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A Results-Based Forest and Range Practices Regime for British Columbia

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1.0 EXECUTIVE SUMMARY

The BC Government has asked the public to comment on a paper entitled “A Results-Based Forest and Range Practices Regime for British Columbia” (the “Discussion Paper”). The Discussion Paper proposes extensive changes to the Forest Practices Code (the “Code”).

This document was released at the beginning of May, and public comment is due by the end of June, allowing a relatively short time-line for meaningful public consultation given the length and complexity of the document. Drafting of the final legislation is already occurring, due to the tight government legislative time-table, in the absence of the results of the public consultation.

We hope that the government will consider and incorporate public comment into any changes to the Code. Accordingly, this report is an extensive review of the Discussion Paper, providing both a critique and suggesting alternative approaches to amendments to the Code. However, we remain skeptical of the government’s interest in public consultation due to the tight time-line imposed both on the public and on legislative drafters, as well as the fact that cuts to Ministry of Forests staff prior to opening the matter up for public discussion, all of which may constrain what type of Code BC can expect.

WCEL Comments/Concerns — Executive Summary

We have organized our comments in this report following, as far as was possible, the basic organization of the Discussion Paper. Very generally, however, we believe that, the proposed Results-Based Code framework will not work for the following reasons:

No Prohibition Against Harmful Results

- It lacks real prohibitions against harmful results.
- A proper Results-Based Code would prohibit any harmful alteration to:
 - habitat for threatened and endangered species;
 - critical winter range for ungulates;
 - habitat features
 - streams and the hydroriparian ecosystems;
 - water quality and quantity;
 - important community viewsheds; and,



- other forest resource values set out in the Code definitions and not enumerated here.

Lack of Measurable, Auditable and Enforceable Standards

- The viability of any move to a results-based approach completely depends upon there being clear, measurable standards which are auditable and enforceable. Yet there is broad awareness, including within both the Ministry of Forests and industry, of the fact that the proposed Code lacks measurable, auditable and enforceable standards. We support the view of the ABCPF that without sufficient clarity, the Code could become “an unenforceable morass for licensees, government, professionals and the public.” We also support the comments of the Forest Practices Board that “the intended results described in the discussion paper are not clear or measurable.”¹
- “Results-based” liability is largely theoretical: the onus is not on industry to demonstrate its logging activity will not harm the environment. Instead, the onus is shifted to government proving damage after the fact, after the removal of the evidence in some cases, and in the context of significantly reduced operational planning information.
- There is a lack of real accountability in the proposed Code: the lack of results-based prohibitions (as outlined above), reduced likelihood of proving non-compliance and possible introduction of due diligence defences, will breed an industry culture in which the likelihood of getting caught is calculated as a business risk against the cost of any possible administrative penalty.
- Opening up the possibility of “due diligence” defences to administrative penalties is not justified in terms of legal doctrine and theory, and given all the other shifts towards reduced accountability, strongly suggests there is not a sincere attempt to hold industry accountable for activity that is harmful.
- Given cutbacks to enforcement staff across agencies, the situation is even more serious: the failure to incorporate citizen enforcement provisions into this Code also suggests an unwillingness to hold industry accountable.
- Measurable results and standards are particularly critical, given the proposed Code’s lack of government oversight despite the inherent conflict of interest in asking timber producing licensees, and their professional employees, to manage for environmental values.

Elimination of Stand Level Planning

- The results of eliminating stand level planning will be devastating to accountability, environmental values and agency oversight. Doing so removes an important level of review for environmental values that has been provided by forest ecosystem specialists, and concerned citizens. Although often ignored by many Forest Service decision-makers and industry proponents, where followed, input provided at this level has resulted in significant protection of environmental values through revised block

¹ Both comments made in the course of submissions to the MLA’s committee hearing submissions on the Results-Based Code.

design, placement, protection for wildlife trees and riparian areas, ungulate winter range, bear denning sites, etc. throughout the province. There is a benefit to this type of site-specific review that simply cannot be replaced by higher level plans or rules.

Lack of Results-Oriented Test for Plan Approval

- The proposed Code places significant focus and reliance on the approval of the one remaining plan (Resource Development Permit application) for the protection of environmental values. However, the legal test for approving the plan is not 'results-focused' at all. The tests in Appendix 2 are largely procedural and not substantive.
- While the plan approval test in section 41(1) of the current Code is known to be inadequate to protect environmental values, the proposed Code abandons the requirement for decision-makers to be satisfied that the plan "adequately manages and conserves forest resources." This test needs considerable improvement, to make it a final conservation safety net — particularly in the absence of mandatory plan requirements — not to be abandoned altogether.
- A Results-Based Code should require the licensee to assure decision-makers and the public that clear and specified outcomes will result from the exercise of rights under the permit. That still leaves plenty of opportunity for a licensee to be creative in proposing how it intends to achieve the result. There needs to be assurance that the permit will sustain a complete list of forest resource values, not just the two mentioned in clause 2(2)(e) on page 56 (terrain and cumulative hydrological impacts in certain watersheds). An evidentiary basis should be required, and an RDP test added, to ensure that the SDM is satisfied that results and rules will be met by proposed activities before logging or roadbuilding is approved.

Loss of Professional Accountability

- It is remarkable that a Code that significantly increases reliance on the professionalism of industry foresters (notwithstanding the conflict of interest in terms of duty to their employer versus moral duty to maintain environmental values on public land) would, at the same time, remove the long-standing, pre-Code requirement to have a professional signature and seal on plans.

Loss of Public Input

- The loss of meaningful provisions for public input is deplorable. This will be the result of the Code in four ways: 1) through the lack of information required in the RDP, the single mandatory plan; 2) through the elimination of stand level planning requirements and the attendant loss of public knowledge and input on where and how logging is proposed; 3) through the failure to have a meaningful test for a licensee's incorporation of public input in the resource development permit, and 4) through the lack of accountability mechanisms for public input and avenues to resolve disputes.

Too Many Exemptions to Rules

- The current Code developed numerous exemptions from legal requirements. While these have been abused, they were partly necessary because non-compliance with government approved plans was a breach of the law. However, in this proposed Results-Based Code, the number and type of exemptions are completely antithetical to the spirit of a results-based approach.



- The rules associated with identified forest and environmental values are very important to the viability of a results-based approach. However, a major problem with the exemptions as proposed is that they often are not linked in any way to the desired goal statements, objectives or desired results. They allow for completely arbitrary exemptions, even where the goals, objectives and results will not be met. The most obvious and egregious example of this is the exemption from meeting old forest objectives on pages 17-18 of the Discussion Paper. Others include clearcutting in community watersheds;² logging in riparian areas and sensitive ecosystems for forest health reasons;³ and identified wildlife exemptions.⁴

Budget and Staff Cuts

- The entire premise of moving towards results-based regulation rests on tough enforcement. The government recognizes this in its communications about the Code, but in reality has reduced already low levels of compliance and enforcement staff in the agencies. For example, twenty-two conservation officer positions have been eliminated from and eight offices closed in areas where there is considerable forestry activity. The Conservation Officer service alone has been reduced to 78% of its 1996 capacity.

The Solutions — Executive Summary

Throughout this paper, we suggest a range of solutions designed to create a true and credible results-based code. Some of our key recommendations are as follows:

- Ecosystem-based planning should be the basis of government strategic planning, with long-promised implementation of legally binding biological diversity objectives occurring before revisions to the Code are made.
- A Results-Based Code should contain not only results that are evaluated after the fact, but results regarding planning which must be conducted, information which must be gathered, and other results that must be demonstrated before logging occurs/can be evaluated while logging is occurring (the latter are referred to as “rules” in the Discussion Paper).
- Professionals engaged in logging operations must certify that planning will achieve specified positive results as well as avoiding negative ones.
- Government and the public must have the information necessary to evaluate, approve (in the case of government) or comment on (in the case of the public) and monitor logging operations under the Code. This means that more detail must be required prior to government approval, and that site level planning and assessments must be required under the Code and made publicly available even if they will not be subjected to government approval.

² Discussion Paper, p.33.

³ Discussion Paper, p.22.

⁴ Discussion Paper, p.39.

- Detailed requirements for public consultation must be included in the Results-Based Code, including notice and obligations to treat public comments in a meaningful manner. An opportunity for public involvement at the site planning level should also be included.
- Government oversight should be extended to protection of endangered species values and to other areas identified by government as requiring oversight.
- The proposed Code must recognize and address the potential impact of logging operations on First Nations rights, which are protected by the Canadian Constitution.
- The Code should be written to include overarching results based on protection of the environment, to drive industry innovation and changes in industrial practice.
- Results and rules must be developed using the precautionary principle and carefully evaluated for enforceability and auditability by a specialized committee.
- Licensees must be required to gather and make publicly available all information necessary to allow government and the public to evaluate compliance with the results and rules.
- The Code should not provide for due diligence to be available as a complete or partial defence in respect of administrative penalties.
- The Code should expand the compliance and enforcement mechanisms available to include such tools as citizen-based enforcement, reporting obligations, expanded appeals mechanisms, enhanced powers of the Forest Practices Board, etc.

2.0 GOVERNMENT DIRECTION REGARDING FOREST PRACTICES LEGISLATION

Comments

According to the Discussion Paper, the proposed Results-Based Code was the result of a commitment by the current administration to “streamline the Forest Practices Code to establish a workable, results-based Code, with tough penalties for non-compliance.” This commitment should not be viewed in isolation, however. One related New Era Commitment not mentioned in the Discussion Paper is the promise to: “adopt a



scientifically-based, principled approach to environmental management that ensures sustainability, accountability and responsibility.”⁵

The Discussion Paper sets out a series of objectives and assumptions, which are said to be the basis of the proposed Code.⁶ The objectives represent a number of potentially inconsistent values, without considering what happens if these values conflict. For example, high on the list of objectives are "reducing the transactional and operational costs to industry" and "providing the forest industry with 'freedom to manage' in delivery of defined results." What happens if these pro-industry objectives come into conflict with objectives of "maintaining the Code's high environmental standards" and "maintaining and enhancing the level of public acceptance of forest management"? If the order in which the objectives are presented is an indication of their priority, environmental standards comes a distant fourth to the first objective of reducing industry costs. Furthermore, we are concerned by the indication later in the Discussion Paper, that such balancing will reflect (existing) “policy” that balances biodiversity conservation with social and economic considerations (see section 6.2.1 below for further detail).

More problematically, most of the objectives listed in this section are framed purely in terms of how the existing Results-Based Code should be changed (or maintained). The objectives do not set out a positive vision of what goals are to be achieved, but instead speak of “reducing” costs and complexity and “maintaining” standards set under the Code.

Truly proactive legislation should set out clear and positive goals which underlie the legislation. In the case of the existing Code, the preamble set out the underlying goal of the legislation:

WHEREAS British Columbians desire sustainable use of the forests they hold in trust for future generations;

AND WHEREAS sustainable use includes

- (a) managing forests to meet present needs without compromising the needs of future generations,
- (b) providing stewardship of forests based on an ethic of respect for the land,
- (c) balancing economic, productive, spiritual, ecological and recreational values of forests to meet the economic, social and cultural needs of peoples and communities, including First Nations,
- (d) conserving biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources, and
- (e) restoring damaged ecologies.

⁵ BC Liberals, *New Era for British Columbia*, p. 13.

⁶ Discussion Paper, p. 3.

The fourth objective listed in the Discussion Paper states that a new Code should “maintain the Code’s high environmental standards”, but makes no effort to articulate what those standards are. Should we expect the new Code to strive for sustainability, as the current Code does? Will it “maintain” the current level of on-the-ground implementation of the Code; standards of the Code as it would have been once all aspects of the framework were fully implemented; or standards of sustainability that were the stated purpose of the Code.⁷ We note that the Minister has publicly stated that the new Code will result in “world class” standards of “sustainable forestry”, but this commitment is not explicitly made in the Discussion Paper.

In addition to the objectives, the Discussion Paper sets out "key assumptions" on the basis of which the proposed results-based regime was developed. Several of these "assumptions" amount to ideological constraints on the development of a results-based regime capable of meeting the objectives; rather than searching for the best way of meeting public objectives, the authors of the Discussion Paper have dictated what tools are appropriate. For example:

No joint statutory decisions — Joint statutory decision-makers were included in the current Code as a way of accessing the different cultures, expertise and statutory mandates of different Ministries for certain, key decisions and to serve as a check and balance between the more timber-oriented MOF and, in particular, the former MELP. There may be other ways to achieve this same result, but nothing is gained by assuming that this tool will not be used.

No government approvals of site level plans — There are many public policy reasons why government approval of site level plans might be required, particularly in cases where private logging operations pose great risks to the public at large or publicly-owned resources. However, rather than discuss this complex question with the public, the authors of the Discussion Paper merely list as an "assumption" that no such approval will be required. This “assumption” overturns pre-Code forest policy from the 1980’s, which was brought in then to address US complaints of subsidy in softwood lumber.

"Balance" of environmental conservation with timber supply — This assumption refers to a government policy developed under the NDP government that purported to arbitrarily cap the impact of Code implementation on the timber supply at 6%. In other words, the government promised industry that if government rules necessary to protect biological diversity, prevent landslides, save endangered species, protect water quality, etc., resulted in a more than 6% reduction in the volume of trees logged, then government would water down the rules. It was done without assessment of environmental impacts. This is not a balancing of interests, but a caving in to industry by dictating an AAC outcome as the top priority. If rules which actually protect the environment can be accomplished within a

⁷ Government policy and delays limited the implementation of the Code. Moreover, government officials frequently failed to require true sustainability in the exercise of their discretion under the Code. However, “sustainable use” (as defined by the Code preamble) remains the overarching purpose that the Legislature directed government officials to implement through a government oversight function. As the proposed Results-Based Code eliminates this government oversight role, a Results-Based Code would have to contain specific directions as to how the listed aspects of sustainable use are to be achieved, rather than expecting government decision-makers to insist upon it. Such direction goes beyond simply setting standards which protect the environment from the worst logging practices, and represents a positive result for companies to work towards.



6% impact on AAC, well and good. But the previous government should not have constrained itself in this manner, and nor should the Discussion Paper. (The actual impacts of the Code have been much less because key provisions, such as landscape unit planning, have not been implemented). This assumption is entirely contrary to the New Era commitment to use a "scientifically-based" approach to environmental management. The public want sustainable stewardship of our forests — not a guaranteed level of timber to logging companies at the expense of other values.

Imposing ideological constraints on to the development of legislation makes for bad legislation. The fact that the Discussion Paper's authors prejudged their development of this results-based regime calls into question the bona fides of this consultation.

Solutions

It is our view that British Columbians deserve sustainability, including the values listed in the current Code preamble, to be front-and-centre in any results-based Code. Indeed, we believe that sustainability should be the primary "result", from which more specific results flow. Objectives related to the costs to industry and the resource capacity of government are certainly relevant and important considerations. However, they cannot be allowed to compromise the standard of sustainability promised in the preamble to the Code and expected by the people of British Columbia. These values need to be given proper legal effect, as their relegation to the preamble has not been effective.

It is our recommendation that the Results-Based Code explicitly set sustainable use, at a minimum as per the current preamble, as the desired result of all forest practices and planning. This would then become the primary result of a true "results-based" Code, and could be a standard which licensees and professionals are required to work towards.⁸

Government should incorporate the public's comments through this process with an open mind, without constraining itself by preconceptions and "assumptions". Accordingly, the government should put off its scheduled November date to introduce legislation, recognizing that it will be impossible to meaningfully deal with public input by that date.

2.1 ROLE OF RESOURCE AGENCIES

Comments

The Legislature has assigned responsibility for environmental protection and the setting of environmental standards to the ministry responsible for the *Ministry of Environment Act*, currently the Ministry of Water, Land and Air Protection (WLAP). Furthermore, it is this Ministry that has the highest level of expertise on how development activities (including logging) are likely to affect the natural environment. Given the assumption of the authors of the Discussion Paper that there will be no joint sign-off on any item under the Code, it becomes crucial that the Ministry of Water, Land and Air Protection, as the

⁸ We note, however, that the current Code's definition would need some modification, to clarify that the government and the public, and not the licensee alone, should determine how to "balance" forest values. See also section 6.2.1, below, for comments regarding our recommended approach to "balancing".

Ministry responsible for environmental protection, be given responsibility for all such matters.

The Discussion Paper appears to recognize the value in making WLAP responsible for environmental standard setting, with WLAP being assigned responsibility for setting objectives for Ungulate Winter Range, water quality and identified wildlife. However, some key environmental objectives, such as those related to landscape level biodiversity values, wildlife tree retention and lakeshore protection are assigned to other ministries.⁹ In addition, despite the assumption against joint sign-off, the Ministry of Sustainable Resource Management (SRM) shares some responsibility for Ungulate Winter Range.

In order for WLAP, or indeed for any ministry, to ensure environmental protection under a results-based code, it will be essential for the ministry to have sufficient staff and resources. We are very concerned about the impact of government cuts to WLAP (as well as the Ministries of Forests (MOF) and Sustainable Resource Management (MSRM)) on the ability of the government to ensure environmental protection.

Solutions

Ensure that WLAP is the ministry responsible for setting the objectives, results, rules and other matters related to environmental protection fields that are within their mandate.

Ensure that WLAP has sufficient resources to fulfill its environmental protection mandate in the context of a results-based Code.

3.0 LEGAL FRAMEWORK

The RBC proposes major changes to the legal framework for forest practices regulation that will significantly weaken protection for environmental values. We would like to address this section under three headings:

1. the need to consider the broader legal framework that governs forest practices;
2. related initiatives that are clearly linked but not adequately addressed; and,
3. the inadequacy of the approach raised in the discussion paper.

⁹ Discussion Paper, p. 54.



3.0.1 THE BROADER LEGAL FRAMEWORK

Comments

The Discussion Paper does not adequately address the full legal framework under which forest practices are and will be carried out in BC. This is quite critical to an informed critique of the concepts in the Discussion Paper because the broader context, as well as other law reform and policy initiatives under way, will have a direct bearing on the real “results” delivered to the BC environment.

