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Comments on the Public Consultation Draft of

the Forest Stewardship Council Regional Certification Standard for British Columbia

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Introduction

West Coast Environmental Law (WCEL) welcomes the opportunity to comment on the draft Forest Stewardship Council Regional Certification Standard for British Columbia (the "Draft Standard").

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

that conserve and maintain forest ecosystems is an increasingly important way for citizens to influence what happens in our forests. In this manner, WCEL firmly believe that Forest Stewardship Council (FSC) eco-certification has an important role to play in putting forest use in British Columbia on a more sustainable path.

Strong, ecologically-oriented, and measurable standards are critical to the credibility and success of FSC certification in BC. The comments below are offered in the spirit of supporting and enhancing the considerable work done to date in developing the Draft Standard.

One overarching comment that we would like to make on the Draft Standard, however, is as follows. Our support for the FSC is grounded on the fact that FSC certification is fundamentally about doing forestry differently. As development of the Regional Certification Standard for British Columbia continues, we urge FSC-BC to reject any proposed revisions that could allow certification of volume-based timber extraction through status quo industrial forestry.

Comments and suggestions for Improvement

The comments below are primarily constructive suggestions for improvements to the Draft Standard. However, WCEL is generally supportive of most aspects of the Draft Standard, on the basis that it goes beyond the current law and policy framework in BC to encourage a more ecologically and socially responsible approach to forestry.

Principle 1

1.1 While in general, one would expect entities seeking certification to comply with applicable laws, the current Draft Standard does not adequately deal with situations where BC law actively encourages unsustainable forest use.

A particular example lies in the "cut control" sections of the *Forest Act*, which require licensees to harvest within a certain range of the allowable annual cut allocated to them. Cut control is a major barrier to sustainable forestry in BC, as the current allowable annual cut throughout the province is far above sustainable levels. Although we are actively seeking law reform solutions to this issue, it is the position of WCEL that the Regional Standard must not permit certification at current cut levels, even if this results in a conflict between the Standard and the cut control provisions, and we suggest that this position be made explicit in the Draft Standard.

1.3 WCEL is supportive of requiring entities seeking certification to comply with the spirit and intent of agreements such as CITES and the Convention on Biological Diversity. Specific measurable criteria for complying with the "spirit and intent" of such treaties should be set out in the Draft Standard.

However, the Draft Standard must make it clear that this criterion is NOT intended to limit forest managers by forcing them to comply with the spirit or intent of international trade agreements, such as the WTO and NAFTA, which run contrary in many fundamental respects to the spirit of FSC certification.

1.4 It would be appropriate to clarify what is meant by "conflict" in this criterion. WCEL proposes that a definition of conflict be adopted that is limited to situations where there is an express conflict. In other words, where Canadian, BC or municipal law says "yes" to an activity, and the FSC

Principles and Criteria say "no," or vis versa. We propose that this criterion should be modified to stress that where the FSC Principles and Criteria are merely more stringent than legal requirements, there is no conflict, as the FSC Principles and Criteria can be met without breaking the law.

1.5 This criterion should acknowledge that logging by aboriginal peoples on their traditional territories without authorization under the *Forest Act* may be constitutionally protected under s. 35(1), and indicate how forest managers should address a situation where a First Nation wishes to log in an area under their management.

1.6 In general, WCEL is of the view that certification of only part of the area controlled by a forest manager must be approached very cautiously. In British Columbia where only a handful of forest companies control most of the forest land base, we are concerned that certification of one portion of a company's operations will have unwarranted spill-over public relations benefits to its other unsustainable operations. On a global perspective, it is unpalatable that other countries would experience unsustainable forestry at the hands of a company that is reaping the public relations benefits of certification of a small area in BC.

However, based on our understanding that the FSC does permit certification of only part of the land controlled by a forest manager or owner, then we are strongly supportive of principle 1.6.c, which requires a forest manager or owner to have a written strategy and to be actively engaged in moving all lands under his or her management towards certification.

We propose that the Draft Standard should specify that this written strategy must set out:

a. a timeframe for certification for the rest of the manager's lands;
b. concrete benchmarks against which progress along this timeline can be measured; and
c. that failure to meet this timeline will result in decertification.

