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West Coast Environmental Law

DEREGULATION BACKGROUNDER

"TIMBER RULES"

FOREST REGULATIONS LOWER STANDARDS, TIE GOVERNMENT HANDS AND REDUCE ACCOUNTABILITY

Summary of Changes

With the release of new forest practices regulations effective January 31, 2004, the BC provincial government has now finalized its "results-based" forest management regime. In November 2002, it passed the *Forest and Range Practices Act* (FRPA), but the legislation did not contain enough details to give a clear indication of what the overall regime would look like. The government claims to have reduced regulatory requirements by 55% by eliminating unnecessary red tape and paperwork. But in the process, measures designed to protect the environment have been cut. Examples include:

- Industry writes the environmental results that they are legally required to achieve;
- Elimination of longstanding requirements for logging plan approvals at the cut block or site level, removing a key method by which government and the public can ensure protection of critical habitat;
- Extraordinary restrictions on when government can reject a plan for failure to adequately protect resource values;
- Extraordinary restrictions and bureaucratic hurdles to government taking action to protect environmental values such as wildlife habitat, water quality for community watersheds, and endangered species;
- Elimination of requirements to undertake precautionary assessments aimed at preventing landslides on steep slopes;
- Reduced likelihood of forest industry liability for landslides and other environmental consequences;
- Provision for industry to 'opt out' of many of the standards from the previous Code;
- Greater opportunity for political interference in decision-making;
- Reduced opportunity for successful enforcement action now that more defences are available for administrative penalties;
- Reduced accountability for forest companies due to narrow definitions for terms such as "damage to the environment".

The *Forest and Range Practices Act* and regulations bring in a new era of forestry deregulation which places an unprecedented degree of control over public resources in the hands of forest companies. There are inadequate checks and balances in the regulations. The impact of these changes, especially when coupled with major cutbacks to Ministry of Forests staff and budgets, is to reduce public control over forest industry operations on public land.

The government says that it is increasing its reliance on professional foresters in the employ of forest companies to be guardians of the public interest, but there is little accompanying accountability to the public. In fact, professional foresters are no longer required to sign and seal operational plans.

All of this will likely render public and community input into forestry decisions much less meaningful.. Protecting the environment and maintaining community relations will be more due to the pleasure of a given forest company than a result of these regulations. British Columbia has much to lose as a result of this deregulation.

Both Standards and Planning Protections Weakened

By way of background, the Forest Practices Code introduced in the mid 1990s mostly regulated through the approval of operational plans. The two main plans have been forest development plans and silviculture prescriptions. In addition, there were some forest practices standards that were required to be followed, such as a prohibition against logging in a streamside "riparian reserve zone" except in certain circumstances. In essence, it was a regulatory regime that said "There are few hard and fast rules, but send us a plan, make sure it addresses these issues, and we'll decide whether to approve it."

The Forest Practices Code was criticized in some industry and environmental circles as being too bureaucratic and uncertain. There are, no doubt, more efficient and effective ways to regulate forest practices. (West Coast Environmental Law has long advocated stricter, more comprehensive standards such as applied in National Forests in the United States.)

The new Forest and Range Practices Act and regulations retains the planning and practices approach, but severely weakens both regimes. The Forest Service will have far less information on industry logging plans, and for the first time since the 1980s, will no longer be approving cutblock plans. The new regime eliminates Forest Service approval of site level plans. Approval of site level plans was a longstanding requirement brought in by the Social Credit government and is an important means by which the Province can ensure sound forest management.

Nominally the new regime maintains the few standards or practices requirements of the old system. However, they are only "default standards," and forest companies are free to opt out by proposing alternatives.

Single plan approval too general to allow practical protection.

The new FRPA regime eliminates approval of the site level plan, and replaces forest development plans with an even more general forest stewardship plan. The elimination of Forest Service approval for site level plans takes away key opportunities for government staff to identify and insist on protection for important values, such as wildlife habitat and visual quality. Under the Forest Practices Code, forest development plans identified proposed roads and cutblocks for about a 5 year period. Silviculture prescriptions were site level plans for specific cutblocks that identified where and how logging would take place. Approval of these two levels of plans has been required since well before the Code.

Silviculture prescriptions provided a method by which the Forest Service, wildlife biologists in the former Ministry of Environment, and sometimes members of the public could identify practical changes to logging plans that would protect environmental, recreational and other values. This has been important where the impacts of logging could only be determined at the site level due to the vague, general nature of forest development plans. For example, government could require that the plan be altered to retain certain types of trees so that important winter range for deer, or a community's scenic view, would be maintained.