Forest practices are regulated in the context of other legislation and contractual commitments that are the main drivers of industrial forestry activity. The starting point is the legal designation of the vast majority of the province as either timber supply areas or tree farm licences (TFLs) – designations that are primarily directed at commercial timber extraction. The secondary context is the allocation of timber, either by volume or exclusive rights to large areas, through tenure agreements allocated under the *Forest Act*. For many years, it has been well understood that rights to our public forests are virtually ‘fully allocated’.

The regulation of forest practices comes into the scene rather late. In the south of the province, the century plus of logging, particularly the last three decades, have eliminated much of the old growth forests required to maintain biological diversity. The Code puts some parameters or constraints on the exercise of legal rights granted under the *Forest Act*. However, the reality is that the regulation of forest practices has been driven by pre-existing contractual commitments and arbitrary directives to maintain or limit impacts on timber harvest levels. This was true before the present government took power, but this government has politically pledged to increase the allowable annual cut even further.

There is an irreconcilable conflict between the drive to maintain or increase the rate of cut and sustain environmental values. This is evidenced today in the logging of habitat for threatened and endangered species and critical winter habitat for species like deer, caribou and mountain goats, to mention just a few examples.

This broader context becomes particularly important when juxtaposed against the lack of measurable and enforceable results proposed in the Discussion Paper. Where there is a lack of clear commitment to environmental values, the public can assume that the drive to ‘get the cut out’ will prevail. These concerns are not premised on pessimism or speculation, but are founded in related initiatives that are currently under way. They are inevitably linked to Code outcomes, and need to be addressed at the same time.

Solutions

The history of logging in BC shows that logging operations consistently take priority in government decisions over environmental considerations. One step in reversing this trend would be to include in the Code clear direction that environmental considerations should take priority over logging and that the precautionary principle be applied in all government decisions.

West Coast Environmental Law (WCEL) has long proposed solutions which take back logging rights from the major logging companies, using the land freed up to increase

community and First Nations control over BC forests within a framework of sustainability. When combined with such forms of tenure as Community Forest Agreements, which allow communities to manage for forest resources other than timber production, this approach holds great promise to remove the presumption in favour of logging over environmental protection. This approach has additional attraction at this time, as a significant tenure take-back is one of the key demands of the American softwood industry in the current dispute between Canada and the US over softwood tariffs, creating a tremendous economic incentive to redistribute tenure from the major players.

3.0.2 SIGNIFICANCE OF RELATED LEGISLATIVE AND POLICY INITIATIVES

Comments

Two government policy initiatives in progress are not only inevitably linked to the Results-Based Code, but could undermine the Code if they proceed as proposed. These initiatives both reside within MSRM — the “Working Forest” and the “Sustainable Resource Management (SRM) Planning” initiatives. The latter addresses the important issue of landscape level planning, whereas the working forest proposal is a political initiative intended to legislatively guarantee timber industry access to a vast portion of British Columbia — the same forest required for conservation of environmental values.

Based on our discussions with Ministry of SRM officials concerning proposed “working forest” legislation, we are very concerned that that initiative will completely undermine the Results-Based Code. The proposal outlined to us clearly placed industrial access paramount to environmental values. It would arbitrarily enshrine timber industry access rights to the operable forest, with minimal or no regard to the environmental values in that same forest. From the perspective of biodiversity conservation, for example, operable forests are often critical habitat for species; areas which have good soil and tree-growing conditions often support a wide variety of life. Biodiversity cannot be maintained and conserved solely in inoperable forests.

The “Working Forest” initiative is based on the misguided notion that one of the critical problems for the forest industry is lack of assured access to public forests. However, as discussed above, access rights to public timber have long been virtually fully allocated through tenure agreements and allowable annual cuts. The only purpose of working forest legislation can be to further entrench the right of industry access to forests, as against environmental and public values.

The second related initiative, SRM Planning, is very important to environmental values, and the results delivered by the Code. It too could be pre-empted, superceded or unduly constrained by the Working Forest legislation.

While landscape level planning is critical to good environmental stewardship (as recognized by the Discussion Paper, which describes it as a main pillar of the results-based regime) the approach to SRM planning proposed by the Ministry of Sustainable Resource Management raises real concerns. It proposes to allow the planning agenda to be driven by private “partners” with the resources and capacity to initiate planning. It also suggests



that planning which may open up economic development opportunities will take priority over planning for environmental objectives.¹⁰

For example, the SRM Planning Document proposes setting objectives for economic production (such as mineral access and timber targets) without necessarily having any clear concept of what level of economic activity the environment can sustain or is appropriate for that.¹¹ Good planning requires planners to identify what values must be protected in an area, and the amount of timber which can be extracted while retaining those values then becomes an output of the planning process. The Ministry of SRM's proposal that landscape objectives set targets for timber production reverses this common sense approach to planning, with the level of logging becoming an input to planning and decision-making. This approach stands in sharp contrast to a longstanding commitment to complete biological diversity planning for the province before proceeding to planning for other values (such planning has been implemented only in a very few areas of the province).

Also disturbing is the lack of discussion and details about this "main pillar" of the results-based regime in the Discussion Paper. The approach proposed by the Ministry of SRM could fundamentally undermine landscape level planning as a tool for environmental protection and make the second part of the test for a Resource Development Permit (discussed below) actually harmful to environmental protection.

In addition, there are key questions as to how, and if, specific legally required results and rules will be tied to the substantive content of landscape level objectives. The SRM Planning Document states that: "The consolidated clear direction provided by the SRM Plan objectives are essential for defining the results by which the forest industry will be measured under the Results-Based Code."¹² However, while the Discussion Paper suggests that landscape objectives will be used by the District Manager in approval of the RDP (discussed below), results and rules of most (though not all) of the values make no reference to requiring forest practices to meet landscape level biodiversity objectives. Such requirements should be implemented to complement, though not to replace results and rules for a particular environmental value.

Solutions

The government of BC has long promised to complete priority biodiversity planning across the province. Much of the planning work on these particular values has been done, and it remains only for government to give legal effect to these landscape objectives.

Legally implemented landscape level objectives for biodiversity, for all values set out in the Biodiversity Guidebook, which are scientifically defensible and unconstrained by timber supply impact caps or timber targets, must be in place before bringing into effect a Results-Based Code.

¹⁰ Ministry of Sustainable Resource Management, *Sustainable Resource Management Planning, A Landscape-Level Strategy for Resource Development* (the "SRM Planning Document"), (May 1, 2002), p. 15. Available on-line at: <http://srmrpdwww.env.gov.bc.ca/rpts/srmp/index.htm>.

¹¹ SRM Planning Document, p. 11.

¹² SRM Planning Document, p. 6.

The Ministry of SRM should also re-evaluate its approach to planning to ensure that economic development planning takes place in the context of a sound and comprehensive understanding of the ecological values which must be protected in a given area to maintain ecological integrity. The value specific approach proposed by the Ministry will result in an unworkable “piece-meal” approach to planning and should be revisited in favour of a consensus, multi-stakeholder model.

Ecosystem-based planning is increasingly accepted as the appropriate approach to defining the use and goals of society across a landscape (i.e., to balancing environmental, social and economic values in a way which will facilitate long-term sustainability). We urge the government to use this conceptual tool as the basis for setting priorities for the the development of landscape level objectives. For more detail, see section 6.2.1 below.

The Results-Based Code should make use of landscape level objectives in Resource Development Permit approval, but also by identifying enforceable rules and results associated with landscape level zones and objectives.¹³

3.0.3 INADEQUACY OF THE RESULTS-BASED CODE PROPOSAL

Comments

There is obvious merit in regulation that establishes clear, measurable, auditable results backed up by meaningful rules and strong enforcement measures. From the perspective of results, the *Fisheries Act* takes this approach by prohibiting “any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.” The present Code suffers from not having such provisions. The only similar ‘results-based’ provision is found in section 45 of the current Code, which prohibits carrying out “a forest practice that results in damage to the environment.” This provision is severely restrained by narrow definitions and broad exemptions, but still represents one of the few results defined in the current Code.

The regulation of forest practices to date has systematically avoided assessment of results. Forest practices were exempted from environmental assessment legislation. With few exceptions, Code rules and their implementation have also avoided assessment of results. For some aspects, such as terrain stability and visual quality, the wide discretion and lack of rules have been touted as justified due to requirements to carry out assessments as part of the planning process. The proposed new approach would eliminate these planning requirements.

To develop a Results-Based Code, however, it makes sense to regulate on-the-ground results at three stages: 1) before logging activity, in terms of planning to avoided undesirable results; 2) during logging activity, in terms of rules regarding particular forest practices to be carried out on the ground; and 3) after logging activity, in terms of results achieved after the logging. The current proposal for a Results-Based Code focuses mostly on enforcement after environmental damage. The forest industry and some in government criticize proactive planning to avoid harmful results as costly and

¹³ This approach has been explored to a degree in the Bulkley pilot project, developed by the Small Business Forest Enterprise Programme in the Bulkley Timber Supply Area.



bureaucratic, and rules that govern logging activity as too prescriptive and stifling of professional creativity. But to rely primarily on enforcement actions against harmful results *after the fact* would be to throw out precautionary measures and ignore known patterns of cause and effect. It means that the public and the environment will bear the cost of the mistakes of the forest industry.

From our perspective, good planning is a result that should be required by the Code framework in and of itself. There must be requirements that landscape and stand level operational plans be prepared (regardless of whether they require approval) and made publicly available. Company planning should be audited against a planning checklist that provides specified standards for plan content (including maps and assessments), and quality of planning, and penalties should be issued to companies who have failed to do “good planning” (i.e., met this standard). Enshrining these planning standards in regulation should provide sufficient flexibility to revise them as best practices evolve. To exclude such a results out of hand would mean that a company with consistently poor planning practices would be allowed to operate without any liability unless or until environmental damage occurs and they get caught. This approach rejects out of hand an important type of result.

A move towards greater focus on results in forest practices regulation would be desirable if its objective were to prevent harmful results from occurring. But the proposed framework does the opposite. Where there is professional expertise to assess the likelihood of harmful results and design avoidance and mitigation strategies (e.g., through terrain stability, watershed, visual quality and cultural heritage assessments), this proposal doesn't require it because it's a cost to industry. While stand level plans are required to know whether logging should be approved, and to hold companies accountable for the results, this proposal does not require them because it's a cost to industry.¹⁴ There are numerous other examples that point to the failure of this proposal to address well-known, harmful results of logging and road building in an effective, efficient and enforceable way.

Although the Code has been criticized as a “command and control” approach, the reality is that companies decide where and when they wish to log and build roads, and the approval agency is legally required to approve the plans if certain tests are met. The Discussion Paper proposes a regime in which virtually all public oversight of the use of public resources is eliminated, to the point that the location of roads and cut blocks will not even be provided to government agencies or the public. It will lead to a regime in which harmful results that could be avoided will not even be assessed. There may well be no enforcement against these results, as enforcement would depend on evidence as to what the state of the forest was before logging; without agency oversight of environmental values in a forest stand, there will be cases where evidence of those values will be removed by logging. As discussed in more detail below, some of these proposed rules are good, but overall there is a lack of enforceable rules for many environmental values. The substantially reduced information and planning requirements may also violate consultation obligations legally required for First Nations.

¹⁴ Somewhat contradictorily, the Discussion Paper also asserts that this type of planning will occur anyhow, because industry will wish to show that it has acted in a diligent manner. As noted, however, this approach would mean that a company that puts the public at risk by failing to do critical planning will be able to escape any consequences unless the feared result actually occurs.

Solutions

Develop results and rules that correspond to all stages of forestry planning and operations. Ensure that the required results and rules prevent environmental and social damage before it occurs. What some of these results might look like is explored in more detail below (see the solutions contained in parts 5.0 and 6.0 in particular).

4.0 LANDSCAPE LEVEL ZONES AND OBJECTIVES

Comments

WCEL agrees wholeheartedly with the premise that landscape level planning¹⁵ and objectives are “an essential component of a results-based management regime,” provided that an ecologically responsible planning sequence is used.¹⁶ We also agree that objectives must be measurable/describe forest attributes that must be retained. Such a critical component of a results-based regime must also be legally binding.

We also fully agree that licensees “will have to provide evidence to demonstrate that the RDP will achieve objectives for zones located in the area encompassed by the plan.”¹⁷ Unfortunately, at the present time, this requirement set out in section 4.0, has been omitted from the draft legislation found in Appendix 2. Instead, the draft legislative language only gives a highly discretionary power to an SDM to “require the person applying...to submit information that the district manager reasonably requires....”

In principle, the idea of legally binding, quantitative interim objectives that apply before landscape level planning is complete has considerable merit. Many important ecological impacts have been impacted during the 7 years that landscape level planning has been delayed in on-the-ground implementation. However, much depends on which objectives are established, what the thresholds set are, and how they are spatially applied. On the later two points, we are very concerned that no detailed information or numbers have been provided to allow meaningful public comment.

¹⁵ We have used the term “planning” rather than “zoning” deliberately. While it is critical that objectives are spatially explicit and the areas to which they apply are mapped, the concept of “zoning” without specifying an appropriate planning sequence raises concerns about the creation of zones where non-timber values may not receive meaningful protection.

¹⁶ I.e., from an ecosystem-based management perspective, landscape/watershed protections necessary to maintain ecological integrity must be in place before decisions about where logging can occur are made (in order to respect ecological limits and to sustain human use of forests over the long term). See section 6.2.1 under “Solutions” for further detail.

¹⁷ Discussion Paper, p. 8.



Furthermore, a number of concerns arise from the proposed approach to addressing landscape level objectives both in the Discussion Paper itself and because of the interaction between the proposed RBC framework and other initiatives, including SRM planning,¹⁸ and the anticipated “working forest” designation. This concern is particularly acute given statements on p. 9 of the Discussion Paper that indicate that all objectives flowing from LRMPs (whether currently legally established as resource management zone objectives or not) will also be “interpreted” in landscape level objectives established through SRMP planning.

Our concerns also include the following:

Which objectives will be established?

The Discussion Paper lacks clarity with regard to which objectives will actually be legally established. For example, the statements that are made in the context of interim objectives imply that interim objectives will be established for all values listed in Appendix 1. “Appendix 1 lists the land use zones and objectives required to support the proposed results-based forest management regime.... In the absence of zones and objectives, there must at least be interim zones and objectives to provide surrogate controls the RDP testing.”¹⁹

On the other hand, inconsistencies are apparent in proposed approaches for different landscape level biodiversity values. For example, the Discussion Paper indicates that interim objectives will be established for old growth retention; that there will be no interim objectives for other seral stages; and, that landscape connectivity will only be addressed “where objectives... have been legally established.” At the same time, however, the section on spatial and temporal distribution of cutblocks actually contains measurable requirements if objectives have not been legally established. All objectives for biodiversity values should be legally established through legislation.

Timber objectives should not limit biodiversity protection

As noted above, under 3.0.2, “Significance of Related Legislative Policy Initiatives”, we are highly concerned with the priority given to timber companies over all other public land users and rights holders in the Discussion Paper itself, as reflected in the statement: “The long-term goal is for relevant land use zones and objectives to be delivered in partnership with forest licensees and others under MSRM-sponsored planning processes.”²⁰

Involvement in planning for ecological and cultural values should never prioritize the very sector that benefits from unsustainable exploitation that compromises such values, nor should industry-driven timber objectives be allowed to limit biodiversity planning.

For this reason, we also share the concern of the BCEN Forest Caucus that:

“Working forest proposals to establish numerical land-base targets for each timber supply area and tree farm licence, with the intent that the targets will be an INPUT to all landscape level sustainable resource management plans,

¹⁸ See SRM Planning Document.

¹⁹ Discussion Paper, p.8

²⁰ Discussion Paper, p.8.

present a virtually insurmountable obstacle to establishing meaningful landscape level objectives for biodiversity.”²¹

Furthermore, Appendix 1 in the Discussion Paper lists “Targets regarding the availability of timber” as one of the “land use zones and objectives for the Results-based Forest and Range Practices Regime.” According to the SRM Planning Document, if timber targets were to be legally established through SRM planning as contemplated, “planners must review and, if necessary, revise existing chapters” (e.g., chapters embodying existing land use plans and existing biodiversity objectives).²²

Not only will this be a new and significant limit on biodiversity protection, but it is the death knell for species whose needs were always acknowledged as not being met within caps for LUP and IDWS, including fisher, bull trout and grizzly bear.²³ Under old NDP policy, if higher level plans were established in the form of a resource management zone objectives (flowing from completed LRMP’s or CORE plans), biodiversity objectives could be established that exceeded the timber supply impact caps.²⁴ Now the Liberals are proposing that timber targets could prevent this from occurring through rewriting/reinterpreting regional and subregional strategic plans by the Ministry of SRM.

SRMP objectives may not be legally binding

The SRM Planning Paper indicates that there is no guarantee that land use objectives will be made legally binding. In fact, at page 17, the SRM Planning Paper indicates that SRM is considering the option ***that operational plans and activities will not be required to be consistent with, or even consider the SRMP and objectives.***

A results-based Code framework simply cannot be implemented without legally binding landscape level objectives, as acknowledged in the Discussion Paper (which indicates that spatially explicit land use zones and objectives are a main pillar upon which the RBC must rest), and that the SRM Planning Paper, which notes at p. 6 that “SRMP plan objectives are essential for defining the results by which the forestry industry will be measured under the Results-Based Code.”

An unfortunate scenario would result if SRM were to proceed with the non-legally binding option: interim objectives would in fact become the norm indefinitely! Furthermore, there appears to be some ambiguity in the Discussion Paper with regard to the legal nature of interim objectives. ***Such interim objectives must be legally binding.***

Staffing and Resource Priorities must be clarified

Recognizing limitations on staff and resources, setting priorities for the establishment of landscape level objectives is key. Even with previous staffing and resource levels, and working on only two priority areas (objectives for old growth retention and wildlife tree retention), virtually no objectives (with one or two exceptions) have been legally

²¹ Forest Caucus of the BC Environmental Network, Initial Discussion Notes for Stakeholder Meeting, May 29, 2002 (Revised), p. 2.

²² SRM Planning Paper, p. 12.

²³ British Columbia, *Managing Identified Wildlife Policies and Procedures, Volume 1* (February 1999), p.6.

