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Forest Policy Review Brief

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Introduction

West Coast Environmental Law (WCEL) welcomes the opportunity to make submissions to the Forest Policy Review process.

WCEL is a non-profit BC society. Since 1974, WCEL has provided free environmental legal services: legal aid – including legal representation and funding – legal research, public legal education, progressive law reform, and the maintenance of a public library of environmental legal materials. We are dedicated to empowering citizens to participate in all aspects of decision-making to protect our environment.

WCEL is a member of the Forest Caucus of the British Columbia Environmental Network. We fully support the principles articulated in the Forest Caucus' statement, *A Vision for Forest Policy Change*. Our submissions are intended to build on and elaborate the fundamental principles set out in the Forest Caucus statement.

We have broken down our submissions according to four key aspects of forest law and policy in British Columbia: 1) ownership/title, 2) tenure rights, 3) forest management, 4) wood processing industries. Forest policy relating to these areas is inextricably interrelated, and may best be seen as layers of law, policy and regulation that are overlaid over one another as shown in the diagram below.

* Wood Processing Industries *

* Forest Management *

* Tenure Rights *

* Ownership / Title *

For each of these areas, our analysis and recommendations for reform have been organized according to three subheadings:

a. **the current system;**

b. **recommended direction for forest policy change; and**
c. **the legal nuts and bolts of change: getting from here to there.**

1) Ownership / Title

1a) The Current Situation

More than 95 percent of British Columbia is Crown land, 83 percent of which has been classified as forest land and designated as part of the "provincial forest" by the Chief Forester. Forest land is land the Chief Forester considers "will provide the greatest contribution to the social and economic welfare of British Columbians if predominantly maintained in successive crops of trees or forage, or both, or maintained as wilderness." Through the designation of provincial forest, the Ministry of Forests came to be the government body with primary jurisdiction over most of the province's land base.

In anglo-Canadian law, property ownership by the Crown or private parties, is considered conceptually to be a "bundle of rights." In relation to land ownership this bundle includes; the right to exclusive possession and control over all attributes of the land, the right to use the land, the right to manage the land, the right to hold the land for an indefinite period of time, the right to transfer or sell the land without limitation, and to economic returns generated by the land. Because of the high percentage of Crown or public ownership in BC, these rights ultimately rest with the people of British Columbia.

At the present time, however, the Crown has chosen to allocate some of its rights, in particular the right to harvest timber and to make management decisions about what happens on forest land, to private parties - primarily large integrated forest products companies, through a system of licences or tenures, without giving up title to the land.

However, Crown title to the land is not absolute. In a recent BC Court of Appeal decision, the court affirmed the long standing principle that aboriginal title is an "encumbrance" or burden on Crown title (a common example of an "encumbrance" on land is a mortgage). The court went on to say that "it has long been recognized that aboriginal title to land can include an interest in the standing timber." This case calls into question the authority of the provincial government to grant tree farm licences on land that is "encumbered" by aboriginal title.

Furthermore, in the 1997 *Delgamuukw* decision, the Supreme Court of Canada affirmed that aboriginal title was never extinguished by the provincial government in BC, and that aboriginal title may continue to exist over much of the province. Aboriginal title "encompasses the right to exclusive use and occupation of the land for a variety of purposes." These purposes do not have to be traditional aboriginal practices or traditions. Where aboriginal title exists, the Supreme Court of Canada has stated that it is a "right to the land itself"; including the trees on the land.

1b) Recommended Direction For Forest Policy Change

- There must be no privatization of public forest land in British Columbia, except to the extent that fee simple lands form part of treaty settlements with First Nations.
- The provincial government should reallocate some decision-making authority over forest management, away from corporate tenure holders and the Ministry of Forests, and place it in the hands of accountable community-based decision-makers, such as community resource boards.

- The provincial government should acknowledge the existence of aboriginal title over forest lands in British Columbia and work towards developing "co-jurisdictional" approaches to regulating forest management that recognize First Nations jurisdiction over land and forests.

1c) The nuts and bolts of change: getting from here to there.

Retaining public forest ownership: No change is required to maintain the present level of public forest land in the province, and we strongly recommend that this situation be maintained. We note that when the provincial government recently sought public opinion regarding privatization of up to 30,000 ha of Crown forest land pursuant to the MacMillan Bloedel Settlement Agreement, of the 1,100 written submissions received, more than 98 percent of them were opposed to privatization. There is no public mandate for forest privatization in BC.

Community-based decision-making: Viewing land ownership or title as a bundle of rights highlights that different aspects of this bundle can be allocated in different ways, to different actors. At the present time, both rights to harvest timber, and to make on the ground management decisions rest largely with licence holders, while approval of forest land use plans rests with the provincial government, and in particular the Ministry of Forests.

We recommend that the provincial government should explore options for transferring some of the management decision-making and approval aspects of their bundle of rights to community-based decision-makers. **In particular, a community resource board that reflects the broad spectrum of viewpoints in the community, could become responsible for developing local strategic level plans, allocating rights to harvest timber or other products from forest lands, determining cut levels and approving operational plans.**

In order to recognize the special status of First Nations rights and title, and First Nations as a level of government, measures should be put in place that ensure that forest allocation and use by the community resource board do not proceed without the consent of First Nations. While this requirement is not currently a legal obligation in BC, it is one of the principles forest managers seeking Forest Stewardship Council certification must demonstrate, and represents an honourable way to recognize the reality of aboriginal title.