While the government claims that the new forest stewardship plan is a comprehensive planning process, the ***Forest Planning and Practices Regulation*** significantly reduces the content formerly required for forest development plans. There will be far less information coming to government, and the public. For example, instead of identifying where roads and cutblocks are being proposed, forest companies must simply identify "forest development units" within which roads and cutblocks will be located. These units could encompass large areas such as drainages or valleys, and hence are being referred to as "blobs on a map."

The lack of precise information on forest stewardship plans will make it more difficult for the Forest Service to diligently approve these plans, and for the public to meaningfully comment on them. Yet this will be the only approved plan under the FRPA regime. Neither Forest Service nor wildlife officials will be reviewing or even receiving site level plans (though they must be made available to the public on request). Because there will be little or no oversight of logging plans at this level, important habitat attributes and other values such as visual quality could easily be lost through the cracks, and there will be no way of measuring the impacts once the trees are gone.

Increased Red Tape Blocks Government Action to Protect Environmental Values

The new regime takes away the district manager's discretion to reject proposed plans if they are not satisfied that resource values will be adequately managed or conserved. Now, plans must be approved unless the Minister of Forests, or his delegate, determines that the industry's results and strategies are not consistent with government's very generally worded objectives in the Act or landscape level plans. Ministers will be legally hamstrung if they want to make a determination of inconsistency. This is because of three factors: 1) the very general wording of objectives in regulations, 2) case law which construes "not consistent" very narrowly when it is applied to general goals, and 3) the poor record of the government in creating legally binding objectives.

Since the inception of the Forest Practices Code there has been dismal performance by government agencies towards developing legally binding objectives for non-timber values such as wildlife habitat. Landscape level planning has been exceptionally slow, and faces an uncertain future due to large cuts to agency staff levels.

Under the new regime, a host of non-timber values (e.g. designating community watersheds, setting water quality objectives, creating objectives to protect wildlife habitat, species at risk) may only be protected if the government takes specific action after following numerous procedural steps and consulting with forest companies. Under the new ***Government Actions Regulation***, a minister may not take any action to protect a host of environmental and recreational values unless:

- Taking the action would not "unduly reduce the supply of timber from British Columbia's forests;"
- The action is consistent with all other objectives, including "maintaining or enhancing an economically valuable supply of commercial timber", and enabling logging companies to be "vigorous, efficient and world competitive"
- The proposed action to protect environmental and recreational values is so important that it outweighs the cumulative impact of all government actions on a forest company to be "vigorous, efficient and world competitive."

These requirements apply every time an agency wishes to take an action to protect the host of 22 values listed in section 1 of this regulation, affecting wildlife habitat, fisheries sensitive watersheds, scenic areas, community watersheds, species at risk, recreation sites, and many more. In addition, there are numerous

procedural hurdles, including prior consultation with logging companies, which must be met before these values can be protected.

This shift in favour of logging unless there are officially established objectives has led some agency staff to coin a new phrase: "If it ain't legal, it don't mean nuthin'." In other words, decision makers are required to approve logging plans even though environmental values may be lost or at high risk, unless specific objectives and bureaucratic procedures have been implemented to protect them.

We are not aware of any other regulations in which the government has imposed upon itself such extensive restrictions to taking action to protect the environment. Given that the government has eliminated precautionary impact assessments in the name of eliminating 'unnecessary' red tape and reducing cost to industry, as discussed below, it seems inconsistent to then impose on down-sized agencies a requirement to undertake cumulative impact assessments of each forest company's ability to be economically "vigorous, efficient and world competitive" before taking environmental protection measures. This bias is also found in section 27 of the *Forest Planning and Practices Regulation,* which enables the Minister of Forests to "balance established objectives" – but only if requested to do so by a forest company.

Industry writes its own legally binding rules

One might expect a 'results based code' to actually specify, as the name suggests, the results that the regulated industry has to meet on the ground. Under the new forestry rules, forest companies now have a choice: they can follow a "default standard" from the old Code, or they can propose a result or a strategy that is entirely different so long as it meets the generally worded government objective, e.g. retaining wildlife trees, "without unduly restricting the supply of timber." The option to propose alternatives to the Code's standards applies to most environmental value that British Columbians care about. Section 13 of the *Forest Planning and Practices Regulation* says that alternatives may be proposed for protection of fish, streams, water quality, wildlife, soil disturbance, wetlands and lakes, maximum cutblock sizes, green-up rules for logging adjacent to prior cutblocks, and more.