²⁴ “Strategic Land Use Planning and Landscape Unit Planning,” from Larry Pederson, Chief Forester, June 3, 1999.



established on the ground in seven years. According to the Landscape Unit Planning Guide, following “priority biodiversity planning”, “full biodiversity planning” was to be carried out for the other values listed in section 5 of the Strategic Planning Regulation,²⁵ and following that for other values.

With legal implementation of “priority biodiversity planning” only just beginning to hit the ground now, after seven years, the SRM Planning Paper now proposes a dramatic shift — to a new form of planning (SRMP) that will give priority to planning for areas where there is a “clear, substantial economic opportunity” and where an (industry) partner agrees to contribute.²⁶ While the paper indicates that completing objectives for biodiversity conservation will still be an “important and early chapter” in “areas where this is a priority”, it is unclear how government resources will be allocated to ensure this, and where exactly it is a priority!

Given the high priority already given to designations and planning associated with timber (e.g., existing delineation of timber supply areas and tree farm licences, timber supply analysis under section 8 of the *Forest Act*, establishment of allowable annual cuts, Forest Development Planning where the plan area is set according to where the licensee plans to harvest timber, AAC uplifts associated with Innovative Forest Practices Agreements), it is logical that in terms of both timing and resource priorities, that objectives for timber supply should be considered already fully addressed by other processes and plans. In other words, additional timber targets or timber supply impact caps are unnecessary and unwise.

Solutions

With regard to the Discussion Paper indication that managers “will have to provide evidence to demonstrate that the RDP will achieve objectives...” we strongly encourage government to make this requirement explicit in the legislative language proposed. In a results-based regime, licensees must be required to provide an adequate evidentiary basis such that accountability rests with them, rather than leaving it to a discretionary decision of individual DMs. In addition, there needs to be an adequate evidentiary basis to satisfy the DM that the results and rules will be met — on their own, the boundaries and level of detail in the RDP will provide no confidence in this regard.

Legally implemented landscape level objectives for biodiversity for all values set out in the Biodiversity Guidebook, which are scientifically defensible and unconstrained by timber supply impact caps or timber targets, must be in place before bringing into effect a Results-Based Code (whether as legally binding interim objectives or as legally binding objectives established through SRM planning). There should be no exemptions from these objectives (see also comments on 6.2.1 for more detail).

Eliminate “[t]argets regarding the availability of timber” from the list of “land use zones and objectives for the Results-based Forest and Range Practices Regime” listed in Appendix 1 of the Discussion Paper.

²⁵ Strategic Planning Regulation, B.C. Reg. 180/95, s.5.

²⁶ SRM Planning Document, p. 15.

5.0 THE RESOURCE DEVELOPMENT PERMIT

Comments

The Discussion Paper describes a severely scaled back version of government approval of plans when compared to the current Code. Instead of requiring companies to seek government approval of both landscape level and site specific operational plans, the proposed Code would only require approval of a single "Resource Development Permit". This RDP is based at the landscape level, but would contain much less information than the current Code requires. Site level approval is removed altogether.

Site level planning is critical to good forest management. While most companies would undoubtedly continue to do site level planning in some form under the proposed Code, the Discussion Paper provides no guarantees that these plans will be available to the public or to government, thereby depriving both of valuable information about what is planned in a particular area. The fact that a member of the public would be unable to determine how logging is to be carried out on public forest lands, which may affect their legal rights or their immediate natural environment, is contrary to good public policy.

Several logging companies have been involved in "Results-Based Pilot Projects" under the current Code. Under these pilot projects, the companies themselves have drafted regulations which will govern these pilot projects. As part of the approval process, the companies are required to satisfy government that their regulations provide for public review and comment of forest plans. Interestingly, almost all of the pilot projects reviewed by WCEL to date provide for site level plans to be prepared, as well as various assessments done, albeit without government approval.²⁷ These plans are then available to the public and government. It is disappointing that a government-developed initiative requires a lower standard of public access to information than these industry-led regulations.

Solutions

While the authors of the Discussion Paper "assume" that government approval of site level plans will not be required under the proposed Code, our primary recommendation would be that stand level plans be required, that these should be subject to public/agency review and approval by a SDM, and that licensees would be legally bound to follow such plans.

At a minimum, there are no sound policy reasons for not requiring at least that plans (at both landscape and site levels) be prepared and made publicly available before logging and roadbuilding are approved, and for the Code framework to specify required minimum content for plans. This will not require greater government oversight, and should not be a major burden to the licensees, as such planning is clearly necessary in any case. In fact,

²⁷ The exception is the Bulkley Pilot Project, which was prepared by the Ministry of Forests Small Business Forest Enterprise Program, and not by a corporate licensee.



specifying minimum plan content will reduce transactional costs associated with each licensee having to reinvent the wheel each time they submit a plan.

If government approval (which we continue to support) is not required, the failure to carry out such basic planning should be the violation of a result in itself.

Ensuring that the Code framework contains these requirements will also provide much of the background planning and inventory information necessary for meaningful government and public monitoring of logging operations.

These recommendations would cover minimum planning requirements, enhanced planning would often be required to prevent harm to the environment before it occurs, and to achieve specific results and rules.

5.2 CONTENT OF THE RESOURCE DEVELOPMENT PLAN

Comments

According to the Discussion Paper, the RDP will not require logging companies to identify the specific location of logging operations, instead requiring them merely to identify “development units” indicating the general area where cutblocks and road construction might occur. None of the detailed inventories or assessments required by the current Code need be included (unless the District Manager requests them).

With only very general information required, it is difficult to see how government officials can give any meaningful approval (the exact nature of the tests is discussed below) or ensure that the public is protected against damage/destruction of forest resources. The locations of roads and cutblocks, and detailed information on what logging practices are to be used (clearcut, partial cutting, etc.),²⁸ as well as information regarding the area where the logging operations will occur, are crucial in evaluating the environmental effect of logging operations.

Proponents of the proposed Code might argue that as long as the District Manager may request further information, companies will be required to provide such operational information where necessary. In our opinion, this approach is not effective in theory or in practice, and shifts accountability from licensees back to government.

First, the proposed Code puts the District Manager in the very uncomfortable position of having to exercise his or her discretion with no real direction from the Legislature. A District Manager is not going to wish to appear “unreasonable” to logging companies (who may hold considerable political clout) by requiring substantial amounts of information over and above what is required by the RBC Code (which is virtually nothing).

²⁸ This level of information is not currently required in a forest development plan, but does require government approval as part of a Silviculture Prescription. District Managers under the current Code, therefore, can assume that forest practices carried out under an FDP will manage and conserve forest resources on the assumption that they will subsequently be able to approve the specific forest practices to be used in the area. This second level of government approval is completely eliminated in the proposed Code.

It is interesting to note that the current Code provides the District Manager with a power to request additional information where needed to evaluate an operational plan.²⁹ It is rarely, if ever, used to its full extent. While this is no doubt partly due to the greater amount of information required by the current Code, it is also true that the individual circumstances of particular plans frequently require specialized information, and this is rarely requested by the District Managers.³⁰

Moreover, because of the wide discretion given to the District Manager, it will not be possible for the public to be certain that forest resources receive equal protection and consideration between districts. It is well known in the environmental community that different District Managers treat their responsibilities under the existing Code very differently. With even less direction in the proposed Code, we will see very different disparate treatment of both the public and logging companies depending upon which District Manager reviews a proposal.

In addition, District Managers will be faced with situations where they cannot possibly know what information should be requested. So little information is required, that a District Manager will not possibly be able to know whether to ask about the habitat for threatened or endangered species or the stability of slopes which might be in the area. It takes some information to even know what questions to raise.

From this perspective, the lack of information requirements is even unfair to the licensees, who may well prefer to know in advance what information will generally be required by a District Manager.

Quite aside from the heavy responsibility imposed upon District Managers, there are legal problems with the approach, assuming that much of the information which a District Manager may require to evaluate a RDP (planning related to siting of cutblocks and roads, practices to be carried out on the blocks, etc.) will not be required to be completed at the time the RDP is submitted. Under the current wording of the draft legislation, the District Manager may require that further information be provided; however, based on past MOF interpretations of a similar requirement in the current Code, we would seriously question whether District Managers will actually be able to use this provision to require that further planning be conducted, and the actual details of cutblocks and road development be determined, even where such information is required to evaluate the RDP. Indeed, the Discussion Paper appears to reflect such a limitation, by noting that even in community watersheds the District Manager might only have "a table ...[that] might specify certain development strategies that will be employed to meet the test. For example, the RDP would include a table describing the amount of the forest cover that will be retained within a forest development unit to address terrain hazards or cumulative hydrological

²⁹ Code, s. 41(2).

³⁰ Past policy guidance from the MOF to SDMs on the use of section 41(2) in the current Code has been subject to considerable controversy, and is not accepted by many lawyers and forestry professionals as legally inaccurate/inappropriate. See Forest Practices Code Bulletin, *Compliance and Enforcement Branch Advice to Statutory Decision Makers and their Staff: Application of Section 41(1)(b) of the Forest Practices Code of British Columbia Act*, July 14, 2000, p. 6.



impacts.³¹ Even in a community watershed, then, it is not expected that the District Manager may request the actual location of a cutblock.

Moreover, even if such planning can be required, the draft legislation does not currently provide for such planning to become part of the RDP, or for the logging company to be bound by the information/planning provided to the District Manager.

It is important to realize the extent to which the proposed Code would undermine long established planning requirements in BC. The major requirements for site level planning by forest companies were well established in BC long before the FPC was ever introduced, although such planning was originally required through licence agreements rather than legislation. Those requirements have now been removed from the licence agreements, on the basis that they are now contained in the Code. The so-called Results-Based Code will push forest planning requirements in BC back several decades.

The idea of reducing the level of information that industry must supply to a single, vague plan is not inherent in the idea of a Results-Based Code. Indeed, for the idea of a Results-Based Code to be effective, government, and the public, should have enough information available to determine whether the results are being met.

Solutions

We recommend that an RDP contain much more extensive background information than the proposed RBC Code framework currently includes, at a minimum modeled after the information currently required for FDPs and SPs. This would include requiring specific siting of cutblocks and roads. The required information could be simplified somewhat, but to the extent that this is done, the District Manager should have a very explicit mandate not only to require further information, but also to demand that assessments be prepared and planning be done. Citizens should also have access to assessments (e.g., watershed assessments) and to information about the locations of cutblocks and roads. For logging proposed in ecologically or socially significant areas, it is particularly important to ensure that government decision-makers have enough information to determine the likely effects of logging *before* damage occurs. If the amended Code reduces planning information required under the current Code, then we propose that it require the licensees to provide an evidentiary basis sufficient to satisfy SDMs that results and rules will be met, and that harm will be avoided.

5.3 RESOURCE DEVELOPMENT PERMIT TESTS

Comments

The Discussion Paper describes four tests, which it proposes that the District Manager will apply before approving the proposed RDP.³² According to the Discussion Paper, the onus is on the licensee to demonstrate that each test has been met, and the standard of proof

³¹ Discussion Paper, p. 13.

³² In drafting legislation with this effect, it is standard to have a clause stating that the approval should not be granted unless all tests are met. See, for example, s. 41(3) of the current Code. This language is not included in the draft legislation found in Appendix 2.

required to satisfy the District Manager that the tests have been met will be “commensurate with the degree of risk to the values or interests at stake.” However, these commitments are not in any way reflected in the draft statutory language found in Appendix 2.

The tests proposed in the Discussion Paper bear no relation to the general test currently provided for by section 41(1)(b) of the Code, which requires the district manager to be “satisfied that the plan or amendment will adequately manage and conserve the forest resources of the area to which it applies.” While the environmental community has long had concerns about the subjectivity inherent in this test, it did have the advantage of allowing government to respond to threats to the environment which were not considered in setting standards or objectives. This general ability of decision-makers to consider the environmental effects of proposed logging would be eliminated under the proposed Code.³³

Section 41 (1) was also a “result” against which government could judge the licensee’s planning. The proposed tests are all largely procedural in nature, suggesting that government has abdicated its oversight responsibility.

Solutions

We strongly recommend that the Code include a duty on DMs to decline to approve an RDP where the evidentiary basis provided is insufficient to satisfy him or her that damage to the environment will not occur, and/or that results and rules will met, notwithstanding that the other tests are met.

Furthermore, a more positively expressed test, improving on section s.41(1)(b), would also be an important addition. For example, such a test could require the signature and seal of the DM that no forest resources under the RDP will be harmfully altered by planned activities.

5.3.1 CONFLICTS WITH OTHER LEGAL RIGHTS TEST

Comments

The first of the legal tests applied by the District Manager is to consider whether there is a “conflict” between the RDP and existing legal rights. As discussed below in part 5.4.5, the language of the test is worded in such a way as to exclude aboriginal rights (as well as any rights granted by the federal government). While we do approve of ensuring that logging operations will not have a negative impact on other rights holders; we do not believe that the proposed approach is adequate.

³³ However, the proposed Code maintains flexibility by allowing exemptions to environmental standards, through numerous exemption provisions proposed in the Discussion Paper. Maintaining this type of flexibility while undermining government’s ability to protect the environment clearly undermines the environmental standards of the current Code.



According to the Discussion Paper a “conflict” would only exist where the activities proposed in a development unit will “prevent the exercise of other legal rights”. By being limited to “prevention”, the test does not effectively deal with situations where logging operations may impair, introduce considerable risk, or otherwise conflict with those other legal rights.

It is perhaps useful to illustrate the difficulties created by the vagueness of an RDP using this test as an example. Suppose an RDP sets out a development unit that will cover several cutblocks connected by a road. The District Manager notes that the development unit covers an area which includes a river on which several water users hold licences and a trapline owned by a trapper. Does the development unit completely “prevent the exercise” of any of these legal rights? There is no inherent conflict, because none of the three cutblocks need come anywhere near either the river or the trapline. But clearly, the development unit, which authorizes the logging company to carry out operations anywhere within the area it covers, could be used as authorization to carry out operations with a profound impact on the trapline and water users.

Proponents of the approach used in the Discussion Paper will object that if the District Manager is not satisfied that there will be no conflict, he or she will not approve the RDP. However, the proposed legislation, as drafted, does not require the District Manager to be satisfied that operations carried out under the Development Permit will not conflict with existing users, but that the development unit itself will not. Since conflict refers to an actual conflict, rather than a potential conflict, it seems that even where there is a high probability that logging and road-building operations within a development unit could conflict with other rights, if there is any possibility that they may not, the licensee could pass this RDP test.

More specifically, in some circumstances the type of logging used, or care in roadbuilding might mitigate risks in regard to e.g., terrain stability hazards. However, given the absence of hard rules regarding how forest practices are carried out, it would seem highly imprudent for the District Manager to assume that the risk will be kept to an “acceptable” level. And will his or her assessment of an acceptable risk be the same as the risk which is acceptable to the water licensees? The Discussion Paper provides no insight into these critical issues. Nor does it make explicit that if logging activities impair or diminish other legal rights, that the holders of those rights so affected will continue to have a cause of action against the forest licensee — i.e., that statutory approval under the RBC is not a defence.

The issue of conflict between resource users is a complicated one and is unlikely to be resolved with a vague plan and a single sentence description of a legal test. In its haste to cut “red tape”, this government should not minimize the complexity of these issues.

Solutions

We recommend that the Code explicitly require that a development unit not include an area within a specified number of metres of an area covered by a competing tenure without the consent of the holder of that tenure (e.g., 500 metres). For water licenses, riparian property holders, and other legal rights involving water, a similar buffer would extend for 1 kilometre upstream from the area where the legal right is situated. If the licensee can demonstrate that there is no risk to the user’s rights, it should be possible to

obtain such consent. Alternatively, the Code might allow the District Manager to grant an exemption where such proof is given and after hearing from both parties. However, even with these protections, it will be necessary for the District Manager to obtain more detailed information about the siting and nature of logging operations prior to approving logging operations outside the buffer areas where those operations are likely to increase the risk to the other legal users. Some direction should be given in the Code as to what level of risk is acceptable. ***Rights holders who face risks should be able to appeal the District Manager's decision to the Forest Appeals Commission.***

In addition, the Code should impose civil liability on logging companies where the potential damage to the existing legal rights holders does occur as a result of the logging operations. Currently, it is often difficult to prove whether or not logging caused a particular slide or other damage (although statistically it is possible to prove that logging increases the likelihood of landslides generally). ***The sections of the Code imposing liability should create a presumption that damage to the legal rights or forest resources occurring in or adjacent to an area where logging operations took place resulted from those operations.*** This will mean that logging companies choosing to operate in an area where there are a number of legal rights will know that it is taking on the possibility of legal liability, and will conduct itself accordingly.

5.3.2 LOCATION OF DEVELOPMENT UNITS TO MEET LEGAL OBJECTIVES FOR LAND USE TEST

Comments

The second test proposed in the Discussion Paper is whether the locations of development units will meet government-set objectives for land use zones.

As noted above, land use zones and their objectives, or where the objectives have not been established, the interim objectives, form one of the “main pillars” of the proposed Results-Based Code. However, no examples are provided of what even the interim objectives (which will presumably be included in the Code itself) will look like. It is therefore not possible to comment on a key area of the Code in the detail we would like. This is unfortunate and undermines our confidence in this process.

As noted, we have significant concerns about MSRMs proposed approach to setting landscape unit zones and objectives, and the interaction between these objectives, the location and intensity of forest practices, and results and rules that apply within development units. We presume that objectives which exclude logging operations from a particular area can be addressed simply by excluding those areas from any development unit. We are unclear, however, whether other objectives are to be dealt with in some way at the RDP approval stage, or whether such objectives will become site level results which it will be the responsibility of the logging company to meet.³⁴

³⁴ Some, although not all, of the results discussed in part 6.2 incorporate landscape objectives. However, for many values, there is no mention of objectives.



We also note, with concern, that since SRM policy on landscape objectives would allow for timber target objectives to be set in the absence of clear environmental objectives, that this test could actually undermine environmental objectives.

Solutions

Planning for biological diversity has been promised under the current Code since it was introduced. To date, relatively few landscape unit objectives have been brought into force. We strongly recommend finishing and legally implementing all such designations before bringing any revisions to the Code into force.

Interim objectives should be developed and made available for public review and comment in their own right. They should have been included in the Discussion Paper.