In 1997 the Eco-Research Chair of Environmental Law and Policy at the University of Victoria released a report which recommended the establishment of a new legal framework to shift "decision-making power and financial autonomy to a local management body, while establishing mechanisms to ensure compliance with overarching, provincially-established ecosystem-based standards, and providing the supportive context to facilitate the transition." The report carefully distinguished between the concept of shifting decision-making authority about how and where forest use should occur, and the question of who actually holds licences to harvest the timber.

As the University of Victoria authors note, legislative changes are required to devolve decision-making authority to local community management authorities. Although community resource boards exist in some areas of the province "existing community-based management structures have little substantive power and must operate within the management constraints of the legislative and policy framework, including an imposed AAC and pre-determined tenure arrangements." We submit that the recommendations of these authors should be closely considered by the Forest Policy Review process.

Co-jurisdictional approaches to forest management. The present Ministry of Forests *Aboriginal Rights and Title* policy (released in June 1999) directs statutory decision-makers that they must not

implicitly or explicitly confirm the existence of aboriginal rights and title. Furthermore, the policy is focused primarily on how the Ministry of Forests can justify infringements on aboriginal rights and title by consultation, rather than on how to avoid them. We recommend instead, that the relationship between the Ministry of Forests and aboriginal people be based on the *recognition* of aboriginal title.

Many First Nations, both inside and outside the treaty process have rejected the land selection model and are negotiating their title issues on the basis that they will maintain some level of jurisdiction throughout their traditional territories. In anticipation of negotiated agreements, or court recognition of aboriginal title over large areas of BC, we strongly recommend that the Ministry of Forest begin to develop models for sharing decision-making authority over forest use with First Nations. Co-management models such as the Clayoquot Sound Central Region Board, a consensus-based board with fifty percent Nuu-chah-nulth representatives, which reviews all forest use decisions in the Clayoquot Sound area, is an excellent model to build on. Furthermore, the government must make good on its commitment to enter into interim measures agreements with First Nations to address concerns about resource extraction while treaty negotiations are ongoing.

The likely alternative is that we will continue to see more First Nations exercising their aboriginal rights and title by logging on their traditional territories without government authorization.

2) Tenure Rights

2a) The Current Situation

The tenure system established by the 1947 *Forest Act* and refined by the 1978 *Forest Act* was designed to favour large companies. To this end, tree farm licensees were expected to incorporate large tracts of private land into their licences, and the major licences, including the forest licences introduced in 1978, required tenure holders to operate processing facilities.

The huge capital investments needed to construct and maintain appurtenant mills were thought to justify providing corporations with a continuous supply of non-competitive wood. In the view of Royal Commissioner Gordon Sloan, whose recommendations shaped the 1947 *Act*: "In award of management licences, first priority must be given therefore, in my opinion, to the pulp and paper industries and other large conversion units, especially the great integrated organizations ...

In a submission in the 1950s to the Royal Commission on Forestry, the Truck Loggers Association predicted the impact of a tenure system set up to meet these priorities: "What then becomes of the independent loggers, the truck operators, the truck operators, small mill owners, remanufacturing plans and independent retailers now in business?" they asked, replying: "Unable to purchase timber, most of these must go out of business."

When the Weyerhaeuser acquisition of MacMillan Bloedel and the Canfor acquisition of Northwood are completed, just two companies will hold 22 percent of the provincial AAC and almost 27 percent of the cut allocated to major licensees in BC. Fifteen companies will control almost 70 percent of the provincial AAC and more than 80 percent of the cut allocated to major licensees.

Furthermore, over 80 percent of the timber harvested on Crown lands in BC is allocated through only two forms of licences, area-based tree farm licences and volume-based forest licences.

The legal tools exist to create more diversified tenure arrangements, for example, by increasing the number of community forest and woodlot licences. The obstacle, simply put, is that the forested land base is already fully allocated to existing corporate tenure holders.

2b) Recommended Direction For Forest Policy Change

- The amount of forest land held in corporate tenures must be reduced and redistributed in order to create new opportunities for communities, First Nations and local, small tenure holders.
- The amount of AAC held by major licensees with manufacturing facilities should be reduced by at least 50 percent and the wood freed up used to create a greater diversity of tenures (similar to the 1991 Forest Resources Commission recommendations).*
- A much wider range of tenure types should be encouraged, including those for non-timber resources, distributed among a diverse group of tenure holders.
- Priority for new tenures should be given to those communities and First Nations that have developed innovative, ecosystem-based plans for management of local natural resources.

*note: this recommendation must be read in conjunction with the recommendation below that the allowable annual cut in BC must be significantly reduced.

2c) The nuts and bolts of change: getting from here to there

The legal tools exist for a wide range of creative changes to tenure arrangements. In making use of these legal tools, however, one must first be clear on the objectives one is trying to achieve. At the end of the day, tenure arrangements are nothing more than a tool to achieve particular policy outcomes.

It is the submission of WCEL that diversifying the number and type of tenure holders can be seen as a tool to achieve the positive outcome of resilient and stable communities. Diversity is a key factor in providing resiliency to our social and ecological systems. Likewise, in advocating an increase in the number of community forests, we see the community forest tenure as one tool to achieve greater community self-determination, or community control over important decisions that affect its members lives. In turn, we support area-based tenures because, in our submission, they have greater potential to support a long-term perspective and a sense of connection to the land.