The Draft Standard should set out a maximum time limit for certification of all the manager's lands, for example, 5 years from the date of his or her first certification.

Principle 2

2.1 Criterion 2.1 requires that long-term tenure and forest use rights to the land must be demonstrated. Throughout the Draft Standard there are a number of places where it is apparent that there are significant challenges to fitting volume-based tenures into the FSC standards. WCEL proposes that these concerns can best be addressed **by clearly specifying in principle 2 that rights to extract a certain volume of timber off Crown land (volume-based tenures) do not meet this principle, and will not be certified**.

At the present time, this is the safest approach to addressing the fact that provincial law and licence documents require that volume-based licensees extract an unsustainable amount of timber off the land.

It is hypothetically possible that a criterion could be crafted that would permit volume-based operations to be certified where a legally binding land use plan, and AAC establishment for the Timber Supply Area, addressed all certification concerns that could not be addressed by the forest manager due to the scale and time frame of tenure in question. However, in our submission, as this would require fundamental revision to the provincial government's timber supply review process and to the limitations that have been imposed on landscape unit planning, it is not a realistic option at

this time.

2.2.d The current content of criterion 2.2.d should be expanded to address three concepts: permitted uses, customary use rights, and community based management. First, the criterion should recognise that the public is permitted to use public land for hiking, recreation etc. whether or not the use is well-established. Second, if the intention of 2.2.d is essentially to define what a customary use right is for the purposes of 2.2.g, then this should be more explicit. The criterion should set out how a use becomes a customary use right; this definition may involve the concept of a "well-established use." If so, the definition should be sensitive to the fact that some uses may be infrequent or non-consumptive, but nonetheless well established. Finally, the notion of customary use should encompass existing or ongoing or proposed community based management plans. Although ecosystem-based plans carried out by a community may not be legally binding, they may be a key aspect of how the community wishes to use the forest. The fact that current government policy or past management practices have inhibited the ability of community members to use the forest in the ways they wish should not prevent these use rights from being considered in the certification process.

2.2.g We note that our interpretation of "free and informed consent" in **2.2.g** is that if groups with legal, customary or traditional use rights oppose any forest management activity, on the basis that it affects their rights, certification will not occur.

2.3.c Criterion 2.3.c is innovative in that it essentially prohibits SLAPP (strategic lawsuits against public participation) by forest managers. WCEL welcomes this effort to address what has become a major silencer of public input on forest issues in BC.

2.3.e WCEL is also supportive of principle 2.3.e, which places the onus on the manager to actually resolve disputes over tenure and use rights before certification is granted. We interpret principle 2.3.e to mean that where there is a significant unresolved conflict about the appropriate use of the forest land in question (for example whether it should be logged or conserved for ecological purposes) no certification will be granted.

Principle 3

3.1 The full and informed consent of First Nations should in all circumstances be required before forest management activities in their traditional territories may be certified. It is appropriate, as principle 3.1.a of the Draft Standard currently requires, that this consent be given formally, in writing, by the leadership of the First Nation. WCEL strongly supports this aspects of principle 3.1 of the Draft Standard. The following are suggestions for clarification and additions to the Draft Standard.

Criterion 3.1.a should begin by providing that certification of forestry operations in a management unit within the traditional territory of a British Columbia First Nation requires that the elected and hereditary leadership of the First Nation has consented formally, in writing, to allow these particular forestry operations to take place in their traditional territory. For greater clarification, the Draft Standard could then go on to set out the circumstances where the consent requirement could be met by the existence of a treaty, interim measures agreement or co-management agreement.

In order for interim measures or co-management agreements to meet the consent requirement in

criterion 3.1.a, we propose that the agreement or agreements must:

a. cover the interests of **all** First Nations' whose traditional territories will be affected by the forest management activities;
b. cover **forest management and use in the area affected** (this is clear for interim measures agreements but not for co-management agreements in the current Draft Standard); and
c. must provide that forest management activities in the area covered by the interim measures agreement or co-management agreement cannot occur without First Nations' consent.

In other words, an agreement negotiated in other circumstances, that gives government or industry the final say in what kind of forest management occurs on a First Nation's traditional territory would not be sufficient to meet principle #3.