Landscape level objectives must be considered as part of a test at the RDP level. However, the District Manager should also have access to further information, as discussed above, and have the responsibility to require either guarantees that logging operations will not occur in the landscape unit zones or further planning as to how and where particular logging operations will be carried out.

In addition, however, the Results-Based Code should clarify that landscape unit objectives are “results” which licensees are expected to abide by, with clear consequences if those objectives are not met, to the extent that such objectives can be met by a single licensee (or the included licensees if a joint RDP is submitted).

The test should exclude timber target objectives. This value is quite adequately protected by the self-interest of the logging company, and the District Manager should not be balancing the economic self-interest of the company against environmental objectives.

5.3.3 PUBLIC CONSULTATION TEST

Comments

Public review and comment of forest plans is given short shrift and cursory treatment in the Discussion Paper. While it is a major component of the existing Code, it does not even warrant a separate heading in the Discussion Paper. Yet the ability of the public to see how logging plans are likely to affect them and to respond to such plans is key to public confidence in the system (one of the government's stated objectives). The approach suggested by the Discussion Paper will almost entirely eliminate meaningful public consultation.

According to the Discussion Paper, the District Manager will consider whether public consultation occurred prior to approving the RDP. Limited discussion is contained in the Discussion Paper as to what that consultation must involve, and even less in the draft legislation found in Appendix 2. The extent of the proposed legislative requirement for public consultation is contained in one of the tests that the District Manager must apply:

- (d) the person applying for the permit has solicited information from the public and has considered any information received respecting the proposed forest development units...

None of the terms used are defined, and it is not at all clear what legal effect such a vague and inadequate requirement will have. Does a quarter inch advertisement in the classifieds section of a weekly newspaper suffice? How about asking the views of a hand-picked focus group? If a District Manager decides that these steps are sufficient public consultation there may be little that a concerned citizen who was left out can do.

The features of an RDP also undermine meaningful public consultation. An RDP can be approved for up to 5 years (compared with an FDP which is approved for one or possibly 2 years), meaning that the public will have fewer opportunities to comment on logging operations.

Equally critical is the lack of detail contained in an RDP. If members of the public don't even have the approximate location of cutblocks and roads available to them, they will be unable to determine whether logging operations will affect them, and will be limited in their ability to comment on these operations. Unlike the District Manager, members of the public will have no legal right to request whatever additional information they need to evaluate the RDP.

A related issue is that of access to information. All of the information which is currently available to the public about how logging operations will occur at the landscape and stand level, including operational plans, assessments and inventories, will no longer be publicly available. If it is prepared, it will be the private property of the logging companies, unless the District Manager happens to request it. This removal of information about operations on public lands from the public domain is unacceptable.

Solutions

The Code should set out clear "results" which must be met for public consultation by the companies. Results should include:

- (a) the consultation should begin early in the process to allow the licensee to incorporate comments into the RDP;
- (b) public notice should accurately describe the affected area and the purpose of the consultation, and be published in a widely distributed newspaper at least twice, in addition to licensee efforts to proactively contact individuals and groups who have previously expressed an interest;
- (c) consultation should include opportunities for members of the public to:
 - i. ask for, and receive, information and more detailed plans on which to base their evaluation of the RDP;
 - ii. meet with licensee staff, individually or collectively, to discuss the RDP; and
 - iii. to provide written or oral comments on the RDP; and
- (d) the licensee should be required to address the comments made in (i), both in the content of the RDP and through commitments to carry out operations in a



particular location or manner. Such commitments will be binding upon the licensee.

The District Manager should not approve the RDP unless he or she is satisfied that consultation has occurred according to the above results. Additionally, these and other characteristics of "good consultation" should be specified in regulation as required results in their own right.

In addition, we have suggested that site level plans continue to be prepared and made available to the public. Any assessments or other materials prepared by the licensees or on their behalf (e.g., inventories, maps, audits) should also be available to the public, including on the internet.

We would recommend requiring licensees to provide opportunities for those members of the public who indicate an interest in the company's logging operations in a particular area to review and comment on site level plans prior to their finalization. "Results" similar to the above should apply in respect of consultation in relation to site level plans. It may be acceptable to focus this level of review on individuals who request to participate, provided that public notice identifies the opportunity to make such a request.

5.3.4 COMMUNITY WATERSHEDS AND DOWNSTREAM FISHERIES VALUES TEST

Comments

The fourth test proposed in the Discussion Paper relates only to Community Watersheds and watersheds with downstream fisheries values. While these are both important types of watersheds, it is disappointing that the government is constraining its responsibility to prevent environmental harm and is not applying a similar approach to other values.

First, the entire approach of the proposed Code relates to punishing licensees for damage after it has occurred. Logging and road-building create risks of some types of environmental damage which are so extreme in nature that one would hope that the government would take action to prevent the damage before it occurs. Examples include the extinction or extirpation of species of animals, or landslides destroying rivers, etc. The government has apparently decided that risks to community watersheds and commercially valuable fish are worth an ounce of prevention, but that threatened and endangered species such as marbled murrelets, spotted owls and others are not.

Second, it is worth noting that the Discussion Paper proposes protecting these values through both a plan approval test and prescribed results. This two-level approach might have been appropriately applied to landscape level biodiversity (which relies on test #2, discussed above, but prescribes no actual results) and various other values, but was not.

Furthermore, while there are some strengths to the basic approach proposed in respect of the test for community watersheds and downstream fisheries values, the actual protection afforded to these watersheds comes up short. The test suffers from the same lack of information that plague the RDP tests generally. How can the District Manager evaluate whether a development unit, which may include several cutblocks and roads covering only a fraction of the geographic area covered by the development unit, is sited

appropriately relative to terrain hazards or hydrological impacts. Should the development units leave out all areas which might pose such a risk, or is the District Manager entitled to assume that a logging company will avoid problem areas in siting the individual cutblocks and roads and/or use practices appropriate to the more difficult terrain?

There is no indication that the authors of the Discussion Paper expect unstable slopes to be kept out of the development area. Instead, “a table attached to the map might specify certain development strategies that will be employed to meet the test”.³⁵ But the District Manager is supposed to be concentrating on the siting of development units,³⁶ not the practices to be carried out by logging companies.

The language used in the draft legislation provided in Appendix 2 does nothing to clear up the confusion over what information should be required in applying this test. While the Discussion Paper insists that the District Manager must be satisfied that “the licensee has identified terrain hazards ... [and] cumulative hydrological impacts and hazards in these types of watersheds”, there is no corresponding obligation to provide such information in the draft legislation. While proponents of the proposed Code might argue “but the District Manager can require such information”, there does not appear to be any recourse given to individuals who rely on a community watershed when faced with a particular trusting District Manager who fails to request such information.

The public can only have confidence in this test if it is clear that the statutory decision-maker will have all the information and powers that he or she requires to ensure that the community watershed, or watershed with downstream fisheries values, is protected. Currently the test falls short.

Solutions

We recommend expanding this test to apply to all watersheds.

As recommended above, a new test should also require licensees to provide an evidentiary basis sufficient to satisfy the SDM that results and rules will be met.

We further recommend that the Code explicitly require the licensee to provide all information necessary to satisfy the SDM that environmental values will not be negatively affected, including but not limited to assessments, inventories, locations of cutblocks and roads, site level plans, etc.

If there is no appetite for requiring proactive assessments to avoid these environmental risks, then rules should be developed to avoid them. For example, if industry does not want to carry out terrain stability assessments for unstable slopes, then clear and measurable rules should be developed that preclude logging on defined slopes (such as all Class IV and Class V areas, for example).

³⁵ Discussion Paper, p. 13.

³⁶ Discussion Paper, pp. 14-15.



5.3.5 FIRST NATIONS AND RDPS — A RECOMMENDED ADDITIONAL TEST

Comments

The RDP will apparently be the primary opportunity for First Nations to comment on logging plans. While not framed in the Discussion Paper as a separate "test", the paper notes that failure to consult with First Nations may be a valid ground on which a District Manager may decline to approve an RDP. The Discussion Paper and the draft legislation both require that such consultation be "consistent with the requirements of the Ministry of Forests consultation policy and guidelines".³⁷

The First Nations will, of course, face the same problems that the general public face in evaluating the impact of an RDP on their interests. This problem is exacerbated by the fact that First Nations concerns over traditional uses, culturally significant sites, etc. may involve very specific locations and a high level of site-specific information.

A major difference does exist from the situation with members of the public: Logging is likely to have a major impact on constitutionally protected rights held by First Nations and the government is under a constitutional duty to consult with them in a meaningful manner, including seeking First Nations consent in some circumstances. It is our assessment that it will frequently be impossible to consult with First Nations in a meaningful manner without detailed information on, at a minimum, the placement of cutblocks and roads.

We note that the Ministry of Forest policy on this subject even under the current Code is not in keeping with recent court decisions on the nature of the obligations of consultation.

We are disappointed that First Nations are provided with less protection under the proposed Code than other holders of legal rights.³⁸ The approach used by the Discussion Paper is entirely contrary to the government's New Era commitment to: "Introduce a legislative framework for legally respecting aboriginal rights protected under the Constitution in the absence of treaties."³⁹

Solutions

Ultimately, it is probably not realistic to expect the results-based code to resolve longstanding grievances of First Nations. This will hopefully occur through a broader process of negotiating treaties and building relations with First Nations communities.

³⁷ We note that given that the Guidebooks are effectively Ministry of Forests policy documents, this legislative reference to a policy document appears to be inconsistent with the "assumption" of the Discussion Paper authors (at p. 3) that Guidebooks would not be referenced in legislation. Depending on the content of such guidance, we are, in theory, fully supportive of legally incorporating best practices guidebooks by reference in the RBC framework.

³⁸ Section 2(2)(b) of the Draft Legislation at Appendix 2 requires the District Manager to consider whether the proposed forest development units conflict with "tenures or other legal rights granted by the Province..." Aboriginal title and other aboriginal rights, although guaranteed in the Constitution, are not granted by the province and therefore would not be covered by this section. Instead, the draft legislation deals with First Nations purely as a consultation issue under section 2(4).

³⁹ *New Era for British Columbia*, p. 27.

However, the Code must ensure that aboriginal rights are not violated by logging interests.

We hope that you will undertake the initiative to ensure First Nations' direct input into this important question. From our perspective, it will be necessary to include sufficient information in the RDP to allow First Nations to evaluate the impact on their rights, and to put in place mechanisms to avoid infringements of aboriginal rights. Such mechanisms could take a variety of forms, but we would suggest that the following features are appropriate:

- funding to enable First Nations to undertake community consultation, traditional use studies and review of the proposed logging operations;
- expand the language of section 2(2)(d) to ensure that First Nations' legal rights have at least the same status as other legal rights, and to recognize the unique constitutionally protected status of Aboriginal Title and rights; and ,
- place the onus on the licensee to prove that its planned activities will not undermine proven or claimed Aboriginal Title/rights before logging is approved.

6.0 RESULTS-BASED MANAGEMENT REGIMES FOR SPECIFIC FOREST AND ENVIRONMENTAL VALUES

6.1 DEVELOPMENT OF RESULTS-BASED MANAGEMENT REGIMES BY VALUE

Comments

The Discussion Paper proposes “results” and “rules” designed to prevent or limit the impact of bad forest practices in 17 different categories, which form the basis of the “results” portion of the Code. Where results or rules were not, according to the authors, considered to be sufficient, the possibility of an RDP test was considered.

Apparently, the authors of the Discussion Paper developed these “results”, “rules” and “tests” by setting a “goal statement” and then considering what tools would be appropriate to achieve that goal.

We will comment on the problems associated with the tools developed for each goal statement. First, however, we would like to express three overarching concerns.



Lack of Baseline Information

We have already raised concerns about the lack of information available to government and the public in evaluating a Resource Development Permit. However, the proposed Code would eliminate virtually all of the requirements currently imposed upon licensees to gather and make available information, and this will undermine enforcement of any meaningful results prescribed under the Code.

In order to understand whether logging operations have **achieved** a particular result or not, it is necessary to understand how the logging operations have **changed** the forest, if at all. In order to evaluate whether logging has changed the forests, it is essential that there be reliable inventories, assessments and other documents demonstrating what was in the forest before the logging took place.

To take an example, consider the results associated with “Roads, Stream Crossings and Access Management” at page 23 of the Discussion Paper. How is it possible to evaluate whether road construction has maintained water quality or stream channel integrity without evidence concerning what these features were like before the road was built? Similar problems exist for many of the results developed under virtually all of the goal statements.

Unenforceable Goal Statements

A second overarching concern is that the goal statements under the proposed Code would “have no legal standing”. There is no rationale for this.

The goal statement is what the authors of the Discussion Paper actually want to achieve. If crafted correctly it is, in fact, the “overarching result” that the public expects to see achieved. However, since the goal statement is not legally enforceable, the proposed Results-Based Code demands compliance with technical results, while giving no legal guarantee that the underlying public policy objective will be met.

From our perspective, the concept of “non-binding goals” should be replaced by an articulation of “overarching results” that must be achieved. It is clear that *both* overarching results that reflect public policy objectives (prescribing stringent outcomes that reflect the public nature of the resources), and technical results and rules, are required in a Results-Based Code framework. The general prohibitions on damage to fish habitat and introduction of deleterious substances contained in the federal *Fisheries Act* would be examples of the level of detail we would consider expected at the level of “overarching results” (now referred to as goal statements in the Discussion Paper).

Making overarching results (goal statements) legally binding will guard against circumstances where the technical results are met, but the underlying goal is defeated by the logging operations.

This is doubly important given that the results and rules have clearly been developed with current industrial practices in mind. How can we expect the logging industry to improve its practices over time if the results give nothing to shoot for? Rather the RBC should set binding goals/overarching results that require industry to innovate and come up with new solutions to old problems. Unless the actual results the Legislature wants are included in the Results-Based Code, how can one judge whether the Code is effective? By including

meaningful and comprehensive big picture “overarching results”, a Results-Based Code will:

- provide a benchmark on the basis of which technical requirements should be developed;
- set out clear objectives for logging companies and resource professionals to consider and implement regardless of the technical requirements of the Code; and
- ensure a company cannot escape liability for negligence causing harm to the environment by demonstrating that the technical requirements of the Code were followed. Rules must be considered necessary but not sufficient to meet results, and in turn, meeting results must be considered as necessary but not sufficient to achieve the goals or “overarching results”.

Weak and Vague Results

Our review of specific standards and results below indicate that many of them are vague, unenforceable and otherwise unlikely to achieve the stated goals. We understand that similar concerns have been expressed by ground-level ministry staff in both the Ministries of Forests and Water, Land and Air Protection.

The precautionary principle is recognized as a principle of international law.⁴⁰ Stated in various ways, it basically involves erring on the side of protecting the environment where scientific information is unclear, including placing the onus of proof on proponents of development. In terms of standard setting this means, for example, that buffers should be larger than might be theoretically necessary and standards more stringent. This allows both for human error in implementing the standards and changes in scientific understanding in setting the standards. We see no evidence that the precautionary principle was applied in setting the proposed standards.

As noted, the Discussion Paper only proposes “after-the-fact” results, and ignores results that should be met prior to or during logging operations. As such it constrains itself in developing results which could be used to protect the values discussed. Results should be included related to information gathering, planning and practices where those are the best means to protect the public resource.

Solutions

We recommend that the Code require logging companies to collect information on the natural state of the environment in an area prior to conducting logging operations,⁴¹ with a qualified resource professional certifying the data collected. This information would be available to the government or the public on request, and would be posted on the internet. Much of this information might be included in the site level plan which we

⁴⁰ *Spraytech v. Town of Hudson*, [2001] 2 S.C.R. 241.

⁴¹ I.e., both current condition and the historic range of natural variability. A requirement to collect some information about the site is already found at p. 39 of the Discussion Paper in regard to documenting and reporting the location of resource features.



have recommended be required under the Code, while other information is more appropriately addressed at the landscape level.

We recommend that a general prohibition on damage to the environment be included in the Code. This “result” is already contained in section 45(1) of the existing Code, which provides: “A person must not carry out a forest practice that results in damage to the environment.” The Code removes a licensee of this obligation when the licensee is operating pursuant to an operational plan which the government has found will “adequately manage and conserve forest resources”.⁴² However, in the absence of government oversight, a general prohibition on damage to the environment (i.e., harmful alteration) would seem to be a key “result” necessary to provide equivalent protection to the current Code.

The “overarching result” of environmental protection can then be particularized in the Code to provide more specific results related to water quality, wildlife habitat protection, riparian protection and the other matters addressed in “goals” identified in the Discussion Paper. Again, the Results-Based Code framework should include these “overarching results” in their own right, as well as providing for specific technical requirements that must be followed. We would suggest that failure to comply with technically prescribed requirements would mean that the more general goal would be deemed to have been violated (although compliance with results and rules would not be sufficient to show compliance with goals or “overarching results”).

By including the desired goals as “overarching results” of the legislation, it would be possible to require a team of scientists and professionals to confirm that the more specific results and rules developed are actually achieving the overarching results/goals they are designed to protect. This function might be served by the Forest Practices Board or by a body of scientists appointed for that purpose.

We recommend that every result and rule, as well as landscape level objectives, should be reviewed for auditability and enforceability by an independent “Enforcement Evaluation Committee” comprised of the Forest Practices Board, Conservation Officer Service, Ministry of Forests and WLAP Enforcement staff, prosecutors in the Crown Counsel office and one or two representatives each from industry and the environmental community. This Committee should also evaluate whether each result and rule is consistent with the precautionary principle.

The Code should require District Managers and licensees to exercise the precautionary principle in carrying out their respective responsibilities, and should require use of the precautionary principle in developing all future results, rules or regulations under the Code.

It is unclear from the Discussion Paper whether the results and rules will be included in the Code itself, or in regulation. The latter is in keeping with common approaches to drafting legislation of this type. However, if the results and rules are only contained in regulation, it will be possible for cabinet to amend the rules and results without debate in the Legislature and with no public discussion, offering the public with little in the way of

⁴² Section 41(1) of the Code.

concrete guarantees that whatever environmental protection is given through technical results will continue.

This underscores the importance of the approach we propose above, wherein “overarching results”, against which any changes to the technical results and rules must be justified, would be contained in the legislation itself.