It is a challenging question to determine what our common vision is for how we allocate and use our forest. One thing, however, is clear. There is currently relatively homogeneous control over the forest land base by large integrated companies. Thus, virtually all tenure reform suggestions will mean, to one degree or another, reducing the control of some actors in the forest economy, and redistributing rights to manage forest land to other actors.

To be even more specific, at this point approximately 80 percent of the cut in BC is allocated through tree farm licences and forest licences, and freeing up land for new entrants is likely to mean some reduction in the land and volume controlled by these major licensees. Below we have analyzed existing legal tools that are available to carry out reforms, and proposed incremental changes to them to facilitate tenure redistribution.

Tools for tenure redistribution within the current statutory framework and amendments required for them to more effectively permit tenure redistribution to occur

a) **Terms and conditions of replacement licences.** Statutory reference: ***Forest Act***, section 15 (forest licences) and section 36 (tree farm licences).

Neither tree farm licences (TFL) or forest licences (FL) are renewable. Instead, they are issued for a specific term, which for forest licences is typically fifteen years, and for tree farm licences twenty-five years. Replacement licences are offered every five years. Unless the TFL or the FL states that it must not be replaced, the regional manager **must** offer a replacement licence, generally for the same volume or area and the same term as the existing licence. Such licences are referred to as "evergreen" because the Province is obliged to offer to replace most of them every five years, indefinitely.

According to the Ministry of Forests background paper that was prepared for the Forest Policy Review, no one has ever rejected a TFL replacement offer, and of the 700 odd forest licence replacement offers in the last 20 years, only one was ever rejected.

However, the *Forest Act* also provides a manner in which this process could be interrupted. Replacement licences may include other terms and conditions provided they are consistent with the *Forest Act, Forest Practices Code* and regulations (see *Forest Act* sections 15(3)(e) and 36(3)(d). The wording of sections 15 and 36 clearly contemplates that one of these terms could be that the next licence is not replaceable.

It should be noted that as the legislation is currently structured, this would not be a fast option for tenure redistribution. For example, for the nine TFLS that come up for replacement in the next two years, these licensees would have the option of not accepting the replacement in which case their licenses would expire some time between 2016 and 2022, or if they accepted a new 25 year licence, on the expiry of that licence a quarter of a century from now. In other words, the land held under the tenure wouldn't be available for redistribution for many years. The reality is that these existing licences are very secure – at least for one human generation.

However, there are a number of creative ways that government could use its capacity to insert terms and conditions, in the short term, which could create opportunities for new entrants. For example, although not an ideal situation in the long term, as a stop gap measure, licensees could be required to resell a certain amount of the volume covered by their tenure through a mechanism similar to the small business program, or to allow small area-based management areas within their tenure to be "sub-letted" to other actors, which would then become regular woodlot licences or community forest licences upon the expiry of the main licensee's tenure. Such options would only be acceptable as interim measures if these tenures within tenures were not driven by unsustainable cut levels allocated to the main tenure holder, but were rather based on ecologically responsible timber harvesting levels derived from an ecosystem-based plan.

In addition, precedents exist for using amendments to the *Forest Act* more aggressively to change how often licences come up for replacement (thus increasing opportunities to insert new terms and conditions), or to change the term of licences entirely. For example, the shift from replacing major licences every ten years to every five years is a relatively recent one. Furthermore, a key example exists in the 1978 *Forest Act* for how the process of significantly shortening the term of licences, without compensation, could legally occur (thus creating opportunities for tenure redistribution sooner and at less cost to the taxpayer).

In the early days of the tree farm licence system, several "perpetual" tree farm licences were issued. In other words, they were for an indefinite period of time, and thus were more similar to a private property interest than today's licences. Following on the Pearse Royal Commission report in 1976, the decision was made to covert these perpetual licences to tree farm licences with 25 year terms; in part because Pearse concluded that "the present incentives for silviculture appear to be equally effective for 21 year licences as for those with perpetual terms." This latter point is an interesting counter to arguments made today that increasing tenure security will lead to greater silvicultural investments!

Two legislative changes occurred to permit the perpetual TFLs to expire without creating compensation obligations. First, a section in the new 1978 *Forest Act* set a specific date upon which all tree farm

licences, including perpetual ones, would expire. The section provided for replacing these TFLs with new licences with different terms (see *Forest Act*, RSBC 1979, c. 140, s. 33). Second, a section of the 1978 *Forest Act* stated that "no compensation is payable by the Crown ... in respect of an expiry, failure to extend, reduction, deletion or deeming under section ... 33."

Recommendation: In order to carry out tenure redistribution in a time frame that will benefit this generation, government should use a mechanism similar to the legislative procedure it used to eliminate perpetual TFLs in 1978, in order to reduce the rights held by major licensees, in the interest of freeing up forest land for tenure redistribution, park creation, and the honourable settlement of First Nations title issues.

b) Five percent take back on tenure transfer, change in control or amalgamation, and conditions on consent. Statutory reference: ***Forest Act,*** sections 54-56.

