conditions of the Gateway Determination.

4.2 Social and economic

No adverse social impact resulting from the proposal has been identified. Prior to lodgement of the planning proposal, some community members have expressed concerns that the PNF Code does not cover impacts on the amenity of neighbouring properties. The planning proposal notes that where required, Council can use other relevant legislation such as the *Protection of the Environment Operations Act 1997* to deal with any local amenity issues (for e.g. noise, air quality, hours of operation) that are not covered under the Code.

The planning proposal suggests that removing the requirement for dual consent as part of the PNF approval process will reduce the regulatory and financial burden on rural landowners who need to obtain two sets of approvals for the same activity. If the planning proposal is not supported, the operations associated with 133 PNF Plans approved by LLS would need to cease until lawful use is demonstrated, or DAs are lodged and determined.

It is likely that requiring 133 operators to stop work until their lawful use is demonstrated or DAs are lodged and determined, would have significant adverse economic implications to Kyogle's PNF industry. Additionally, it would result in significant resource implications for Council in requiring

lodgement and processing of DAs to legalise 133 LLS approved PNF Plans or undertake compliance work. Council has advised that their resources are minimal to manage this process.

4.3 Infrastructure

No new local or state infrastructure has been identified. Prior to the lodgement of the planning proposal, some members of the community have raised concerns about the impact of PNF operations on local road and bridge infrastructure, which are not considered under the Code.

The Kyogle LGA is mainly an agricultural area where heavy vehicles are commonly used to transport crops, livestock, and other agricultural materials through the road network. Council is of the view that logging trucks are no different in terms of their impact on the local road network as compared to other heavy vehicles and is satisfied that any necessary roadworks can be managed as part of Council's works program.

Council has also advised that it is in process of implementing a comprehensive program to replace the LGA's ageing timber bridges with new concrete bridges, built to modern standards to improve accessibility and reduce the overall maintenance burden. The bridge replacement program commenced in mid-2020 and many of these new bridges are now constructed and open to traffic.

4.4 Community

Council does not specify a community consultation period. Should the proposal proceed, a period of 30 working days is appropriate consistent with the Department's LEP Making Guidelines for a complex LEP, and forms part of the conditions of the Gateway determination.

4.5 Agencies

Council has nominated that the following public agencies be consulted in relation to the planning proposal:

- former NSW Department of Planning and Environment – Biodiversity Conservation Division (now NSW Department of Climate Change, Energy, the Environment and Water – Biodiversity Conservation and Science)
- NSW Local Land Services
- NSW Environment Protection Authority
- Transport for NSW
- NSW Department of National Resources Access Regulator.

It is recommended that the following agencies also be consulted:

- NSW Department of Primary Industries – Agriculture
- NSW Rural Fire Service
- Muli Muli, Gugin Gudduba and Jubullum Local Aboriginal Land Councils.

In accordance with the Department's LEP Making Guidelines for a complex LEP, a period of 40 working days for agency comment is appropriate and forms part of the conditions of the Gateway determination.

5 Timeframe

Council proposes a 9 month time frame to complete the LEP.

The LEP Plan Making Guidelines (Aug 2023) establishes maximum benchmark timeframes for planning proposal by category. As the planning proposal is categorised as complex, the proposal is within the 12-month recommended timeframe and is considered appropriate.

6 Local plan-making authority

Council has confirmed that it would like to exercise its functions as a Local Plan-Making authority for this proposal.

During preliminary pre-lodgement discussions, the Department's former BCD (now Department of Climate Change, Energy, the Environment and Water – BCS) expressed concerns about the proposal. In addition, a number of community members have raised concerns about both the impacts of the proposal on the environment and Council's powers to regulate wider impacts of PNF, such as road infrastructure and local amenity.

Allowing the proposal to proceed to agency and community consultation will provide an important and essential opportunity for the NSW Department of Climate Change, Energy, the Environment and Water – BCS, LLS, other relevant state agencies, and the community to review and provide feedback on the proposal prior to a final decision being made.

It is therefore recommended that Council not be authorised as the local plan-making authority for the planning proposal. This will enable the Department to undertake an impartial final review of the proposal and comprehensive assessment of any submissions before finalisation.

7 Assessment summary

The planning proposal is supported to proceed with conditions for the following reasons:

- it is not inconsistent with the State, regional and local planning framework;
- allowing the proposal to proceed at this stage will enable Council to undertake formal and comprehensive consultation with State agencies and their local community to help determine the appropriateness of the proposal;
- it will facilitate private native forestry (PNF) in the Kyogle LGA consistent with the planning pathway in surrounding council areas with similar environmental characteristics, economies and communities; and
- it will streamline the regulatory approval process for PNF in the Kyogle Shire while maintaining appropriate environmental protections under the NSW Government PNF process managed by NSW Local Land Services.

The planning proposal should be updated prior to agency and community consultation to:

- specify the correct date for lodgement of the Scoping Proposal; and
- revise the Project Timeline to accurately reflect the Gateway determination date.

8 Recommendation

It is recommended the delegate of the Secretary:

- Note that the consistency with section 9.1 Directions 1.1 Implementation of Regional Plans, 3.1 Conservation Zones, 3.2 Heritage Conservation, 4.3 Planning for Bushfire Protection and 9.2 Rural Lands are unresolved and will require justification.

It is recommended the delegate of the Minister determine that the planning proposal should proceed subject to conditions:

1. Prior to agency and community consultation, the planning proposal is to be updated to:

- specify the correct date for lodgement of the Scoping Proposal; and
 - revise the Project Timeline to reflect the Gateway determination date.
2. Consultation is required with the following public authorities:
- NSW Department of Climate Change, Energy, the Environment and Water – Biodiversity Conservation and Science Group
 - NSW Local Land Services
 - NSW Environment Protection Authority
 - Transport for NSW
 - NSW Department of National Resources Access Regulator
 - NSW Department of Primary Industries – Agriculture
 - NSW Rural Fire Service
 - Muli Muli, Gugin Gudduba and Jubullum Local Aboriginal Land Councils
3. The planning proposal should be made available for community consultation for a minimum of 30 working days.

Given the nature of the planning proposal, Council should not be authorised to be the local plan-making authority.

The LEP should be completed within 9 months from the date of the Gateway determination.



5/2/24

(Signature)_____
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26/2/2024

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