IPMA Issues Analysis
March 3, 2007

FIRST NATIONS AD HOC TECHNICAL WORKING GROUP

Integrated Pesticide Management Act
And
Proposed Consultation Guidelines

An independent First Nations
Legal, Legislation, Policy and Consultation Issues Analysis
(March 3, 2007)

EXECUTIVE SUMMARY

The members of the First Nations Ad Hoc Technical Working Group (AHTWG) (see Appendix 4 for profiles of members) on pesticide legislation, policy and consultation have no formal or official status. As the name suggests, this is an ad hoc group. The members agreed to work together to identify issues to move forward discussions in the proposed First Nation regional information workshops on pesticide consultation. The members were hesitant about becoming involved in this initiative since First Nations did not develop it. However, the members decided that some analysis with input from First Nation technicians is better than none.

The Integrated Pest Management branch of the provincial Ministry of Environment (MoE) agreed to support the work of the AHTWG provided it did not turn into a position paper and provided the analysis could be delivered in a very short time frame.

The AHTWG participated in this Issues Analysis based on the following understandings:

1. This is an Issues Analysis; it is intended to be used for discussion purposes only.
2. It does not represent the views or positions of any First Nations or any First Nations groups or organizations.
3. The Issues Analysis is entirely without prejudice to the rights, title and interests of all First Nations individually and collectively.
4. The Issues Analysis will not be considered consultation or accommodation with any First Nation or First Nations groups or organizations.
5. None of the members of the AHTWG will be presumed to support *IPMA* legislation, policy or consultation guidelines, nor the process for consultation with First Nations.
6. The Issues Analysis must be reported out openly and transparently.

The AHTWG identified a number of issues including:

- The fact that the use of pesticides carries high potential for infringing aboriginal rights and title in some cases. Many First Nation members consume plants, medicines, fish and wildlife that may be contaminated by application of

pesticides. Consultation should be at the high end of the spectrum where such risks are present;
- Concerns with sufficiency of consultation with First Nations in developing and passing the *IPMA* in 2003-2004;
- Lack of recognition of aboriginal rights and title and consultation issues in the *IPMA* legislation;
- Inconsistency between *IPMA* and requirements of common law and also the commitments in the New Relationship;
- Issues with the theory of Results-Based Regulation and self-monitoring by companies;
- Issues with removal of judicial review and narrower scope and limitations for appeals to the Environmental Assessment Board, both of which were potentially quicker and cheaper options for First Nations. As well as being less confrontational, more proactive than the alternatives such as court remedies that remain; and
- Issues with the draft consultation guidelines.

The AHTWG hopes that these and *all other* relevant issues raised by First Nations will be fully discussed:
- at the upcoming regional information workshops;
- in consultations with individual First Nations; and
- in discussions with the Leadership Council.

The AHTWG further hopes, that plans will be developed with all participating First Nations and First Nation organizations to address all relevant outstanding issues.

AHTWG Recommendations Summary

#1: Maintain a clear and separate consultation process for the Wildlife Act and for the IPMA in discussions with First Nations.

#2: Ensure all First Nations are contacted regarding this process, so they may identify and choose appropriate participants.

#3: Develop training for First Nation monitors, evaluators, and auditors.

#4: MoE undertake to identify where and when the WCEL submission were effective in making changes to the *IPMA*

#5: Through the Regional Information Workshops, if there is First Nation concern expressed related to the Act and its consultation, the AHTWG recommends government consult and review the Act with First Nations.

#6: That technical issues be further identified and a workable plan developed to address the issues raised through the Regional Information Workshops.

#7: At the design workshop one of the recommendations was that there be a continuation of information flow, work from one workshop relayed to the next.

#8: Identify the role for ongoing AHTWG involvement. However ensure the Ad Hoc members are identified in an open and transparent process by First Nations.

#9: MoE to initiate an industry/FN workshop to discuss issues.

