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## Review of TFL 49 (Riverside) Pilot Project

April 19, 2002

The following review of the Draft TFL 49 Results-Based Pilot Project was prepared on behalf of the Forest Caucus of the BC Environmental Network by Andrew Gage, staff counsel at West Coast Environmental Law, in consultation with BCEN Forest Caucus member organisations located in the TFL 49 area.

Our review focused primarily on assessing the draft pilot regulation (the “Regulation”) for compliance with Part 10.1 of the *Forest Practices Code (the “Code”)*; in some cases we have also provided our perspective as to the public policy issues surrounding the Regulation. At the present time, the pilot project does not meet the requirements of Part 10.1 of the *Forest Practices Code*, for the following reasons:

- The Regulation is designed to enable Riverside to adopt voluntary standards and results, rather than to experiment with new methods of regulation as contemplated by Part 10.1;
- The Regulation exempts Riverside from a number of statutory requirements under the *Code* and the *Forest Act* without creating new regulatory requirements which address equivalent issues. As a result, the Regulation does not provide equivalent protection to the *Code*;
- As a result of exemptions and lack of standards or government oversight, the Regulation does not ensure that forest practices will adequately manage and conserve forest resources and is not consistent with the preamble of the *Code*;
- The Compliance and Enforcement regime does not provide for equivalent protection of the environment to that available under the *Code*;
- The Regulation does not require Riverside to monitor the effectiveness of the *Code* in meeting environmental objectives or the goals set out in the preamble to the *Code*; and
- The Regulation does not provide the Forest Practices Board with powers equivalent to those available under the *Code*;

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### Results-Based

As with previous Pilot Project Regulations developed under Part 10.1 of the *Code*<sup>1</sup>, the TFL 49 pilot is not “results-based” as that concept is commonly understood. Indeed, the Regulation removes some of the few results contained in the *Code*. Riverside justifies this step by noting that specific criteria, and ways of measuring those criteria, will be developed as part of the Stewardship Plan created under the Regulation. Riverside maintains that these criteria, and the associated measurables, are “results” and that the Regulation is consequently “results-based.”

With respect, the Forest Caucus opposes a system of regulation in which forest companies are responsible for developing their own results. This approach replaces government regulation, with government monitored self-regulation. Although the regulation does provide for government approval of Riverside’s chosen results, this represents only a right to veto the results chosen by Riverside under certain circumstances, and does not represent true government regulation. In our view government is ultimately responsible for setting the goals, and the results to be met in meeting them, in respect of logging on public lands.

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<sup>1</sup> One notable exception was the Bulkley Valley Pilot Project. While the Forest Caucus review of the pilot was critical on many issues, the Bulkley Pilot was the only pilot project we have reviewed to date which identified specific results and included them in the Regulation itself.

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## Role of Part 10.1 Regulations

At Riverside's request, members of the BCEN Forest Caucus, as well as the Parks Caucus, met with representatives of the company on March 19, 2002 so that Riverside could present the Pilot Project to us and answer any questions. As well as taking us through the Regulation, Riverside gave a detailed presentation about the virtues of its "sustainable total resource management model", and referred us to three new types of planning which would be show-cased as part of the Pilot Project, related to silviculture, riparian protection and fish habitat protection. The presentation was very interesting and thought provoking.

However, a review of the Regulation reveals that none of the innovations presented to us as ecologically beneficial area will actually be required by law. Indeed, the only apparent link between the Regulation and the proposed "sustainable total resource management model", etc. is that the Regulation would not prevent Riverside from trying out some of its innovative ideas. In other words, the Regulation is not designed to regulate Riverside, but to empower it to experiment with a range of forest management models with only limited regulation.

This criticism will be discussed in more detail when examining the role of the Stewardship Plan and the use of Exemptions under the Regulation. Generally, however, the Forest Caucus submits that this approach is entirely contrary to the purpose of Part 10.1 of the *Code*. Part 10.1 is entitled "Pilot Projects to Improve the Regulatory Framework for Forest Practices." Section 22.1.1 (1) – the first provision of the Part – provides "The Lieutenant Governor in Council may make regulations respecting pilot projects to *experiment with ways to improve the regulatory framework* for forest practices" [Emphasis added].<sup>2</sup>

While the Forest Caucus can understand the value of experimenting with different techniques of Forest Management, the mandate of Part 10.1 requires that the pilot project experiment with different regulatory frameworks. Instead, the Regulation is designed to remove, wherever possible, regulatory content in favour of the discretion of Riverside and, to a lesser extent, the District Manager.

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## Exemptions

This "enabling" approach not only means that most of the details of the Pilot Project which might be said to commend it are not reflected in the Regulation, but also that the Regulation provides broad exemptions from the *Code*, its regulations and the *Forest Act* without creating corresponding responsibilities.

When asked about one such feature at the meeting with BCEN members, Riverside representatives explained that one of the exemptions was justified because superior protection would be provided by one aspect of the pilot project. However, since the Regulation removes the protection required by the *Code* and its regulations, and does not require the promised aspects of the Pilot Project, the result is a major weakening of the legislative regime governing Riverside, with no replacement regulatory regime as contemplated by Part 10.1.

One notable exemption is from portions of section 35 of the *Forest Act*. The exempted sub-sections relate to information that Riverside, as holder of a TFL, is required to provide to the District Manager as part of a management plan. Riverside representatives have described the Regulation as requiring a "modified" TFL management plan, but really the only modifications are to exempt Riverside from providing inventory and other information. These requirements are not replaced by terms of the Stewardship Plan or by other requirements under the Regulation.

This exemption is particularly ironic for two reasons. First, Riverside, in its presentation, has made a good deal of the fact that it has done an extensive inventory and that this data will guide its pilot project. Second, the Forest Caucus, in virtually all of its reviews of pilot projects to date, has commented that a results-based

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<sup>2</sup> Code, s. 221.1(1)

approach requires base-line data and that this was not required by the pilot project regulations. Here we have a pilot proponent that claims to have conducted base-line inventories, but which is exempting itself from being required to do so.

