

REVIEW OF FORT ST. JOHN PILOT PROJECT

Canadian Forest Products Ltd.
Slocan Forest Products, Ltd.
Louisiana-Pacific Canada Ltd.
Ministry of Forests Small Business Program

December 21, 2000

The following review of the Draft Fort St. John Pilot Project was prepared on behalf of the Forest Caucus of the BC Environmental Network by Jessica Clogg, staff counsel at West Coast Environmental Law, and Laurel Brewster, forestry advisor at the Sierra Legal Defence Fund.

Our review focused primarily on assessing the draft pilot regulation for compliance with Part 10.1 of the *Forest Practices Code*; however, in some cases we have also provided our perspective as to the public acceptability of the pilot. In our opinion, at the present time the pilot project does not meet the requirements of Part 10.1 of the *Forest Practices Code*.

OVERARCHING CONCERN

The detailed pilot proposal states: “The successful certification of the pilot project forestry system carries significant implications for certification endeavors throughout the province and could provide a template for future tenure change.”

We would like to strongly emphasize that the “template” presented in the pilot proposal is not an acceptable model for tenure change. The proposed pilot sets an undesirable precedent for increasing control by major licence holders over the land-base when the preferable direction would be tenure redistribution in favour of communities and First Nations. The need for tenure redistribution has been highlighted by several major commissions and reviews.

For example, the Forest Resources Commission in 1990 recommended that the AAC allocated to major licensees with processing facilities be reduced by 50 percent, and the wood freed up be used to create a greater diversity of tenures by re-allocating to small area-based tenures managed by communities, First Nations and woodlot operators. More recently, the provincial governments Forest Policy Review recommended that government should provide increased opportunities for community-based forest tenures.

Section 6 of the draft pilot regulation specifies that the pilot project area is all land within the Fort St. John Timber Supply Area. By jointly proposing a pilot for this area, with themselves as the only participants, the participants seek to essentially transform their volume-based rights into area-based rights over the whole TSA, giving themselves a monopoly over a vast area. While in theory new participants can be added, there are two significant barriers. First, in order to be added as a participant, a person must already be carrying out forest practices in the pilot area. Second, as the volume allocated to the participants is already 9.77 percent of the regional AAC, new participants in the pilot project area are effectively excluded by the volume caps in Part 10.1 of the Code. In addition, the detailed pilot proposal indicates that the participants anticipate that they, not the Ministry of Forests, will be deciding which licensee harvests or builds roads where and when in the pilot area.

The justification for this appears to be, at least in part, CSA certification requirements. In this regard, we must stress that from the perspective of the Forest Caucus and our member groups, Forest Stewardship Council (FSC) certification is the only credible and independent certification system.

While FSC emphasizes long-term stewardship of a particular area of land, this requirement must be read in light of other FSC principles that stress the importance of enhancing the long-term social and economic well-being of forest communities. As the explanatory text to the May 1999 FSC draft regional standard states: “Small scale community-based forest tenures, where the people directly dependent upon and living in geographical proximity to a particular forest have primary responsibility for its management as well as the right to harvest and directly benefit from its resources, offers the surest means for meeting the objectives of Principle 4.”

We emphasize that likewise, the soundest approach to removing tenure related barriers to certification is tenure redistribution to communities and First Nations, not further entrenching the rights of existing licence holders.

ISSUES RELATING TO APPROVALS AND AUTHORIZATIONS

- Sections 24 of the draft regulation does not make it clear that amendments must be subject to regional manager and regional director approval – the current language states only that “participants may at any time apply to the regional manager and regional director to amend a sustainable forest management plan.” We recommend that this be revised to clarify that approval is required.
- Section 17(1)(b) currently states “does not materially affect the forest practices that may occur within the pilot project area.” We assume this should read “forest resources.” We would also recommend adding “does not materially change the objectives, strategies, or results of the plan” (similar to present s. 43(1) of the Code).
- In our opinion, section 20(1)(d) is too limiting, as it currently requires that a sustainable forest management plan be approved if it “adequately manages and

conserves the forest resources on those portions of the pilot project area that are effected by the proposed operations.” This is not equivalent to the Code, which requires that a plan adequately manage and conserve the forest resources of the area to which the plan applies.

