

Reply to the British Columbia Environmental Network

Review of the Fort St. John Pilot Project

Prepared on behalf of the pilot project participants:

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Introduction

In December 2000, the participants in the Fort St. John pilot project sent an electronic copy of the draft detailed proposal and draft pilot project regulation to Jessica Clogg, staff counsel at the West Coast Environmental Law Association. At the request of the participants, Ms. Clogg and Laurel Brewster, forestry advisor at the Sierra Legal Defence Fund, kindly reviewed the draft submissions and prepared a report on behalf of the BC Environmental Network (BCEN). The BCEN report is entitled "Review of Fort St. John Pilot Project" dated December 21, 2000. This document is prepared in response to the BCEN report, and is intended to address the issues and concerns raised therein.

The content of the BCEN report is substantially included in this document. The pilot project participants' responses to BCEN issues and concerns are inserted throughout the document, following the points raised by BCEN. The BCEN report excerpts within this document are in arial bold italics 10-point font. The participants' responses are in arial regular blue 11-point font. The document is divided into the same sections as the BCEN report, in order to maintain consistency in format.

It must be pointed out that the pilot project participants disagree with the overall BCEN opinion that the Fort St. John pilot project does not meet the requirements of Part 10.1 of the *Forest Practices Code*. The participants have carefully addressed each element of Part 10.1, either through commitments made in the draft detailed proposal or within the draft pilot project regulation. The fundamental component of the Fort St. John pilot project with respect to providing equivalent protection for forest resources as that provided by the *Code* is through the consolidated forest development plan (FDP), which will be consistent with the current regulatory requirements in their entirety. In order to improve clarity around this point, the draft pilot project regulation has been amended by inserting section 9.1, which explains the existence and function of the forest development plan in the pilot project.

Further to BCEN's overall opinion, the fundamental component of the project with respect to maintaining consistency with the preamble to the *Code*, and for providing adequate management and conservation of forest resources, is through the proposed Sustainable Forest Management Plan (SFMP), and the associated public involvement process. The participants believe that the strategic approach generated by the SFMP will enable improved operational planning by addressing the gap recently identified by the Forest Practices Board in their review of forest development planning in the province.

The role of the forest development plan, the sustainable forest management plan and the public involvement process in the pilot project is explained within the text of this document.

Overarching Concern

The detailed pilot proposal states: “The successful certification of the pilot project forestry system carries significant implications for certification endeavours 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.

The proposed pilot project will not result in any tenure change within the Fort St. John Timber Supply Area (TSA). The pilot project will only apply to the participants and not to any other tenure holders. For example, woodlot licencees and the holder of Forest Licence 59939 are not participants in the pilot project and can not be negatively affected. Similarly, the pilot project will not prevent government from awarding new tenures, or from apportioning timber harvest volumes within the TSA.

Ultimately, decisions regarding tenure change are the responsibility of the government and it is not the intention of the pilot project participants to promote any particular options in that regard. In order to avoid misconception, the portion of the sentence (page 2, paragraph 2, last sentence) “and could provide a template for future tenure change.” will be stricken from the detailed proposal.

Notwithstanding the participant’s neutrality in the proposal regarding tenure change, an interesting aspect of the Fort St. John pilot project remains. Namely, the pilot project will enable consolidated strategic and operational planning of forest operations within the TSA, with full public involvement, despite the fact that the participants operate under three vastly different types of tenure.

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.

It is incorrect to allege the pilot project provides the participants a monopoly when all current tenure obligations will remain in effect within the TSA. For example, major licensee obligations and requirements regarding cutting permits, timber sale licences and road permits will remain as they are under the current system. The Small Business Forest Enterprise Program will continue to advertise and award timber sale licences in a competitive manner under the pilot project. Likewise, cut control requirements specified in the participant’s licence documents will also remain unchanged. Determination of allowable annual cut for the timber supply area will continue to be the responsibility of the chief forester of the province (Section 8, *Forest Act*) and apportionment of allowable annual cut will continue to be at the discretion of the minister (Section 10, *Forest Act*).

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.

