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Forest Practices Board
PO Box 9905
Stn Prov Gov't
Victoria, BC V8W 9R1
Attention: Bruce Fraser
Chair, Forest Practices Board

August 8, 2006

Re: Request for Appeal

Dear Forest Practices Board,

Please accept this letter as the request of the Sunshine Coast Conservation Association (SCCA) for the Forest Practices Board to appeal the approval of International Forest Products' Forest Stewardship Plan (FSP) for Forest Licenses A19220 and A19224, and Timber Licenses T0392, T0147, T0162, T0050 and T0404 in the Sunshine Coast Timber Supply Area. This approval was made by Greg Hemphill, Sunshine Coast Forest District (SCFD) district manager and delegated decision maker.

Government Decision

On July 20, 2006, the delegated decision maker approved Interfor's FSP. In a letter to Interfor, he stated that this FSP meets the requirements of the *Forest and Range Practices Act (FRPA)* and associated regulations (emphasis ours).

Complaint

We complain that this FSP does not comply with *FRPA* and associated regulations. We also allege that approval of this FSP is beyond the authority of the Minister of Forests and

Range, or that of his delegate, because approval of the FSP establishes a conflict with other provincial statutes, such as the *Ministry of Forests and Range Act* and the *Foresters Act*. This FSP also establishes a breach of federal statutes, including the *Species-At-Risk Act* and the *Migratory Birds Convention Act*.

Public Interest Issues

We believe that one of the purposes of the *FRPA*, as described by the language of the Act, by government publications and communications, and by the explanations of the Minister in the legislature, is to maintain previously existing provincial environmental standards as expressed in the *Forest Practices Code Act* and other Acts. Members of the public, therefore, including the SCCA, have a legitimate interest in seeing that environmental standards are not compromised through implementation of the *FRPA*'s regulatory regime. We believe that Interfor's FSP (and many others) substantially reduces environmental protections that existed under the regulatory regime of the Forest Practices Code. We note that various recent publications of the FPB have also identified potential losses of environmental protections and values. We believe, therefore, that it is in the public interest—and well within the mandate of the FPB—to pursue an appeal of the approval of Interfor's Sunshine Coast FSP.

Seriousness of the Issue

The FPB has stated, in its reports to the public, that FSPs and the *FRPA* are establishing barriers to the adequate management and conservation of wildlife resources. We agree with these statements. With the approval of this FSP, a barrier against the protection of Marbled Murrelet nesting habitat (and that of many other Identified Wildlife Management Strategy recognized species) is established in one of the species' most critical regions: the southern portion of the SCFD including the Brittain, Skwawka, Jervis, Narrows and Salmon landscape units.

The distribution of nesting habitat is well known to both government agencies and to Interfor in these landscapes. Interfor already has sufficient Category A approvals under its North Jervis and South Jervis Forest Development Plans (FDPs) to preempt and make meaningless implementation of the recommendations of the Marbled Murrelet Recovery Team. These recommendations describe the minimum measures necessary to ensure the survival of the species in this management unit. Under this FSP, Interfor is largely unconstrained in harvesting the remaining critical murrelet habitat that is not part of a Wildlife Habitat Area or a draft or established Old Growth Management Area. As this FSP (and many others) assumes that the notices and regulations of the *FRPA* may be used to establish barriers against habitat protection, we ask the FPB to consider this appeal request to be urgent.

Minimum Requirements

We ask the FPB, when reviewing this complaint, to consider that there are more “minimum” approval requirements than those specified under Section 5 of the Act. For example, the Minister cannot approve an FSP with a result that conflicts with the *Ministry of Forests and Range Act* or obstructs its purpose. Section 4 of this Act states:

4 The purposes and functions of the ministry are, under the direction of the minister, to do the following:

(b) manage, protect and conserve the forest and range resources of the government . . . and

(c) plan the use of the forest and range resources of the government, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are coordinated and integrated . . . (our emphasis)

Likewise it is obvious that there are numerous other Acts that create mandates and authorize service plans that relate to the obligation of Crown agencies to conserve a variety of natural resources, including fish, wildlife and water. The basic principles of administrative law require that the interpretation of any Act must take place within the context of all relevant statutes.