- Section 20(2) should have an additional provision that allows the regional manager and regional director to refuse to approve an entire plan.
- In addition, section 20(2)(b) is not acceptable as presently worded, as it would allow portions of a SFM Plan that are not consistent the preamble to the Code, do not provide equivalent protection for forest resources or do not adequately manage and conserve forest resources, to be approved. At a minimum SFM Plan approval should parallel section 41(1) of the Code, which makes it clear that all requirements must be met before a plan is approved. We strongly suggest that 20(2)(b) be replaced with a new provision which states only that “the regional manager and regional director may make their approval of an SFM Plan or an amendment subject to a condition,” similar to the present s.41(5) of the Code.
- With regard to section 9, in our submission, giving the district manager the discretionary authority to authorize participants to perform forest practices inconsistent with a requirement of Part 3 of pilot regulation where it is “otherwise in the public interest” is too vague a requirement to be meaningful.

ISSUES RELATING TO CONTENT OF PLANS

- The core of the SFM plan is a set of strategies and indicators; however, as the draft regulation is presently worded an SFM plan would be legally sufficient if it contained objectives and strategies only related to timber, with nothing about biodiversity, soils, water etc. Section 16(2) of the draft pilot regulation that: “The participants must ensure that a sustainable forest management plan contains forest management objective and landscape level strategies for one or more of the following... (a) timber, (b) reforestation ...”. This is not acceptable, either from an equivalency perspective, or from a public policy perspective. This discretionary language must be replaced with a mandatory requirement to provide criteria and indicators for all the values listed. The list should also be extended to include cultural heritage resources and, where appropriate, restoration.
- With regard to section 10, the draft regulation should be modified to make it clear that a site plan “in the nature of” a silvicultural prescription, stand management prescription, road layout and design and road deactivation prescription contain the same content as is presently legally required in these plans, in addition to the specifics listed in s. 10(2) of the draft regulation. The list of requirements in section 10(2) on its own would not provide equivalency.
- With regard to definitions, we have concerns with the definition of “known” in the draft pilot regulation. First, the definition chosen parallels the language in the Timber Harvesting Practices Regulation, rather than the Operational Planning Regulation. The effect of this that while ordinarily, information could be made known to licensees by the DM or DEO before an silvicultural prescription was submitted for approval, under the pilot regulation, the participants control

whether information becomes known by whether it is in an FDP or not. More importantly, we agree with the recent assessment of the Forest Practices Board that “limiting the inclusion of resource information only to that information which is legally made known is neither sound forest management, nor is it consistent with the professional responsibilities of foresters.” We would recommend that the participants pilot an approach which eliminates the requirement that information be made legally known before there is a requirement to address it in planning.

ISSUES RELATING TO EXEMPTIONS

There are two main sections of the draft pilot regulation that address exemptions from the existing legal framework, section 14 and section 23(1)(c).

Section 23(1)(c)

In our submission, section 23(1)(c) should be deleted in its entirety, as the exemptions it would permit go far beyond what is permitted by Part 10.1 of the Code.

Part 10.1 sets up a framework where, if certain very specific legal tests are met, the Lieutenant Governor in Council may order, by regulation, that provisions of the Forest Practices Code, Forest Act etc. do not apply to a licensee (referred to here as “exemptions”). By way of contrast, pursuant to the present draft regulation, participants put into their SFM Plan a list of provisions of the Code, the regulations and Part 3 of the pilot regulation that are to be “affected” by proposed landscape level strategies, and then automatically get exemptions from these provisions when the SFM plan is approved and FDPs consistent with it are completed. This is inconsistent with Part 10.1 in several ways.

- First, it delegates the decision of whether exemptions should be granted from the Lieutenant Governor in Council to the statutory decision-makers who approve the SFM Plan.
- Second, it is contrary to the requirement that exemptions be made through regulation.
- Third, the rationale the participants would provide under section 16(4) is considerably more limited than the conditions specified in Part 10.1 that must be in place before exemptions are granted.
- Finally, section 23(2) creates a presumption that exemptions set out in the SFM Plan will stand, unless the Lieutenant Governor in Council determines that they are not in the public interest. This is contrary to the intent of Part 10.1, which puts the onus on pilot proponents to satisfy all the legislative tests before exemptions are granted.

Section 23(1)(c) effectively creates a blank cheque for the participants to get exemptions from existing law outside of the parameters authorized by Part 10.1 of the Code, and is unacceptable for that reason.