#10: For each regional information workshop, it would be useful to have a trend analysis of the pesticide use by the categories used under the Pest Control Act so that exempted pesticides under this Act are not lost in the analysis. This would help indicate whether or there has been a reduction of pesticide use and an increase of Integrated Pesticide Management techniques.

#11: Jointly (FN new AHTWG/MoE) conduct a review of the excluded pesticides with other jurisdictions.

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BACKGROUND

Background on B.C. Pesticide Legislation

In 2001 the provincial government set a target of reducing all regulations by at least one-third. The basic concept was to "cut red tape". The government also developed a philosophy and goal of applying "Results Based Regulation" as much as possible. Finally, there were a few appeals to the Environmental Assessment Board which, according to some sources, were causing concerns in government and industry quarters due to the extent to which the EAB was ruling on requirements for consultation with First Nations[1].

Whatever the motivations, the Province carried out a review and revision process for pesticide legislation. The *Integrated Pest Management Act (IPMA)* replaced the *Pesticide Control Act* on December 31, 2004. The new Integrated Pest Management Regulation became effective on the same date[2].

The Province set out three stated goals for the new legislation:

- Establish regulatory requirements based on degree of risk to human health and the environment;
- Promote environmental stewardship and integrated pest management; and
- Set clear and enforceable regulatory requirements.[3]

There were a number of complaints and criticisms from environmental groups[4] and the general public about the proposed new pesticide legislation. These included the move away from a regulation and enforcement approach, the broad discretion of the Minister, and the removal of requirements, in most cases, for pesticide users to get permits. Initial comments from First Nations focused primarily on the lack of consultation with First Nations.

Background on First Nation Consultations Review Project

In the late Spring of 2006 the Province began indicating its intention to review and amend the *Wildlife Act* and to develop new or revised guidelines for consulting

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[1] See, for example, *TNG* v. *Deputy Administrator and MOF*, Appeal No. 97-PES-0; and *TimberWest Forest Corporation* v. *Deputy Administrator, Pesticide Control Act (Cowichan Tribes, Participant)* 2002-PES-008(a).

[2] Integrated Pest Management Regulation, B.C. Reg. 604/2004, M422/2004 and M423/2004, amended B.C. Reg. 28/2005, February 8, 2005.

[3] Ministry of Water, Land and Air Protection, *Integrated Pest Management Act and Regulations* Intentions Paper (September 2004).

[4] See, for example, Gage, Andrew "Integrated Pest Management Act Falls Short" West Coast Environmental Law Association's Submissions (November 2002).

with First Nations in relation to pesticides. For example, on May 31, 2006, Provincial representatives attended the First Nations Summit Chief Negotiators meeting in Westbank after a conference hosted by the Westbank First Nation on s. 91(24) lands in Treaty negotiations. Provincial representatives proposed consultations on wildlife and pesticides with the Chief Negotiators forum as well as through regional sessions. In our understanding, the Chief Negotiators agreed to regional information sessions, provided that this was not considered a substitute for direct consultations with each First Nation. It also appears there has been no follow-up with the Leadership Council or Chief Negotiators on this proposal since May of 2006.[5]

On July 21, 2006, the Ministry of Environment issues an RFP for a Project Coordinator for the "Draft First Nations Consultation Guidelines Review"[6]. The maximum budget was $85,000. The stated purpose of the project was:

> "To design, organize and manage a series of regional information workshops throughout the province of British Columbia. The purposes of the workshops are twofold:
>
> a) to engage First Nations and Industry representatives, capture feedback and recommend possible revisions to or replacement of the *Ministry of Environment Draft Guidelines for IPM Proponents Conducting Consultation with First Nations* (draft First Nations consultation guidelines) as necessary; and
> b) to engage First Nations and major stakeholders, capture feedback for input to the *Wildlife Act* Review Project."

In our understanding, there was no consultation with First Nations before the Ministry issued this RFP and there was no invitation to First Nations to use the $85,000 to design their own consultation and review process in partnership with the Ministry.