Section 7 of the draft pilot project regulation (PPR) provides for the addition of new participants. At the time the preliminary proposal was submitted, the number of potential participants was in part limited by the 'cap' on total volume under a pilot project imposed under S.221 (4) (a) of the *Forest Practices Code (FPCBC)*.

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 pilot project will not have any influence over the Ministry of Forests' ability to make decisions about where and when harvesting and road construction occurs. Under the pilot project, licencees will propose operational activities in forest development plans as is done under the current planning regime. Government will retain the authority to approve or deny approval of proposed activities.

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.

The pilot project participants have no direct relationship with CSA and comments regarding CSA credibility are more appropriately directed to the Canadian Standards Association. The CSA sustainable forest management (SFM) system was chosen by the participants as a template because it is an internationally recognized, independent certification system that provides a superior model for public involvement compared to that required under the FSC system. Furthermore, the CSA SFM process requires registrants to address criteria and critical elements developed by the Canadian Council of Forest Ministers, including the British Columbia minister of forests. There is no government policy dictating a preferred certification process. On the contrary, the participants are aware that the ministry of forests is openly exploring and testing a variety of certification models, including CSA and FSC.

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."

Principle 4 of the Forest Stewardship Council states that "Forest management operations shall maintain or enhance the long-term social and economic well-being of forest workers and local communities." Although the participants have not endorsed the FSC Principles in the pilot project proposal, opportunities for public involvement provided under the pilot project regulation and commitments made in the proposal to be consistent with the objectives of the Fort St. John LRMP will satisfactorily address Principle 4 objectives.

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.

The pilot project will test another approach that may prove to be equally sound in removing tenure related barriers to certification. The government should be commended for providing opportunities for such experimentation in this area.

Issues relating to Approvals and Authorizations

- ***Section 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 20 of the draft pilot project regulation (*PPR*) will be amended to clarify that the regional manager and regional director approve amendments.

- ***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).***

Section 17(1)(b) of the draft *PPR* will be amended to be consistent with section 43 (1) of the *Forest Practices 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 manages and conserves the forest resources of the area to which the plan applies.***

The Sustainable Forest Management Plan is a strategic plan and does not replace the forest development plan (FDP). Forest development plans prepared by the participants in the pilot project will be subject to the tests under Sections 41(1) b and 43(1) b of the *Code* to “manage and conserve the forest resources of the area to which it applies”. The scope of the SFMP must not be so broad that it could infringe upon or constrain the activities of non-participants such as oil and gas tenure holders.

- ***Section 20(2) should have an additional provision that allows the regional manager and regional director to refuse to approve an entire plan.***

The ability for the regional manager and regional director to refuse to approve an entire plan is inherent under section 20 (1) of the draft pilot project regulation. This approach is consistent with the approve/reject authority provided under section 41 of the *Code*.

- ***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.

Section 20 (2) (b) of the draft pilot project regulation will be amended by deleting “approve portions of the plan that do not meet the requirements and”. Section 20 (2) (b) will now read “may make that approval subject to conditions.”

- ***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.***

This is a general provision to allow for emergency or unusual situations, (e.g., fire, flooding, etc.). The provision will be modified to make that meaning more explicit.

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.***

The sustainable forest management plan is a strategic plan and does not replace the forest development plan. The pilot project proposal retains the forest development plan in its entirety. Forest development plans prepared by the participants under the pilot project must continue to meet all of the tests that any forest development plans outside of the pilot project area must meet, including those related to biodiversity, soils, water, etc. Forest operations and forest practices carried out under the pilot project will be authorized through approval of a forest development plan.

The SFMP will not replace or displace any other higher level planning provision of the legislation and will be subject to any higher level planning designation brought into force. The SFMP is intended to enable innovative and improved forest management strategies to be implemented as they are developed. These strategies will evolve as forest inventories are updated, or as information and technology improves. The SFMP, as structured, allows for one or more improved strategies to be implemented immediately, and for more and better strategies to be implemented over time. During the time that it will take to prepare an entire suite of strategies, the interests of the public, and the equivalency requirements of section 221.1 of the Code, will be met through the continued use of the FDP.