Treaties will not in all situations be sufficient to meet the consent requirement, for example, where proposed forestry activities are to occur in areas where First Nations have a fee simple or other interest post-treaty. Another example would be where a treaty signed with one First Nation overlaps with the traditional territory of another, who has not consented to forestry operations. Further elaboration on when additional consent is required in a post-treaty environment should be set out in the Draft Standard.

We strongly support the current definition of traditional territory, which includes the territory delineated by the First Nation itself, whether or not proven in court or affirmed by treaty. Any narrowing of the definition of traditional territory currently in footnote one to principle 3.1a would be unacceptable. From a First Nations perspective aboriginal or original title is about the sacred relationship of the people to the land, and does not require validation by Canadian law. Certification standards should respect this perspective.

As noted above, the Draft Standard should be amended to make it clear that full and informed consent must be given, in writing by **all** First Nations with traditional territories in the area affected and by **hereditary as well as elected leaders**.

The plain meaning of full and informed consent is that forest management activities will not proceed if a First Nation objects to them. Full and informed consent is quantitatively and qualitatively different than current consultation as required by Canadian law. For example, we note that current Ministry of Forests policy regarding consultation with First Nations is completely insufficient to meet principle 3.1, as it is primarily about on how to justify government infringements of aboriginal rights and title, and not about ensuring First Nations consent.

3.3.e We are supportive of the recognition in criterion 3.3.e that a First Nations' choice not to have sites identified or published must be respected.

3.3.f WCEL is generally supportive of principle 3.3.f, which provides that the Province of BC or the entity seeking certification must provide funds for studies to research, identify, locate and evaluate culturally important areas, and prohibits forestry activities until this occurs. Traditional use studies can be very costly and many First Nations do not have the resources to conduct such studies. However, where resources are made available for such studies, the Draft Standard should specify that First Nations should be in control of the process and products. Because of the cost, this may be an area where a modified approach may be required to accommodate small-sale forest managers with limited resources.

3.4.c The relationship between this criterion and 3.3.f should be clarified to indicate what types of sharing and use of traditional ecological knowledge (TEK) require compensation. The information provided in order to carry out traditional use studies can be seen as a contribution of TEK to the

planning process. Is compensation payable where the First Nation remains in control of this information, or does the payment of compensation imply that they must give up control? Does the requirement that licensees reflect culturally important areas on maps and protect and respect them constitute a use of TEK that entitles First Nations to a share of the return on the forest products produced? These and other questions require clarification.

3.4.d WCEL is supportive of the spirit of this criterion, which requires scrupulous respect for First Nations right to refuse to share traditional knowledge.

Principle 4

4.5 FSC criterion 4.5 provides that "[a]ppropriate mechanisms shall be employed for resolving grievances and for providing fair compensation in the case of loss or damage affecting the legal or customary rights, property, resources, or livelihoods of local peoples. Measures shall be taken to avoid such loss or damage."

WCEL is supportive of this criterion, but feels that the current Draft Standard requires further elaboration and thought. Some of the unresolved issues with the Draft Standard are as follows:

a) Criterion 4.5.a. must be clarified to indicate to whom compensation for impairment of essential environmental functions etc. would be payable and who would carry forward and pay for this novel claim.

b) As currently worded the Draft Standard narrows the scope of the FSC criterion by providing for compensation only in a situation where negligence is proven. Proving that negligently carried out forestry activities were the proximate cause of loss of resources, livelihoods etc. could be quite difficult, especially given that virtually all forest harvesting is approved by government and takes place in complex natural and economic systems. Furthermore, to prove negligence in a court would be time-consuming and expensive. To make this system function to the benefit of local people some innovative steps might have to be taken. For example, perhaps reversing the burden of proof so that if harm to wildlife or water etc. in or around the management area is shown, the onus is on the forest manager to prove that he or she didn't cause the harm.

Alternatively, perhaps this principle should be framed more like a regulatory offence, subject to a defence of due diligence.

c) In general there are issues about the legal enforceability of this principle, unless it is set out in a contract.

d) On the whole, this criterion needs to be fleshed out to better address mechanisms for avoiding loss up front. In this regard, the current 4.5.b is too vague and open-ended.

