

## Submissions on the Draft BC Biodiversity and Ecosystem Health Framework

West Coast Environmental Law Research Foundation

January 31, 2024

Thank you for the opportunity to comment on the Draft BC Biodiversity and Ecosystem Health Framework (the “Framework”).

### ***West Coast Environmental Law***

West Coast Environmental Law harnesses the power of law to solve complex environmental challenges. Our non-profit group of environmental and Indigenous rights lawyers works to transform environmental decision-making and strengthen legal protection for the environment through collaborative legal strategies that bridge Indigenous and Canadian law.

Since 1974, we have successfully worked with communities, nongovernmental organizations, the private sector, and federal, provincial and Indigenous governments to develop proactive legal solutions to protect and sustain the environment. Our largest program – RELAW, or “Revitalizing Indigenous Law for Land, Air and Water” provides legal support to Nations working to revitalize their own Indigenous laws and to develop contemporary legal instruments such as written laws, land use plans, and declarations.

### ***1. Strengths of the Framework***

West Coast believes that BC’s commitment to enacting a new law prioritizing biodiversity and ecosystem health could be transformative. Such a law has been called for by [First Nations](#), [fish and wildlife organizations](#), [environmental groups](#), and [local governments](#). We understand that the Framework is intended to provide strategic direction for co-development of a new biodiversity and ecosystem health law with First Nations. It is thus important that the Framework set us on the right course and be accompanied by on-the-ground action.

We were pleased to see BC make the long overdue and important commitment to ecosystem-based planning and management across BC in the Framework, and to legislating legal objectives for biodiversity and ecosystem conservation based on western and Indigenous science that will apply across all resource sectors.

We note that the Framework appropriately draws on well-established definitions of ecosystem-based management and principles for ecosystem-based planning, for example:

- “maintain and enhance<sup>1</sup> biodiversity, ecological integrity, and their overall resilience to ensure the coexistence of healthy ecosystems and human communities and economies in B.C. for current and future generations” (p.1);
- “an adaptive approach to managing human activities that seeks to ensure the coexistence of healthy, fully functioning ecosystems and human communities” (p.3);

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<sup>1</sup> Although ‘restore’ would be more common than ‘enhance’ in this context.

- “policies, decisions, and actions would first consider what ecosystems need to sustain themselves and the benefits they provide across spatial scales (e.g., local, watershed, regional) through time, and then consider how they may be sustainably used to support communities and economies” (p.4);
- “Ecosystems are managed in a way that minimizes biodiversity risk and ensures ecological integrity is maintained” (p. 8);
- “That cumulative effects of natural and human-caused disturbances are managed for the desired future conditions,<sup>2</sup> informed by the range of natural/historic variability and the need to manage for resiliency to future climate conditions” (p.9).

Maintaining and restoring ecological integrity as a focus of ecosystem-based management may be achieved “using the range of dynamic change in natural systems over historic time periods as a benchmark for risk assessment” (HRV):

“Precautionary” management targets, reflecting a commitment to achieve a high probability of maintaining ecological integrity, should be equal to or below the low risk threshold. Management should not exceed the high risk threshold because there is a high probability that ecological and conservation values will not be sustained. (Figure 2.3)<sup>3</sup>

As the Coast Information Team *Ecosystem-Based Management Planning Handbook* notes, retaining 70% of historic range of variability (e.g., in old forest retention) is scientifically understood as a ‘low risk’ target, with 30% retention understood as high risk.

We agree that the historic range of variability (i.e., expected pre-colonial ecosystem conditions) is an appropriate benchmark for maintaining and restoring ecological integrity. The Framework should, however, explicitly reference the fact that such conditions were and are the result of not just natural disturbance but active management to Indigenous legal standards over time (e.g., through cultural practices such as burning).

While not sufficient in and of themselves, all of the actions listed under the current “Whole of Government” Pillar (e.g., creation of an Office of Biodiversity and Ecosystem Health; development of ecosystem health and biodiversity objectives and standards based in science and local and Indigenous knowledge; co-development of legislation, ecosystem-based planning) have a critical role to play in the proposed paradigm shift.

We note that a whole of government approach “consists of both governance structures (distinct organizational groups within government that are dedicated to cross-governmental coordination and collaboration, such as cabinet committees)” and processes, rules, standards and mandates that direct multiple government ministries/departments.<sup>4</sup>

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<sup>2</sup> Although it should be made clear that ‘desired future conditions’ in this context means conditions that reflect the biodiversity and ecosystem health priority.

<sup>3</sup> Coast Information Team, *Ecosystem-Based Management Planning Handbook*, online: <<https://www.for.gov.bc.ca/tasb/slrp/citbc/c-ebm-hdbk-fin-22mar04.pdf>> at 10.