Since the TFL management plan is used to assist the Chief Forester in calculating the Allowable Annual Cut for the TFL, it is essential that the Chief Forester have comprehensive and accurate information. The Regulation does not provide any other means to provide the Chief Forester with such information. The effect of the exemption would be four-fold. First, it would deprive the Chief Forester of necessary information in the making of the AAC determination. Second, it would keep from other government officials inventory information useful in plan approval and regulatory function. Third, it would keep the inventory information out of the public domain. Finally, it would allow Riverside, should it wish to do so, to stop keeping comprehensive inventory information.

The Regulation provides exemptions from conducting watershed assessment plans (WAPs) in community watershed and other areas prescribed by the District Manager. When asked where the Regulation provided equivalent protection, Riverside representatives explained that in their opinion WAPs were unnecessary to protecting water quality and that, accordingly, the sections were being exempted.

Other exemptions are also problematic. While some of the exemptions, particularly the exemptions from the *Code* itself, are rationally connected to the rest of the Regulation (most commonly removing requirements for District Manager approval or for approved plans prior to undertaking certain forest operations), others relate directly to standards and results which are currently required under the *Code* or its regulations, and are not otherwise addressed in the Regulation. For example, exemptions include standards related to road and trail construction and deactivation<sup>3</sup>, soil disturbance<sup>4</sup>, riparian protection<sup>5</sup>, restrictions on clearcut size or location<sup>6</sup>, wildlife tree and old growth protection<sup>7</sup>, silviculture<sup>8</sup>, community watershed protection<sup>9</sup>, and clean-up after logging operations.<sup>10</sup> The Regulation does not introduce any explicit requirements to protect any of these values. Also exempted are powers of the Chief Forester to set further standards and/or to request further information,<sup>11</sup> which is made more alarming in light of the broad exemptions outlined above.

The Forest Caucus has previously objected to pilot projects which provided for the District Manager and the licensees to allow further exemptions once strategies were identified to protect particular values and forest resources. This Regulation goes further in that it provides blanket exemptions without even identifying the values and resources which must be protected, on the strength of strategies which have not yet been developed and will not need to be approved by the District Manager at all. The entire approach is unacceptable.

It should be noted that despite the long list of exemptions contained in section 5 and 6 of the Regulation, this list is not exhaustive. Other sections of the *Code* and its regulations only come into play once a Forest

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<sup>3</sup> Code, ss. 61, 64(1)-(2), (5)-(7), Timber Harvesting Regulation, s. 13(2), 16(1), 17; Note, in the case of s. 13(2) of the THR, the extent of exemption is unclear, in that it refers to conditions contained in s. 13(1), which explicitly applies to work done prior to December 1999. It would be preferable to spell out conditions where the exemption does not apply.

<sup>4</sup> Timber Harvesting Regulation, s. 18.

<sup>5</sup> Code, s. 67(2), 248, 249, Operational Planning Regulation, s. 15, Timber Harvesting Regulation, s. 6, 10(3), 11(1),(2), 22.

<sup>6</sup> Operational Planning Regulation, s. 11, Timber Harvesting Regulation, s. 9, 29.

<sup>7</sup> Timber Harvesting Regulation, s. 3, s. 29.

<sup>8</sup> Code, s. 70(6), Timber Harvesting Regulation, s. 9. Section 70(6) is curious in that it relates to obligations connected to work done prior to 1994. Since neither the Regulation nor the Pilot Project can govern how work was done prior to 1994, it is difficult to see how this exemption could be justified.

<sup>9</sup> Operational Planning Regulation, s. 14, 15.

<sup>10</sup> Timber Harvesting Regulation, s. 16(1),(7), 19.

<sup>11</sup> Code, s. 8.

Development Plan (FDP) has been developed. However, as the Regulation removes the requirement of a FDP, these sections will also effectively cease to have any effect once a Stewardship Plan is approved. This effect is considered in more detail below, under Stewardship Plans.

With a few exceptions, the exemptions outlined in section 5 of the Regulation appear to have been included either on the strength of proposals which Riverside did not put into the Regulation, or simply because Riverside found the requirements of the *Code* and Regulation to be inconvenient. This is not an appropriate use of Part 10.1 of the *Code*.

**Recommendations:**

- Rewrite the Regulation to ensure that any exemptions from the *Code*, the *Forest Act* or their regulations, are rationally connected to the actual content of the Regulation.
- Formalize aspects of the pilot project which are intended to provide equivalent protection to the *Code*, the *Forest Act* and the regulations in the Regulation.

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**Stewardship Plans**

The Regulation centres around the approval of a Stewardship Plan by the government. The Stewardship Plan replaces the Forest Development Plan and all other government approved plans. Unlike an FDP, the stewardship plan does not involve approval of cutblock location or other technical approval, but approval of goals and objectives. While Riverside would be required to submit various mapped information, the meat of the Stewardship Plan (as reflected in the approval criteria contained in section 10 of the Regulation) is:

- (a) the vision and goals of Riverside in respect of the TFL;
- (b) the criteria, or the “conditions” identified by Riverside as desirable for the TFL; and
- (c) indicators and measurables identified by Riverside against which to evaluate whether the criteria are being advanced.

The government therefore moves from the role of technical oversight to value-based oversight, with the Regional Manager being asked to approve the end goals and how to measure whether they are being achieved only. Moreover the goals, criteria and measurables for TFL 49 must be approved by the government if they meet the requirements of section 10, further constraining the government’s ability to set objectives in respect of the TFL.

While it is true that forest management can often benefit from clear objectives and goals, this level of planning should not be done by industry. Rather the public (with industry as only one stakeholder) and the government should define the objectives and goals for Crown land. The Regulation nowhere defines what the vision and goals has to be, other than it must be “consistent” (meaning not in conflict with, but not necessarily advancing) the preamble of the *Code*<sup>12</sup>.

Similarly, the “criteria” must be consistent with the objectives identified in the LRMP<sup>13</sup>, but need not be based on, or even advance, these objectives, developed by a multi-stakeholder table and endorsed by government.<sup>14</sup> Indeed, we are advised that Riverside intends to base its criteria on the Canadian Council of Forest Ministers criteria, rather than on the LRMP objectives. While Riverside believes that the CCFM criteria “nest” the LRMP objectives, government should be slow to give effect to a Regulation which

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<sup>12</sup> Regulation, s. 10(1)(b).