There are several problems with this approach. First, government can approve results or strategies that are far less effective than the default standards. There is nothing requiring government to satisfy itself that the alternative they approve will be equally effective at actually protecting the environment.

Second, there is no incentive for logging companies to suggest results and strategies which can be effectively enforced. As discussed further below, this creates a risk of results being written in a manner that is deliberately or accidentally unenforceable.

Third. government objectives themselves are weak when it comes to environmental protection. For most non-timber values, including soil, water quality, fish habitat and all wildlife including threatened and endangered species, is qualified by the reference to "without unduly restricting the supply of timber." What does 'unduly restricting' mean? At this point, that's anyone's guess. Some officials maintain that this is coded language to continue the political constraint that all management for non-timber values must not impact the allowable annual cut by more than 6% provincially. The environmental impacts of this policy have never been assessed, but it is well known that it will not sustain some threatened and endangered species. For example, even the Code's Biodiversity Guidebook acknowledged that for a significant portion of the landscape, "the pattern of natural biodiversity will be significantly altered, and the risk of some native species being unable to survive in the area will be relatively high."

In effect, most of the rules that government claims it has maintained are now up for negotiation by inviting companies to propose alternatives.

Abandoning Precaution

In any environmental regulation, there is a decision to be made regarding the merits of taking a preventive approach versus a reactive approach. When it comes to forest practices, there is often a long time delay between cause and effect. For example, the risk of a landslide is often much greater 10 years after logging a steep slope than at the time it is logged, after the stumps that hold the soil in place start to decay.

When the former Forest Practices Code was being developed, an issue arose as to how to regulate certain known hazards such as clearcutting on steep slopes, or the cumulative impact of numerous clearcuts that could impair the hydrology of a watershed. The question was whether these and other industrial impacts should undergo environmental assessment under the *Environmental Assessment Act*, or be regulated by practice requirements that said certain steep slopes were off limits. Given that most of the valley bottom forests on the coast were already logged, the forest industry generally wanted the opportunity to persuade decision makers that it could safely log steep slopes. The Code therefore exempted forestry from the *Environmental Assessment Act*, and did not specify any slopes as off limits. Instead, it required that companies proposing to log steep slopes to carry out a terrain stability assessment, prepared by a qualified professional, and submit that to the Forest Service. Similar precautionary assessments were required for logging in community watersheds, significant fisheries watersheds, and visually important scenic areas if required by the district manager.

The new rules eliminate these precautionary assessments altogether, presumably on the grounds that they are costly to industry and amount to ‘unnecessary red tape and paper work.’ As noted earlier, the Forest Service will be required to approve logging on the basis of far more general information in forest stewardship plans.

The regulations further compound the problem by restricting the government’s ability to require additional information from licensees. For example, the minister may only require additional information if it is relevant to ‘factors’ that a company chooses to address in its plan. If the plan does not to address factors that the Forest Service considers relevant or important, the agency is left powerless to require that additional information. Furthermore, the Forest Service may only require information that is available to, or “in the control or possession” of the company. This provision might prevent the Forest Service from requiring further information, such as expert analysis of terrain stability for example, if a forest company has not completed such analysis.

Some industry and government officials are saying that forest companies may voluntarily prepare some of these assessments in order to establish “due diligence” in the event of possible enforcement action being taken against future events, such as slope failure. However, for reasons discussed below, we are concerned that the FRPA changes also weaken the likelihood of liability, making this a speculative suggestion at best.

Damage to the Environment OK if it does not “fundamentally and adversely alters an ecosystem”

Given the extent to which these new rules place much greater control in the hands of the forest industry, one might expect a strong countervailing sanction for damage to the environment. However, the new regulations have a very limited definition of what damage to the environment encompasses. Its meaning is restricted in section 3 of the *Forest Planning and Practices Regulation* to certain specified events that “fundamentally and adversely alters an ecosystem.” This qualification may lead, for example, to arguments that although a landslide occurred it did not fundamentally and adversely alter the ecosystem, and therefore the forest company whose operations caused or contributed to the landslide is not liable.

By way of contrast, the federal *Fisheries Act* simply prohibits harmful alteration to fish habitat. This theoretically captures even relatively small alterations to fish habitat, but the agency exercises discretion not to prosecute trivial infractions. The new FRPA regime removes much of the government oversight of logging plans, but at the same time makes enforcement more difficult.