Principle 5

5.1 In WCEL's view many of the concerns set out in the boxes in principle 5.1 and after 5.6.d are addressed by our earlier recommendation that volume-based tenures should not normally qualify for

FSC certification.

5.2 WCEL is strongly supportive of the spirit of principle 5.2.a-e, which begins "[f]orest products should be processed as close as possible to their point of harvest and utilized with the maximum possible local value-added." In order to make sure the spirit of this criterion is carried out, managers should be required to demonstrate the steps they have already taken to this end – not merely that they intend to take them. In other words, managers should have to demonstrate a track record of actually meeting principle 5.2. This could be demonstrated by communications records with local businesses and manufacturers, statistics about where wood leaving the land is manufactured etc., over a specified period of time leading up to certification.

Throughout the criteria for principle 5, more measurable criteria are required in order to ensure that principle 5 isn't just being met on paper.

5.6 WCEL strongly asserts that the current provincial government AAC, as established through the timber supply review process, is not adequate to meet principle 5.6, as it gives undue weight to social and economic factors at the expense of ecological ones. Nor is the long run harvest level put forward by the Ministry of Forests adequate to meet principle 5.6, as it is premised on timber extraction rather than on maintaining fully functioning forest ecosystems. The fact that the rate of harvest determined in criterion 5.6 is different than these two measures should be clarified.

Principle 6

We are of the view that the approach outlined in italics at the beginning of the criteria for principle 6, referred to as a "coarse filter precautionary approach" is very appropriate, and are supportive of the aspects of the Draft Standard criteria that attempt to operationalize this conservation biology approach. We are also supportive of using a historical benchmark against which to measure potential environmental impacts or changes.

Our other comments on the criteria for principle 6 are as follows:

Ideally the order of the criteria under principle 6 would be restructured in order to emphasise that the Draft Standard is encouraging forest managers to focus on what to leave behind, rather than on what to take. In other words, from a planning perspective, protected areas networks and connectivity are dealt with first, and what is permitted to occur in areas available for ecologically responsible forest use is, in a sense, the last question. However, we recognise that the order of the existing FSC criteria is already fixed. Perhaps a summary or a diagram (covering both the landscape and stand level) of some sort could be incorporated to emphasise the point above.

6.3.b.1 We are very supportive in principle of the concept of maintaining relative proportions of stand species mixes, seral stages and structural types within the range of historical variation. However, here as elsewhere in the standards, the relationship between stand and landscape level management is cause for concern where the forest manager is not in control at the landscape level. The Draft Standards should include safeguards that prohibit aggressive stand level forest interventions on the basis of assumptions about what will occur elsewhere in the landscape, especially where there is uncertainty about what will happen on land outside the manager's control. Even where the manager is in control, certifiers should approach with caution situations where the manager is relying on non-legally binding statements about its future management on areas that are

not part of the management unit being certified.

6.3.b.6, 6.3.b.7 and 6.4.a With regard to **6.3.b.6, 6.3.b.7 and 6.4.a** the Draft Standard should be modified to clarify that the network of protected areas will be **permanently** reserved over time, and that snags, living wildlife trees and fallen trees are permanently reserved in the sense that they will not be cut or disturbed throughout their natural cycle. In particular, the Draft Standard should specify a minimum percentage of large trees (dominant and co-dominant trees), well distributed spatially and by species, that will be permanently reserved within the stand in order to grow old and eventually fall down. Drawing on an earlier proposal from the Pacific Certification Council, we propose that the minimum percentage of these full cycle trees retained should be 30%. This requirement would be in addition to the requirement to establish a protected areas network.

In general, **for all the criteria related to stand composition and structure, much more measurable and specific criteria are required**. For example, forest managers should be required to mark or map or otherwise clearly identify specified percentages of permanently reserved composition and structures in the stand so that continuity in their protection over time can be ensured. **The same concern about lack of measurable criteria applies to maintaining forest ecosystem processes and functions.** At the present time, reading the criteria for principle 6, one would not know what one would actually have to see on the ground to satisfy this principle.