<sup>13</sup> The word “consistent” is defined, as is the case in many of the *Code*’s regulations, as “not in material conflict.”

<sup>14</sup> It is ironic that the Regulation requires only consistency with the LRMP objectives (and actually allows for exemptions from LRMP implementation (see strategic planning below), since section 3 of the Regulation relies upon the LRMP to claim compliance with s. 221.1(5) of the *Code*, which requires a balancing of competing values and interests. We suggest that s. 221.1(5) mandates a more direct connection with this balancing of competing values and interests.

allows Riverside the power to replace locally developed and government endorsed LRMP objectives with its own criteria (provided only that the replacement criteria not be inconsistent with the LRMP objectives). A more appropriate approach would be to require the criteria to include the LRMP objectives<sup>15</sup>, possibly in addition to the CCFM criteria.

In relation to the approval of indicators and measurables as part of the Stewardship Plan, we would like to comment on two of the criteria to be considered. First, the criteria of “cost effective” is one that Riverside may well consider in deciding what indicator or measurable to propose, but we do not see that it should be relevant to the Regional Manager. Second, we are not aware of any set of criteria or body of professional opinion which is referenced by “generally accepted principles of sustainable forest resource management,” and accordingly question how useful this consideration is.

From an environmental perspective, the most important part of the test for approval of the Stewardship Plan is section 10(1)(e) which requires that the plan “when taken as a whole” will “adequately manage and conserve forest resources in the TFL 49 Area.”

The “adequately manage and conserve” language is taken from the language of the *Code* surrounding approval of an operational plan. Operational plans under the *Code*, such as FDPs and Silviculture Prescriptions, involve the approval of technical planning requirements, such as the location of cutblocks and roads, or the methods for logging and replanting, respectively.

As noted, the Stewardship Plan does not involve approval of technical planning requirements, but rather approval of values and goals, and of how to measure movement to those values and goals. Does it make sense to lift the “adequately manage and conserve” language from the *Code*, and to apply it to a value-based plan? We do not believe that it does. If the vision, goals, and criteria were so inconsistent with the preamble of the *Code* as to require damage to forest resources, then perhaps the Regional Manager could determine that a Stewardship Plan failed this test. However, short of that extreme example, there is no way that a Regional Manager could determine whether or not forest resources will be managed or conserved simply by looking at a list of visions, goals and criteria. The Regional Manager would still require technical information on how those goals and values are expected to be implemented.

Some technical information must be submitted to the Regional Manager at the same time as the submission of a Stewardship Plan, under section 8 of the Regulation. However, it does not form part of the Stewardship Plan, and can be amended by Riverside without notice. Moreover, it is not at all clear that the Regional Manager can rely upon this technical information in considering whether the Stewardship Plan will adequately manage and conserve forest resources.<sup>16</sup>

In addition, I am unsure of the effect of the words “when taken as a whole” in section 10(1)(e). This could be taken to mean that it does not matter if one of the criteria will actually hurt forest resources, so long as other criteria and/or the vision and goals result in corresponding improvements to forest resources?

A problem associated with the removal of technical planning requirements from plan approval is the reduced amount of information available to the public in the review of the Operational Plan. Since this is often the only opportunity for the public to obtain some types of information concerning forest operations, we note that section 7(2)(e) represents a major reduction from the types of information which would be required for an FDP approval under the *Code*. If the information required under the Operational Planning Regulation for plan approvals is not required for Stewardship Plan Approval, then the Regulation should include a provision allowing the public to obtain such information from Riverside.

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<sup>15</sup> We note that a list of LRMP objectives are already included as Schedule A to the Regulation, and could easily be referenced as objectives to be included as criteria. Currently Schedule A does not appear to be explicitly referenced in the Regulation.

<sup>16</sup> The most intriguing of this additional information is the “framework for the ecological forest management model”. The content of such a framework is set out to some degree by its definition in section 1 of the Regulation. However, specifics are lacking, and the model is not enforceable and apparently not required to directly relate to the Stewardship Plan or forest operations.

Another issue associated with the replacement of the FDP with the Stewardship Plan and Silviculture Prescriptions with Site Level Plans is that this creates other *de facto* exemptions from the *Code* and Regulations. As discussed in the exemptions section, above, the Forest Caucus is very concerned that the Regulation creates exemptions without providing regulatory structures to provide equivalent protection to forest resources.

The protection given to Community Watersheds under the *Code* and its regulations provide a useful illustration of one of these *de facto* exemptions. Under section 12 a licensee must prepare terrain mapping in respect of community watersheds before submitting a Forest Development Plan for approval. However, since no FDP is required under the Regulation, Riverside is effectively exempted from having to prepare terrain mapping, notwithstanding that the section of the *Code* technically remains in force.<sup>17</sup> Similar problems exist with requirements that a company record and evaluate the occurrence of forest health factors<sup>18</sup>, perform a terrain stability field assessment in certain areas<sup>19</sup>, and restrictions on harvesting on potentially unstable terrain<sup>20</sup>. We are led to believe that these *de facto* exemptions may be the result of a drafting oversight on the part of Riverside, in which case we certainly urge them to correct the Regulation accordingly.

Finally, we note that the criteria for Stewardship Plan development does not explicitly require the Stewardship Plan to be consistent with higher level plans. Under the *Code* this requirement is found in the description of the content of Forest Development Plans and Silviculture Prescriptions<sup>21</sup>, and no equivalent section is to be found in the Regulation.<sup>22</sup>

**Recommendations:**

- Require the Stewardship Plan criteria to explicitly address the LRMP objectives;
- Amend the Regulation to require criteria to protect particular forest resources and values;
- Require that the Stewardship Plans provide sufficient technical information on strategies, location of cutblocks, etc. to allow the Regional Manager to evaluate the impact of logging operations under the plan on forest resources;
- To the extent that government does not approve technical planning requirements, provide explicit regulatory requirements designed to provide equivalent protection to the *Code*;
- Ensure that the public may obtain at a minimum the information currently available as part of Forest Development Plans and Silviculture Prescriptions; and
- Rewrite the Regulation to remove *de facto* exemptions.

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**Stewardship Plan Amendment and Government Review**

The Regulation provides for two types of amendments: voluntary and mandatory.