The *Cultural Heritage Resources Act (CHRA)* is outside the scope of Part 10.1, *FPCBC*. Any person carrying out a forest practice under the proposed regulation continues to be subject to all provisions of the *CHRA*.

- ***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.***

The disapplication of site level plan requirements is central to the pilot project experiment. The forest development plan, the provisions of the draft pilot project regulation, notably sections 9 through 13, and the performance and audit requirements attached to certification processes form the core of equivalency.

- The draft pilot project regulation mandates consistency of sustainable forest management plans with Fort St. John LRMP resource management zones (RMZ) and RMZ objectives.
 - All current forest development plan legislative and regulatory tests still apply.
 - Section 13 of the draft pilot project regulation introduces new legal requirements for participants in the pilot project.
- ***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.

The forest development plan continues to be the primary operational plan under the pilot project and will be subject to all current provisions contained in the *Forest Practices Code Act* and *Operational Planning Regulation (OPR)*. “Known”, as defined in the *OPR*, will continue to apply with respect to forest development plan approval. The definition for “known” in the pilot project regulation ensures that any forest practice carried out under the regulation will capture any “known” information either through the FDP or directly through the draft pilot project regulation.

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 participants to 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 that 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.

The Fort St John Timber Supply Area is composed primarily of boreal biogeoclimatic types, with much of the TSA comprised of boreal mixed-wood (spruce-aspen) types. These forests are typically short lived and subject to very large natural disturbances, usually fire. Large scale mixed-wood harvesting and silviculture are relatively new concepts in British Columbia and new management strategies are evolving. Unfortunately, the forest resource inventory data in the TSA is inadequate compared to that which is common in southern and coastal areas of the province. The participants expect that the evolution of mixed-wood management systems, in combination with improved inventory information over the next several years, will trigger the need for further modifications to existing practice statutes. Additionally, the pilot project is an experiment and experience may suggest changes to the project regulation itself. Both needs will be met through provision of a mechanism for implementing change through the pilot project regulation.

The approval by the regional manager and regional director is for the convenience of government as their approval with public oversight may be the most administratively efficient model for government. Requiring Lieutenant Governor in Council approval would limit the applicability to apply this project more broadly. It is easy to lose sight of the fundamental objective of the pilot project proposal(s). Pilot projects are “to experiment with ways to improve the regulatory framework for forest practices.” (S.221.1 (1), *FPCBC*). This project will not be carried out in a vacuum. There will be independent audits. There will be government inspections and audits. The Forest Practices Board maintains the ability to carry out audits. If the government's fundamental objective is to improve the regulatory framework for forest practices then it is reasonable to assume that change in the future should be anticipated. As an experiment – or perhaps more correctly, operational trial – with a degree of oversight that is much higher than is usual for operations under the standard statutory bundle, cabinet may be quite comfortable with the regional manager and regional director exercising a degree of discretion that would be unusual in standard circumstances.

Nonetheless, the pilot project participants understand BCEN's concern and propose to amend section 23 in its entirety as follows.

23 (1) If

- (a) a sustainable forest management plan has been approved, and
- (b) the participant has prepared or amended the forest development plan and site plan for and area to be consistent with the approved sustainable forest management plan,

then the participant must carry out forest practices in a manner that, is measured by the performance indicators, is consistent with the landscape level strategies contained in the sustainable forest management plan.

- (2) If there is a conflict between a landscape level strategy contained in a sustainable forest management plan and a provision of the Act or the regulations, the landscape level strategy prevails.

The rationale for this change is linked, in part, to section 16 of the draft pilot project regulation, which provides a mechanism for establishing content requirements for sustainable forest management plans. One of the content requirements is landscape level strategies. If a strategy is inconsistent with some detail of a mainstream regulation, then the strategy, if approved, would apply to the extent of the inconsistency.

Following this approach, the participants will not be exempting regulations in the future. The mainstream regulations continue to apply. However, to the extent of an inconsistency, the approved plan provision will prevail. The test for approving the particular strategy is fundamentally the same as for the Lieutenant Governor in Council to make the pilot project regulation itself under section 221.1 (3) (b), *FPCBC*.