As the recent Weyerhaeuser-MacMillan Bloedel and Canfor-Northwood take-overs indicate, we can expect increasing consolidation amongst the forest sector in the coming years. Written consent of the Minister of Forests is required where a tenure is sold, or control over a company who holds tenures changes, or private land in a TFL (or woodlot) is disposed of. Three tools for tenure change exist within the current *Forest Act* provisions on tenure transfers:

- Conditions can be imposed on the consent. Where the corporate change in question is a share purchase or amalgamation, there is nothing on the face of the *Forest Act* that would prevent the Minister from consenting to the change in control only on the condition that the company's tenures will revert to the Crown to be redistributed to other actors according to the applicable sections of the *Act*.
- If a tenure holder fails to obtain consent, the Minister may cancel the tenure.
- If consent is given, the allowable annual cut in respect of the tenure in question is reduced by 5 percent.

Recommendation: WCEL strongly recommends that, at a minimum, existing policy statements about Ministerial consent should be amended to provide that the Minister should take maximum advantage of opportunities for tenure redistribution created by take-overs and other tenure transfers. Furthermore, section 56.1 of the *Forest Act*, which permits the Minister of Forests to give back the 5 percent takeback on approval of a job creation plan, must be amended to provide that only job creation plans involving value-intensive processing, or experimenting with more labour intensive ecoforestry practices should qualify – plans to prop up existing volume driven jobs should not.

In addition, section 56(10) of the *Forest Act*, which already provides that no compensation is payable when the takeback on tenure transfer occurs, should be amended to provide that no compensation is payable in relation to terms and conditions imposed at the time of transfer either.

Finally, and perhaps more importantly, the takeback on change in control or tenure transfer should be significantly increased. We would recommend a minimum of 20 percent.

c) The 5 percent "no compensation" threshold for deletions from tenures, or reduction in AAC. Statutory reference: ***Forest Act*, section 60**

Section 60 provides that once every fifteen years for forest licences, and once every twenty-five years for tree farm licences, the minister may delete land from a tree farm licence, or reduce the allowable annual cut for a forest licence by up to 5 percent, without compensating the licensee.

From the perspective of tools for tenure redistribution, there is an important point to be made about section 60, namely that the section 60 compensation provisions apply only *if the land is to be used for non-timber related purposes.*

On the face of it, section 60 is silent on whether compensation would be payable for deletions for timber related purposes such as tenure redistribution. Furthermore, in the absence of section 60 of the *Forest Act*, it is not certain that licensees have a right to compensation when their rights are reduced. As the Supreme Court of Canada has stated, where rights are affected by government pursuant to a statutory framework such as the *Forest Act*, "the right to compensation must be found in the statute."

Furthermore, even where rights held pursuant to a tenure are reduced for non-timber related purposes such as park creation or settling First Nations treaties, section 60 is only brought into play where deletions to the tenure have taken place under that section, not where they have occurred through other mechanisms. For example, the Chief Forester may reduce the AAC through the timber supply review pursuant to section 8 of the *Forest Act* without obligating the government to pay compensation to licensees (see *Forest Act*, section 80).

These factors have not stopped companies from making large claims when parks are created or treaties are settled. This spring, the provincial government settled out of court with MacMillan Bloedel (MB) for close to 84 million dollars as a result of MB's claim for compensation arising from park creation on Vancouver Island. Several claims are already in motion in relation to the Nisga'a treaty.

Following upon the public consultation process related to the MacMillan Bloedel Settlement Agreement, David Perry, the chair of that process, recommended that:

… in order to clarify the Province's position on compensation for loss of resource rights, it is recommended that a clear and transparent policy be developed in order to determine the amount of compensation payable in any particular resource tenure changes. This would be of benefit both to resource holders and to members of the public in evaluating changes in tenure arising form park creation or from settlement of Treaties with First Nations.

However, Mr. Perry also noted that only a minority of speakers in this consultation process thought that MacMillan Bloedel *deserved any compensation at all*, either in cash or land. As Mr. Perry states:

Many speakers at the public hearings cited what, in their, view was a scandalous environmental history of logging, which includes destruction of fish habitat, cutting of old growth forests, and destruction of ungulate and other species' habitat. Because of past environmental harm, speakers claimed that MB "owed" the Province compensation to rehabilitate damaged ecosystems. Speakers also argued that because MB has reduced its workforce, it should be responsible for the losses to communities through mill closings and accordingly no compensation for lost cutting rights should be payable.

Recommendation: Fair compensation legislation is needed in BC. The current situation where licensees are able to use the threat of multi-million dollar settlements to chill necessary reforms regarding the allocation of public land is untenable. Furthermore, setting out transparent principles about where, when and how compensation is payable when rights are affected, may ultimately be the only way to provide security both to industry and to communities. We recommend that such legislation be shaped by the following basic principles:

- A much wider array of tenure redistribution tools should be included in the list of impacts on tenure rights which are not compensable at all.
- Where compensation is payable, it should only reflect losses related to vested rights, not proposals to log that still require further approvals (for example, once a cutting permit has been issued, the right to cut can be said to be vested, however, any rights to cut in other areas of the tenure or to cut further volume in the future would require extensive further approvals, and are therefore not vested).
- As per the recommendation of the 1992 *Schwindt Commission of Inquiry Into Compensation for the Taking of Resource Interests*, where compensation is payable, it should only reflect loss of direct investments, not lost profits.

- Where compensation is payable for direct investments, it should reflect the depreciated value of the investment.
- The cost of losses to the environment and workers due to past company practices should be offset against any compensation payable.

d) Proportional reductions in AAC for all licensees in a TSA without compensation. Statutory reference: ***Forest Act*, section 63**

Incremental change to this provision would be required so that it could be used as a tool for tenure redistribution.