6.4 .a While we are supportive of the idea of having prescriptive minimums for the percentage of land that must be placed in a network of protected reserves within the management unit, the percentages chosen should be clearly scientifically defensible. At a minimum, the Draft Standard should clarify that more than these apparently arbitrary numbers may often be required and the criteria for when this is so. Currently the relationship between the percentages and the other criteria listed for establishing reserves is not as clear as it could be.

6.4.c We propose that this criterion should require specific percentages of old growth retention. This may also require adding a definition of the age, structural characteristics and other defining characteristics of old growth in different contexts.

6.4.d Criterion 6.4 should address more explicitly the concern that has arisen regarding *Code* landscape unit planning, namely, that managers are permitted to use adjacent protected areas, inoperable or already constrained areas (eg riparian reserve zones) to meet percentages for old growth retention.

The link between principle 9 (high conservation value forests) and criterion 6.4 should also be clarified. Where an entire management unit is made up of high conservation value forests, for example, the percentages set out in Table 1 may well be inadequate.

6.5.j-q As we read the current proposals for riparian management under the Draft Standard, the drafters have essentially attempted to maintain the classification scheme under the *Code* and the terminology for riparian reserve zones and management areas, but propose different management practices in these areas.

In our view, relying on terminology from the *Forest Practices Code* in the portions of the FSC Regional Standard dealing with riparian management could potentially be confusing or misleading. In particular, the concept of a riparian management area under the *Code* has obfuscated the fact that most harvesting in these areas is done by clearcutting, and provides little or no protection for riparian values. There are also aspects of the classification approach that are problematic; for example, the *Code* classification approach downplays the importance of small streams.

The Draft Standard should also be reviewed for internal consistency in this section, as for example

criterion 6.5.k refers to riparian management areas as defined by the *Code*, whereas the alternative proposals for Riparian Areas establish different definitions of "Riparian Management Zones."

We generally support the view expressed in the second paragraph of the box following criterion 6.5.n, which begins "[i]ncreasingly fisheries biologists..." and ends "[w]e recommend riparian zone protection of 100 m around S1 and S4 streams, and 50 m for S5 and S6 streams that feed into fish-bearing streams. There is ample justification for this when our neighbouring states have legislation close to this."

In order to be credible, the FSC Regional Standard should at least require the highest levels of protection being required for non-certified forestry operations in neighbouring jurisdictions (e.g. requirements on National Forest lands in Washington State). We recognise that this standard might make logging prohibitive in some areas of the coast.

If criterion 6.5.p remains relevant (i.e. if the alternative for riparian management chosen includes a riparian management area or zone) than this criterion should be modified to specifically prohibit clearcutting.

6.10 In our view criterion 6.10 is one of the most critical aspects of the FSC Principles and Criteria. It is this criterion that prohibits the conversion of high conservation value natural forests into tree dominated vegetated areas shaped by aggressive human interventions (plantations). As the Draft Standard is currently framed, however, the significance of criterion 6.10 is limited by the view, expressed by the drafters in principle 10, that few areas of BC meet the definition of plantation.

We begin from the premise that under no circumstances should sustained yield or other forest management practices premised on the liquidation of old growth, and other high conservation value forests, be certifiable. In our view, status quo forest management in BC that involves large-scale clearcutting and replanting with commercially valuable species, that uses rotations that are not based on natural cycles and that radically alters stand structures, is an unacceptable conversion of natural forests into managed timber crops.

WCEL would propose modifications to principles 6 and 9 and 10 that address this premise.

One option is to modify the definition of plantation appropriately so that there is no question that it covers status quo forestry in BC. Based on the definition currently set out in the Draft Standard, little modification is in fact required to accomplish this goal. In this manner, criterion 6.10 would then address our concern.

Another option is to expand criteria under principles 9 as set out below, namely by setting out very specifically management practices that are prohibited in high conservation value forests. In this manner, even if the "end result" does not fully meet to the definition of a plantation, high conservation value forests can be protected from destructive management practices.

The central concept that we would like to see reflected is that the Draft Standard should prohibit the conversion of high conservation value forests not only into plantations, but also into managed systems in the sense contemplated by sustained yield theory (i.e. conversion to a normal forest to be harvested on periodic rotations).