Section 14

- With regard to section 14(1), the exemption from section 45 of the Code (protection of the environment) is not appropriate, since there are no replacement provisions in the draft pilot regulation that a) generally prohibit forest practices that result in damage to the environment, and b) require participants to stop forest practices that they know or should reasonably know may result, directly or indirectly in slumping or sliding of land (etc. as per s.45(3), prevent further damage to the environment, promptly notify the district manager and take remedial measures.
- The exemptions set out in section 14(2) of the draft pilot regulation are extremely broad, and in our submission, are not replaced with equivalent provisions in the draft regulation.
- For example, section 14(2)(a) would exempt participants from those portions of the OPR that address silviculture prescriptions, including assessments carried out at the SP level, which may include, depending on the circumstances, visual impact assessments, terrain stability field assessments, pest incidence surveys, and riparian assessments (see OPR s. 37).
However, the draft regulation creates no equivalent replacement requirement for similar assessments to be done in the pilot area. While section 19(3) implies assessments might be part of a landscape unit strategy, there is no requirement that they will be. It is essential that this oversight be remedied in the draft regulation. Otherwise, it would be possible that a participant could carry out forest practices without, for example, having classified the riparian class of streams, wetlands or lakes, or done field assessments where there are indicators of potential slope instability, information that is important for ensuring that forest resources are adequately conserved.
- Participants would also be exempted from the entire Forest Road Regulation, Timber Harvesting Practices Regulation, and Silviculture Practices Regulation. There are a number of instances where this results in exemptions for which no replacement protections at all are included in the draft pilot regulation, for example, the prohibition on harvesting adjacent to unidentified or incorrectly classified streams (THPR, s. 6), and exemption from the prohibition against clearcutting in old growth management areas (THPR, s.29).
- A further concern relates to the framing of desired “results” in section 13 which are presumably supposed to provide “equivalent” protections. First of all, the pilot regulation makes no provision for establishing and documenting a benchmark against which “maintenance” is to be measured. Second, the pilot regulation provides no meaningful and measurable thresholds against which to judge the adequacy of the results achieved. A specific example of this is that site level biodiversity requirements are those set in the site plan, which is prepared by the participants, and receives no independent assessment or approval. This provides no assurance to the public that wildlife tree retention and CWD retention or recruitment will be adequate for conserving site level biodiversity.

ISSUES RELATED TO NOTIFICATION

- As we understand it, a key aspect of the draft pilot regulation is that the participants are exempted from approvals of silviculture prescriptions, stand management prescriptions, road layout and design, and road deactivation prescriptions. Approval is replaced by a system of notification set out in section 11 of the draft pilot regulation.

In our submission, the notification process set out in section 11 is inadequate for ensuring that forest resources are adequately managed and conserved at the site level.

Because only the approximate location of roads and proposed category A cutblocks is now required at the FDP level, the draft pilot regulation presently creates a situation where the norm would be that government and the public would never know precisely where and when logging and roadbuilding was occurring unless notice was specifically requested by the DM.

At a minimum, it should be made clear that in addition to being able to request site plans at any time (not just if the cutblocks and roads are specified at the FDP stage), the District Manager should also be able to notify the participants not to proceed with the operations associated with the site plan at any time if s/he determines that the operations will not adequately manage and conserve all forest resources. Furthermore, we would strongly suggest that notification was given to the District Manager of all site plans.

It is also essential that section 11(8) be amended such that the District Manager MUST notify the participant not to proceed if the operations described in the notice either a) do not comply with the Code, its regulations or the pilot regulation, or b) will not adequately manage and conserve all forest resources. There should not be a discretion for the DM to allow operations that do not meet these requirements.

- An additional issue related to the replacement of approvals by notification is how the Ministry of Forests fiduciary obligation to aboriginal people will be met in these circumstances. The government has an obligation to justify any infringements of aboriginal and treaty rights, and a key aspect of the legal justification analysis relates to consultation – if the Ministry of Forests does not even receive site plans, it is difficult to see how they can ensure appropriate consultation on them occurs.

ISSUES RELATING TO MONITORING AND EVALUATION

- As an overarching concern, nothing in the monitoring section of the pilot regulation requires the participants to set benchmarks and monitor their on the ground performance in relation to results-based measures set out in the pilot regulation, nor to modify operations and plans in response to monitoring.
- With regard to section 10(8) the time requirement to retain site plans should parallel the amount of time records are presently kept by the MOF and licensees of the plans which they replace, as the impacts of activities carried out under the site plan (e.g. slope stability issues) might only become apparent long after the activities are completed. For the same reason, survey and inspection records

should be retained over time (see s.29(1) of the draft regulation). We note that section 110 of the Code (production of records) contains no time limitation.