Under section 63, the minister can reduce the AAC's of all licensees in a timber supply area (TSA) more or less proportionately, according to a set procedure. Provision is made so that cut levels for each licensee don't drop below a prescribed base level.

However, presently this can only occur if the AAC for a TSA is *reduced for any reason other than a reduction in the area of land in the timber supply area*. In other words, as presently worded, section 63 provides no scope to delete land from a TSA to provide new entrants with area-based tenures, followed by a proportionate reduction to the AAC for other operators. At presently worded it is also unlikely it could be used to free up volume within a TSA for new entrants, because it only applies where the AAC has been reduced; except in an unlikely hypothetical situation where new licences were issued despite full allocation of the cut in the TSA, then the AAC reduced and then everyone's cut levels proportionately reduced.

Recommendation: Section 63 should be amended so that it can be used as a tool to treat licensees in a TSA fairly when tenure redistribution occurs. More specifically, it should be made to apply in cases where the area of land in a timber supply area is reduced in order to redistribute the land to new tenure holders, to create parks or to honourable settle First Nations title issues.

e) Cut reductions for failure to meet cut control, log the profile, meet utilization standards, establish a free growing stand, or operate a mill. Statutory references: ***Forest Act*, sections 66, 69, 70, 71.**

There are certain situations where a licensee's failure to live up to its obligations can result in a reduction in AAC. In the case of mill closures, the *Forest Act*, section 71, specifically provides that timber made available by volume reduction is available for disposition to other people. However, section 71 of the *Forest Act* has never been used. In the case where a licensee fails to meet minimum cut control volumes, there is also a provision for actually deleting land from a TFL to reflect the unused volume.

As a tool for tenure redistribution, we stress that the *Forest Act* clearly contemplates that the where a mill shuts down or reduces its production, that the AAC of the licensee may be reduced by an amount equivalent to the reduction in volume that would have been processed through the facility, and that the Crown timber freed up is available for disposition to other people.

Recommendation: Government should make full use of existing legal mechanisms to redistribute tenure and volume when licensees fail to live up to their obligations. However this recommendation must be read in light of the recommendation below that the allowable annual cut must also be reduced significantly.

f) The provincial government has the legal authority to reallocate rights to manage public lands beyond what is currently set out in the *Forest Act*

As Madam Justice Southin, now of the BC Court of Appeal, once stated in a case involving a challenge to reduction in AAC of Rustad Bros:

... the Queen like any other landowner is under no obligation to sell or lease her land and if she chooses to offer it for sale or lease, may make such stipulations as she pleases.

... a statute relating to Crown land is nothing more or less than a consent by the Crown to a limitation on its inherent right.

Statutes may be changed according to the regular democratic process, provided the government has the constitutional authority to address the matter. Subject to aboriginal title considerations, there is no question that the province of BC has the constitutional authority to determine how our public forest lands are allocated. Furthermore, provided it does so specifically through legislation, the Province has the legal authority to reallocate forest resources without compensation or to provide direction as to the extent of compensation when resource rights are affected. This is the case even for private forested land.

Recommendation: The provincial government should use and augment existing legal tools to reduce the tenure rights held by existing major licensees, and to reallocate the land through long-term area-based tenures to communities, First Nations and local, small tenure holders. Government should establish a fair legislative framework for compensation that allows this to occur at the lowest possible cost to the taxpayer.

3) Forest Management

3a) The Current Situation

As the forestry law framework in BC is currently structured, forest management decisions are driven by the allowable annual cut established by the Chief Forester for each timber supply area or major area-based tenure. Once the allowable annual cut is set for a licence, the cut control provisions of the *Forest Act* require most licensees to cut within plus or minus 50 percent of this amount yearly, and within plus or minus 10 percent of this amount over a five year period (see section 64).

This legal requirement must be seen in light of the significant overcut in British Columbia. Even using the Ministry of Forests own measure of the "long run harvest level" (LRHL) there is a 22 percent overcut in the timber supply areas of the province, and the cut allocated to tree farm licences is 1,509,543 cubic metres above the LRHL. However, the way both the allowable annual cut and the LRHL are determined is in fact part of the problem.

The concepts of "allowable annual cut," and what was previously referred to as the "long run sustained yield" (LRSY) were central to the development of forest policies, including the present tenure system, which were aimed at the implementation of sustained yield management in British Columbia. "The goal of sustained yield harvest regulation was to convert the old slow-growing forest to a thrifty fast-growing normal forest as quickly as possible." In other words, the imperative of sustained yield management has always been, first and foremost, to liquidate the old growth forests of the province. The LRHL is a modified version of the LRSY, and is supposed to represent a harvest level that can be maintained indefinitely given a particular forest management regime and estimates of timber growth. "The LRHL is a predictive measure of what level of cut might be *economically* sustainable, based on estimates of the availability of mature, commercially useful second-growth timber that should replace natural forests." It is

not based on the concept of ecological sustainability; if it were, it would be apparent that the overcut is much higher again than the 22 percent figure cited above.

Although the allowable annual cut is supposed to reflect constraints that reduce the amount of timber that may be harvested, since the *Forest Practices Code* came into effect there has been considerable delay in implementing those portions of the *Code* that would provide protection for biodiversity and species at risk. Furthermore, despite the fact that hundreds of British Columbians have spent years of their lives negotiating at CORE and LRMP processes, few of these plans have been legally implemented as higher level plans. The policy of the Chief Forester is not to take into account the impact of land use plans on the allowable annual cut, until they are actually made legally binding through the establishment of higher level plan resource management zone objectives.