Failure to Comply with the Wildlife Notice

1. Interfor's FSP does not comply with Schedule 1 of the Wildlife Notice, which requires "an amount equal to the total amount of currently suitable nesting habitat in the non-contributing landbase" for Marbled Murrelet conservation. On page 25, the FSP states in Section 1 a) i) and Section 1 b) i) that Murrelet habitat areas must be protected as follows:

i) Amount: area equal to the amount of suitable nesting habitat in the non-contributing land base at the time the Notice was issued, up to a maximum net mature timber harvesting land base impact of 495 ha.

The notice refers to *all* the currently suitable habitat in the non-contributing landbase and is not limited by the impact cap that applies only to contributing landbase. A literal interpretation of this paragraph is that the figure of 495 ha. *is* the total land to be protected and not a part of the total land to be protected. Interfor's FSP is imposing a barrier to habitat conservation in the non-contributing landbase that conflicts with the Wildlife Notice.

2. The FSP describes two situations, one where "a detailed survey has been conducted by a qualified professional," and another where "a detailed survey has not been conducted by a qualified professional." It does not state who is obligated to get the detailed survey or when the detailed survey must be conducted. According to the government's FSP Administrative Guide;

Results and strategies must be verifiable or measurable. In the Forest Planning and Practices Regulation (FPPR), "result" and "strategy" are expressed as "verifiable or measurable." Outcomes or steps are "measurable" if they can be quantified (i.e., compared to an empirical set of data), or "verifiable" if they can be qualified (i.e., proven through examination or demonstration). If a result or a strategy is measurable or

verifiable, it is enforceable. The practice requirements are examples of enforceable results and strategies. Within the approval test for measuring whether results or strategies are consistent with objectives, achievability and enforceability measures *must* be part of the content of the result and/or strategy.

In this section of the FSP the result or strategy is vague, not measurable, not verifiable and cannot be quantified. Therefore this section does not meet the test of consistency required by the Act.

We note that Interfor has conducted a “detailed survey” of Murrelet nesting habitat in each of the landscapes noted in this appeal (these were Forest Investment Account-funded projects) and has also completed draft Landscape Unit Plans for each of these landscapes that have not been placed before the public for review. There is no apparent reason why Interfor cannot specify a strategy with enforceable results for the protection of this resource.

Obstruction of Objective

This FSP obstructs the objective set by government to ensure the survival of the Marbled Murrelet. Interfor already has a sufficiently large number of Category A approvals in documented murrelet nesting habitat in both the contributing and non-contributing landbase to preclude compliance with the recommendations of the federal Marbled Murrelet Recovery Team. These recommendations are known to Interfor and to the delegated decision maker and represent the best currently available scientific information about measures necessary to ensure the survival of the species in the areas to which this plan applies. As presently stated, the FSP will preclude measures necessary to ensure the survival of the species in at least four landscape units.

The FDP further limits protection of murrelet nesting habitat by stating (page 27, paragraph 4) that:

If the amount of habitat for the Marbled Murrelet specified in the Notice is addressed, the strategy will not apply to areas beyond that amount.

A reasonable interpretation of this statement is that Murrelet habitat not protected by the notice is available for logging and will be logged.

The fact that the Minister has not specified sufficient measures in the notice to achieve the objective, set by government, of ensuring the survival of the Marbled Murrelet is an inherent difficulty for Interfor's FSP. While it may be arguable that the specified measures of the notice are adequate in some parts of the province, they are clearly not adequate in the area of this FSP. Considering Interfor's concentration of approved cut blocks in the nesting habitat of the non-contributing landbase, we submit that Interfor is obligated to commit to a verifiable strategy and measurable results that will ensure the survival of the species over time. Government has given the public a legitimate expectation that a Forest Stewardship Plan (our emphasis) is the appropriate venue for this to happen.

It is noteworthy that under the previous regulatory regime, Interfor was obligated to have a plan to protect this value and to keep options open for government to be able to resolve the issue.