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<sup>17</sup> See also s. 7 of the Timber Harvesting Practices Regulation which limits harvesting in community watersheds if “a terrain stability field assessment is required to be carried out for the forest development plan or silviculture prescription that applies to the area, or the area has been exempted from the requirement for a forest development plan or silviculture prescription and a terrain stability field assessment is required to be carried out as a condition of the exemption.”

<sup>18</sup> OPR, s. 13.

<sup>19</sup> OPR, s. 16, 17; Section 23(3) attempts to require terrain stability field assessments in circumstances listed in section 16(1), but as there is no requirement in the Stewardship Plan or elsewhere to identify areas which have such characteristics, this section becomes difficult to enforce.

<sup>20</sup> Timber Harvesting Practices Regulation, s. 8.

<sup>21</sup> Code, s. 10(1)(d), 12(a); See also s. 11(1)(c), 13 and in relation to other types of operational plans.

<sup>22</sup> Section 16 of the Regulation exempts the Stewardship Plan from consistency with Higher Level Plans under certain circumstances, which, of course, implies that the Stewardship Plan must otherwise be consistent with such plans. However, a clear positive requirement would be preferable.

The first, contained in section 14, occurs when Riverside chooses to amend its Stewardship Plan, which it may do so at any time. In relation to strategic planning, discussed below, Riverside argues that because of a 25-year plan period Riverside should not have to adjust to changes in government objectives as expressed in higher level plans, but in relation to amendments Riverside wants the ability to completely change the objectives it has to meet at any time. Section 14 recognizes makes no acknowledgement as to consistency in vision, goals and criteria, and the Regional Manager is given no power to consider the respective merits of the old Stewardship Plan versus the new. If the Plan meets the criteria set out in section 14, the amendment must be approved.

Section 14 also sets out a moderately different test than was contained in section 10, under which Stewardship Plans are first approved, creating an unusual situation where Riverside may be able to get a Stewardship Plan by amendment that it could not get by the original approval. Of special concern is section 14(1)(c) which allows the Regional Manager to disregard the approval criteria of section 10 on the grounds that: “the amendment is necessary or desirable and will adequately manage and conserve forest resources.” Since the section 10 criteria include requirements that the Stewardship Plan be prepared in accordance with the *Code* and its regulations, this is effectively a back door invitation to further exemptions.

Section 15 provides for “mandatory amendments” to the Stewardship Plan. The function of the section is not limited to amendments, however. The section deals generally with what happens when Riverside knows, or should know, that a forest practice is “unlikely to ensure” that the criteria of the Stewardship plan will be achieved over time. If this occurs:

- (a) the licensee must modify the forest practice **and**
- (b) “if necessary” submit an amendment to the stewardship plan, which case the forest practice must not be carried out (except with the consent of a district manager) until the Stewardship Plan is amended.

The section merges sections of the *Code* related to protection of forest resources<sup>23</sup> with sections related to mandatory amendments<sup>24</sup>. The result is confusing and does not provide equivalent protection to the *Code*.

Despite the use of the word “and”, it is clear from the rest of the section that the licensee may choose to amend the Stewardship Plan rather than to modify the forest practice so that it no longer prevents the Licensee from meeting their criteria. The Forest Caucus objects to the idea that changing objectives is an appropriate response to finding that a particular forest practice will not meet the original objectives. When asked about the rationale for this approach, Riverside representatives explained that it was possible that on the ground practice would reveal that the Stewardship Plan had identified the wrong indicators and measurables, giving rise to the need for an amendment. However, section 15 is clear that Riverside must stop where it knows that it is unlikely to ensure that the *criteria* are met, not the indicators or measurables. It might well be appropriate to see a separate section in which Riverside is required to amend the Stewardship Plan when it knows, or ought to know, that the indicators or measurables are unlikely to accurately measure progress towards the criteria. However, section 15 does not do this.

The mandatory amendment provisions of the *Code* arise in the context of operational plans which bind the Licensee not only in relation to objectives but also forest practices. As a result, on learning that the plan has an inherent contradiction in it, the plan must be amended. In the case of the Regulation, however, Riverside would have full control over its forest practices subject only to the requirement that they meet the criteria.

If there were a situation where the Stewardship’s criteria were so unrealistic that they could not be met, this could be addressed through a voluntary amendment. The idea of merging forest practices which do not meet the stated objectives with a mandatory amendment procedure is problematic and unnecessary.

The idea of a stop work requirement, on learning the criteria are unlikely to be met, is sound, although we would prefer stronger language, requiring Riverside to refrain from Forest Practices which are unlikely to

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<sup>23</sup> Code, s. 45.

<sup>24</sup> Code, s. 35.

progress towards the Criteria. Whatever stop work provision is used, however, it should not, as section 15 appears to, replace the *Code* requirements that Riverside stop work on learning that its forest practices are likely to cause significant damage to the environment,<sup>25</sup> regardless of whether the harm is likely to prevent Riverside from meeting the Criteria or not.

The Regulation also provides for a 5-year “periodic review” of a Stewardship Plan by the Licensee and the Regional Manager. It is important to note that this review is not an opportunity for the Regional Manager to amend the Stewardship Plan, or to insist upon changes to the Stewardship Plan. The content of the Stewardship Plan is left to the discretion of Riverside (provided that it meets the requirements of section 10) and the most that a plan review can result in is a voluntary amendment by Riverside. As a result, government has no ability to ensure that changes in circumstances are addressed by Riverside during the 10-year term of a Stewardship Plan.

On their face, the factors to be considered by the Regional Manager and Riverside in a periodic review relate more directly to forest practices than to the Criteria and other content of the Stewardship Plan, although in some cases the information may relate to measurables and indicators. This illustrates yet again the tension between the governance role the public expects of the Regional Manager, and the superficial oversight role actually granted in the Regulation.

Section 21(1)(e) requires the Regional Manager and Riverside to consider public comment received in the course of “public review of forest practices in the TFL.” It is unclear whether this refers to comment received through annual consultation meetings, through public review and comment, or whether it is intended to be taken more broadly.