Accountability & Enforceability Reduced

The government claims that it has strengthened compliance and enforcement by creating a new power to intervene before environmental damage is done, and stiffer penalties. However, the chances of being held liable appear to be much narrower, and the available defences much broader, than under the Forest Practices Code, and the intervention power is severely restricted by regulation.

With respect to intervention power, the regulation narrowly restricts the minister's ability to use this power. The *Forest and Range Practices Act* says that the power may be exercised by the minister for "any prescribed event or circumstance having an adverse impact on the environment." But the regulation restricts his ability to use that power to situations in which there is "a fundamental and adverse alteration of an ecosystem."

There are larger accountability and enforcement concerns. Where a forest company develops its own results or strategies in a forest stewardship plan, it incurs a duty to ensure that the intended results are achieved. Thus, there is an incentive to propose results and strategies that are extremely difficult to enforce in practice. For instance, a company might suggest that no logging zones close to streams be waived in favour of a requirement that silt in the stream not increase above natural levels. But with no information on natural fluctuations in siltation levels this will be hard to prove. Under the new regime, Forest Service decision-makers will have to ensure that the proposed results or strategies are in fact measurable and legally enforceable. Given the extent to which this regime puts the pen in the hand of industry, Forest Service staff will need greater training in enforcement matters to ensure that they are getting legally binding commitments that can be realistically enforced in courts.

This concern is exacerbated by creation of new defences for logging companies that break the law. Section 72 of the Act allows due diligence (where it is argued that all reasonable precautions have been taken), mistake of fact (where it is argued that the company relied on mistaken data), and officially induced error (where it is argued that government is responsible the error) as defences for administrative proceedings. While the courts have said that these defences are available for offences prosecuted in court, they have not required them for non-punitive administrative penalties which are which are intended to be a quick and easy way of encouraging companies to comply. Bodies such as the Forest Practices Board have argued that they undermine the intent and effectiveness of administrative penalty schemes.

Finally, even though forest stewardship plans are extremely general, complying with them also constitutes a defence against damage to the environment. Companies will be able to argue that they were in compliance with vague references in forest stewardship plans and thus should not be liable.

Public Input Less Meaningful -- Government Authority Reduced

The new regime will reduce and hamper public input into forestry decisions. As mentioned above, the *Forest and Range Practices Act* and regulations take away some of the government's former ability to reject plans submitted by the industry. For example, the Minister of Forests must approve forest stewardship plans if they conform to some basic content requirements, are consistent with government objectives (where they exist) and with timber harvesting rights. Gone is the discretion to reject plans on the basis that they do not "adequately manage and conserve" public forest resources. Also gone is the ability to compel companies to produce additional information in support of the plan or decision-making, except

in limited circumstances. This may render community and public input much less meaningful, because the government has tied decision makers' hands respecting how to respond to public concerns .

Plans prepared by industry may be much more general in the information they provide due to the very limited content requirements and the imprecision of forest development units. This alone could render public review of a plan much more difficult. However, add to that the fact that decision makers are legally required to approve those plans unless they conflict with government objectives, and you get review and comment process that is bound to frustrate public and community interests. It also undermines the professionalism of Forest Service staff.

The only way decision makers can meaningfully respond to public concerns under these rules is if they are framed as being inconsistent with government objectives. Where objectives are set out in the *Forest Planning and Practices Regulation*, or have been established under the *Government Actions Regulation*, there should be room for fair evaluation. However, as noted above, for many non-timber values, the government itself must take numerous and lengthy bureaucratic steps to establish many types of objectives in the first place. Furthermore, government objectives are not binding on a forest company unless they are in place 4 months prior to the submission of its forest stewardship plan. So, if the public reviewing a plan raises an issue for which there is no established objective (such as an important community viewscape or wildlife habitat), even if the government were to respond by establishing such an objective, it would not apply to the proposed logging. Also, any comments concerning previously approved forest development units may be ignored. By tying the government's own hands, the regulation is likely to frustrate community input to forest practices considerably.

Another major factor in reducing public input is the longer term for forest stewardship plans. Under the Forest Practices Code, forest development plans were put out for review and comment every one to two years. Under the new regime, forest stewardship plans will have five year terms, but are extendable to ten years. This means that a local community might only have an opportunity for input to decision makers once or twice in a decade!

Political interference more likely to override professional judgement

Prior to the Forest Practices Code, forest tenure agreements reserved enormous discretion on the part of the Minister of Forests to decide where and when logging would take place. While most decisions were made locally, a company always had recourse to the political level if it didn't get what it wanted at the local level.