- Section 32, which provides for an annual assessment of the level of performance of each participant, refers only to the regional manager. This section should be revised to include the regional director.
- Section 39(1) states that a participant who is of the opinion that all applicable requirements in respect of a road, timber harvesting or reforestation have been met may declare this, in writing, to the district manager. The district manager may subsequently notify the participant that they have no further obligations with respect to those requirements.

This section must be revised to include a provision requiring the participant to submit a detailed rationale which demonstrates how the requirements have, in their opinion, been met. Without such evidence it is not clear how a district manager would be able to make an appropriate decision.

Section 39 should also include a timing provision, similar to the format currently used for determining when a free growing assessment may be performed, that would allow for meaningful assessment of whether the obligations have been met. Finally, section 39 should clarify that nothing in that section limits the participants' legal liability under the Code or any other Act related to subsequent events/conditions caused by the participants' activities.

- Section 30 requires an independent audit of the participant's compliance with the pilot regulation and "any matters specified in the sustainable forest management plan as being subject to the audit." This should be modified to allow all aspects of the pilot to be subject to audits. It is inappropriate for participants to select those matters that will be subject to the audit.
- Section 36(1) of the draft regulation should be modified to clarify that it is not the intent of the participants to reduce the administrative penalty provisions of the Code. For example maximum penalties for existing provisions of the Code such as s.47(1) (exceeding maximum soil disturbance) and section 70(3) (failure to establish a free growing stand), are \$100,000, where as the present draft would imply that for replacement requirements the penalty was limited to \$50,000.
- Section 36 adds a list of factors that may be considered before a penalty is levied for unauthorized timber harvesting pursuant to s. 96/s.119 of the Code. There does not appear to be any reason related to the "regulatory framework for forest practices" to add the considerations in s. 117(4) or the new considerations to the s. 119 determination.

ISSUES RELATING TO PUBLIC OVERSIGHT

- Part 5.3 of the detailed proposal refers to annual schedules outlining proposed harvesting, road and silviculture activities for the ensuing year (under an approved consolidated forest development plan). This provision should be incorporated into the regulation, making it a requirement for participants to notify both the district manager and the public of proposed activities. Public notification of this information should take place at least once annually, and the

information should be included in the forest development plan submitted for approval.

- We also recommend that section 38 of the regulation be revised to include a requirement to make “all relevant planning documents and related assessments” publicly available at all times. Section 38(1) of the regulation currently limits this information to the district manager, the public advisory group, the Forest Practices Board and persons carrying out audits. Section 38(3) currently contains a more limited list of information that will be publicly available.
- This pilot project encompasses a large and, in some cases remote, landbase. In order to facilitate public participation, we recommend that all planning documents relating to the pilot project, including site-specific operational information, forest development plans and sustainable forest management plans be made available on the internet. Section 38(3) should be modified to include this commitment. In addition, the information should be available at the business premises of all participants in a manner that is accessible to local communities without undue effort.

ISSUES RELATING TO TRANSITION

- We are concerned that the regulation in its current form does not clarify planning obligations, including approval and amendment provisions, for the two-year transition period prior to the submission of a sustainable forest management plan. This lack of clarity may make it difficult for members of the public to understand participants legal obligations. We recommend that the transition provisions be clarified.
- Section 21(5) appears to be contradictory in that it allows the approval of a site plan that is consistent with an inconsistent forest development plan. Specifically, once this regulation is in effect, participants are required to prepare a site plan that complies with an approved forest development plan. This plan, in turn, is not required to be consistent with subsequent sustainable forest management plans, which may lead to confusion.
- With regard to s. 25 of the draft pilot regulation, we would recommend that rather than just approving a process/strategy for compliance, it should make clear that compliance with higher level plans is actually a mandatory requirement.

CONCLUSION

In conclusion, we reiterate that in our opinion, the draft pilot regulation is not sufficient to meet the legal tests outlined in Part 10.1 of the Forest Practices Code.

In addition, the present pilot proposal does not provide sufficient assurances as to how the government’s fiduciary obligation to First Nations people will be met within the pilot framework. Treating First Nations as another stakeholder who may participate in a public advisory group about the pilot is unlikely to be sufficient.

In addition, we would like to express our concern that there has been no public or First Nations involvement of the crafting of pilot project to date. In these circumstances we would like to suggest that the ministers establish a committee pursuant to section 221.1(6) of the Forest Practices Code to, among other things, report to the ministers as to the public acceptability of the proposed pilot project.