**Recommendations:**

- Amend section 14 to give the Regional Manager discretion to consider the relative benefits of the previous Stewardship Plan, the reasons for the amendment, and the need for consistency in planning prior to approving any amendment; place the onus on Riverside to demonstrate the need for the amendment;
- Amend section 14 to require that the amendment approval test include all the terms of the original approval test; remove s. 14(1)(c);
- Remove section 15;
- Ensure that the Regulation includes stop work provisions where forest practices are unlikely to advance the criteria or are likely to cause significant damage to the environment; and
- Give the Regional Manager power to require Plan amendments and set standards related for forest practices in the course of a periodic review.

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**Strategic Planning**

The *Code* provides for strategic planning by the government to ensure that public objectives are recognized and addressed by forest companies in the course of their operations. Through higher level plans such as resource management zones, landscape units and sensitive areas the government can specify objectives for a particular area and can require logging companies to abide by these objectives.

The Regulation, in sections 16 to 19, would severely restrict the government’s ability to use these and equivalent powers in respect of Riverside’s operations. Once a stewardship plan is in place Riverside would have the ability to veto any higher level plans which were inconsistent with the approved stewardship plan.

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<sup>25</sup> Code, s. 45(4); section 25 of the Regulation, which tracks the language of s. 45 of the Code, does not contain the equivalent stop work requirement, leaving section 15 of the Regulation providing the only such requirement.

This is of particular concern given that stakeholders in the Okanagan-Shuswap area have recently negotiated a Land and Resource Management Plan (LRMP). This Plan was approved in principle by the government on January 18, 2001, and an LRMP implementation and monitoring committee is in the process of determining how the LRMP will be implemented. As a result, Riverside is fully aware that a significant number of Old Growth Management Areas (OGMAs) and other designations will likely be implemented in the near future. It is not possible to assess whether any of the resulting OGMAs, or other designations, might be inconsistent with an eventual Stewardship Plan, as the final plan has not yet been drafted, yet alone approved.

It should be noted that the District Manager does not have the power under the Regulation to decline to approve a stewardship plan on the grounds that it is inconsistent with a soon to be designated higher level plan. Indeed, as noted above, it is not clear that he or she can refuse to approve a Stewardship Plan even where it is inconsistent with existing Higher Level Plans.

Even if the Regulation does require a Stewardship Plan to be consistent with higher level plans, the exemptions contained in sections 16 to 19 would in theory allow Riverside to include provisions in a Stewardship plan for the purpose of rendering a soon to be established higher level plan inconsistent with the plan, thereby buying up to 10 years during which the higher level plan will have no effect.

Riverside, when asked about these provisions, explained that since the Stewardship Plan was approved for a 10-year period, and planned over a 25-year period, Riverside's planning would be undermined if the government significantly changed its objectives mid-way into the plan.

The Forest Caucus has serious problems with the idea that the convenience of a forest company should take precedence over the ability of a democratically elected government to set objectives in respect of a publicly owned resource. The designation of higher level plans involves a public consultation process and if a higher level plan were to be designated which might conflict with a stewardship plan, Riverside would have the opportunity to point this out to the authorities at that time. The *Code* currently gives a forest company time to amend its operational plans after a new higher level plan is designated and this is, it is submitted, an appropriate approach in respect of a Stewardship Plan also.

Even if such an approach were justified where a change in government plans catches Riverside by surprise (requiring a change in the Stewardship Plan), it cannot be justified in cases, such as in the implementation of the LRMP, where Riverside was fully aware of, and in fact participated in, the planning process. At a minimum the Regulation should be amended to make this distinction. Another approach might be to hold off enacting the Regulation, or those portions of the Regulation related to Higher Level Plans, until after the LRMP has been fully implemented.

Forest Caucus members asked Riverside whether these sections would allow the company to be exempt from OGMAs currently under development by Old Growth Management Area Advisory Committee, as part of the LRMP implementation process. Initially Riverside representatives expressed the view that their pilot project would provide better protection than the OGMAs would anyway. Again, however, we note that these aspects of Riverside's pilot project, whatever their merits, are not required by the Regulation.

Riverside representatives then asked what conflict we could see arising between their Stewardship Plan and the OGMAs (since it is only where there is a conflict that the restrictions apply). With respect, while Riverside has provided a draft Stewardship Plan, neither the Stewardship Plan nor the OGMAs have been developed, and it is difficult to speculate over what conflicts might arise. A more useful discussion would be for Riverside to give examples of what types of conflicts it might see between its Stewardship Plans and higher level plans.

**Recommendations:**

- Remove sections 16 to 19 of the Regulation;
- Amend the Regulation to explicitly require the Stewardship Plan and forest practices to be consistent with any higher level plan and to the LRMP as approved;

- If the Regulation exempts Riverside to any degree from future Strategic Planning, the Regulation should be reworded to make it clear that higher level plans developed as a result of the LRMP process, or other planning processes of which Riverside has notice and opportunity to participate, will have full force and effect.

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## Public Consultation

Under the Regulation Stewardship Plans will generally require public review or comment prior to approval or amendment. The exceptions to this general rule are for amendments which (a) affect only the indicators and measurables<sup>26</sup>; (b) are of an administrative nature; or (c) do not materially change the objectives or results of the plan.<sup>27</sup> Since the content of a Stewardship Plan focuses on vision, goals, criteria, indicators and measurables, one would think that (c) was redundant. If an amendment to the vision, goals or criteria did not materially change the objectives or results of a plan, then why make it?<sup>28</sup>

Review and Comment of the Stewardship Plans will be carried out under the Operational Planning Regulation requirements, following the process for approval of a Forest Development Plan.<sup>29</sup> However, since Stewardship Plans need only be approved every 10 years (or longer if an extension is granted), whereas FDPs are generally approved annually, this means that the public may have one tenth as much opportunity for public review and comment as would occur under the *Code*.

Moreover, since the content requirements of the Stewardship Plan are substantially different than that of an FDP, the public will not have access to the same level of information about forest practices to be conducted, and, indeed, will not necessarily be able to comment directly, as part of the Review and Comment, on actual operations<sup>30</sup>. Instead, interested members of the public will find themselves in a similar situation to the Regional Manager in reviewing a Stewardship Plan (discussed above); the plan will give them some general ideas about the features of the TFL as a whole, and about the general goals and objectives of the company, but little knowledge, or opportunity to comment on, the specific operations of Riverside. While it is certainly desirable that the public have the opportunity to comment on the Stewardship Plan, this review and comment will not serve the same function that review of an FDP does.