Currently, BC forest practices regulations contain numerous references to “unless otherwise approved in an operational plan...” (ex. *THPR* 11 (1), 14 and 17 (2)) In these cases, operational plans are approved after the regulations are in effect and therefore the regulations contemplate that if certain events take place (i.e. the plan gets approved), then the regulation provision will not apply.

The participants are saying the same thing. Regulations will be complied with unless the statutory decision-makers approve a plan that provides an alternative performance requirement. In the case of the pilot project, there is considerably more rigor with respect to the approval of a sustainable forest management plan than for conventional operational plans, therefore the ability to undertake alternative practices will presumably be more limited than under normal situations. The approval process for sustainable forest management plans includes oversight by a public advisory group, a public review process and joint approval by two statutory decision makers, both of whom must apply a stringent test. In fact, section 221.1 (7) (g) provides that the Lieutenant Governor in Council may make a regulation for planning, which would include sustainable forest management plans. The plan approval test provided for under section 20, *PPR* is more stringent than for any operational plan approved under the *Code*.

Section 221.1 (2), *FPCBC* enables the Lieutenant Governor in Council to make regulations providing that the provisions of the *Code* do not apply. The participants have proposed in the amended section 23 that provisions of the *Code* will not apply to the extent that they are inconsistent with the approved SFMP. Section 221.1 (8), *FPCBC* enables the Lieutenant Governor in Council to exercise all of the regulation making powers in the *Code*. Section 198 (4),

FPCBC enables the Lieutenant Governor in Council, by regulation, to delegate a matter to a person and to confer discretion on a person. The participants have conferred discretion on the regional manager and the regional director to decide whether or not the specified SFMP approval test has been met. Section 203, *FPCBC* enables the Lieutenant Governor in Council to make regulations exempting a person from a requirement of the *Act* or the regulations. The participants do not characterise section 23 of the draft pilot project regulation as an exemption, but even if it were, then section 203, *FPCBC* would appear to allow it. Given this rationale, the participants believe the amended section 23, *PPR* is consistent with Part 10.1 of the *Code*.

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.***

Section 13 of the draft pilot project regulation sets out the required results for forest practices. Section 36 of the draft pilot project regulation provides for an administrative penalty of up to \$50,000 for a breach of section 13, *PPR* (or any other provision the regulation) and section 37, *PPR*, provides for a quasi-criminal penalty of \$500,000 and up to two years imprisonment for a breach of section 13.

Section 13 (1) (e), *PPR*, puts a positive duty on a participant carrying out a forest practice by requiring that “a participant who carries out a forest practice on an area must ensure that the forest practice protects the forest resources and resource features on the area by ensuring that the forest practice,

- (e) Conserves the soil,
 - i) by maintaining slope stability
 - ii) maintaining surface drainage patterns
 - iii) minimizing surface soil erosion
 - iv) maintaining the productive capacity of areas to be reforested.

Additionally, sections 48, 118 and 145 of the *Forest Practices Code* continue to apply to all operations under the pilot project.

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.

- Part 8, *OPR* applies to the pilot regulation. Also, section 13 (1) (b) (I) A, *PPR*, requires that there be no felling or modifying of trees in an area that is in a riparian reserve zone.
 - Section 13, *OPR*, requires a forest health assessment if directed by the district manager. This assessment may include a site level pest incidence survey.
 - Terrain stability field assessments may be triggered by section 16 or 17, *OPR*, for the pilot project area.
 - Section 18, *OPR*, terrain stability requirements, applies to the pilot project area.
 - Section 12, *PPR*, requires that archaeological impact assessments be carried out.
 - Section 13 (1) (d), *PPR*, requires that if a forest practice is carried out, the forest practice must be consistent with any established visual quality objectives for the area.
 - S.13(1)e, *PPR*, requires the conservation of soil, including the maintenance of slope stability.
- ***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).***

Section 13 (1) (b) (i) A, *PPR*, prohibits the felling or modifying of trees in a riparian reserve zone. If it occurs at all, it is a breach and is subject to penalty. If it occurs because of an error it is still a breach and subject to penalty.

Section 13 (1) (b) (i) B, *PPR*, prohibits the felling or modifying of trees in an area that is a mappable reserve. Old Growth Management Areas are mappable reserves.