The *Forest Practices Code* represented a welcome codification of some protections for non-timber values. However, our forest management system remains one of "constrained timber extraction." By virtue of the legal imperatives of the allowable annual cut and cut control, extracting a certain volume of timber off the land remains the primary focus of forest management decisions. Management for all other values on the landscape are viewed as red-tape and unwarranted interference with the "right" of companies to extract timber in the fastest and most economical way possible. This is not forest management, but timber management for the benefit of a few corporations and government revenue, rather than the long-term health of ecological and human communities.

In addition, forest practices regulations have shifted constantly since the *Code* came into effect. There has been a progressive watering down of the minimal considerations for non-timber values that were initially required in the operational planning process. These changes have made it more difficult for the public to get information about the potential impacts of logging on watersheds, riparian areas and archaeological and cultural heritage resources at the forest development plan stage. Furthermore, cutbacks to Ministry staff have reduced the capacity of the Ministry of Forests and the Ministry of Environment, Lands and Parks to review and evaluate operational plans. Now the new part 10.1 of the *Forest Practices Code* (regarding pilot projects) will give Cabinet the power to enact regulations exempting licensees from the *Code*, the *Forest Act* and their regulations, raising concerns about future reductions in public and government oversight of forest practices.

3b) Recommended Direction For Forest Policy Change

- **The amount cut from forest land in BC must be reduced significantly.**
- Decisions about how much should be cut, where, and how, should flow from what the ecosystem can sustain in the long run.
- We must move from volume-driven, timber-based management to ecosystem-based management (e.g. Clayoquot Sound Scientific Panel recommendations).
- Forest planning must prioritize maintaining forest ecosystem composition, structure, function, integrity, and resilience and maintaining options for future generations. Where there is uncertainty or imperfect information, the precautionary principle must take precedence.
- We must abandon short-rotation industrial forestry predicated on old growth liquidation and replace it with ecoforestry practises based on natural forest cycles.
- Changes to forest policy should facilitate eco-certification of forest products.
- Decision-making about B.C.'s public forests must not be turned over to corporations. We must ensure a strong role for the public and government in oversight of forest practices, plan approval, auditing and enforcement, and reject initiatives that undermine public control over public forests. We must reject "results-based" approaches that reduce public oversight and environmental protection.
- At a minimum, government must implement the biodiversity measures of the *Forest Practices Code* as originally set out in the *Biodiversity Guidebook*, and the protected areas and biodiversity

provisions of all approved strategic land use plans. Government must provide opportunities for public participation in full scale landscape unit planning using an ecosystem-based approach.

3c) The nuts and bolts of change: getting from here to there

As many aspects of forest management are driven by unsustainably high allowable annual cuts, reducing the cut is a primary imperative for putting forest land management in BC on a more sustainable path. The present approach to AAC determination will not sustain forest-based communities, and the forest ecosystems they depend on, into the future.

In the short term, we strongly recommend that the criteria in the *Forest Act* for determining the cut must be reformed to incorporate and prioritize ecological criteria, and the precautionary principle, such that one would see a considerable reduction in cut levels. When the allowable annual cut is reduced through the timber supply review process pursuant to section 8 of the *Forest Act*, no compensation is payable to licensees (section 80 of the *Forest Act*). This gives the province considerable legal flexibility to adjust cut levels in this manner.

More fundamental change, is however, required.

In our submission, British Columbia must move from volume-driven, timber-based management to ecosystem-based management. The Clayoquot Sound Scientific Panel recommendations present a viable example of how ecosystem-based management could work.

The change to ecosystem-based management must be in more than name. Language describing forest management concepts is easily co-opted, and care must be taken that what it described as ecosystem-based planning is actually based on conservation biology principles.

Any forest planning process or forest management approach that is premised primarily on harvesting a certain volume of timber is not ecosystem-based.

Ecosystem-based management focuses on what to leave in the forest, rather than on what to take. It requires forest planning that prioritizes maintaining forest ecosystem composition, structure, function, integrity, and resilience, as well as maintaining options for future generations. Where there is uncertainty or imperfect information, it requires that the precautionary principle must take precedence.

Decisions about how much should be cut, where, and how, should flow from what the ecosystem can sustain in the long run. Ecosystem-based management acknowledges that conditions such as the shape of the terrain, the slope gradient, the soil depth, the soil texture, the amount of moisture available and local climatic conditions all serve to define the ecological limits to human use of forested ecosystems. It "requires that ecological limits be respected, and that human uses are designed to prevent (as opposed to mitigate) damage to ecosystem functioning."

Before planning for human uses occurs, ecosystem-based planning requires the establishment of a permanently protected landscape network to ensure connectivity and ecosystem functioning at all scales. Only once this network is established should aggressive human uses such as timber harvesting be considered. A secure land base for less aggressive uses such as cultural and spiritual uses, use by fish and wildlife, and recreation/tourism must be secured before responsible timber management takes place.