<sup>4</sup> Canadian Climate Institute, *Greater than the Sum of Its Parts*, online: <https://climateinstitute.ca/publications/greater-than-the-sum-of-its-parts/>.

## 2. Gaps in the Framework – Recommendations

### a. IPCAs and other protection areas have an important role to play

Despite BC's 30 x 30 commitment (framed in Minister Cullen's mandate letter as "[30% protection of BC's land base by 2030, including Indigenous Protected and Conserved Areas](#)") the Framework downplays the critical role of an interconnected and representative network of protected areas in maintaining biodiversity and ecosystem health, going so far as to suggest that protection may be limited only to situations where "an ecosystem is severely degraded or at risk" (p.12). Some language in the Framework also suggests (perhaps inadvertently) that protection areas may be limited to "small spots" like wildlife features or riparian areas (p.9). Further, the absence to any reference to Indigenous Protected and Conserved Areas ("IPCAs") is a glaring omission from the Framework.

#### Recommendations:

- i. The Framework should explicitly note that maintaining 30% of the landbase free from industrial resource extraction through an interconnected and representative network of effective, legally protected areas is an essential conservation "backstop" to the proposed ecosystem-based approach.<sup>5</sup> This minimum target should be established in new BEH legislation.
- ii. BC should fully uphold IPCAs (Indigenous Protected and Conserved Areas) that have been declared by First Nations, as one of the most direct, immediate pathways to advancing BC's 30 x 30 and UNDRIP commitments.

### b. The BEH priority must be given legal effect:

Beyond the statement that ecosystem health and biodiversity objectives and standards developed through the BEH Office "can then be" recognized in legislation, the Framework offers little clarity about how the biodiversity and ecosystem health priority will be given legal effect. Further, the Framework stops short of saying that a new law will actually require or create legal triggers for ecosystem-based planning (particularly at the strategic level) on the ground. To date, BC's modernizing land use planning initiative has been under-resourced and narrow in scope, with few opportunities to expand. This must change if the commitments in the Framework are to have an impact on the ground. The Framework also fails to recognize the need for new legal designations or other tools that would overhaul BC's current inadequate hodgepodge of (often ineffective) measures under various resource statutes. This will be required to effectively ensure that biodiversity and ecosystem health are prioritized in the 'matrix' beyond the backstop of 30% protection from industrial resource extraction. In particular, the 'free ride' that mineral exploration and mining have long gotten from complying with land use objectives must end.

#### Recommendations:

- iii. A new law for biodiversity and ecosystem health is essential to give legal "teeth" to the Framework.

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<sup>5</sup> As this represents a high-risk threshold, and thus a minimum protection standard.

- iv. The new BEH law should legally prioritize biodiversity and ecosystem health in government decision-making across all resource sectors, including a “biodiversity shield” provision that prohibits provincial decisions that jeopardize biodiversity or ecosystem health. A citizen suit or appeal mechanism (e.g., to the Environmental Appeal Board) in the new law should provide for accountability to this standard.
- v. A new BEH law should require **proactive measures** to protect, and where necessary restore, biodiversity and ecosystem health to meet measurable, low-risk, Indigenous and western science-based objectives/targets<sup>6</sup> through ecosystem-based planning, effective land/water designations and compliance with default minimum legal management objectives that apply across all sectors.
- vi. The Framework should recognize the need for, and commit to enacting, new legal tools (e.g., designations) that allow for prompt, unified implementation of measures and outcomes for biodiversity and ecosystem health that apply across all statutes and sectors.
- vii. The current Timber Supply Review Process should be replaced or superseded by an Ecosystem Review Process under the auspices of the BEH Office that would be responsible for ensuring the following occurs within ecologically and culturally relevant regions throughout BC:
  - a. Establish a base case based on the historic range of ecosystem conditions (based on natural disturbance and Indigenous cultural practices);
  - b. Evaluate risk to ecosystem values arising from current conditions (as compared to the base case), and status quo plans and practices;
  - c. Spatially model scenarios that would maintain or restore to low risk;
  - d. Periodically reevaluate levels of risk, effectiveness of conservation measures etc. based on the outcomes from monitoring (e.g., every five years, or in response to significant change in circumstances, request of First Nation etc.), and require adaptation and management action to respond.

\*Outputs from the Ecosystem Review Process would inform the establishment of an interconnected, representative network of protection and conservation areas at multiple spatial scales, and flowing from that, areas available for logging or other development.

\*Based on the low-risk scenarios from c / outputs of planning, a sustainable harvest level and rate of cut may then be determined in a precautionary manner (e.g., taking into account realistic vulnerabilities to losses from wildfire, pests).

\*Target dates should be set and clear pathways established for redetermination of the annual allowable cut to align with new prioritization of biodiversity and ecosystem health objective.