- ***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.***

A forest development plan must be prepared and approved for forest practices to be carried out under the pilot project regulation. All site plans under the *PPR* must be consistent with the *FDP*. (S.10 (2), *PPR*).

Section 10 (1) (c) (ii), *FPCBC*, requires that the forest development plan specify the measures to be carried out to protect forest resources. Biological diversity is defined as a forest resource in S.1(1), *FPCBC*. S.18(1)u, *OPR*, requires that the forest

development plan specify the general objectives respecting the target levels of retention for coarse woody debris and wildlife tree retention.

Section 39 (1), *FPCBC*, and sections 25 to 30, *OPR*, require the proposed forest development plan be made available for review and comment. Comments may come from any person, or agency, including the Ministry of Environment, Lands and Parks and the Ministry of Forests. The proponent of the plan must consider all comments and may revise the plan in response to the comments.

Section 41 (1) (a), *FPCBC* requires the district manager to approve a forest development plan where the plan was prepared and submitted in accordance with the *Act* and regulations. This also means that the district manager cannot approve the proposed forest development plan if it is not in accordance with the *Act* and regulations.

Section 41(1) (b), *FPCBC* requires the district manager to be satisfied that the proposed forest development plan adequately manages and conserves the forest resources for the area to which it applies. In determining if the proposed plan 'adequately manages and conserves', the district manager may seek advice from a wide variety of sources, including experts and interested persons outside of government. If the proposed plan is determined to not adequately manage and conserve forest resources, the district manager may refuse to approve the plan.

Summary:

Under the pilot project:

- A forest development plan must be prepared.
- The FDP must contain measures for the protection of biological diversity.
- The FDP must specify objectives for the retention of coarse woody debris and wildlife tree retention.
- The public and agencies can influence the content of the FDP.
- The DM can provide policy direction under section 11(2) of the *PPR*.
- The district manager has the discretion to determine if the measures and objectives are satisfactory.
- The site plan (S.10 (2), *PPR*) must be consistent with the FDP.
- Consistency between the site plan and FDP is subject to an environmental management system requirement.
- If certification is achieved, consistency between the site plan and the FDP is subject to independent audit performed by the certifying body.
- Consistency between the site plan and the FDP is subject to independent audit as required by the *PPR*.
- Consistency between the site plan and the FDP is subject to compliance inspection by government agencies.
- Consistency between the site plan and the FDP may be audited by the Forest Practices Board.
- The Forest Practices Board may investigate a complaint from the public with respect to forest practices carried out under the pilot project.

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.

Section 10 (1) (b) (i) A, *FPCBC*, requires the forest development plan to describe the size, shape and location of cutblocks proposed for harvesting and the approximate location of existing and proposed roads. The pilot project retains all forest development plan requirements.

For a cutblock to be harvested it must have met the requirements of S.20, *OPR*.

Section 20 (b) (i), *OPR*, requires a harvest schedule indicating timing of harvest only if the management of non-timber resources is critical.

Modifications to a cutblock or road at the site plan level in the absence of government or public oversight are not possible. Once a road or cutblock is approved in the FDP, a modification to the cutblock size, shape or location, or to a road location, requires an amendment to the FDP. An amendment to an FDP must be made available for public review and comment unless otherwise determined under Section 43 of the *FPC*.

It is already normal practice for FDP proponents to prepare a 'notification list' of persons who may be affected by the timing and location of forests operations (eg. trappers, ranchers, first nations) as part of the FDP proposal. This practice will continue under the pilot project. In any event, the district manager could make notification of other persons a function of FDP approval under section 41 (1) (b), *FPCBC*.

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 discretion for the DM to allow operations that do not meet these requirements.