Riverside has tried to address these problems with the Public Review and Comment process (as applied to the Stewardship Plan) by introducing additional public input processes. In particular, the Regulation provides for annual meetings with “affected first nations, persons having tenures issued under legislation in the TFL 49 area and the general public.”<sup>31</sup> However, this requirement could be met by a single annual public meeting combined with some efforts to contact the above groups. There are no notice provisions set out and there is no requirement to do anything more at these meetings than “provide information about the licensee’s proposed operational plan and operational plan map ... [for] at least the next ensuing three years.” If this type of company led consultation is to be credible, we would suggest that requirements for meaningful engagement with each of these groups should be spelled out in some detail. This would be doubly important in terms of consultations with First Nations, as the government is under a constitutional obligation to ensure that such consultation is meaningful.

Section 20(5) does require that Riverside forward written copies of comments received during these “annual consultation meetings” to the Regional Manager together with a report summarizing how the licensee has addressed each written comment. This is a positive step, but since this consultation takes place

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<sup>26</sup> Regulation, s. 20(2).

<sup>27</sup> Regulation, s. 14(2).

<sup>28</sup> To the extent that this restriction is intended to enable substantive amendments without review and comment the Forest Caucus opposes it.

<sup>29</sup> Regulation, s. 1.

<sup>30</sup> S. 221.1(3)(c) requires that a pilot project regulation provide an opportunity for public review and comment of the “forest practices” under the Pilot. This Regulation does not do so.

<sup>31</sup> S. 20(3).

after plan approval, and in relation to forest practices which would not require government oversight, any actual changes to the operations of Riverside would depend entirely upon the goodwill of the company.

The Regulation also requires Riverside to make Site Level Plans, and required assessments, available to the public and the government at the company's business premises. However, there is no requirement as to what content must be included in a Site Level Plan, so there is no guarantee that the public will be able to obtain information about forest practices currently available under the *Code*. Also section 20(3) refers to an "operational plan" in addition to Site Level Plans, suggesting that there are levels of plans not covered by this disclosure requirement. The Regulation should provide for broader disclosure, to ensure that the public has the information required under the Act. The Regulation should also explicitly provide for members of the public to be able to get copies of such information.

We note that the Okanagan Shuswap LRMP originally provided for District Advisory Committees (DACs), a multi-stake holder committee to advise the statutory decision-makers on their decisions. Riverside has its own advisory group, although the Forest Caucus is not clear on how membership in that group was determined. Neither advisory group was included as a consultation mechanism in the Regulation itself. Such a mechanism could be useful in ensuring public consultation if the Regulation were to set out clear and fair rules for determining membership and providing an opportunity for such a committee to influence forest practices.

**Recommendations:**

- Provide a mechanism with specific requirements for meaningful public and stakeholder consultation on operational planning in the Regulation itself, either as a part of, or in addition to, annual consultation meetings;
- Create a mechanism to ensure that First Nations rights are recognized and respected; and
- Provide for broad public disclosure, including opportunity to obtain copies, of plans, maps and data created or gathered by Riverside in the course of its forest operations.

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**Forest Practices**

Part 4 of the Regulation is entitled "Forest Practice Requirements." However, the Part provides little in the way of actual results, instead providing, for the most part, for information sharing with government (to replace government approval under the *Code*) and planning requirements. The Forest Caucus has serious concerns in regard to the lack of information made available to the government, both under the sections, and in terms of general context on which to assess the information obtained under this Part.

Section 22 provides that Riverside must notify the district manager of upcoming logging operations in a "strategy unit." The term "strategy unit" is not defined<sup>32</sup>, and should be. Under the section, Riverside must inform the District Manager of the location of timber harvesting or road construction 30 days before commencing the operations, but need not pass on Site Level Plans until "within 48 hours of commencing timber harvesting or road construction activities..."<sup>33</sup> In addition, there are circumstances under subsections (4) and (5) where no notice, or copy of the Site Level Plan, need be provided to the District Manager.<sup>34</sup>

Not only does this provision keep the District Manager in the dark until the last moment, but it deprives the public of notice about what operations are likely to take place in areas which are of interest to them. As noted above, the Regulation does provide for public consultation around an operations map and plan, but

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<sup>32</sup> Riverside is required to develop strategies to manage forest resources under s. 24 of the Regulation, but these strategies need not be attached to units.

<sup>33</sup> This wording is ambiguous and reads as though the notice to the district manager can actually be given up to 48 hours *after* the start of operations. We are advised that this is not the intent. However, even if our recommendations are not adopted, this provision should be amended to clarify that notice must be given at least 48 hours prior to the start of operations.

<sup>34</sup> We cannot conceive of circumstances where it would be appropriate for the District Manager to waive the limited notice requirements provided for in the Regulation. Section 22(5), which provides for such a waiver, is therefore entirely unacceptable.

since those documents may be amended at any time, and since no content is required for the operational plan, the Site Level Plan may be the first actual indication of the location and methods of logging plans. Quite aside from the inadequacy of public comment, we do not believe that the short notice could allow government to live up to its obligations to consult First Nations.

Section 23(1) is useful to illustrate the problems arising from the lack of general information and planning information available to the District Manager. It enables the District Manager to require the preparation of an archeological impact assessment if he or she “has determined that the assessment is necessary to adequately manage and conserve archaeological sites in the area...” However, the Regulation nowhere requires Riverside to provide information, or the District Manager to acquire such information on his or her own, on the basis of which the District Manager might make such a determination.<sup>35</sup>

The problem of the lack of information available to the District Manager is even more serious in relation to what should be one of the Regulation’s more powerful environmental protection provisions. Section 28 allows the District Manager to suspend forest practices where the forest practices will interfere with Riverside from achieving its criteria under the Stewardship Plan, illegally infringe aboriginal rights, or cause irreparable harm to a “resource feature”. However, since the District Manager will not generally be aware of environmental features or, indeed, the characteristics of the site, it is difficult to imagine when this section might be exercised. Even if the Site Level Plan contains an obvious risk to the environment, First Nations rights or Plan criteria on its face, the District Manager will have a total of 48 hours to analyze the plan, recognize this risk and decide how to respond. This will not be easy given the competing demands on a District Manager’s time. And in many cases a risk to the environment will arise from circumstances or characteristics not obvious on the face of a Site Level Plan.