In addition, powers for environmental enhancement, whereby the DM has the power to enhance results or rules in the specific circumstances should be included in relation to all values.

6.2 DESCRIPTION OF RESULTS-BASED MANAGEMENT REGIMES BY VALUE

6.2.1 LANDSCAPE LEVEL BIODIVERSITY

Overall Comments

A number of overarching concerns are raised by this section of the Discussion Paper, many of which arise from the wording, “...consistent with land use objectives and policy that balances biodiversity conservation with social and economic considerations”, which is contained in 3 of the 4 goal statements for landscape level biodiversity. Concerns addressed below are the following:

1. Inappropriate policy limitations in goal statements
2. Missing information
3. Unscientific and unbalanced limitations placed on coarse filter biodiversity protections
4. The absence of rules and results in this section, and the inclusion of overly broad exemptions

The Goal statements should not contain policy limitations

The goal statements for the four “landscape scale attributes” found in section 6.2.1 of the Discussion Paper are all problematic, in that they are self-limiting, specifying that biodiversity protection is only a goal if the government of the day sets it as a goal through policy and objective setting.

Such circular limitations are inappropriate in a goal statement (or what we have referred to as an “overarching result”). Instead, goal statements should reflect the most rigorous and scientific outcome for the value in question, in order to provide a benchmark for assessing risks to environmental values, and against which rules and results can be assessed for effectiveness over time. Current goal statements are also inconsistent with government promises that the Code will provide equivalent environmental protection to the current Code, and with international and moral obligations to protect biological diversity.



Key information is Missing

The Discussion Paper omits crucial pieces of information necessary to evaluate the landscape level objectives that will eventually be established, either through SRM Planning, or through interim objectives. In this portion of the Discussion Paper, as in other sections, the authors refer to “existing” or “current” policy concerning timber supply impacts. Many aspects of “existing” policy are contained in internal government letters/memos that few British Columbians are fully aware of. Any components of “existing policy” that the Liberals propose to adopt should have been enumerated specifically in the Discussion Paper rather than the use of euphemistic references to “balancing”. In addition, to the extent that new policies will be implemented, these too should have been set out for discussion. This is of particular significance because the clear intent appears to be legally entrench aspects of policy (which by definition refers to guidance that is not legally binding) in the legal framework for the RBC.

Likewise, actual numbers for proposed interim objectives should have been provided in the Discussion Paper. Without them, it is virtually impossible to comment on the subject.

The Results-Based Code framework must not be implemented until there has been an opportunity for public participation in relation to forestry policies to be retained or implemented, and the actual numbers for interim landscape level objectives.

Limitations on coarse filter biodiversity objectives are unscientific and unbalanced

The phrase in the goal statements that reads: “consistent with ... policy that balances biodiversity conservation with social and economic considerations” implies that an appropriate balance was struck between conservation and logging/roadbuilding by the NDP; a premise which we, along with other environmental/community groups and resource professionals have always contested.

The original Code framework involved the following components: a) section 4 of the Code; b) the Strategic Planning Regulation, section. 5; and, c) the Biodiversity Guidebook.

The “principles and assumptions” on which the Biodiversity Guidebook was written included the well accepted scientific principle that: “The more that managed forests resemble the forests that were established from natural disturbances, the greater the probability that all native species and ecological processes will be maintained.”⁴³

However, significant “balancing” of biodiversity conservation with economic and social considerations **already occurred** before the original Code and Biodiversity Guidebook were released. The extreme nature of the constraints placed on biodiversity conservation in the original Code framework are illustrated by the following quote from the 1995 Biodiversity Guidebook describing low biodiversity emphasis areas, which were to make up 45% of planning units the province: “...**the pattern of natural biodiversity will be significantly altered, and the risk of some native species being unable to survive will be relatively high.**”⁴⁴ A further 45% were to be classified only as “intermediate biodiversity

⁴³ Ministry of Forests, *Biodiversity Guidebook* (1995), p. 4.

⁴⁴ *Ibid*, p.7.

emphasis” which embodied a “tradeoff” of biodiversity needs in the interests of timber production. Only 10% of planning units were to have a high emphasis on biodiversity.⁴⁵

Because the original compromises contained in the Biodiversity Guidebook were so extreme — and already acknowledged by government scientists/other staff to present significant risks to biodiversity (to the extent that some native species may not survive in close to half of BC’s forests) — we are fundamentally opposed to retaining later NDP policy restrictions that **further** limited the timber supply impacts of implementing landscape level planning. Such further restrictions on implementing the original Code framework were contained in a later policy document called the Landscape Unit Planning Guide (1999), and in letters of direction from government officials.

Some specifics of these policy restrictions later imposed by the NDP were as follows:

- The impact of landscape unit biodiversity objectives on provincial timber supply was not permitted to exceed 4.1% in the short term and 4.3% in the long term.⁴⁶ (However, in fact even these have not been met because landscape unit planning have not been carried out throughout the province).
- Biodiversity objectives for most values listed in section 5 of the SPR (seral stage distribution, landscape connectivity, stand structure, species composition, and temporal and spatial distribution of cutblocks) were not to be drafted unless, among other things, they did not have timber supply impacts.⁴⁷
- Representativeness was not to be considered at a scale finer than BEC variant.⁴⁸ Such analysis for establishing biodiversity objectives is better carried out by **site series or groups of site series**,⁴⁹ in order to take into account the recurring pattern of sites that occurs across the landscape within BEC variants. Without doing so, insignificant attention is given to the ecological importance of rare or threatened site series within a BEC variant.
- Biodiversity objectives (for old growth management areas) were not to be established in areas covered by Category A cutblocks,⁵⁰ which delayed implementation, potentially put off limits the most ecologically appropriate areas to meet objectives, and created an even greater incentive for companies to stack cutblocks (it is not uncommon for

⁴⁵ By way of contrast, the drafters of the Forest Stewardship Council-BC Regional Standards worked from the premise that only areas managed according to the high biodiversity emphasis option would have a chance of meeting the FSC standards (with the exception of plantations within strict limitations, e.g., maximum of 10% of the timber harvesting land base, and only 5% new conversions among other things).

⁴⁶ “Release and Implementation of the Landscape Unit Planning Guide,” from Larry Pederson, Chief Forester et al. (March 17, 1999).

⁴⁷ “Strategic Land Use Planning and Landscape Unit Planning,” from Larry Pederson, Chief Forester, June 3, 1999.

⁴⁸ “Chief Forester Direction on Landscape Unit Objectives,” from Larry Pederson, Chief Forester, May 25, 1998.

⁴⁹ “Site series are subdivisions of site associations and include all sites within a biogeoclimatic subzone or variant that are capable of producing the same mature or climax vegetation unit (plant association).... Site and soil conditions, and the vegetation community, are used to identify site series. See: <http://www.for.gov.bc.ca/research/becweb/becinfo/aboutbec.htm>

⁵⁰ Ministry of Forests, *Landscape Unit Planning Guide* (1999).



licensees to have approved volume through Category A cutblocks that is 100% or more above their AAC). The latter is a serious problem for the efficacy of public review, comment and monitoring, government oversight, and adequate planning.

- Consideration of putting old growth management areas in the timber harvesting landbase was only permissible if the target area couldn't be met in the non-contributing landbase.⁵¹ In particular, when read together with the "representation by variant only" direction, this compromised achieving goals such as representation of rare old growth site series.
- In low emphasis landscape units, only 1/3 of the targets were to be established, despite the already high risks to biodiversity in low BEOs.⁵²

The Government has promised that environmental management will be scientifically based. A review of the above reveals that all of these policies were political in nature, primarily aimed at keeping the level of timber harvest at a level which posed an inherent risk to biological diversity.

There are no rules and results specified in this section of the Discussion Paper

Perhaps because of the weak goal statements, the Discussion Paper does not impose any results for the four landscape scale attributes on the logging companies. Instead, the proposed framework relies upon one of the tests that the District Manager is meant to apply in approving the RDP, namely, whether the locations of the proposed development units meets objectives/whether proposed development is "consistent" with uses specified in government-set objectives. As discussed above, the RDP is not required to provide sufficient detail to determine, for the most part, whether proposed logging operations are consistent with such objectives. Moreover, the word "consistent", in the context of the Code, means merely not in "material conflict", further watering down the likelihood that biodiversity would be effectively protected under the proposed Code.

While it is true that aspects of the "landscape level attributes" identified in part 6.2.1 should be addressed through landscape level objectives, this does not preclude the development of results/rules related to specific forest practices to address coarse filter biodiversity concerns. For example, specific thresholds concerning cutblock size and green-up requirements are proposed in relation to "Temporal and Spatial Distribution of Cut-blocks"; however, rather than requiring the licensee to meet these results, the Discussion Paper charges the District Manager with determining whether these results will be met through the RDP.⁵³ Conceptually, both should be required. We are unclear why these and similar requirements that could form results and rules have not have been developed to ensure that biological diversity is maintained, and if necessary restored.

Comments on Specific Landscape Attributes

In addition, a number of other specific concerns are raised in relation to each of the "landscape attributes" in the lettered sections (a) to (d) under 6.2.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Discussion Paper, p. 19.

a) Retention of Old Forest

It is unclear *how* interim objectives will address landscape zones that do not contain sufficient old forest to meet the objective.

Exemptions to meeting interim old growth objectives are overly broad. District Managers will be able to excuse a logging company from meeting old forest objectives, among other circumstances, “where necessary to achieve timber supply objectives as per existing code impact policy.” To be clear, this means that a single statutory decision-maker will be able to prioritize timber production above meeting the result of biodiversity protection. The result is no real guarantee of environmental protection at all.

b) Representation of Other Seral Stages

According to the Discussion Paper, there will be no interim objectives for other seral stages, there are no results and rules specified, and even the goal statement only applies if the government of the day has chosen to set land use objectives. In this manner, there appears to be a low probability that that maximum thresholds for early seral, and minimums for mature will be implemented before further biodiversity loss occurs.

c) Landscape Connectivity

Similar to subsection (b), there appear to be no requirements at all related to connectivity unless the government of the day chooses to set land use objectives. Since maintaining mature and old forest landscape connectivity between various landscape components, stand types and key habitats is critical for the long-term persistence of naturally occurring species, the absence of requirements such as mapping connectivity corridors is unacceptable.

d) Temporal and Spatial Distributions of Cut-Blocks

The goal statement should not be limited to “providing an opportunity” to do the right thing, but rather outline an overarching result that the temporal and spatial distributions of openings actually emulate natural patch size distribution (with the exception of rare extreme events).

The level of specificity and measurability in the points made under the heading “Cross reference” regarding situations where objectives have not been established is positive; however, these should be formulated as results and rules in addition to being part of an RDP test.

With regard to the specifics given; however, the clearcut sizes specified will not necessarily meet the overarching result recommended above, particularly in areas where gap replacement is the dominant natural disturbance regime.

The RDP tests listed in this subsection assume a level of information in RDP which is not available to DM under the proposed Code, e.g., locations of cutblocks.



The RDP tests specific to temporal and spatial distribution discussed in this subsection are not reflected in Appendix 2 draft legislation.

How the material under the heading “Test Limitations and considerations” will legally form part of the Code framework is completely unclear.

With the goal statement as currently written, point 3 under “Cross Reference” is problematic — it essentially lets industry set their own requirements.

Point 4 is definitely on the right track — we absolutely agree that the DM must have sufficient information to “be satisfied that cutblocks within a proposed RDP will achieve objectives for other resource values.” However it is not possible to comment on the effectiveness of this test without knowing what the objectives are.

We support the principle of what is listed as “exemption 2” (DM may increase green-up standard for listed reasons); however the DM should be obligated to do so in specified circumstances.

Solutions

From WCEL's perspective, the only way to appropriately balance human and ecological values is through an ecosystem-based approach to planning and management. “In ecosystem-based planning, priority is given to identifying requirements to maintain or restore ecological integrity. Within this framework, the resulting potential for production of forest products can then be determined.”⁵⁴ The following statements from the document *An Ecosystem-Based Management Planning Framework for the North Coast LRMP* succinctly summarize why:

In summary: maintaining ecosystem integrity is the goal for ecosystem-based planning because it protects ecological and evolutionary processes (i.e. it protects biodiversity within the bounds of the natural range of variability (Swanson et al. 1994; Holling and Meffe 1996; Noss 1999b). And, it maintains ecosystem and social resilience against catastrophes in biological, economic or political systems (Holling and Meffe 1995; Haynes et al. 1996; Quigley and Arbelbide 1997), and should foster development of diversified economic systems in order to avoid unsustainable boom/ bust cycles.⁵⁵

Unlike human social and economic aspirations, ecosystems have limits. Thus, planning and implementing human activities must occur within the limits of what the ecosystem

⁵⁴ R.F. Holt, R.P. Bio, *An Ecosystem-Based Management Planning Framework for the North Coast LRMP* (Province of British Columbia, March 2001) at 4. Available from government on-line at: http://www.luco.gov.bc.ca/lrmp/ncoast/docs/EBM_framework_doc.pdf.

⁵⁵ *Ibid.*, p.4, citing Swanson et al. *Scientific Information and the Tongass Land Management Plan: key findings from the scientific literature, species assessments, resource analyses, workshops, and risk assessments panels* (USDA FS PNW-GTR-386, 1996); C.S. Holling and G.K. Meffe, “Command and control and the pathology of natural resource management,” *Conservation Biology* 10(2) (1996): 328-337; R.F. Noss, *A citizens guide to ecosystem management* (Boulder: Biodiversity Legal Foundation, 1999); R.W. Haynes et. Al, *A framework for ecosystem management in the Interior Columbia Basin and portions of the Columbia Basin* (USDA FS PNW-GTR-405, 1996); T.M. Quigley and S.J. Arbelbide, *An assessment of ecosystem components in the interior Columbia Basin and portions of the Klamath and Great Basins*, Vol 1 (USDA FS-PNW-GTR-405, 1997).

can sustain. Put another way, ecological integrity is the foundation upon which our communities and economies are based, if that foundation is undermined or destroyed, then the human systems that rest upon that foundation will start to break down. This key principle was recognized by the Central Coast LCRMP Phase 1 Framework Agreement, which states: “Healthy, fully functioning ecosystems provide the basis for sustaining communities, economies, cultures and quality of human life therefore ecological sustainability is fundamental to land and marine management.”⁵⁶

From this perspective, it is clear why constraining biodiversity protections by timber supply impact caps or timber targets will undermine the balance between ecological and human systems necessary for sustainability over the long-term, and is fundamentally contrary to an ecosystem-based approach.

Implications for Goal Statements/“Overarching Results”

As noted above, protecting biodiversity within the range of natural variability is a key component of maintaining ecological integrity. This does not mean a “one-size fits all approach” because the range of natural variability will be different in different areas of the province, notably because they would have experienced different forms of natural disturbance. Nor does this not mean that every species or value is protected on every square inch of land; however, “it do[es] mean that *at the appropriate spatial scale*, all elements, populations and processes are maintained.”⁵⁷ The landscape or watershed scale is an appropriate scale at which to address many coarse filter biodiversity issues.

Thus, goal statements for retention of old forest, representation of other seral stages, landscape connectivity and temporal and spatial distribution of cutblocks should indicate that **the goal is to maintain and where necessary, restore landscape patterns for these values to be within the range of natural variability**. Note that effectiveness monitoring will require research efforts to establish what the range of natural variability for the value in question is, although natural disturbance types and high BEO targets in the Biodiversity Guidebook provide a conservative approximation for use in interim objectives, at least for seral stage distribution.

Links to Planning Sequence, Results and Rules

From a process perspective, the first and fundamental defining characteristic of ecosystem-based planning is that forest users must first identify the parts of forest landscapes and forest stands that require protection in order to maintain forest functioning at all spatial and temporal scales, before planning/zoning for human uses.⁵⁸ Likewise, as the Clayoquot Scientific Panel stated: “forest reserves, based on credible biological and physical criteria are designated at the watershed level before the delineation of harvestable areas and subsequent planning of specific forestry activities.”⁵⁹

⁵⁶ Available on-line at: <http://www.luco.gov.bc.ca/lrmp/cencoast/docs/Framework%20Agreement.pdf>. See Appendix 4.

⁵⁷ Holt, p.3.

⁵⁸ Silva Forest Foundation et al, *Ecosystem-Based Forest Use for Ecological and Cultural Sustainability*, (course Materials) (Slocan Park, BC: SFF, 2001).

⁵⁹ Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *Sustainable Ecosystem Management in Clayoquot Sound, Report 5 Planning and Practices* (Science Panel, 1995), p. xv. The watershed level forest reserves encompassed in the Clayoquot Scientific Panel approach to



Thus, legally implemented, spatially explicit landscape level objectives for biodiversity for all values set out in the Biodiversity Guidebook, which are scientifically defensible and unconstrained by timber supply impact caps or timber targets, must be in place before bringing into effect a Results-Based Code.

We would recommend that interim objectives reflect targets, etc. based on the high biodiversity emphasis option in the Biodiversity Guidebook, and that specific results and rules that require compliance with these be implemented. Not only will this facilitate FSC certification (the only credible certification scheme from the perspective of the environmental sector), but more fully integrate an ecosystem-based approach to balanced use. Where there is insufficient old growth to meet targets, mature forest areas with old growth characteristics should be designated as recruitment areas.

Licensees would be expected to meet the goal/overarching result of maintaining landscape level patterns and stand structures within the range of natural variability (with the exception of emulating rare extreme events). Proposed cutblock sizes under “temporal and spatial distribution of cutblocks” are unlikely to be consistent with this goal in areas that only rarely experience natural stand replacing disturbance, and may not be consistent in other areas depending on the amount of stand structure retained and cut levels.⁶⁰

In addition, objectives should be established for values addressed at the watershed/landscape level by the Clayoquot Scientific Panel, but for which the Biodiversity Guidebook lacks detail or doesn't address, e.g., reserves to protect red- and blue-listed plant and animal species, reserves to protect forest-interior conditions in late successional forest, reserves to protect cultural values, reserves to protect scenic and recreational values, reserves to represent all ecosystems (to site series level).

