

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

## **EXECUTIVE SUMMARY**

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*A short five-page backgrounder on the proposed "results-based" code is [available as a PDF file \(65Kb\)](#), as is a [full 70-page report \(650Kb\)](#).*

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.”
- “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 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  $\frac{3}{4}$  particularly in the absence of mandatory plan requirements  $\frac{3}{4}$  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; logging in riparian areas and sensitive ecosystems for forest health reasons; and identified wildlife exemptions.

### **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.
- 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.

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