The district manager is afforded wide latitude for the requiring of notice under section 11 (2), *PPR*, including requiring notice of all site plans. If notice is required for an operation, the participant cannot proceed with the operation (S.11 (4), *PPR*) until the requirements have been

met. Harvesting, road construction and stream crossing operations also require additional authorizations (cutting permit, timber sale licence, road permit, etc) before operations can commence. For a road or cutblock to have been approved in an FDP they must have complied with the *Act* and regulations, therefore only the discretionary “manage and conserve” provision can logically apply. Providing the district manager with the discretion to deal with site plans for specified areas or conditions is central to improving administrative efficiency. The vast majority of forest operations are carried out without special issue or concern. It is a matter of practical efficiency to allow government, through the district manager, to focus its attention on those areas where there are special issues.

- ***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.***

In the Prince George Forest Region the forest development plan is the primary consultation document. Site level plans, such as silviculture prescriptions, rarely, if ever, form part of a consultation package. From time to time First Nations may request additional information relating to a specific site, or may request additional input into a site level plan as a result of their FDP review. The FDP for the pilot project area will continue to be the consultation document and First Nations interests at the site plan level will be dealt with as they presently are under the standard legislation.

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.***

The participants will establish benchmarks to enable government and the public to evaluate the success of the pilot project under section 32 of the draft pilot project regulation (performance of the participants) and section 33 (success of the pilot project experiment).

Benchmarks related to forest resources will be identified in the SFMP

- ***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.***

The continuing liability provisions of the *Forest Act*, and obligations under individual tenure agreements held by the participants will continue to apply under the pilot project.

In addition, certification standards require records to be retained for appropriate lengths of time.

- **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.**

The regional manager is obliged to assess the performance of each participant on behalf of government. To adequately assess participant performance the regional manager must draw upon expertise appropriate to the subject area, (eg. biodiversity, fisheries, range, silviculture, timber harvesting, wildlife, etc.), including the expertise of the regional director and staff who are ordinarily presumed to report to the regional director. Including the regional director in S.32 would therefore be a redundancy.

- **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.

It is unnecessary to include additional provisions for this matter. The district manager is not compelled to relieve the participant of any obligations.

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.

This issue is dealt with under section 10 (2) (e), PPR, in which a reforestation period, and tree species, heights and spacing to be achieved at the end of the reforestation period, are required elements of a site plan.

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.

The liability provisions of the Forest Act, Forest Practices Code Act and tenure agreements will continue to apply.

- **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.**

Audits will be carried out on forest practices. The FDP and site plans will be audited with respect to consistency with the SFMP. This is consistent with any performance assessment of any FDP or site level plan with respect to any higher level plan.

- **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.**

All administrative penalty provisions under the PPR are for a maximum of \$50,000. \$50,000 is substantially more than is the case for the majority of the provisions under the *Administrative Penalties Regulation*. To the extent that participants in the pilot project will be exposed to a major increase in penalty potential for far more common breaches of compliance, it is not inappropriate that some commensurate reduction in exposure be found. For a breach in which an administrative penalty of \$50,000 were to be contemplated is more in the realm of prosecution in any event, in which case the provision is for \$500,000 and up to two years imprisonment.

- **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.**

The additional provisions provide an incentive to the participant to report breaches and to undertake remedial works. To the extent that the senior official considers the reporting of breaches and the undertaking of remedial works, the senior official also can consider the failure to report a breach or undertake remedial works.

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.**

The participants will commit to undertake notification to government and public as indicated in section 6.4 of the detailed proposal (Table 5).

- **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.**

All information currently available to the public through the forest development plan public review process will continue to be available under the pilot project. However, for clarification, Section 38 (3) (b) of the draft pilot project regulation will be revised to include “and related assessments” immediately following “operational plans”.

- ***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.***

The participants are committed to providing full public access to information related to the pilot project. A pilot project website would be an innovative way of sharing information that will be investigated. It should be noted however that those persons in the remote areas of the Fort St. John Forest District are also those least likely to have access to the Internet. Therefore, the participants will continue to undertake site visits to remote communities under the pilot project as is currently done.

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.***

A forest development plan complying with all the normal requirements will continue to be required. The sustainable forest management plan will provide strategic direction for the FDP and site level plans. As there are currently no landscape level plans in place within the Fort St. John TSA, the SFMP will address a void that was observed and reported by the Forest Practices Board in their recent special report on Forest Development Plans. The participants believe that strategic planning proposed for the pilot project will help improve public understanding of forestry activities and the obligations of licencees.