While the shift from timber-based management to ecosystem-based management will require dramatic changes in how BC's forests are managed, these changes are in fact the very ones that the international marketplace is demanding. The drafters of the Forest Stewardship Council Regional Certification

Standard for British Columbia have adopted a conservation biology, ecosystem-based approach. Under Principle 6 the draft standard states:

Approach of the Drafting Committee *....*

As a starting point it is assumed that not enough is known to manage for every species individually. Therefore the BC standards have taken a course filter precautionary approach, which assumes that biological conservation requires an appropriate complement of the following elements:

A representative, comprehensive and strategically located system of protected area and reserves;

A network of low risk management areas to provide protected area buffers, connectivity, and for the conservation and/or recover of rare and/or endangered ecosystems and species and other critical habitats;

A matrix where coarse filter forest management measures maintain seral state distributions at the landscape level and structural attributes at the stand level, thereby maintaining habitat diversity distribution and abundance, presumably broad distribution of most species, at levels within the range of historic variability (at landscape and stand levels); and

Carefully selected developed areas to meet human needs...; excessive area of development requires compensatory increases in protected areas, low risk areas and/or more conservation emphasis in the remaining matrix.

In our submission, forest policy changes should be designed to facilitate eco-certification of forest products. Until the legal and policy framework for forest practices and forest planning in BC shifts to an ecosystem-based approach, and abandons volume-based forest management that prioritizes timber extraction, it will remain an obstacle rather than a facilitator of eco-certification in BC.

Finally, on the issue of public and government oversight of forest management, we submit that reform is required.

With the advent of the *Forest Practices Code*, some opportunities for public participation in reviewing operational plans were increased (review and comment opportunities on forest development plans), others, such as the opportunity to review silvicultural prescriptions (previously pre-harvest silvicultural prescriptions) were reduced. The situation was worsened with the 1998 *Code* changes, which the Forest Practices Board has referred to as a: "very significant reduction in the public's ability to have adequate opportunity to review and comment on, forestry plans, including forest development plans and silvicultural prescriptions." Furthermore, the capacity of Ministry of Forests and Ministry of Environment, Lands and Parks staff to provide effective oversight of forest planning and forest practices has been significantly reduced by government cutbacks.

There is presently considerable industry interest in the notion of a "results-based Code" and "results-based pilots." This language is often used very loosely, and under the mistaken assumption that "results-based" necessarily means less a less prescriptive approach to forest management regulation. This mistaken assumption arises from a misperception that our current *Code* is about prescribing what forest practices may or may not occur. In reality, our *Code* is primarily a planning document. It requires licensees to complete certain planning and assessment requirements, and relies on the approval of the district manager (and designated environment official in joint approval areas) to ensure that the plan will adequately manage and conserve forest resources. Designing measurable on the ground results that can actually be verified may in fact be more prescriptive, or more onerous, than the current *Code*. For example, a measurable on the ground result might be: "the licensee must demonstrate that no harvesting has occurred within 100 metres of class 3 streams." Furthermore, a results-based framework implies a system of effective monitoring and stringent penalties if licensees fail to meet the results specified. In fact, results-based management has the potential to be a more command and control approach than the current planning framework.

As it is unlikely that industry representatives advocating "results-based" approaches are interested in either more prescriptive outcome requirements, or more penalties, there is considerable cause for concern that the real industry vision of "results-based" management would involve reduced public and

government oversight of forestry activities; negative impacts on non-timber values; and, without a significant increase in the resources available to the responsible ministries, no effective mechanism for monitoring and punishing those who do not meet the standards.

It is critical that the new pilot project legislation must not become a way for agreement holders to be exempted in a broad brush way from government and public oversight of forest practices on public land, for the purpose of results-based pilots. Public involvement in forest management decisions about what occurs on public forest land cannot in good conscience be viewed as mere "red tape" to be eliminated.

In the immediate term, we recommend that the 1998 *Code* changes that removed requirements for certain assessments of non-timber values at the forest development stage, and reduced the public accessibility of the assessments that were done, should be reversed.

Furthermore, the safeguards for environmental protection and public oversight set out in the new Part 10.1 of the *Code* must be clarified and strengthened. Priority in granting pilot projects should be given to communities, First Nations and small scale forest managers that have developed innovative, ecosystem-based plans for management of local natural resources. Priority should also be given to pilots that provide opportunities for the implementation of ecoforestry practises based on natural forest cycles.

Finally, in conjunction with a shift in decision-making authority to local management authorities such as community resource boards, the level of public involvement at a local level in determining how much should be cut, where, and how should be dramatically increased.

4) Wood Processing Industries

4a) The Current Situation

The desired forest policy changes to support thriving wood processing industries will vary according to how one identifies the problems to be solved, and the desired future state of the industry. In West Coast's submission, it is essential that we analyze the forest industry from the perspective of how well it delivers benefits to British Columbians, particularly British Columbians who live in forest-based communities. From a public policy perspective, generating long-lasting benefits to communities, not profits to corporate shareholders, should be the focus of policy changes related to the forest industry. Furthermore, in order for benefits to be long-lasting, they must be ecologically sustainable.

The vast majority of wood processed in BC is allocated non-competitively to integrated forest products companies through long-term "evergreen" timber tenures. The tight control over tenure rights by a small group of companies is thus largely replicated by lack of diversity in the wood processing sector. For example, the same 15 companies that control 70 percent of the provincial AAC, control close to 82 percent of the pulp capacity in BC.

The large forestry companies who control harvesting and manufacturing at the present time in BC produce primarily commodity forest products such as dimension lumber and pulp for export. Present forest policy encourages this industry focus on volume over value, and often legally mandates that the same company harvest and manufacture the wood. The highly integrated nature of our forest industry limits opportunities for small untenured companies to obtain wood. In particular, access to wood is a problem for the value-added sector. In the result, we add less value to our wood per cubic metre than the rest of Canada, the United States, New Zealand and Sweden, among other countries.