The Code ushered in an era of greater independence for decision makers. Operational plans had to be approved by Forest Service district managers. They received training on how to exercise that independence as 'statutory decision makers' in order to avoid legal issues such as the fettering of discretion, which would arise if they blindly adhered to a policy or political direction, rather than their professional judgment.

The *Forest and Range Practices Act* regime turns back the clock on statutory decision makers, and names the Minister of Forests as the individual responsible for decisions. The minister will no doubt delegate his powers, but the changes clearly open the door again to a greater level of political involvement in local level decisions such as plan approvals.

Old Growth Stands -- "Phantoms of the FRPA?"

A critical component to conserving British Columbia's diversity of plant and wildlife species is to protect enough ancient forest outside of parks for the species that require that type of habitat. Only 6% or so of BC's forests (as opposed to higher rates of protection in less resource rich alpine areas) are protected in

parks. It is widely recognized that this is not adequate to maintain species such as mountain caribou, marbled murrelets, spotted owls, and many other species that are dependent upon or associated with older forests. Under the Forest Practices Code, the Biodiversity Guidebook was developed to provide guidance on how much older forest to maintain on a given landscape by identifying areas that had the necessary habitat attributes and ensuring that management of these areas was consistent with those goals. Overall, in large part due to resistance from the forest industry, the responsible agencies were very slow to identify old growth management areas, and large portions of the province still do not have them nearly a decade after the Code.

The new FRPA regulation maintains old growth management areas that were already established under the Code. However, there is no provision for new areas. The Ministry of Sustainable Resource Management has indicated an intent to have a general order that requires a specified amount of old forest to be maintained on the landscape, but without identifying any particular locations. While this is perhaps better than continued inaction while old growth conservation options are continually lost to ongoing logging operations, past experience says that this can become a shell game, in which no one knows exactly where the supposedly protected old growth is located. It appears on computer screens running timber supply models, but can't be found on the ground.

The Ministry of Sustainable Resource Management now has the authority under section 93.4 of the *Land Act* to establish objectives for Crown land and resources that affect forestry operations, and says it intends to use this provision to implement old growth management areas. However, the agency is facing significant staff cuts in 2004, and has been told by government to "partner" with the forest industry in carrying out this type of planning. Some in the industry argue against "spatially locating" old growth management areas for a host of rationales, such as management uncertainties due to mountain pine beetle and wildfires.

We are concerned that new old growth management areas will be kept off the map, and British Columbia will be left only with what wildlife agencies and conservationists have come to call "phantom forest."

Conclusion

The *Forest and Range Practices Act* and regulations bring in a new era of forestry deregulation in which an unprecedented degree of control over public resources is being placed in the hands of forest companies. There are inadequate checks and balances in the regulations. The potential to hold forest companies accountable is reduced by narrow definitions of terms like damage to the environment, and an increase in the defences available for non-compliance. Government itself will not have critical information necessary to diligently approve logging on public land. It has tied its own hands by imposing extraordinary restrictions on statutory decision makers, and introducing excessive red tape and bureaucracy to measures now necessary to protect the environment. The government has made a major ideological shift, stating that it intends to rely on professional foresters employed by forest companies to deliver the public interest, more than civil servants.

All of this could render public and community input into forestry decisions less meaningful. Protecting the environment and maintaining community relations will be more due to the pleasure of a given forest company than a result of these regulations.

Environmental values are particularly at high risk during the current transition period, before the Forest Service and Water, Land and Air Protection agencies get around to taking the actions necessary to protect wildlife, community watersheds and visual quality. Past performance since the Code came into force

nearly one decade ago is not cause for hope. And now, their budgets and staffing levels have been cut considerably.

In the mean time, viable options for protective designations are being lost to ongoing logging operations. Over the last decade, in many parts of the province the agencies have been stalled in implementing important conservation initiatives such as landscape level planning, wildlife habitat areas and ungulate winter range in many places in the province. The government has not ensured that these conservation measures were in place before handing over this level of responsibility and control to logging companies. The fact that regulations are now much more lax does not inevitably mean that the environment will be irreparably harmed, as that depends on how forest companies choose to act. But it does significantly increase the risk. Given the time lag that sometimes exists between forestry operations and impact, for some values it may take several years before the impacts are evident on the landscape. Overall, British Columbia has much to lose as a result of this deregulation.

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