Land Use Objectives

With regard to the land use objectives established under Sections 3 to 5 of the FPC for the Homathko, Skwawka, Chapman and Sechelt landscape units, Interfor states:

The Holder of this FSP will not construct roads within OGMA's . . . unless no other practicable option exists, in which case replacement OGMA's may be required.

This is not a strategy or result, just a recitation of the goal established by government. How is "practicable" to be defined? How is "may be required" to be determined? How would government establish that a result has or has not been achieved? According to the FSP Guidelines a result must be enforceable.

Inherent Conflict with *Species-At-Risk Act* and *Migratory Birds Convention Act*

The Marbled Murrelet is a listed species under the federal *Species-At-Risk Act (SARA)*. All threatened and endangered migratory birds are listed and given the protections of the Act (grandparented) to ensure compatibility of *SARA* with the *Migratory Birds Convention Act* and Canada's international obligations to protect biological diversity. Here is a quote from Sections 5 and 6 of the Act;

5. This Act is binding on Her Majesty in right of Canada or a province.
6. The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.

As the Marbled Murrelet is also a listed species under the *Migratory Birds Convention Act*, certain provisions of *SARA* are currently in force in all of British Columbia. In particular, the *Species-at-Risk Act* states that:

32. (1) No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.

Also, Section 33 says that:

33. No person shall damage or destroy the residence of one or more individuals of a wildlife species that is listed as an endangered species or a threatened species, or that is listed as an extirpated species if a recovery

strategy has recommended the reintroduction of the species into the wild in Canada.

It is noteworthy that *SARA* specifies a process through which the accidental destruction or harassment of a listed species or its residence may be permitted. No such permit has been issued to the Minister, his delegate or any party, nor has there been any application for such a permit.

The Interfor FSP clearly specifies that when the amounts of land required by the notice are protected there will be no further strategy for nesting habitat protection, and that other areas utilized by the Marbled Murrelet will be logged. As previously noted, both government and Interfor have knowledge of the distribution of Marbled Murrelet nesting habitat in the noted landscape units, as well as general information about the numbers of individual birds using these habitats.

Approval of this FSP is beyond the jurisdiction of the Minister because the FSP authorizes a violation of federal legislation: the *Species-at-Risk Act*.

Foresters Act

The *Foresters Act* authorizes a regime of “professional reliance,” in which foresters, in the course of managing publicly owned resources, are accountable for compliance with relevant legislation, standards of professional practice and a code of ethical conduct. In this way, the *Foresters Act* has become part of the regulatory regime and approval process governing the practice of forestry. We suggest that compliance with the *Foresters Act*, and the bylaws and resolutions of the Association of BC Forest Professionals, is one of the minimum requirements that the Minister must consider in approving an FSP. It is beyond the authority of the Minister to approve an FSP that violates the *Foresters Act*.

A forester signing an FSP that breaches a provincial or federal statute is presumably liable for a breach of the *Foresters Act*. While enforcement of the *Foresters Act* is the responsibility of the professional association and not within the mandate of the FPB, we ask the FPB to consider that, in approving Interfor’s FSP, the Minister or his delegate is complicit in a breach of the *Foresters Act*.

Remedies

We ask the Forest Practices Board to seek an Administrative Review and Appeal of the decision to approve Interfor’s Sunshine Coast FSP and, if necessary, to represent this case to the Forest Appeals Commission.

We make this request for the following reasons:

- the Interfor FSP is unlikely to ensure sound forest management practices or protection of Crown resources,
- the minimum approval requirements specified in the *FRPA* allow FSPs to conflict with the purposes of other provincial statutes,

- the minimum approval requirements specified in the *FRPA* allow FSPs to conflict with federal statutes,
- the reality of the minimum approval requirements is substantially at variance with the policies of government as expressed by such publications as the FSP Administration Guidelines,
- implementation of the *FRPA* is resulting in a substantial rollback of environmental protections that existed under the *Forest Practices Code Act*,
- the public has a legitimate interest in seeing legislation achieve the goals and objectives of government as set out in policy and official communications.

Thank you,

Daniel Bouman, Executive Director

Sunshine Coast Conservation Association