- ***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.***

Section 21 (5), PPR is necessary for the grandfathering of currently approved plans and activities.

- ***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.***

Consistency with higher level plans is a mandatory requirement for the pilot project participants. Section 25 of the draft pilot project regulation allows for a transitional period in the event that the approval of a higher level plan necessitates modifications to

the SFMP, and, potentially, to the FDP and site plans. It is quite possible that several years of operations will have been planned and approved under an SFMP and FDP.

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.

Government's fiduciary responsibilities with respect to aboriginal people are not met, nor are they intended to be met, through provincial legislation. All action taken under the pilot project will be governed by the same fiduciary and consultative requirements as any other action taken under other provincial forest legislation.

The Fort St. John district manager of the ministry of forests has indicated to the participants and managers from other government ministries and jurisdictions, that the pilot project provides a potentially superior framework for consultation with First Nations compared to the current processes

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.

BCEN is incorrect in stating "that there has been no public or First Nations involvement of the crafting of pilot project to date." In fact, the participants have met with, or made presentations to, a large number of persons since the project was in the initial planning stages to the present. Comments and recommendations received at these meetings have been considered, and in many cases, incorporated in the draft detailed proposal and draft pilot project regulation. Following is a list of the groups addressed by participant representatives on the pilot project.

- ❖ Fort St. John LRMP Monitoring Committee, November 17, 1999
- ❖ Bulkley Pilot Project Working Group, April 20, 2000
- ❖ Council of Forest Industries staff and member representatives, June 6, 2000
- ❖ Fort St. John community meeting, June 22, 2000
- ❖ Northern Forest Products Association forestry committee, November 2, 2000
- ❖ Association of BC Professional Foresters council, November 30, 2000
- ❖ Peace BC Lands and BC Environment Annual Meeting, December 1, 2000
- ❖ MoF Prince George Regional Management Team meeting, December 13, 2000
- ❖ Forest Practices Board staff, December 14, 2000
- ❖ Peace Managers (MoF, MoELP, Oil & Gas Commission representatives), January 4, 2001
- ❖ Public Advisory Group, January 24, 2001

In addition to the above noted formal meetings, the participants also met with various individual members of the public, including First Nations representatives to discuss aspects of the proposed pilot project.

The June 22, 2000 public meeting in Fort St. John was conducted in order that the participants could explain the approach envisioned by the participants for the Fort St. John pilot project. The meeting was attended by approximately 160 people including a number of persons from First Nations communities within the Fort St. John TSA. At the meeting, attendees were asked to provide input on those areas of interest they believed should be represented on the proposed pilot project public advisory group. Additionally, the participants invited those in attendance to indicate, by way of a questionnaire, their willingness to represent a particular interest on the advisory group.

A follow-up meeting was held on January 24, 2001 with invitations sent to all those who responded affirmatively at the June 22, 2000 meeting, plus additional persons who have previously represented interests at local land use planning tables. The participants asked those persons who attended the meeting to form a public advisory group to undertake a number of tasks related to the proposed pilot project. Notwithstanding the important role of the public advisory group upon approval of the pilot project, the group has been asked to undertake several tasks during the public review period before the pilot project is presented to cabinet. Among those tasks, the group has been asked to:

1. Review comments made by the public related to the proposed pilot project, including those prepared by the BC Environmental Network.
2. Review the participant's responses to public comments on the proposed pilot project and actions taken by the participants to address those comments.
3. Report to the government as to the public acceptability of the proposed pilot project.

First Nations representatives will be provided with ample opportunity to participate in the public advisory group as committed to in the detailed proposal.

All contributions of the public advisory group, as well as comments received from stakeholder groups, First Nations and the general public will be submitted to government at the end of the public review period.

In closing, the Fort St. John pilot project participants wish to thank the representatives of the BC Environmental Network who reviewed the proposal and prepared the associated report. A number of important suggestions made by BCEN in the report have been adopted in the draft pilot project regulation. The result is an improved regulation in terms of clarity and effectiveness.

This reply has been prepared on behalf of the Fort St. John Pilot Project participants by:

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January 24th, 2001