It has also been unclear to many First Nations from the outset as to why the Ministry is combining consultation on the *Wildlife Act* and the *IPMA.*

[5] Personal communication with Robert Morales, Chair of Chief Negotiators.
[6] Ministry of Environment Request for Proposals Number: EMB07034, July 21, 2006.

AHTWG RECOMMENDATION #1: Maintain a clear and separate consultation process for the Wildlife Act and for the IPMA in discussions with First Nations.

Background on First Nations Ad Hoc Technical Working Group

On January 16, 2007, the Fish and Wildlife, Wildlife Act Section and the IPM and Industry Section of the Ministry of Environment invited a few First Nation representatives to a "Design Workshop" at the Rosedale Hotel in Vancouver. It is unclear how First Nation representatives were selected to attend this workshop or why particular First Nations were invited.

Consultation is an obligation on the Province of BC with First Nations, particularly when sweeping changes are made to legislation or consultation processes are being discussed. It is incumbent on the Province to be open, transparent and inclusive in its communications with First Nations.

AHTWG RECOMMENDATION #2: Ensure all First Nations are contacted regarding this process, so they may identify and choose appropriate participants and appropriate ways to participate or not.

Despite what appear to have been the best efforts of the Ministry, there was much confusion at the Design Workshop. Some First Nation representatives wanted to focus on issues relating to the review of the *Wildlife Act*. The link between consultation on the *Wildlife Act* and the *IPMA* was unclear to many people.

Key Question #1: Given the discussion above, the AHTWG asks if the Ministry will work with First Nations to develop a separate and meaningful consultation process for both pesticide issues and the review of the Wildlife Act if necessary?

Out of the confusion arose a suggestion for an independent legal, legislative and policy analysis of the *IPMA* and proposed Consultation Guidelines led by a small technical working group. First Nations participants at the design workshop were canvassed for their interest to participate and this resulted in the development of the First Nations Ad Hoc Technical Working Group.

In mid-February the members of the AHTWG to carry out an issues analysis because it was felt an independent review was clearly needed. The AHTWG project was not confirmed by the Ministry until February 23, 2007. Time was very short and the Ministry was already committed to starting their series of information workshops on the proposed *IPM* consultation guidelines in early March. The AHTWG chose to take on this challenge provided they could report out openly and transparently to First Nations and First Nations organizations.

Finally, the AHTWG members decided it was better to try and get some information out to First Nations in advance of these workshops despite the imperfections of the process. The theory was that some information and analysis is better than none.

The Integrated Pest Management Branch from the Ministry agreed to support the work of the AHTWG and to provide a small amount of funding with the provision the AHTWG delivered its report by March 3, 2007 and focused on issues analysis rather than a position paper. **The AHTWG chronology of events is set out in Appendix 2.**

The AHTWG has prepared this Issues Analysis based on the following understandings:

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3. The Issues Analysis is entirely without prejudice to the rights, title and interests of all First Nations individually and collectively.
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ISSUES ANALYSIS

Terminology

The *IPMA* legislation gives a broad definition to the term "pest" and "pesticide". There is no distinction in the legislation between a herbicide (which kills or defoliates plants) and a pesticide (which kills insects, bacteria or other pests).

This unusual use of terminology in the legislation may cause confusion. It would be helpful to clarify terminology at each workshop and in each consultation process.

The IPMA Legislation

Many concerns remain about the *IPMA* legislation itself. The AHTWG identifies and discusses the following set of issues and includes the issues listed and identified by West Coast Environmental Law (WCEL) for discussion purposes. It must be noted that the AHTWG did not have the resources or time to confirm or compare the WCEL submission to the Act to identify when and how their comments may or may not have made changes to the *IPMA.*

Issues with *IPMA* legislation identified by AHTWG

In addition to the issues identified by West Coast Environmental Law (set out below), the AHTWG raise the following issues. Each issue is identified and is followed by a brief analysis in point form.