Section 24 requires Riverside to develop strategies “to achieve the criteria identified in the ... stewardship plan as substantiated by the applicable indicators and measurables.” These strategies are not approved by government and need not be available for public comment. The section is vague, as it is unclear on whether all strategies must advance all criteria, or whether Riverside may legitimately be pursuing separate, or even contradictory, strategies aimed at achieving different goals. The Forest Caucus feels that this level of planning should be available to public and government scrutiny, and the mere requirement that Riverside have some strategies adds little to the regulatory regime. Section 26, related to Silviculture, is similarly vague and unenforceable.

As noted previously, section 25 replaces section 45 of the *Code*, but, unlike that section, does not provide for a requirement that Riverside stop work when faced with damage to the environment. However, there is an additional problem with section 25 which provides that there is no harm to the environment if Riverside is “acting in accordance with an approved stewardship plan or a site level plan or permit consistent with the approved stewardship plan.” Section 45 on its face seems to provide for similar protection for a company acting pursuant to an “operational plan or a permit issued under this Act or the regulations.” However, a Site Level Plan is not, under the Regulation, “issued”, but is simply developed by Riverside with no government oversight. To allow Riverside to exempt itself from the prohibition on damaging the environment on the strength of a plan that it developed without government approval is to render the prohibition nearly meaningless.<sup>36</sup>

Section 27(2) should be rewritten in legally enforceable language. While apparently intended to allow the district manager or designated environment official the power to intervene in regard to road construction,

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<sup>35</sup> As noted above, section 23(3) and (5) are also problematic because they assume the availability of information which would ordinarily be required in an FDP, but which is not required at all under the Regulation.

<sup>36</sup> It is true that section 25(2)(a) can be read as referring to a Site Level Plan “consistent with the approved stewardship plan” (although that is not clear from the drafting). However, since “consistent” merely means not “not in material conflict”, and since the Stewardship Plan does not impose many binding requirements, there are still many situations where Riverside could damage the environment in circumstances where it knew or should have known it would do so, but still be covered under a Site Level Plan.

the section, as currently worded, only gives the officials the right to request plans (with no actual obligation on Riverside to provide them) and does not give them any ability to require changes to road layout or design in the event that there are problems with the plans.

**Recommendations:**

- Amend the Regulation to ensure that the District Manager has sufficient information and notice to allow him or her to effectively oversee forest operations;
- Provide mechanisms whereby the public may receive advance notice of operations in a particular area;
- Ensure that the Regulation meets constitutional obligations to First Nations in regard to site level operations;
- Amend the sections, as discussed above, to clarify definitions and statutory requirements which are currently unclear;
- Amend section 25 to require clear protection of the environment as a “result” in itself, rather than allowing Riverside to exempt itself through development of Site Level Plans;
- Amend section 27(2) to provide a clear oversight power; and
- Create mechanisms which ensure protection of the environment and other forest resources, whether through additional oversight powers or through specific, enforceable requirements related to forest practices.

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**Monitoring and Evaluation**

As with other Pilot Projects which we have reviewed, the Pilot provides for monitoring and evaluation aimed at ensuring that the stated goals of the Pilot are met, but limited mechanisms for ensuring that the objectives contained in the preamble to the *Code*, including environmental protection, are met. As we read Part 10.1, the Pilot Project should include wide monitoring provisions designed to assess the effectiveness of the Regulation as a legislative instrument. Instead the Regulation merely assesses whether Riverside is meeting goals and targets which it set,<sup>37</sup> and whether Riverside is complying with legal requirements.

In order to assess whether the Regulation in fact provides environmental protection it is necessary to have comprehensive data on the state of the environment in the TFL prior to beginning the Pilot Project. This requires base-line data against which an auditor could compare the effect of the Regulation. As noted above, the Regulation not only does not require base-line data, but actually eliminates requirements that Riverside collect inventory data under the *Forest Act*. In light of representations by Riverside that it has, in fact, done a significant amount of data collection, we are unable to understand why there is not a clear requirement to collect base-line data and to monitor the effect of the Regulation on ecological values.

The Forest Caucus is concerned over the requirement, in section 29(3), that an auditor not submit a report until Riverside has had "an opportunity to review and comment on the findings of the audit." While the section does not require the auditor to adjust his or her report to accommodate Riverside's comments, this structure will inevitably give rise to questions about the independence of the audit process.

The Forest Caucus does approve of requirements that auditors be approved by government<sup>38</sup> and that the report be made available to the general public.<sup>39</sup>

**Recommendations:**

- Require base-line data to be collected by Riverside;
- Ensure that the effectiveness of the Regulation in meeting the goals contained in the pre-ambule to the *Code* and environmental protection is evaluated; and

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<sup>37</sup> Such criteria may, but need not, include ecological criteria.

<sup>38</sup> Regulation, s. 29(1).

<sup>39</sup> Regulation, s. 29(4).

- Remove or modify s. 29(3) to ensure that the auditing process is perceived to be arms-length from Riverside.

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## Compliance and Enforcement

The Regulation departs from the compliance and enforcement sections of the *Code* in several ways. First, the penalties provided are significantly lower than for equivalent penalties under the *Code*.<sup>40</sup>

Second, a new category of defence is created.<sup>41</sup> Section 33 creates a range of defences arising from situations where Riverside did not intend the result to occur. The range from the often debated “due diligence” defence to situations where the offence is caused by a natural disturbance. There are a number of concerns raised by such defences:

- (a) **Compensation** – The forest managed by Riverside is publicly owned, but managed by Riverside. The public suffers a loss when Riverside damages the environment or other forest resources. While the Courts have been sympathetic to the idea of a “due diligence” defence when an administrative penalty is designed to penalize an offender, in the context of compensation, the Courts have generally assigned liability to the party most able to control the situation. Under the Regulation, the public (through government) will have limited control over forest operations, while Riverside carries on forest operations which clearly pose a risk to the publicly owned resource. We note that the Bulkley Results Based Pilot Project makes this distinction, with the due diligence defence only being available for penalties over and above an amount of compensation.
- (b) **Incentives for high standards** – The premise of a results-based framework is that the licensee is responsible for meeting the results. This should require the licensee to take all available steps to ensure that their information and planning are aimed at achieving the prescribed results. By introducing defences related to mistaken fact or due diligence, the Regulation would remove a significant incentive to ensure that an extremely high level of care is taken in regard to the forest resource. Instead it need only demonstrate that it took steps.
- (c) **Clarity of responsibility** – Questions of due diligence and the knowledge available to Riverside are complicated and likely to result in many disputes and argument and/or a disincentive for government to assign penalties for offences in all but the clearest cases. Since government will now have only limited access to Riverside’s planning and information, it will be required to rely upon Riverside for evidence as to whether due diligence was exercised. As a result, much of the effectiveness of the penalty sections could be lost.
- (d) **Confusion around causation** – All of the defences, but in particular the defence arising from natural disturbance, raise complicated questions of causation. While an offence may be caused by a land slide, will it be possible to determine with any certainty whether Riverside’s logging operations might have caused that slide?

There may well be cases where it will seem unjust to hold Riverside responsible for more than compensation to government. This is the case with all offences and is generally addressed through prosecutorial discretion and discretion in setting the penalty. The fact that there is a risk that Riverside might be treated unfairly in extreme cases does not justify clouding the issues of responsibility in every case. If these types of issues are to be addressed in the Regulation at all, they should be listed as one factor which the government may consider in determining the amount of a penalty.

Also included under compliance and enforcement are provisions allowing the government to order Riverside to take action to control a natural disturbance or to mitigate damage to forest resources caused by forest practices. While such a power should exist, the Regulation creates a number of problems.

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<sup>40</sup> Notable among these is the reduction of an offence for damaging the environment from \$1,000,000 and/or 3 years in prison for a court proceeding to \$250,000 and/or 2 years in prison in the Regulation. Maximum administrative penalties for a violation of the same section is reduced from \$50,000 in the Administrative Remedies Regulation to \$25,000 in the Regulation.

<sup>41</sup> These defences are not just in respect of offences under the Regulation, but apply to offences under the Code or other regulations.

First, Riverside is apparently only required to mitigate damage to forest resources resulting from its forest practices when ordered to do so by the Regional Manager.<sup>42</sup> Second, the word “mitigate” is not defined in the Regulation, but probably falls short of “remediation” of damaged forest resources.<sup>43</sup>

Third, Riverside is presumed to be entitled to compensation for work done pursuant to such an order, unless there is a final determination that Riverside committed an offence which caused the damage. In combination with the new “due diligence” defences, discussed above, this means that Riverside may be entitled to compensation for mitigating damage which it caused, as long as its actions fall within one of the “defences” contained in s. 33. As noted above, the Forest Caucus believes that Riverside, as the party responsible for forest practices carried out in the TFL, should be responsible for compensating the public for loss caused as a result of those forest practices. This includes remediating damage caused by its operations, regardless of whether Riverside intended the damage to occur.

**Recommendations:**

- Provide for penalties which are consistent with those included in the *Code*;
- Eliminate the “intention-based” defences proposed in section 33 of the Regulation;
- Ensure that the public is entitled to compensation for damage, by Riverside, to publicly owned resources;
- Amend s. 34 to require Riverside to remediate any damage its forest operations cause;
- Ensure that the Regional Manager’s powers under s. 34 extend to ordering remediation of damage arising from forest practices; and
- Restrict the right of compensation under s. 34 to cases where Riverside was in no way responsible for the natural disturbance or damage to forest resources.

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**Forest Practices Board**

Notwithstanding section 29(5) of the Regulation, which purports to preserve the Forest Practices Board’s jurisdiction, the Regulation does raise two problems in regard to the Board’s jurisdiction.

First, and most importantly, the Forest Practices Board, under s. 128(1)(c) of the *Code*, and regulations related to that section, has the ability to request a review of the approval of a Forest Development Plan. However, the Regulation replaces the Forest Development Plan with a Stewardship Plan, but does not provide the Forest Practices Board with a corresponding power to request a review. As a result, an important power of the Forest Practices Board is undermined.

Second, Riverside, under s. 35 of the Regulation, grants itself the ability to appeal directly to the Forest Appeals Commission in respect of certain decisions. No equivalent ability is granted to the Forest Practices Board. While this does not actually reduce the Board’s jurisdiction, it does create a perceived imbalance between the powers and abilities of Riverside versus the Forest Practices Board, as a public watchdog. The Forest Caucus has recommended in respect to other pilots that if such an approach is used, the pilot should provide a corresponding right of appeal to the Board.

**Recommendations:**

- Provide the Forest Practices Board with the right to request a review of decisions made under sections 10 and 14 of the Regulation; and
- Ensure that the Forest Practices Board has equivalent rights of review and appeal to Riverside.

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<sup>42</sup> Regulation, s. 34(1).

<sup>43</sup> Section 118 of the Code is apparently still in force and does allow for broader remedial orders where a contravention has occurred. It would be useful to clarify the relationship between s. 34 of the Regulation and s. 118 of the Code.

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**Transition**

The Regulation, as reviewed by the Forest Caucus, provides only an incomplete termination provision, and no transitional provisions. Termination provisions are key to ensuring that the pilot projects meet their goals and definitely should be better developed before being made available for review and comment. The drafted termination provision does not currently include the time frames or mechanisms which would be necessary to ensure a smooth transition to full compliance with the *Code*.

**Recommendations:**

- Flesh out and develop termination and transition provisions prior to public review of the Regulation. If possible, provide opportunity to the Forest Caucus to review these provisions in advance of public review.

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**Conclusion**

As discussed above, the Forest Caucus has a wide range of concerns about the Regulation as drafted. In our view, the Regulation runs entirely contrary to the purpose of Part 10.1, and does not meet the tests laid out in that part. Most problematically, the Regulation provides for widespread exemptions from the *Code* (both directly and indirectly) without providing for corresponding legal requirements. At our meeting with representatives of Riverside we were told about a pilot which is in no way reflected in the Regulation. If the Pilot is to proceed, the Regulation should be completely rewritten to ensure that it sets out structure and requirements related to the Pilot.