Principle 7

In general, we are concerned that the criteria of principle 7 may be very onerous for small land

managers. We recommend that FSC-BC draw on the experience of small-scale forest managers in BC to assist with creating a modified set of criteria for small-scale (e.g. less than 1000 ha) operations. In defining small-scale operations other criteria may also be relevant, such as the scale of the manager's other non-certified forestry operations, if any, or the manager's other financial resources.

7.4 With regard to the public availability of management plans and opportunities for review and comment, WCEL would like to stress the following:

Although the FSC criteria only specify that a summary of the primary elements of the management plan be available to the public, in the BC context, particularly where the forest manager is operating on public land, the expectation should be that the entire management plan, including all supporting documents and assessments should be publicly available. This should be made explicit in criterion 7.4.

Specific provisions for notice to the public when plans are available for review, and timeframes for review and comment should be specified in the Draft Standard. The Draft Standard should require managers to make this information available in an accessible manner. The opportunity for public comment on the management plan should be more than a pro forma open house and should include opportunities for real discussion about the future of the management unit. This is particularly the case where the management unit is on public land.

First Nations consent to the management plan should be specifically required under principle 7, and provision should be made to accommodate the resource requirements of First Nations to effectively review plans in a timely manner.

Principle 8

8.1 Criterion 8.1 should be modified to require that all monitoring results should be publicly available (not just a summary), and to provide for local community involvement in monitoring in an ongoing fashion, not just for comment at the end of a reporting period.

Principle 9

9.1 WCEL is of the view that the assessment of high conservation value forests must involve a process that is arms length from the applicant. The assessment must focus on the value of the forest from a conservation perspective. Economic criteria must not form part of the assessment. An analysis such as the Conservation Areas Design methodology is an excellent example of how the ecological aspects of high conservation value forests could be determined.

9.2 With regard to the consultation process WCEL would stress again that this consultation should be focused on the conservation attributes of the management unit, not concerns about economic impacts of designating the areas high conservation value forests. We suggest that this should be made explicit in criterion 9.2.

9.3 We are of the view that the risk assessment proposed by the Draft Standard is not adequate to

protect high conservation value forests.

We propose that criterion 9.3 should contain a presumption that no harvesting will occur in high conservation value forests, and that this presumption can only be displaced by clear evidence from a risk assessment that the conservation values of the forest will not be reduced or harmed by the human activity proposed.

Further, we strongly recommend that criterion 9.3 set out a list of activities that are prohibited in high conservation value forests. This list should at a minimum include all aspects of the plantation definition, secondary characteristics of plantations, and management techniques associated with plantations currently set out in the Draft Standard. The list of prohibited activities should also include clearcutting and roadbuilding.

In addition measurable performance standards should be set out for activities which are permitted in high conservation value forests.

Principle 10

Further discussion is required as to whether areas of replanted second or third growth forest in BC generated following clearcut logging will generally meet the definition of plantation. Please refer to comments under criterion 6.10 for WCEL's concerns in this regard.

In general, we feel that the current definition of plantation in the Draft Standard is on the right track in the BC context; although it is our view that the list of "other management techniques associated with plantations" would also be appropriate as diagnostic criteria.

10.1 The criterion is ambiguous as to whether it intends to integrate by reference the management objectives from *Code* landscape unit planning (i.e. landscape unit objectives as a higher level plan). Because of the limitations that have been placed on *Code* landscape unit planning, we recommend that the drafters clarify and expand on what is meant by this criterion.

Conclusion

On a final note, WCEL has one recommendation that is applicable to the criteria for all principles, and in particular principle 6. In our view, it is essential that an entity seeking certification demonstrate a track record of meeting the FSC Regional Standard in the management unit for a specified period of time before being granted certification. In other words, throughout the Draft Standard it should be made clear that simply planning to meet the FSC principles and criteria in the future is insufficient. At the present time this concern is not clearly addressed by the Draft Standard. Throughout, the Regional Standard should set out measurable criteria, with which an entity seeking certification must be able to demonstrate a record of on the ground compliance, before certification occurs.

We will follow with interest the continued development of the FSC Regional Standard for BC, and once again express our gratitude for the opportunity to comment on the Draft Standard.