**c. Need to align with Indigenous law and First Nations conservation priorities**

The draft Framework does not tangibly indicate whether and how BC intends to align its laws, policies and practices with First Nations’ inherent title and rights or First Nations’ conservation priorities.

We have had the benefit of reviewing in draft form the submissions and proposed Framework wording changes from the Lower Similkameen Indian Band, which West Coast adopts in full. Specific LSIB proposed wording changes are included in an Appendix to our submissions for ease of reference.

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<sup>6</sup> Defined relative to natural disturbance and expected pre-colonial patterns and abundance and applied representatively by ecosystem type (BEC site series or site series surrogate); low risk = 70% of the historic range of variability.

## Recommendations:

- viii. Aligning BC laws, policies and practices with the conservation priorities of First Nations titleholders, including First Nations' governance of IPCAs declared by them, needs to be front and centre in the Framework and a new BEH law.
- ix. The Framework and BEH law should uphold and give effect to inherent First Nations' inherent title, rights, jurisdiction, laws, knowledge, and worldviews in all aspects of biodiversity conservation and management.
  - a. This includes a truly co-administered and co-developed process for development of the new BEH law (or Thriving Ecosystem Relationships Act – see Appendix) with First Nations leadership and knowledge holders.
  - b. For other analysis and proposals, please see BEH submission of the Lower Similkameen.

### **3. Implementation and Immediate Measures - Recommendations**

BC's current legal frameworks associated with resource development have been 'hard wired' for failure when it comes to ecological and community resilience.<sup>7</sup> There is a legacy of thousands of tenures, approvals and permits granted without regard to ecosystem limits (and without First Nations' consent) that have already placed many ecosystems at high risk, and resulted in/contributed to the alarming impacts noted in the Framework, such as floods, wildfires and species loss.

We desperately need to move forward with the paradigm shift set out in the Framework, namely:

“[A] transformational shift from a land management system that prioritizes resource extraction (subject to constraints) to a future that is proactive, prioritizes the conservation and management of ecosystem health and biodiversity, and is implemented jointly with title and rights holders.”

Within the next 18 months -2 years we hope and expect that the paradigm shift expressed in the Framework will be fully embodied in a new BEH law (Thriving Ecosystem Relationships Act). West Coast is prepared to contribute as necessary to help achieve this goal.

However, because it will take some time to co-develop new BEH legislation, thoughtful attention must be given *now* to “how to begin as we plan to go on”. Ongoing tenuring, approvals and tactical planning (e.g., forest landscape planning), in the absence of legal direction to prioritize biodiversity and ecosystem health, risks further locking in the status quo for years to come.

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<sup>7</sup> See e.g., J. Clogg & D. Carlson, *Land Use Planning for Nature, Climate and Communities: Taking Stock and Moving Forward*, online: <https://www.wcel.org/publication/land-use-planning-nature-climate-and-communities-taking-stock-and-moving-forward>

Statutory decision-makers require legal, not merely policy, backing now if they are expected to begin giving effect to the BEH priority in decision-making. Further, it is unrealistic to expect licensees (or their shareholders) to accede to this ‘paradigm shift’ unless it is a legal requirement.

Starting “as we mean to go on”, will also require setting in place the consultation and cooperation approaches for implementation of the Framework, and in particular, co-developing of a new BEH law.

Recommendations for immediate actions:

- x. Legal direction should be given, when the Framework is announced or shortly thereafter, to require the immediate prioritization of biodiversity and ecosystem health in provincial decision-making across all sectors.<sup>8</sup>
  - a. *Environment and Land Use Act*, s. 7 provides a flexible mechanism for legal orders that apply across resource sectors and is an obvious choice for this.
  - b. Additionally, pursuant to *Forest Act*, s. 1.1 legal direction could also be given by the Minister of Forests to the Chief Forester and other delegated decision-makers to apply the overarching biodiversity and ecosystem health priority in decision-making. By virtue of the Chief Forester’s new legislative responsibility for Forest Landscape Plans, once in force, this direction should be applicable to ongoing and new FLPs.
  - c. Removing existing policy and legal constraints on biodiversity protection (see note 11).
- xi. Development and announcement of a mutually agreed-to Consultation and Cooperation Plan for timely, sufficiently resourced co-development of a new biodiversity and ecosystem health law in full alignment with the UN Declaration on the Rights of Indigenous Peoples.
- xii. To maintain momentum, consideration should be given to establishing an interim leadership team/task group of Indigenous and western scientific, legal and policy experts; members should be respected in their fields/communities *and* fully committed to the ‘paradigm shift’. This team could play a key role in overseeing/moving forward cooperative work on topics such as:
  - Fleshing out the structure, authority and accountability of the new BEH Office and advising on the set up and hiring for the Office, drawing on lessons learned about/best practices re: effective whole-of-government initiatives.<sup>9</sup>

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<sup>8</sup> E.g., That prioritizing biodiversity and ecosystem health means:

- managing to low risk to biodiversity and ecological integrity (where risk is understood relative to pre-colonial processes and patterns of abundance), and using best available western and Indigenous science to do so;
- requiring a precautionary approach to industrial use and development if best available information is insufficient to support informed decision making about risks to biodiversity and ecosystem health; and,
- that no provincial decision-makers may issue a tenure, approval or permit that is inconsistent with the BEH priority, taking into account cumulative impacts on biodiversity and ecosystem health values.