An ecosystem-based approach militates that what must be retained at the stand or patch level should be determined before carrying out forest practices. This has two implications in relation to landscape level planning; first, the goal should be to retain, and where necessary restore stand structure to conditions compatible with the range of natural variability at the landscape level (as well as the stand level); second, it is not appropriate to identify forest areas that are solely for commercial forest use at the expense of other values, EVEN WHERE ecosystem-based planning at the landscape level has been completed, because maintaining ecological integrity will require retention of stand structures such as canopy complexity, live wildlife trees, snags and coarse woody debris.

ecosystem-based planning were: reserves to protect hydriparian resources, reserves to protect sensitive soils and unstable terrain, reserves to protect red- and blue-listed plant and animal species, reserves to protect forest-interior conditions in late successional forest, reserves to protect cultural values, reserves to protect scenic and recreational values, reserves to represent all ecosystems (to site series level), and reserves to ensure linkages among watershed-level planning areas,” p. 249.

⁶⁰ Assertions that smaller cutblocks contribute to fragmentation are often based on the assumption of retaining current cut levels which are significantly above even the Long Run Harvest Level. This issue is of much less concern, however, if cut levels come down to levels that are within ecosystem limits as defined through an ecosystem-based planning process.

6.2.2 WILDLIFE TREES

Comments

Wildlife trees are an important tool in retaining biological diversity in an area, and the basic result and rules proposed by the Discussion Paper are based on a sound approach. However, we would make the following comments:

- The result, unlike the goal statement, makes no reference to the “quality” of tree. While “quality” involves a somewhat subjective evaluation, it could easily be included in the result to deal with situations where clearly inappropriate trees are left.
- The details of the quantity of wildlife trees is not provided (they will be included in regulation later), making it impossible to evaluate whether the level of wildlife tree retention will be appropriate.
- The result specifies that the wildlife trees should be left in a distribution “that reflects natural patterns”. This is one of the many examples of where the licensee should be required to research, and make available, on request, documentation as to what the natural patterns were prior to logging.

We also have concerns about the exemptions for forest health factors proposed in the Discussion Paper. Forest health has frequently been misused to authorize setting economic salvaging above environmental considerations. Although there may be circumstances where an exemption is appropriate, we would hope that the Code provide a definition of forest health based on the biological health of the forest, rather than in terms of timber production, and limit the scope of the exemption powers accordingly.

Solutions

Measurable and quantitative results and rules must be established for wildlife tree retention. Tables 20(a) and (b) in the Biodiversity Guidebook provide a starting point, but it would be preferable to set minimums for structures like wildlife trees on a structures/hectare basis. Rules should also require that trees retained are suitable for wildlife purposes.

6.2.3 COARSE WOODY DEBRIS

Comments

The sole result for coarse woody debris (CWD) provided by the Discussion Paper is a classic example of a vague and unenforceable result due to the final sentence:

Coarse woody debris will be left dispersed on the site after harvest. This retention will include large pieces that can last the full rotation. Coarse woody debris retention will be balanced with other resource management objectives and results.⁶¹

⁶¹ Discussion Paper, p. 21.



Although a requirement to leave large woody debris that can last a full rotation is positive, how much woody debris is to be left? What is an appropriate “balance” between retention and other objectives and results (remember that it will be the licensee who is doing the balancing, not government)? None of these questions have answers based on the result.

Solutions

Looking at the Goal Statement, similar considerations apply to those for wildlife tree retention, and we would propose a similar approach. A matrix can be developed in regulations to provide further detail on the actual quantity (probably in terms of volume and/or large debris), and quality (which the goal statement notes can be quantified in terms of size, species and decay class), of debris to be left. Such numbers should be based on the range of natural variability in such stand structures at the landscape and stand levels. An alternative would be to require retention of 100% of naturally occurring CWD. As with wildlife trees, it would be necessary for the licensee to provide documentation on what the natural forest conditions had been like prior to logging, and naturally.

The key is that measurable results and rules be established for CWD, that address the quantity and quality of CWD required to be left behind.

Because of already proposed elimination of utilization standards/allowable waste benchmarks by British Columbia in the context of softwood lumber negotiations (except where required to meet biodiversity objectives), the likelihood of running into competing resource management objectives as presupposed by the Discussion Paper will be greatly reduced.

6.2.4 MANAGEMENT OF VISUAL QUALITY

Comments

The Discussion Paper proposes a single result in respect of visual quality, which is based entirely on objectives set for scenic areas. Under the current Code, the Operational Planning Regulation defines “scenic areas” as “any visually sensitive area or scenic landscape identified through a visual landscape inventory or planning process carried out or approved by the district manager” and where cutblocks fall in known scenic areas, licensees must carry out visual impact assessments that show that logging is consistent with visual quality objectives for that area. The proposed approach appears to insert a further step of government “establishment” of scenic areas. If areas that currently have policy-based visual quality objectives are not established as scenic areas, the proposed Code may reduce standards for visual quality management.

Visual management is a field in which proactive assessment is a necessary, valuable and commonly used tool. Licensees will likely have to carry out the assessments to meet the desired result in any event. We do not share the Discussion Paper’s enthusiasm for eliminating all planning and assessment requirements from the Code. Requiring that planning be done according to specified standards, is an appropriate result in itself.

There are no rules proposed for scenic values. Measurable and enforceable standards from the Visual Impact Assessment Guidebook should be incorporated into the rules, providing a basis for ensuring that the result is met.

Solutions

For this regime to work, it will be necessary to ensure that all areas with important visual quality values be designated as scenic areas. As noted, rules should be included based on the Visual Impact Assessment Guidebook. However, we also suggest including a general rule that a licensee be required, prior to engaging in operations, to “have a qualified professional conduct an assessment of the impact of its operations on visual quality and minimize such impact, or, for scenic areas, to ensure compliance with visual quality objectives or interim objectives set for that scenic area,” and to require public participation in this process.

6.2.5 FOREST HEALTH

Comments

The proposed Results-Based Code would weaken, and fail to close problematic loopholes in the present requirements of the Code for forest health, at a time when forest health issues such as mountain pine beetle are a major issue.

One theoretically positive aspect of the current Code in relation to this value was the requirement that licensees do some proactive evaluation of forest health factors, and to carry out forest health assessments if required by the district manager. Since these assessments were carried out prior to approval of Forest Development Plans, the results were reflected in the operational planning. The proposed rules and results do not represent even an equivalent approach. Likewise, the lack of information requirements regarding forest health factors both generally and in silviculture prescriptions undermines proactive management and enforceability. This section is perhaps a good example of deregulation for its own sake and not because of any onerous difficulties with the current Code.

The results proposed for forest health are vague and unenforceable. The first two results are not results but vaguely expressed rules. The third is a worthwhile result, but expressed in a manner that is not enforceable.

We support the positive acknowledgement in result 4, that managing forest health factors is not an excuse for failure to meet objectives for ecological values; however, its efficacy will depend on the actual objectives and results set for “other values”. In this regard, we note that retaining remnant forest patches and stand structure (e.g., coarse woody debris) as well as using diverse silvicultural systems, is key for maintaining biodiversity and the resilience of ecosystems in resisting or recovering from disturbance. We also note that



reducing stand and landscape diversity through clearcutting may actually “increase the susceptibility of these forests to large mountain pine beetle outbreaks in the future.”⁶²

Another key requirement is for proactive monitoring and strategic intervention to avoid exacerbating forest health problems. It is hinted at here, but only in the vaguest possible way — e.g., expressions such as “in a timely manner”, “activities that will address”, etc. There needs to be much greater definition of the desired on-the-ground results. Forest Practices Board audits on forest health issues may be a helpful resource for better definition of the problem and the solution.

The three rules proposed on page 22 of the Discussion Paper are fine in intent, but are insufficient to accomplish the desired results. There needs to be far more detail in the rules to make them meaningful and enforceable. This requires much greater definition for the third rule, and the development of additional rules to achieve the intent of the goal statement and results.

It is particularly important that forest health issues be enforceable and enforced, and that the penalties be large enough to deter any actions which intentionally or negligently undermine forest health. This is an important issue not only because forest health is a significant issue, but also because in some situations there can be incentives for licensees to not addressing forest health in a proactive and strategic manner. Some forest companies may continue to carry out assessments and design proactive management strategies. But others will want to avoid the expense and focus on the highest value wood in the short term in the knowledge that ignoring the issue may yield cheap wood at salvage rates in the future.

With Resource Development Permits being approved for up to 5 years, there is no real ability or incentive for the licensee to adapt its logging to address forest health factors. Even where forest health issues are obvious, the District Manager will have no authority under the limited Resource Development Permit test to strategically direct licensees to problem areas. Again, the proposed Code undermines much of the protection of forest health values under the current Code.

The exemption section is overly broad and has no test or limitations on its exercise. This could lead to avoidable harm to riparian areas, sensitive ecosystems and land use objectives. The Discussion Paper also provides no definition for forest health. In our opinion, the term “forest health” should be clearly defined to exclude operations where the economic value of the timber, but not the ecological integrity of forests, is threatened.⁶³

The Discussion Paper proposes a role for government officials to intervene where there is a forest health emergency. However, the complete absence of any discussion about when

⁶² J. Hughes and R. Drever, *Salvaging Solutions: Science-based management of BC’s pine beetle outbreak* (Vancouver: CPAWS, Forest Watch, DSF, 2001), p. iv.

⁶³ It is critical to acknowledge that “[t]he current outbreak in BC is a socio-economic challenge, rather than an ecological crisis” (Ibid.). The outbreak may be a problem because of impacts on timber supply, revenue and long-term community stability, but at the end of the day beetles, like fire, are a natural disturbance in interior forests. Thus, operations currently directed at “forest health issues” must be seen as operations that are more economic than ecological in nature.

an emergency could be declared makes it difficult to comment on the appropriateness of this approach.

Solutions

We recommend that the Code impose rules which require annual assessments of forest health. Where the assessment identified risks to forest health, the licensee would be required to report those results, together with a plan for addressing the problem, to the District Manager. The District Manager would then have the ability to (a) adopt the plan as proposed or with modifications; (b) amend the RDP accordingly (but still pursuant to the RDP test); and/or (c) order the licensee to take actions necessary to deal with the forest health problem.

Any exemptions provided in the Code should be limited to situations where the ecological integrity of the forest ecosystem is at stake, and not merely to protect against a reduction in timber value.

6.2.6 ROADS, STREAMCROSSINGS AND ACCESS MANAGEMENT

Comments

The results and rules proposed for “Roads, Streamcrossings and Access Management” deal reasonably well with road construction.⁶⁴ However, it has major shortcomings in relation to three areas: 1) access management, 2) road density, and 3) road location. Results and rules need to be developed to address these important issues.

In regard to the specific results, there is a potential contradiction between the requirement to “maintain” surface drainage patterns in road construction and maintenance,⁶⁵ and “restoration” with respect to deactivation.⁶⁶ To the extent that the latter is intended to deal with situations where the first result has been breached, we would suggest that the Code include a general requirement that there be remediation where any result has been breached. For the sake of consistency, the word “restoration” could then be amended to “maintain”.

Rule 8 should be amended to delete “unless acid generation is mitigated”. This is too vague, does not specify a clear outcome, and more importantly raises a potential conflict with the *Waste Management Act*.

Solutions

We strongly recommend that results be developed related to access management, road density and road location.

⁶⁴ We note, however, that care should be taken in drafting sections so they are enforceable. Sections such as “minimizing the introduction of silt to watercourses” and “limiting access on the road...” should be modified to use verbs such as “prevent” or “avoid”.

⁶⁵ In the first result, bullet # 4.

⁶⁶ Result #2, bullet #2.



6.2.7 SILVICULTURE

Comments

There are a number of concerns raised by the approach of the Discussion Paper in relation to silviculture. An overarching concern is that this section provides no direction about what silvicultural systems are permissible in what circumstances.

Second, the goal statement is very broad (e.g., contains undefined words like “sustain” and “value of the land”) considering that this section is flagged under section 6.2.1 (Landscape Level Biodiversity) as a primary place where specifics re: maintenance of stand structural attributes and species composition are to be addressed.

With regard to the results, we are also concerned that protections for non-timber values are limited to situations where legal objectives are in place (result #2), and that the only reference to maintaining site and stand productivity is linked to partial cutting (see result #3), implying, incorrectly, that this is not an issue with clearcutting! Result 2 is also extremely open-ended, only requiring licences to take “all reasonable measures”.

With regard to the rules, there is a notable absence of rules related to non-timber values (with the exception of limited content on fertilizer use). With regard to fertilizers, application restrictions only apply in community watersheds ignoring other domestic use watersheds and fisheries values. Furthermore, the limit of 10,000 stems per hectare (re: maximum density) is so excessive as to be meaningless — it would result in planting trees only one metre apart!

Finally free growing is not defined, and no details are specified for what free growing standards will be. We remain concerned that requirements around removing competing vegetation could create incentives for herbicide use that has potentially harmful environmental impacts.

Solutions

The goal for this section should be that silvicultural systems result in present and projected landscape patterns and stand structures that are maintained, and if necessary restored, to be within the range of natural variability for the area in question.

Results for this section of the RBC should include a requirement that silvicultural systems are chosen that will achieve objectives for biodiversity, stand structure and species composition (these objectives of course must be scientific and unconstrained by timber supply impact caps/targets).

Specific rules and results for maintenance of stand structural attributes and species composition, as well as protections for non-timber values should be specified either here or elsewhere in the standards (e.g., canopy complexity, snags etc. are not addressed anywhere).

A result related to sustaining plant community representation and tree species composition typical of the ecosystem at the landscape level (at the site series level) (result 4) is an excellent idea, but must not be overridden if lesser legal objectives are established.

A lower limit on maximum density per block should be set (e.g., 5,000 stems per hectare).

6.2.8 GENE RESOURCES

Comments

There are a number of concerns with this section of the Discussion Paper. First, the goal statement is a good start, but reflects only the bare minimum that would be acceptable, rather than what our long-term goal should be. In addition, the goal statement does not address genetic diversity in relation to non-timber values. For example, breeding trees that are resistant to heart rot might be desirable for timber managers, but such trees would be missing an element highly valued by cavity nesting birds.

This concern also arises in relation to the results regarding gene resources. Phrases like “best”, and “acceptable” are highly subjective and unless requirements to protect non-timber values in particular ways are specified, such words are likely to be interpreted in relation to fibre production not in terms of ecological functions.

Likewise the rules for gene resources do not address non-timber values, except indirectly as possible land-use objectives.

Solutions

Requirements related to addressing non-timber values in the goals, results and rules for gene resources must be specified.

6.2.9 SOIL CONSERVATION

Comments

In general, this section of the Discussion Paper comes much closer to the level of measurability and specificity that a results-based framework should contain. The proposals here nevertheless raise certain concerns.

First, the goal statement does not make clear what it means to “protect” soil properties, and no definition is provided. Likewise, no definition is given of “sensitive soils.” Other ambiguous and subjective language is contained in the rules, such as “insufficient area...to warrant treatment, and “unacceptable risk”. Second, although on their face very similar to the existing Code requirements, the thresholds for soil disturbance proposed could be lower and yet be operationally feasible. Lower levels of soil disturbance would be desirable from the perspective of maintaining forest productivity, reducing soil erosion etc.

We are concerned that the proposed approach does not require the inclusion of roads that run parallel to cutblocks in the area on which calculation for permanent access structures is based.



Solutions

Retain specificity and hard numbers in the soil conservation section.

Effectively lower the thresholds, and put in place a more logical framework for calculating soil disturbance and permanent access structure thresholds by basing percentages on the whole productive area (i.e., everywhere that once grew trees). In particular, ensure that the area considered does not exclude roads that run parallel to cutblocks.

Provide a definition of sensitive soils. We would suggest that any areas where soil sensitivity ratings are moderate or above (i.e., moderate, high or very high) for soil erosion, soil compaction and soil displacement should meet the definition.

Rule #6 should apply more broadly than in community watersheds.

Remove exemptions in rules #8 and 9 given the already high threshold numbers.

Wording improvement under “Information requirements” — to be meaningful must require a map of the whole area that shows any areas of sensitive soils.

6.2.10 TERRAIN HAZARD MANAGEMENT

Comments

The framework for this section of the Discussion Paper is weak and incomplete. In particular, it limits terrain hazard management requirements to only those areas where human values may be impacted. Although there is a broader reference to forest resources in the goal statement, the specific list enumerated in the result is limited to impacts on humans or on resource extracted by humans. This implies that a human-caused landslide that impacted on an old growth reserve would be acceptable.

In addition, concerns arise from the use of the phrase “will result in” in the result statement. Any enforcement action related to this result would require expert evidence not just that a landslide is likely to result, but that it actually “will” — a huge barrier to successful enforcement and a very low bar.

Rule #1 is unacceptable. The results referred to (e.g., landslides, snow avalanches) are too serious to restrict rules about licensee behaviour to simply reporting such events after they are already happening, and (on one reading) only if the licensee is willing to admit they caused the event! A requirement to carry out actions to prevent or mitigate only applies in extreme circumstances (property or lives are likely to be lost or if “significant environmental damage” is likely). The later phrase is undefined, and no action is required to protect environmental values generally.

Note that Rules #2 and 3 are inconsistent here (though not in draft legislation provided).

The statutory power listed is a good start but a) cutbacks to staff and resources raise serious concerns about what we could actually expect to be observed, and b) “to do certain things” is very vague. The statutory power does not appear to be included in the draft legislative example provided.

Solutions

Delete rest of goal statement after the words “snow avalanches”.

In the result statement, replace the phrase “will result in” (or words “likely to cause” in Appendix 3) with “will increase the likelihood of landslide etc. risk to moderate or above (as determined in an assessment by a qualified professional), or will increase the likelihood at all if natural conditions would involve a moderate likelihood of landslides etc.”

Assessments related to landslides, snow avalanches, and the other hazards identified in this section must be required and must be made publicly available before logging is approved. A standardized process and format for such assessments, including standardized hazard ratings, would help ensure the quality of assessments, provide cost savings to industry and consistency in products produced by consultants.

If there is no appetite for requiring proactive assessments to avoid these environmental risks, then rules should be developed to avoid them. For example, if industry does not want to carry out terrain stability assessments for unstable slopes, then clear and measurable rules should be developed that preclude logging on defined slopes (such as all Class V and Class IV areas, for example), without exceptions.