1. There does not appear to have been full and meaningful consultation with First Nations in developing and passing the IPMA.

    - The March 2004 document prepared for the Province as a thematic summary of the regulations is based on responses received through the consultation process for the amendment of the Act and for developing the IPMA Regulations. The document is based on 125 responses of which 80 % were from companies involved in the vending or application of pesticides. The report indicates one third of the forestry sector responded. The report does not indicate any responses from First Nations were part of the summary. However, throughout the document First Nation consultation is discussed. It would be useful to know to what extent the Province used the document in developing the regulations and the guidelines used this document.

- When MOE was queried on the consultation record, the AHTWG was referred to the MOE website, but there does not seem to be any public or First Nation record of consultation on the web-site.

It should be noted this might yet be a technical issue, rather than a factual issue. However, the AHTWG feels that the record or its chronology and outcomes, be readily, openly and transparently available, where appropriate.

2. The *IPMA* legislation does not appear to be consistent with requirements of the common law including cases such as *Haida*[7] and *Adams*[8]. There are no provisions written into the legislation to address aboriginal rights, title and interests.

   - Use of pesticides carries high potential for infringing aboriginal rights and title in some cases. Many First Nation members consume plants, medicines, fish and wildlife that may be contaminated by application of pesticides.
   - The Supreme Court of Canada stated in *Adams*:
     "In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test."
   - The Supreme Court of Canada clearly stated in the *Haida* case that consultation should occur at the strategic level, not just at the operational level after all government laws and policies are already in place:
     "The Crown's obligation to consult the Haida on the replacement of T.F.L. 39 was engaged in this case… T.F.L. decisions reflect strategic planning for utilization of the resource and may have potentially serious

[7] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.
[8] *R.* v. *Adams* [1996] 3 S.C.R. 101.

impacts on Aboriginal rights and titles. If consultation is to be meaningful, it must take place at the stage of granting or renewing T.F.L.'s. Furthermore, the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may also require significant accommodation to preserve the Haida's interest pending resolution of their claims."

3. The *IPMA* legislation is not consistent with many of the commitments in the New Relationship. Here are some of the commitments made in the New Relationship which are inconsistent with the current *IPMA:*
   - To restore, revitalize and strengthen First Nations and their communities … including restoration of habitats to achieve access to traditional foods and medicines;
   - To achieve First Nations self-determination through the exercise of their aboriginal title…and exercising their jurisdiction over the use of the land and resources through their own structures;
   - To ensure that lands and resources are managed in accordance with First Nations laws, knowledge and values and that resource development is carried out in a sustainable manner including the primary responsibility of preserving healthy lands, resources and ecosystems for present and future generations;
   - To lead the world in sustainable environmental management, with the best air and water quality, and the best fisheries management, bar none;
   - Develop new institutions or structures to negotiate Government-to-Government Agreements for shared decision-making regarding land use planning, management, tenuring and resource revenue and benefit sharing; and
   - Identify institutional, legislative and policy changes to implement this vision and these action items.

4. The assumptions behind Results-Based Regulation and self-monitoring by companies do not seem to be based on science or on protecting the environment and the rights, title and interests of First Nations.
   - The theory of Results-Based Regulation is unproven in the scientific and academic literature.
   - Self-monitoring and self-regulation by companies has been somewhat successful in some areas but problematic in many other areas.

- Additionally, and following on the last issue, there is a serious limitation for the role of third parties in consultation with First Nations.
- In Appendix 1 we have provided a summary of some of the academic literature highlighting problem areas with the theory of Results-Based Regulation and self-monitoring.