<sup>9</sup> For example, as initially housed within the Premier’s office, the Climate Action Secretariat and related bodies are widely perceived to have been more effective at achieving the goals of a whole-of-government approach than when housed in the Ministry of Environment and Climate Change Strategy.

- Supporting title-holders in envisioning and shaping distinct First Nations BEH institutions, the relationship between them, the BEH Office, and decision-makers, and how these should be reflected in a new BEH law.
  - Identifying default/interim low risk management targets by ecosystem<sup>10</sup> based on best available Western and Indigenous science.<sup>11</sup>
- xiii. Immediate opportunities to support on-the-ground First Nations conservation leadership, particularly through implementation of declared IPCAs, should be pursued as a priority as a foundation for beginning/piloting the paradigm shift.
- xiv. Ensure clarity, sufficiency and accessibility of funding streams to support all noted recommendations. Include sufficient funding for BEH co-development process and immediate actions in upcoming budget estimates.

Thank you for your work on this draft Framework to date, and for the chance to engage with this process.

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<sup>10</sup> This should be done by site series, or a surrogate for site series; the failure to do so in the past (combined with direction to prioritize areas outside of the timber harvesting landbase), has resulted in the underrepresentation of highest productivity ecosystems in reserves.

<sup>11</sup> Done through an update to the Biodiversity Guidebook or otherwise, to embody the paradigm shift/BEH priority, new interim, default targets must close existing loopholes (e.g., double-counting, allowing young forest to meet old targets, 1/3 drawdown) that have undermined effectiveness in the past, and be updated to reflect best available information (including up-to-date data on stand disturbance intervals).

## **Appendix - Summary of proposed Framework wording changes**

PROPOSED NAME for the new biodiversity and ecosystem health law:

**Thriving Ecosystem Relationships Act** (TERA)

ADD to the definitions of key terms in the Framework:

**“Indigenous Protected and Conserved Areas** are lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems.” (Indigenous Circle of Experts)

**“Ecosystem Health”** describes environmental conditions in relation to natural/historical benchmarks for biodiversity and ecosystem composition, structures, functions, and processes, i.e., those resulting from natural disturbance and First Nations cultural practices. Ecosystems are healthy when ecological integrity and biocultural continuity are maintained, and where necessary restored.

**ADD an additional foundational “pillar” to the Framework, as follows:**

*“Grounded in Indigenous relational perspectives, including Indigenous legal orders, contemporary and traditional governance and management systems, and Indigenous conservation priorities.”*

*Related actions to include:*

-Work with Nations who have declared IPCAs to remove legal barriers and to align provincial laws and decision-making processes with First Nations’ governance of their IPCAs, including through the new BEH law/TERA .

**ADD the following to the list of paradigm ‘shifts’ in the Framework:**

*From ‘asserted Crown authority’ to ‘First Nations’ self-determination / legal pluralism’*

*From ‘top-down / human centric’ to ‘decentralized / ecosystem-based’*

*From ‘resource extraction’ to ‘thriving ecosystem relationships’*

**ADD the following to the proposed ‘Conditions of Success’:**

*“Recognition of inherent title and jurisdiction, i.e., First Nations’ decision-making authority and self-determination.”*

**ADD the following to the proposed Outcomes in the Framework:**

*“Self-determination of First Nations titleholders”.*



**ADD the following additional “principles” to the Framework:**

**Self-determination and inherent title:** Uphold First Nations’ right to self-determination, including the inherent right of self-government.

**Ecosystem-based management:** Maintain and restore ecological integrity and biocultural continuity as a foundation for healthy communities and economies (*appears elsewhere in Framework but not as a principle*).

**Indigenous law:** Honour and uphold distinct Indigenous legal orders. Maintaining and restoring Indigenous cultural integrity (Indigenous laws, languages, governance, cultural practices) is essential to maintaining and restoring thriving ecosystem relationships.

**Precautionary principle:** Humans will never fully understand the complexity of the natural world, and when faced with uncertainty or imperfect information, we will take action to avoid harm to biodiversity and ecosystems.