Statutory powers should be better defined, and include e.g., the issuance of stop work orders, and a role for citizen monitoring should be enshrined in the framework.

6.2.11 COMMUNITY WATERSHEDS/WATERSHEDS WITH SIGNIFICANT DOWNSTREAM FISHERIES VALUES

Comments

It is positive that many of the results for community watersheds and watersheds with significant downstream fisheries values (the “selected watersheds”), are also required in the proposed framework for riparian management, (although the riparian management results do not provide for maintenance of either water quantity or timing of flow, omissions which should be corrected). Another value which is covered through the RDP test in regard to these selected watersheds, but which is not addressed in any result in relation to other watersheds, is the cumulative hydrological effect of logging. This oversight should also be corrected. However, little true additional protection seems to be provided to these important watersheds.

The single rule listed in the Community Watersheds and Watersheds with downstream fisheries values section of the Discussion Paper reads: “Licensees must comply with specifications to achieve objectives that are described in a table that a licensee appends to the RDP.”⁶⁷

⁶⁷ Discussion Paper, p. 34. Note that there is a second rule provided in the Terrain Stability section on page 33 of the Discussion Paper.



It is not clear what objectives are referred to, although the Discussion Paper refers the reader to the description of Test #4 in section 5.3. That reference suggests that the objectives relate to appropriate siting of development units relative to terrain hazards and hydrological effects, although the word “objective” is not used in that section.

What is clear, is that the results under this section add little to the protection of either type of watershed, while the “rule” allows the licensee to develop its own rules (albeit which are subject to sign-off as part of the RDP).

This is by no means protection equivalent to the results and rules contained for community watersheds or watersheds with downstream fisheries values under the current Code. Currently extensive planning before logging can occur in a community, and decisions are made on the basis of recommendations from a hydrologist. Removing the planning but putting no meaningful results and rules in its place does not qualify as either a Results-Based Code or equivalent protection.

Solutions

Given that the purpose of having a special status for watersheds of these types is because we recognize that their values must be protected *before* the damage occurs, it is especially important to use a precautionary approach to logging operations in these areas. Accordingly, the “rules” may be modeled after the “rules” given for other areas and values, but with an increased margin of error.

The presumption should be against any logging in community watersheds, unless the evidentiary basis provided demonstrates that the results will be met, and clearcutting should be prohibited. An additional RDP test should require water users’ sign-off on any development units that contain or affect community watersheds.

Some aspects of this proposal are provided for under terrain hazard management, at p. 33 of the Discussion Paper, which provides that clearcutting will not be allowed in community watersheds if: “there is a moderate or high likelihood of landslides with a high risk of landslide debris entering directly into streams, unless exempted by the District Manager.” This rule is a good first step, but should be modified:

- to provide equivalent protection to watersheds with downstream fisheries values;⁶⁸
- to expand the prohibition to all such situations in these watersheds, and not merely where there is a high risk of landslide debris entering directly into streams. Landslides in such watersheds should be avoided at all costs; and,
- to remove the District Manager’s exemption powers. It is not at all clear why the current wording would allow the District Manager to authorize a clearcut in a community watershed knowing that there is a high or even moderate likelihood of a landslide devastating water quality in that watershed. If there are legitimate

⁶⁸ A similar comment should be made in relation to the result, specified under the discussion of silviculture, for fertilizer use in community watersheds. Indeed, many of these results really should be extended to all watersheds.

circumstances in which such a bizarre decision could be made, and we can think of none, these circumstances should be spelled out and the use of this discretion strictly limited.

Similar rules could be proposed, adapted from our suggestions for clear rules under other sections.

6.2.12 RIPARIAN MANAGEMENT

Comments

Concerns in this section include the following:

First and foremost, we are extremely concerned that there appears to be no legal requirement to identify, classify and map streams and other hydrologic features. Without this information, and information about the location of cutblocks and roads in relation to hydrologic features, it is not clear how meaningful consultation can occur, nor how an SDM can satisfy him or herself with regard to RDP Tests #1 and 4. Furthermore, if such assessments are not completed before logging and roadbuilding occur, it may be very difficult in an after-the-fact enforcement process to prove, for example, that a stream that has been heavily impacted was once a fish-bearing stream.

With regard to the results statements, the concepts referenced are excellent, but the requirements remain open-ended and undefined. For example, language such as “conservation of”, “protection of”, and “sufficient” is used in the results; however, with the exception of water quality, no benchmarks against which “conservation”, or “protection”, or “sufficient” will be judged are specified. Without a benchmark, the laudable concepts referenced in the results are not really measurable. Furthermore, open-ended concepts will prove difficult to enforce, and can be expected to lead to a battle of the experts in terms of their content and definition.

By way of contrast, the range of natural variation, (the benchmark specified in bullets 5 and 9 for measurement for water quality and water temperature), could be an appropriate benchmark against which results and risks should be measured (see solutions below) provided data are available to determine what this benchmark is, and safe guards are put in place regarding how such data are used (e.g., it is not appropriate to emulate rare extreme events).

NB: riparian reserve zones are NOT listed in the results for riparian management. We must assume this is a drafting error, because to eliminate no-logging buffers for streams, lakes and wetlands would be an unacceptable reduction in environmental standards.

Finally, despite communications from the Department of Fisheries and Oceans regarding concerns that management according to existing Code requirements does not provide the level of protection necessary to comply with the federal *Fisheries Act*, and despite the inclusion of a result related to not introducing deleterious substances to streams, the Discussion Paper does not propose requiring riparian reserve zones on small fishbearing



streams or tributary streams.⁶⁹ In addition, despite a result referring to maintaining water quality, and strong public concern about drinking water, no detail is provided as to whether existing problems with community watershed designation (which excludes many water users who do not meet the specific tests under section 41) will be addressed in a new SRM approach; and no special rules address domestic use watersheds that have not received community watershed designation.⁷⁰

Solutions

Completion of stream classification and assessments must be legally required, and the assessments and resulting maps/recommendations must be made publicly available (regardless of whether government approval must be sought).

Requirements related to activities in community watersheds should apply to all domestic use watersheds.

We would recommend that protection for streams should be re-designed around the concept of the hydroriparian ecosystem, where the hydroriparian ecosystem is defined as the combination of the aquatic ecosystem and the terrestrial ecosystem directly influenced by, or having an influence on, the aquatic ecosystem zone. Riparian management areas (reserve and management zones) should be sufficient to maintain the four main functions of hydroriparian ecosystems (land-on-water influence, water-on-land influences, landscape links and biodiversity).⁷¹

Reserve zones should encompass the entire mapped area of water-on-land influence, as indicated by the topographical limits of water tolerant plant communities (organic and/or cumulic soils are also a useful indicator). Riparian management areas (riparian reserve and management zones) should cumulatively cover the mapped area of “land-on-water” influence. This should be at least one site potential tree height on either side of streams to address physical exchange (e.g., recruitment of CWD) and several tree heights to address terrestrial habitat use (e.g., nutrient exchange resulting from grizzly-salmon interactions, and climate moderation).

⁶⁹ Instead, the Discussion Paper indicates that regulatory requirements related to riparian reserve zone and management zone widths will reflect current provisions. This is the bare minimum that should be required, however, it does not address DFO concerns about small fish streams in relation to the federal Fisheries Act and direct tributaries to these streams. DFO recommended that what are now management zones (with no required level of retention) for S4 streams, as well as S5 and S6 streams that are direct tributaries to fish bearing streams, in essence should be managed as reserve zones, with retention levels “approaching 100% retention”. D.M. Petrachenko, Director General, Pacific Region to Lee Doney, Deputy Minister of Forests (received March 01, 2000).

⁷⁰ Instead, the approach seems to be that the rights of domestic water licensees that are not in designated community watersheds will be addressed through RDP Test #1. Our concerns with this test are addressed above.

⁷¹ See hydroriparian discussion from Church, McLennan, Price, Trainor, Winfield, Young, Zielke, Central Coast Hydroriparian Decision Tool, Draft #2, Appendix 1. In summary, this draft makes the following points: In modern ecology, riparian is used to refer to the land area adjacent to open water, the character of which is influenced by the presence of water. The extent of direct influence of water is indicated by plant communities (with practical identification using the topographical limits of water tolerant plants). In addition, functionally the riparian zone extends out farther from the water body due to use of this zone by terrestrial species (riparian birds, grizzlies). The hydroriparian zone refers to the combination of the aquatic zone and the riparian zone, which are intimately connected, in terms of water, sediment, nutrients, organisms, downed wood and energy.

Where data are unavailable to use the range of natural variability as a benchmark for specific riparian functions listed in the results section, ensuring that stand level retention in management zones is consistent with range of natural variability should achieve a similar result. In other words, within riparian management zones, required minimums for structural retention should be within the range of natural variability (or at least consistent with the dominant natural disturbance type). For example, in NDT 1 where stand replacing events are extremely rare, it would not be acceptable to clearcut a riparian management zone.

If the current approach to riparian classification is maintained, the regulatory framework must include mandatory no logging/roadbuilding reserves on Class 4 streams, and on Class 5 and 6 streams that flow into fishbearing streams. Such reserves zone widths would be at least equivalent to the present management zones for these stream classes, as per DFO guidance regarding what is required to comply with the federal *Fisheries Act*.

6.2.13 UNGULATE WINTER RANGE

Comments

This section of the Discussion Paper defers to future objectives set by government. It claims to specify a result, but since the required maintenance of forage and cover attributes is “as specified by the Ungulate Winter Range objectives, or interim objectives...” the result is to follow objectives to be developed at some time in the future. At the present time, there is no way of evaluating whether the result will be effective until we see the objectives “set by government”. Clear measurable results must be specified.

The Discussion Paper also proposes that government be able to enter into “agreements with licensees to use information from their plans as the basis for these objectives.” It’s not clear which plans these are. Not the Resource Development Permit, as it’s not required to contain any information concerning Ungulate Winter Range. So having said that the government will not require planning, and will not tell Licensees how to do planning, because that’s none of government’s business, the government is saying that if a licensee chooses to prepare a plan, that plan can form the basis for the “results” that will be binding on the Licensee. We question whether this is an appropriate approach.

Most other provisions in the Discussion Paper are very clear on who the decision maker is. Ungulate winter range areas and objectives must be set by the habitat experts in MWLAP. The status quo in UWR management is not satisfactory due to the high discrepancies across the province. Critical winter range is being logged in forest districts that have resisted proper UWR management. The status quo is not scientifically defensible.

Given the government’s insistence that there be only one identified and responsible decision maker in other contexts, it is surprising to see the Discussion Paper proposing that both WLAP and MSRM play a role in designated UWR. No justification is provided for why MSRM should exercise decision making on ungulate winter range.



Solutions

The only way to correct these contradictions and anomalies in a consistent manner is to have the experts in MWLAP identify critical winter range. Due to urgency in some districts where ungulate winter range still has not been identified (even though other districts have had it in place for decades), there must be provision for immediate protection measures, similar to the proxy measures for old forest retention.

6.2.14 IDENTIFIED WILDLIFE (INCLUDING APPENDIX 4)

Comments

The Discussion Paper's goal statement for Identified Wildlife is unsatisfactory in that it specifies a strategy (the province's identified wildlife management strategy) that is intended to meet a goal as part of the goal statement. We would like to begin by noting the shortcomings of the IWMS to date. MWLAP has recognized that, to date, the IWMS has failed to protect many identified species including, for example, spotted owls and marbled murrelets. Critical habitat for the so-called "higher level plan" species often remains unprotected due to feared impacts on the timber supply. Missed at the IWMS level, higher level plans have also failed to deliver on habitat protection for many of these species. We hope that Identified Wildlife will receive a higher level of attention under the any new Code.

The result specified in the Discussion Paper is a good general statement, akin to what we have proposed should be included as "overarching results".⁷² No technical or planning results are proposed, however. This could make it difficult to enforce in all but the clearest cases.

The rule provided focuses on general wildlife measures which government will set in relation to a wildlife habitat area or specified ecosystem unit. This will be a useful tool and an appropriate way to set stringent rules where a particular species has been recognized as in need of protection. However, this tool should not replace specific rules designed to protect endangered and identified species generally.

We also note that s. 3(a) of the draft legislation appears to contemplate that a general wildlife measure could be designated in respect of a species generally, and not linked to a particular wildlife area. However, no provision is made to make such a designation binding on a Licensee.

Solutions

While the proposed results and rules are good as far as they go, we would propose additional requirements aimed at providing more enforceable protection for wildlife outside of wildlife habitat areas, including:

⁷² We note that the proposed legislation, found at Appendix 4, actually contains two "results", both of which are useful.

- requirements that a survey of the wildlife and habitat attributes be made prior to approving operations in a development unit; and
- that any evidence of the presence of an identified species in or near a development unit be immediately communicated to the Ministry of Water, Land and Air Protection.

We would further recommend that the Ministry of Water, Land and Air Protection be given a general power to review proposed or current logging plans, to issue stop work orders, and to make such general orders as may be necessary to protect identified wildlife.

Finally, we urge government to eliminate the 1% timber supply impact cap policy for implementing the IDWMS. To the extent that it is not explicitly mentioned in the Discussion Paper, we hope that this is what is being proposed.

6.2.15 RESOURCE FEATURES

Comments

This section of the proposed Results-Based Code framework contains positive concepts, but the language is open-ended. The phrases “will protect” in the Goal Statement, and “will not result in damage” in the results could be interpreted as setting a very high bar (i.e., full protection and a zero threshold for damage), which we would wholeheartedly support; however, without definitions, there is no guarantee that they will be interpreted this way. Furthermore, because of the after-the-fact nature of a Results-Based Code, in effect the language “will not result in” will put the onus on the body enforcing this result to prove that a licensee’s action “will” result in damage to resource features. Instead, in the face of scientific or technical uncertainty, the precautionary principle would suggest that the onus should be reversed, and that the action should not proceed in the first place if there is uncertainty as to whether it will cause damage.

The single rule for this section is symptomatic of the least effective aspects of the proposed RBC framework, in that both the level of protection, and the actions to protect resource features are left almost completely up to the licensee. To further add to concerns about this section, it also gives the District Manager complete discretion to exempt licensees from having to protect certain resource features at all!

It is positive that government officials will have the authority to identify other resource features, however, this opportunity should also be open to First Nations, and concerned citizens through a public participation process. Such identification must trigger an obligation to avoid any harmful alteration to the feature.

Solutions

Clarify that the definition of resource features is as per the existing Code and Operational Planning Regulation definitions, or if it is being altered, seek public input on the alteration.



In relation to the proposed result, define “damage to” to include any alteration to the feature’s natural or original state that affects its ecological or cultural value to users.

Delete the exemption. With the level and type of protection already completely open, having such an exemption is excessive. Furthermore, if the Code framework must contain exemptions at all, it must carefully specify conditions under which each exemption may be permissible.

6.2.16 CULTURAL HERITAGE RESOURCES

Comments

This Goal Statement is empty of meaningful content; it contains no guidance as to expected management goals for cultural heritage resources. Furthermore, it indicates that impacts, presumably even destruction of cultural heritage resources is expected and acceptable.

In addition, with the exception of archaeological sites the proposed framework provides no assurance that there will be any protection at all for cultural heritage resources (i.e., it is not obvious what legislation is being referred to — certainly no details are given in the Discussion Paper — and there does not appear to be any obligation on DM’s to prepare written guidelines).

Solutions

Develop legally required protections for identification and protection for cultural heritage resources in conjunction with BC First Nations.

6.2.17 LAKESHORE MANAGEMENT

Comments

It is positive that some protection is provided for lakes; however, there appears to be no rationale for excluding smaller lakes. In the Goal Statement, the words “important” and “conserved” are too open to provide meaningful guidance to managers.

With regard to the result set, no security whatsoever is provided that lakes will receive any protection at all, because it is contingent on objectives being set by an SDM.

Solutions

Clarify the relationship between 6.2.17 and 6.2.12 “Riparian Management” which also refers to lakes.

Include results and rules for lakeshore reserve and management zones in the Results-Based Code legal framework.

6.3 REGIME FOR WOODLOT LICENCES

Comments

The Discussion Paper justifies departing from the general results-based regime in respect of woodlots, stating that “the regime for certain values is not relevant on woodlots”.⁷³ While this claim may be true in certain circumstances, it will be false for others, and it cannot be used to justify a loosening of environmental standards. The examples of exemptions cited — ungulate winter range, identified wildlife and biodiversity objectives — are exactly the sorts of situations in which the comment is wrong-headed. Woodlot boundaries can move but habitat for species at risk often cannot. These exemptions are not supportable.

Also, the move to a 10-year permit approval is an overly long time frame that will not provide sufficient flexibility and opportunities for review, especially since woodlots are usually located close to communities in which issues arise from time to time, and since the five year horizon was introduced to grant woodlots relief from annual approvals under the Code.

Solutions

Strategic and operational planning at the woodlot level should be required to take into account and comply with landscape level (coarse filter) biodiversity objectives, to the extent woodlot licensees are able given the size of their operations. Species-specific measures, particularly for species at risk, should apply fully to woodlots.

Do not extend the term of the RDP.

In the future, the Ministry of Forests should seriously consider a “no-logging” option in lieu of allocating woodlots in areas with high environmental values, environmentally sensitive areas or domestic use watersheds.

6.4 MANAGEMENT REGIME FOR RANGE

Comments

The proposed management regime for range provides a list of which results/rules would apply to Range Management. One omission is watersheds with significant downstream fisheries values (only community watersheds are listed as included). It is not clear if this omission is clerical or substantive in nature, but it should be corrected. In addition, no specific requirements are elaborated in relation to protecting wetlands and preventing erosion.

It is difficult to comment on the Discussion Paper’s assertion that government will share accountability with licensees for Range operations. More detail as to what role government will play is clearly required.

⁷³ Discussion Paper, p. 40.



Solutions

Because of the mobile nature of livestock, proving causation in relation to results after the fact would be very difficult; thus, the Code framework should contain rules applicable to range practices directed at preventing environmental damage, for example, requiring fencing and limiting access to sensitive ecological areas.