5. The removal of appeals to the Environmental Appeal Board and of other forms of legal challenges negatively affects First Nations.
   - The *IPMA* removed important tools for First Nations to challenge government decisions relating to pesticides. The tools and processes that were removed were potentially quicker and cheaper than full trials on infringements of aboriginal rights and title.
   - Firstly, the government took itself out of decision-making relating to permits and handed much of the decision-making over to companies and other pesticide users. This significantly limited the availability of judicial review. It is difficult for First Nations to challenge government decisions based on lack of consultation when the government hands over decision-making authority to companies. The courts have made it clear that the government cannot sidestep its consultative duty through administrative schemes.
   - Secondly, the *IPMA* specifically limited the types of issues that can be appealed to the EAB.
   - First Nations such as Cowichan Tribes had successfully pursued such appeals to protect their rights, title and Territory. The TimberWest/ Cowichan Tribes ruling is summarized in Appendix 6.
   - Arguably, First Nations no longer have EAB appeals available under the new *IPMA*.[9]
   - The EAB is a far less confrontational mechanism than courts and was indeed very proactive, as it followed existing frameworks, whose process was broadly known and understood.

Issues with *IPMA* legislation identified by West Coast Environmental Law

The AHTWG also recommends discussion on the following issues raised by West Coast Environmental Law (WCEL).

[9] In addition the provincial government passed the *Administrative Tribunals Act* in 2004 which removed the ability of administrative tribunals to deal with constitutional issues and issues relating to the *Charter*: see sections 44 and 45.

6. The former *Pesticide Act* was criticized as 'inefficient' and 'inflexible' without evaluating the social and environmental benefits received from stringent regulation of pesticide use in the province.

7. The new Act is not 'risk-based', as claimed by the Discussion Paper, but instead is premised on a one-size fits all mentality which ignores the fact that the location and quantity of pesticide use are central to evaluating risk.

8. For landscape and structural pesticide use on public lands, the Act allows individuals with service licences to use pesticides according to terms in their licences without requiring planning or public consultation.

9. The Administrator will have broad powers to set standards that determine how the Act will work. However, there is no requirement that these standards protect public health or the environment, ensure public consultation, etc. The Act should contain such important requirements.

10. The Proposed Act gives the Administrator wide powers to exempt pesticides from government regulation, without any requirement for safety evaluations of the exempted substances. These blanket exemptions continue even when the scale or location of spraying create a risk to public health or the environment.

11. While promising that Pest Management Plans (PMP) prepared by the pesticide user be based on Integrated Pest Management, the Proposed Act will apparently only require that PMPs include certain information, and does not create a requirement that Integrated Pest Management actually occur in a meaningful way.

12. Much of the Act will be difficult to enforce. Although there is a compliance mechanism proposed - "monitors" hired by the pesticide user - it is not at all clear what requirements will be in place as to how and when monitors will be used.[10] (Please see AHTWG recommendation #3, in the Recommendation Summary).

13. The government has removed most requirements for government approval of proposed pesticide use. Policy documents indicate that, under regulations to be

[10] West Coast Environmental Law Association (WCELA), *Summary of Submissions on the proposed Integrated Pest Management Act* (2002-12-04)

drafted, government approval of pesticide permits will only be required for narrowly defined "high-risk" circumstances.

14. For pesticides that do not fall within the "high risk" category, the government may require certain classes of pesticide-users (e.g. forest companies) to develop Pest Management Plans, which will become valid merely on notice to government, without government ever seeing the completed plan, let alone evaluating whether it will prevent harm to human or environmental health and was prepared according to the legal requirements.

15. Accountability will be reduced because members of the public will no longer be able to appeal pesticide use permits to the Environmental Appeal Board. The public also cannot ask the Environmental Appeal Board to review Pest Management Plans prepared by pesticide users, even though those Plans have involved no government review. Overall, these changes mean that much of the pesticide use on public land could escape scrutiny by the government, the public and the EAB.

16. The Administrator under the new Act will have broad powers to set standards that determine how the Act will work. However, there is no requirement that these standards protect public health or the environment and ensure public consultation. We feel that such important requirements should be contained in the Act itself.