Furthermore, BC generates less direct employment per thousand cubic metres of wood cut than the rest of Canada, the United States, New Zealand and Sweden, among other countries. This is linked to the type of products we produce and the lack of more labour intensive value-added manufacturing in BC.

Both from an employment, and an ecological perspective, we must also address the fact that BC has significant mill overcapacity in relation to supply. Even compared to the LRHL (which as discussed above does not adequately take into account ecological considerations), the estimated annual timber requirements of BC's lumber mills outstrip the LRHL by millions of cubic metres. The falldown effect, which will occur when remaining old growth forests have been depleted and cut levels must be reduced to reflect the actual volume of wood that can be sustainably produced from second growth forests, will be felt sooner rather than later by employees of these mills.

4b) Recommended Direction For Forest Policy Change

- We must increase opportunities to diversify local economies and value-added manufacturing.
- All forest policy changes and 'job creation' programs must be focused on value-driven businesses, not on propping up volume-based companies.
- Value-added businesses must be supported by broadening access to fibre through viable regional log markets. At least 50% of the AAC should flow through log markets (similar to the 1991 Forest Resources Commission recommendations).
- We must promote economic diversification by encouraging the non-resource, knowledge-based sectors of the economy through training and support for small business. Diversity is the key to a healthy economic future.
- Proactive, community-driven, 'just transition' strategies must be developed and funded for workers, families and communities that face significant change due to decreasing reliance on extractive resource sectors.

4c) The nuts and bolts of change: getting from here to there

The answer to supporting a thriving wood processing industry is *not* a race to the bottom that focuses on reducing costs to industry.

No amount of cost reduction will allow BC to compete with southern producers whose low costs are arrived at through poverty wages and non-existent environmental protections. As Professor Marchak states in *Logging the Globe*: "In addition to low wood costs, labour costs also favour southern-based plantation industries, with the result that factory prices for their pulps are substantially lower than for northern-based pulps." As she notes, globalization in the forest sector is already a reality:

It is now a full-scale industrial operation. In tropical forests, it involves clearcutting. On cleared land it encompasses planting seeds through to manufacturing pulp, even paper, in locations where the species being planted does not grow naturally. The global plantation-based forest industry produces manufactured wood products for world markets, and it does so in southern locations – Brazil, Chile, Indonesia, Thailand, South Africa, and other southern hemisphere countries – as well as in the Iberian Peninsula and the southern United States.

Instead, the answer is increasing diversity, both in the type of wood processing industries in BC, and in the products they produce. The answer is an industry based on value, not volume. Policy reform related to wood processing industries must be complemented by tenure redistribution, such that we achieve a

situation where an extensive network of forest managers are directing wood towards diverse manufacturing opportunities, and diverse end-users.

As Professor M'Gonigle and Ben Parfitt notes in *Forestopia: A Practical Guide to the New Forest Economy*:

Just as in the 1950s, today's forest economy still requires cheap raw materials to produce the low-value commodity two-by-fours on which its established markets depend. Breaking this pattern is the single most important contribution we can make to financing an economic transition to a new forest economy.

An essential step is to introduce mechanisms that make wood available to value-added industries. To this end we recommend creating regional log markets though which value-added producers can purchase wood on the market. One key to the success of log markets is the careful sorting of logs by species and grades so that wood can be sold for optimum prices to individuals and companies who require specific logs for their value-added operations.

The log market concept has been recommended by numerous previous committees and commissions. As the Forest Resources Commission stated in 1991: "In essence, the Commission sees a tenure system that significantly reduces the volume of timber now controlled by a relatively small number of large corporations, and transfers that freed-up volume to the development of a competitive log market ..." Similar to the recommendation made by the Forest Resources Commission, we propose that at least 50 percent of the provincial AAC should flow through log markets.

However, in developing log markets, care must be taken that they are designed to meet the objective of supporting viable, local value-added businesses. Thus, log markets should only operate in conjunction with continued raw log export controls and incentives to manufacture wood locally. Log markets must not become a mechanism for wood harvested locally to flow out of communities to benefit only a few centres of the province. In part for this reason, we support the concept of regional versus provincial log markets.

Further, creating regional log markets to encourage local value-added manufacturing will facilitate certification of BC producers. As the draft Forest Stewardship Council Regional Standard for eco-certification in BC states:

5.2.a Forest products should be processed as close as possible to their point of harvest and utilized with the maximum possible local value-added. Where significant local processing does not occur, managers must demonstrate that every reasonable effort has been made to assist local communities to develop additional processing businesses using locally harvested forest products.

Finally, diversification in forest based communities in BC must not only be within the forest sector, but in relation to other sectors of the economy. Communities must have the resources to develop a new community development vision for their local area, and to implement community-driven transition strategies to achieve their own desired vision for the future.

Conclusion

While West Coast Environmental Law is pleased to have the opportunity to provide input into the Forest Policy Review process, we note that some of the issues identified here have not changed since our submissions to the Pearse Royal Commission in 1975. It is time for change.

As the 1991 Forest Resources Commission stated: "... the status quo is not good enough. The way the forests and their many values are managed by government and industry is out of step with what the public expects. It must change."

We urge the provincial government to take the courageous action necessary to reform forest policy in BC so that it truly serves the well-being of communities and the environment.

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