6.5 THE REGIME FOR FIRE MANAGEMENT

The Results and Rules proposed in respect of fire management are vague and unenforceable. Enforceable language would require that the Code define what steps must be taken to “mitigate” the risk and spread of fire. For example, the Discussion Paper avoids issues around fuel management and other risks. Rules and results should be developed to address such risks, for example, by addressing the topic of prescribed burning.

7.0 THE COMPLIANCE AND ENFORCEMENT REGIME

7.1 THE ROLE OF DUE DILIGENCE AND ABSOLUTE LIABILITY

Comments

The Discussion Paper begins by quoting the New Era campaign promise of a Results-Based Code with “tough penalties for non compliance”. However, once the reader reaches the section on compliance and enforcement we learn that not all non compliance will necessarily warrant a penalty under this Code.

The Discussion Paper raises the question of what role “due diligence” is to play in administrative penalties, and proposes three options for discussion. We note that much of the rest of the Discussion Paper assumes that due diligence will be a relevant factor in the enforcement regime, and that the third option discussed, in which due diligence is relevant but not determinative, is the one clearly favoured in the Discussion Paper.

Let us start by stating our position: Due diligence is not an appropriate tool for administrative penalties, and particularly not under a results-based regime.

The concept of due diligence arises from judge-made law in the context of the prosecution of strict liability offences in court. The Discussion Paper proposes expanding the availability of due diligence defences to the realm of absolute liability. This is completely inappropriate and will defeat the entire purpose of an absolute liability regime. There is

no justification for such an expansion of due diligence defences either in legal theory or otherwise.

Due diligence has no place in the administrative penalty scheme, which is more akin to a ticketing function than the prosecution of an offence. It is our opinion that administrative penalties under the Code should be addressed in the context of absolute liability. Risks to human safety, property and environmental values from forestry activities are of such significance that they deserve this treatment – particularly if accompanied by significant reductions in up front planning, impact assessments, administrative approvals and oversight, and enforcement staffing levels. It is quite alarming that the Results-Based Code proposes due diligence defences in addition to all of the other deregulatory measures and cuts to agency budgets and staffing: it will create a regime in which there is little actual accountability.

As the Discussion Paper notes, administrative penalties under the Code are not designed to punish, but to deter, to ensure remediation, and to recover the cost of harm to the public, amongst other purposes. Its effectiveness in accomplishing these things comes from the very fact that the penalty is automatic. Imagine a police officer, on giving a traffic ticket, being legally required to receive extensive evidence as to whether the traffic infraction had occurred despite the due diligence of the driver. The effectiveness of the police force would be undermined if this type of discussion happened every time a person was pulled over.

Similarly, it is not efficient to require stretched government officials to listen to, and adjudicate on, a series of excuses arising from forestry infractions. These government officials are not legally trained in what constitutes due diligence. And, perhaps more importantly, under a results-based regime, industry will control all of the information relevant to determining due diligence. Licensees are likely to provide only exculpatory information in an effort to prove due diligence (i.e., they would be unlikely to volunteer the memorandum from its chief biologist warning against proceeding with a road when faced with an infraction). Unless the government wishes to give the District Manager the power to subpoena witnesses and evidence, and then fund the time required for him or her to obtain and review the necessary evidence, any regime in which due diligence is relevant will undermine the use of administrative penalty powers.

The Discussion Paper recognizes that if due diligence were to be given the status of a “complete defence”, it would mean that licensees would only have to take exercise reasonable care in attempting to meet the results and rules prescribed. It would undermine the entire concept of holding licensees accountable for results and would severely reduce the incentives for licensees to develop practices which are better than the standard industry practice (on the basis of which due diligence will often be determined). However, the same effect occurs, albeit to a lesser extent, when the exercise of due diligence results in a lesser penalty. Lesser penalties can become a cost of doing business, and reduce (although do not eliminate) the incentive to develop more reliable approaches which reduce the potential for company liability.

The Discussion Paper argues that “deterrence” should be treated differently than “compensatory” administrative penalties, and that this is the reason for allowing consideration of due diligence in relation to quantum of the penalty. Assuming that this distinction is valid, one could craft an option in which certain administrative penalties,



such as orders for remediation and compensation, do not give rise to consideration of due diligence.

There is no discussion, however, of why deterrence should be treated differently than compensation. It is certainly not the case in traffic violation regimes — traffic tickets are used almost entirely for their deterrent effect. The authors seem to assume that deterrence is only effective where a person intentionally did something (or failed to do something) that could be foreseen to lead to the non-compliance. In actual fact, absolute liability can be an extremely effective incentive for companies to not only use the best possible practices, but to develop new procedures and practices which are more likely to prevent the harm. In a regime which purports to put responsibility for meeting the requirements on the licensees, this makes sense. It is also consistent with imposing a precautionary standard of care (which is legally a higher standard than due diligence) on the licensees.⁷⁴

The Discussion Paper attempts to bolster the “combination” approach to due diligence by suggesting that it is approach adopted by the Forest Appeals Commission. The Forest Appeals Commission’s comments were made, of course, in the context of the planning-centred approach of the current Code, in which the evidence of what steps were taken to exercise diligence will already be available to the government. It was not made in the context of a results-based regime, and entirely different considerations apply.

In light of the Discussion Paper’s concern with deterrence vs. compensation, it is interesting to note the recent observation by the Forest Practices Board that District Managers frequently undervalue the damage that has occurred to the public resource.⁷⁵ It appears that the real problem is not whether District Manager’s need to consider the diligence of the licensee, but whether District Managers are even recovering compensation for damage suffered by the public. The Discussion Paper reintroduces the concept of a formulaic approach to assessing compensation, as proposed under Bill 47. What it does not mention is that the reason this provision was not brought into effect was that it was unworkable and soundly criticized by the Forest Practices Board, among others.

Solutions

The enforcement regime under the Code should require District Managers to explicitly consider the damage suffered by the public and the forest resource (e.g., harm to the environment) and ensure full compensation for, and remediation of that damage. In addition, the Code should ensure that a licensee obtains no financial benefit from the non-compliance and that a sufficient level of deterrence is established. Any penalty imposed for the sake of deterrence should be sufficiently large to have a deterrent effect, while being proportionate to the nature of the non-compliance, and should be imposed on an absolute liability basis.

Due diligence should be recognized as inappropriate under a results-based regime.

⁷⁴ We considered the possibility that an explicitly precautionary standard of diligence could be explicitly written into the legislation. However, such an approach would still have the effect of requiring District Managers to consider complicated factual patterns and legal issues for which they are ill-equipped, thereby diverting public resources away from enforcement.

⁷⁵ Forest Practices Board, *Forest Practices Code Penalties and Environmental Damage*, Special Report, November 2001.

7.2 OTHER PROPOSED CHANGES TO THE COMPLIANCE AND ENFORCEMENT REGIME

Comments

As the government has noted, compliance and enforcement are key to an effective results-based code. If penalties are too low and/or enforcement too lax, then penalties imposed under the Code risk becoming the cost of doing business. We remain concerned that government is cutting enforcement staff at the same time as moving to a results-based regime, a step which could well undermine the entire approach.

Also important is the culture of enforcement. The results-based regime, as noted by the provincial government's New Era promise, depends upon "tough penalties for non compliance". However, the Ministry of Forests has a history of holding off imposing penalties on offenders, in the hopes that persuasion will cause them to change their practices. The authors of the Discussion Paper promise to continue what they describe as a "balance between proactive compliance activities and reactive enforcement activities".⁷⁶ "Proactive compliance activities" sounds like ensuring that good planning takes place so that mistakes do not happen. In actual fact, the entire approach of the Discussion Paper tells us that requiring good planning is not something government is going to do under the proposed Code. This passage really means that government will continue to hold off imposing penalties on those Licensees it considers to be basically good players who won't do it again.

Regardless of whether or not that approach worked under the current Code, where there is a high level of government oversight with which to monitor whether the licensee's ongoing behaviour, it is not an appropriate approach for a results-based regime. Given the difficulty in detecting violations with particular results across the province, we can expect that only a fraction of offences which occur will be detected — say 1 in 10. If the government then chooses to use enforcement powers against only a fraction of those — say 1 in 20, then the deterrent value, and the accountability, on which the results-based regime is based will suffer. An entirely different culture of enforcement is required — a fact that the authors of the Code do not recognize.

The Discussion Paper then provides a list of changes to the compliance and enforcement regime which are being planned. Several of the proposals are useful additions to the Code, but not of major significance. Others may be of concern, but since no details are provided, it is difficult to comment.⁷⁷

The concept of a power "that permits government to intervene proactively in certain situations where a contravention has not yet occurred" is clearly a necessary and important addition to the compliance and enforcement arsenal given the structure of a results-based regime. It is unfortunate that the authors of the Discussion Paper did not see fit to provide more details about when and how this power could be used.

⁷⁶ Discussion Paper, p. 51.

⁷⁷ Specifically, we would not endorse the concepts proposed at 7.2(a) or (b) without further information on how these changes would work, and we have concerns over proposed use of due diligence described in 7.2(c), although the general concept of a performance record is a good one.



Solutions

Generally, however, the discussion of compliance and enforcement tools was disappointing, in that the Paper failed to consider a number of interesting and potentially effective enforcement tools.

- (a) **Citizen's Enforcement** — The governments of Canada, Ontario and Alberta all have legislation which provide citizens with the power to enforce environmental statutes. While citizen enforcement should not replace an active role for government in monitoring and enforcement, it is one tool that should be available to the public in ensuring that the results set out in the Code are met. Indeed, one would have thought that a Code which requires companies to meet clear results would lend itself to allowing private citizens to enforce those results. Different models are available.
- (b) **Citizen's prevention** — We propose that the Code contain provisions allowing a member of the public to apply to the Government for a prevention order where particular logging operations pose a risk to that person's legal rights or to the natural environment.
- (c) **Dedicated enforcement body** — The Discussion Paper proposes that the Ministries of Forests and Water, Land and Air Protection carry out parallel but independent enforcement activities related to the Code. This seems to be an unnecessary and inefficient duplication of resources. At the same time, both ministries have demonstrated a past inability to take a tough enforcement approach to the forest industry and/or a lack of appreciation for each other's functions. Consequently, we propose that a single, dedicated body be set up with an investigation and enforcement function.
- (d) **Expanded appeals** — The Code currently allows only industry or the Forest Practices Board to appeal approval of an operational plan to the Forest Appeals Commission. The RDP approval section as proposed would focus on, amongst other issues, (a) the legal rights of others; (b) appropriate public consultation; (c) the rights of First Nations; and (d) potential damage to community watersheds. All of these issues directly affect particular individuals, suggesting that it would be appropriate to allow appeals to the FAC by members of the public who are affected. We would further suggest that a mechanism be put in place to allow members of the public to obtain standing to bring appeals in respect of the remaining parts of the RDP test (conflict with land use objectives and damage to watersheds with fisheries values).
- (e) **Whistleblower Protection** — The Discussion Paper is silent as to whether current provisions protecting the employees of forest companies who report violations of the Code will continue. Forest workers will have a unique opportunity to monitor the practices of their employers, and this type of "whistleblower protection" should be strengthened.
- (f) **Reporting Obligations** — There should be an explicit obligation on licensees to report themselves when they have failed to achieve the results. Failure to make such a report should result in a separate and automatic penalty on top of the penalty for failing to achieve the result. In addition, since professionals owe an

ethical duty to the public which transcends their duty to their employer, it would be appropriate to place an ethical obligation on resource professionals who learn of non-compliance with the Code to make such a report, should their employer fail to do so.

- (g) **Information Gathering Powers** — Government should have clear powers to obtain information from logging companies about the state of the forest prior to logging operations occurring. Similarly, licensees should have a corresponding obligation to collect such information.
- (h) **Tough and Innovative Penalties** — Tough penalties were promised, but are not spelled out anywhere in the Discussion Paper. The monetary penalties in the current Code should be strengthened, and jail penalties actually used. In addition, more innovative penalties should also be included, such as cancelling a licensee's tenure,⁷⁸ requiring licensees to advertise their non-compliance, and requiring licensees to relinquish decision-making control or land/volume to be devolved/redistributed to communities and First Nations.

8.0 THE NON-LEGISLATED REALM OF THE RESULTS-BASED REGIME

Comments

The Discussion Paper argues that it is not appropriate to include science or best management practices in regulation, but that developments in these areas will inevitably be taken into account by licensees carrying out their operations under the Code.

The confidence of government that industry players will use up to date science and innovation in its logging practices is surprising given that it was industry's failure to adopt environmentally sensitive practices which gave rise to the need for the Code in the first place. The proponents of the proposed Code may respond arguing that industry's performance is much better now, though. While there have been improvements, these occurred in the context of the current Code, which does prescribe particular planning requirements, and in limited cases practices. There is no reason to believe that industry will generally adopt innovative practices in absence of government direction to do so.

⁷⁸ This is a penalty for environmental damage which existed in the *Forest Act* prior to the introduction of the *Forest Practices Code*, but was never used.



It should be recognized that the approach used to prescribe results in the proposed Code will encourage industry to develop technology and practices aimed at achieving those results and no more. Since the results are set at levels which can be met using current industrial logging practices, there is not the incentive which the Discussion Paper assumes to experiment with new approaches. These incentives would exist to a much greater extent if our recommendation of requiring that both general and specific results be met.

The authors of the Discussion Paper also hope that best practices will be used because industry will inevitably use qualified resource professionals, but that there is no need to regulate the actions of such professionals in forest development.

Without examining the question of whether licensees will automatically use professionals as required, the Discussion Paper implicitly assumes that the obligations of a professional operating on public land are the same as his or her obligations when operating on private land. While a professional always owes a general duty to the public, we believe that a professional operating on public land owes a specific duty not only to his or her employer, but to the public as owner of a land. As the representative of the public, the government should be instrumental in defining what the broader duty to the public looks like.

The arguments for removing professional sign-off are very weak. An analogy in the legal profession would be that the Land Title Office should not require notarized title documents because the Law Society can discipline lawyers. In the face of such significantly increased reliance on industry foresters, the provisions accompanying their signature and seal on submitted plans should be enhanced and not eliminated.

This inevitably raises issues beyond the practice of forestry, and should other professionals, such as professional engineers, geoscientists, agronomists and biologists, must be engaged where their specialty is required to assess non-timber values. Local governments rely on professional sign-off in their approval of building permits; surely the same is appropriate for the approval of resource development permits for forestry.

It is wholly inappropriate to suggest that professional accountability can or should be addressed primarily through amendments to the *Foresters Act*. Strengthening disciplinary and other measures in that Act might be appropriate, but it is a complete separate issue from professional legal responsibility under the Code. (We parenthetically note that the proposed changes to the *Foresters Act* are inadequate to either task).

Regarding the Discussion Paper's assumption that corporate use of professionals is sufficient to ensure protection of the environment, this assumption is a matter of some controversy among resource professionals. In the late summer of 2001, the professional associations representing the professionals who work in the forest sent their members a survey to find out what they thought of the concept of professional reliance. While many members of resource professions looked forward to such increased responsibility, a significant portion of each of the professions questioned the approach. When asked whether increased professional reliance would have a positive or negative impact on the environment, 32.3 percent of Registered Professional Foresters who responded to the

survey thought that it would have a negative impact.⁷⁹ Other questions had similar splits. While there was some support in each of the professions for increased professional reliance, there was also a large majority of professionals who felt that this approach would not be good for public policy in British Columbia. When significant numbers of professionals are saying that giving them more responsibility is not a viable approach, one must ask whether this is an appropriate approach. The survey did not ask professionals whether delegating increased control to licensees, without explicitly requiring the use of professionals, would result in a positive impact on the environment or other non-timber values.

We note that the Discussion Paper's treatment of the "Non-Legislated Realm" assumes throughout that due diligence will be available to the licensees as a defence. It is not appropriate for the authors of the Discussion Paper to present this as a matter for public discussion in part 7 of the Code, while elsewhere assuming a particular result.

Solutions

We propose that the Code should require that professionals be used for planning under the Code, and that a professional signing a plan must certify that in his or her professional opinion the plan not only satisfies the requirements of the Code, but actually promotes sustainable forestry (i.e, maintains ecological integrity), which should be a "result" defined by the Code. As we have noted, the results contained in the Discussion Paper do not include an overarching vision of how forestry should occur on public lands; we cannot expect licensees or professionals to strive for new practices and science unless we tell them what vision we want them to work towards.

We reiterate our recommendation that the Code should include both "overarching" (broad level) and specific (technical) "results". The "overarching results" will provide a greater incentive to improve forest practices than specific results alone, at least at the present time given that the latter are designed to be met within the current model of industrial forestry.

⁷⁹ Professional Reliance Survey. January 31, 2002, Quantitative Summary, p. 15. This compared with 40% who believed that it would have a positive impact and 23.8% who believed it would not have an effect on the environment.



9.0 THE FOREST PRACTICES BOARD

Comments

While we are pleased that the Discussion Paper recognizes the importance of retaining the Forest Practices Board, particularly in this time of flux, we note that its effectiveness will depend both on levels funding and its powers under the new Code, neither of which are addressed.

Since the proposed Code would result in a major reduction in government oversight, it makes sense to question the limited mandate that the Board was given under the Current Code. This watchdog agency may be faced with situations where significant damage to the forest resource is imminent, and where immediate action is required. Its powers should reflect this.

Solutions

The sections of the Code related to the Forest Practices Board should be amended to ensure that its powers in relation to a results-based regime are clear, ensuring that its audit and complaint procedures will be revised accordingly.

We support recommendations made by the Sierra Legal Defence Fund and Forest Watch which would expand the Board's powers to include matters related to the *Forest Act* and Ministry of Forests administration, allow it to make recommendations on enforcement action, and require government to respond to the Board's recommendations.⁸⁰ Overall, however, the link between actual enforcement action, and the auditing function of the board needs to be enhanced.

More specifically, expanded powers for the Board to actually intervene are advisable, given the decreased level of government oversight. The Board should have the ability to order licensees to take such action as it considers necessary to protect the environment or the rights of other users, including a power to: delay administrative decisions where necessary for the investigation of complaints or to prevent environmental harm; to overturn administrative decisions; and to issue stop work orders.

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Sierra Legal Defence Fund and Forest Watch, *Who's minding our forests? Deregulation of the forest industry in British Columbia* (May 2002), p. 33.