17. The new Act gives the Government wide powers to exempt pesticides from government regulation, without any requirement for safety evaluations of the exempted substances.

18. The provincial Cabinet can pass regulations preventing local governments from passing bylaws regulating pesticides. This could diminish the role of local governments in protecting their environment, at a time when the Supreme Court of Canada has upheld local government jurisdiction respecting pesticides elsewhere in Canada *(Hudson* decision, 2001).[11]

AHTWG RECOMMENDATION #3: Develop training for First Nation monitors, evaluators, and auditors.

[11] West Coast Environmental Law, Deregulation Backgrounder: Bill 53, 2003 – The Integrated Pest Management Act

AHTWG RECOMMENDATION #4: MoE undertake to identify to what extent the WCEL submissions were effective in making changes to the *IPMA*.

Key Question #2: Given the above concerns, will the consultation process address outstanding issues with the *IPMA*?

AHTWG RECOMMENDATION #5: Through the Regional Information Workshops, if there is First Nation concern expressed related to the Act and consultation, the AHTWG recommends government consult and review the Act with First Nations.

Technical Issues

There are a range of technical issues that likely varies across regions and traditional territories, including chemical usage, cumulative impacts, bioaccumulation and limitations and focus of studies or research on use of pesticides. As well, the broad pest management plans themselves and planning processes often fail to address First Nations values, uses and timing of uses. One glaring issue is that terminology is often not clearly explained or defined. The AHTWG did not have the time or resources to undertake a comprehensive review of the technical issues. The list below is preliminary and NOT comprehensive:

- First Nation review of the excluded list of chemicals
- Limitations and focus of studies or research on use of pesticides
- Cumulative impacts and bioaccumulation
- Pest Management Plans and planning
- Failure to incorporate First Nation values and uses and timing of uses
- Glossary of terminology used

AHTWG RECOMMENDATION #6: That technical issues be further identified and a workable plan developed to address the issues raised through the Regional Information Workshops.

Issues with Draft Guidelines for IPM Proponents Conducting Consultations with First Nations

The Ministry has provided draft guidelines for IPM proponents conducting consultations with First Nations. The draft document is dated March 27, 2006. The AHTWG is not in a position to carry out a full analysis of the draft guidelines. However, here are some issues identified during our initial review. We begin with general issues and then comment on some specific sections.

General comments

a) It appears that the draft guidelines, like the legislation, were prepared without meaningful input from First Nations. The AHTWG realize the Ministry intends to consult on the draft guidelines but it is still a problem for the Ministry to unilaterally create a draft even for consultation purposes.
b) The Courts have stated that the Crown has a duty to fully inform First Nations and to inform itself of any potential aboriginal rights and title that may be adversely affected. The Crown also owes a duty to avoid infringement first, then negotiate mitigation and, if necessary, accommodation. It is seems difficult, if not impossible, for a third party to carry out these duties.
c) It is a serious issue when the Crown undertakes to delegate procedural matters for consultation obligations to companies or third parties.
d) Additionally this may set the stage – inadvertently or not - for the Crown to then neglect its own obligation to consult and where appropriate accommodate. The Court clearly stated in *Haida* that it is the Crown that owes these duties, not the third parties.
e) The courts have further stated that government may pass on 'procedural matters' to proponents, however it is problematic for proponents to achieve the depth and meaning of consultation required by the courts. Therefore Guidelines may not be the appropriate place to deal with substantive consultation issues. Even perfect guidelines likely cannot remedy issues created by excluding aboriginal rights, title and consultation issues from the legislation itself.
f) Authorizing corporations and third parties to carry out the Crown's consultation obligations or making unilateral assessments of aboriginal rights, title and

consultation based on information from a proponent presents a high potential for conflict of interest.

g) As well, it presents serious implications if the proponent is not equipped or resourced to understand or address the complexities of consultation.
h) The contemplation of accommodation where appropriate is not attended to in the consultation guidelines. However, even if it were, it presents the same issue relating to proponents not being equipped or resourced to understand this complexity.
i) There is nothing in the legislation or the guidelines to deal with cumulative impacts, bioaccumulation, or coordination with other potentially harmful activities in a First Nation's Territory.
j) There is no discussion in the legislation or the guidelines about assessing whether proposed pesticide applications are consistent with First Nations' land-use plans, management plans, Treaty negotiations, policies or visions for the use and protection of lands, waters and resources in their Territory.
k) The consultation is proponent-led with no commitment for funding or resources for First Nations to participate in any consultation meetings or resources to review plans, materials, permits, licences, or Pesticide Use Notices.
l) The proponents are encouraged to seek traditional knowledge, traditional uses and sites for the proposed areas of treatment without agreeing to or respecting First Nations Traditional Knowledge, Intellectual Property Rights, or any requirement to enter into Information Sharing Agreements or Protocols if required by the First Nation.
m) The proponent is expected to use the Traditional Knowledge to assess the level of adverse impacts on the Aboriginal asserted interests or treaty rights (Ministry language, Page 4, first paragraph) not the First Nation. The First Nation is excluded from this, their own process.
n) Proponents are not obligated to fund the collection of the information, placing a burden on First Nations for an activity that is likely to be an infringement on their Rights and Title,
o) Neither is it clear how a proponent is to evaluate and consider these matters in terms of infringement; this is the point where the Crown's responsibility is triggered.
p) Pest Management Plans may not be audited by the Ministry to determine if the plan is safe, appropriate consultation has occurred, and environmental and health protection is being maintained.
q) Pesticide Use Licenses are intended for persons who apply pesticides such as small companies who treat termites, but also applies to land managers related to right of ways or forest pest management on private lands. It is up to the

licensees to inform themselves about consultation requirements, asses the level of adverse impacts to First Nations interests or treaty rights, and inform the Ministry of the consultation outcomes. The AHTWG considers this to be a questionable expectation as the average small company that may not have regular interaction with First Nations, will not understand or appreciate the gravity of the process.

r) In addition, there is a disconnect between the land managers establishing the relationship with the First Nations and the field crew conducting the pesticide application. This has resulted in conflicts between the field crew when they are applying pesticides adjacent to First Nations practicing cultural or traditional uses and harvests.

s) Pesticide Use Licences are required as non-service licences for pesticide application on public land if less that 20 ha/yr is treated. The proponent is only required to post signs at treatment areas at least 14 days before application or contact landowners if the treatment will occur within 150 meters of the property. This includes forestry or industrial vegetation management. The concern is that consultation may not occur in small applications, and that First Nations use areas, First Nation family properties and harvest areas are outside the legislated definition of "property".

t) It is unclear how the IPMB anticipates linkages to other Agreements First Nations have with the provincial Crown, for example FRA/Os. This issue is substantive as Forestry Companies are major pesticide management proponents. The issue is that Forest companies may feel that their activities are part and parcel to the FRA or O and the PMP and traditional use study were not part of the FRA or O *(please note: one AHTWG cited this as an issue but was not able to attend the meeting; the AHTWG has not yet had time to verify the extent to which this is an issue).*

u) Consultation is an iterative process; consultation processes must be flexible to the nature and culture of the First Nation being consulted. A one-size-fits-all consultation process will not achieve consultation from one Traditional Territory or First Nations cultural group to the next. As well, this may be reflected in the variety of issues dealt with on a biological or ecosystem basis. The proposed guidelines do not.

v) Pesticide Use Permits are for situations when pesticides being proposed are of high public risk, or have no standards or regulations. In this case, First Nations are lumped into the public consultation requirements under the regulations and treated as stakeholders, this is inconsistent with court decisions.

Specific Issues Drawn from the DRAFT Consultation Guidelines

"The foremost requirement of the IPMA is that a proponent must not use a pesticide that causes or is likely to cause an unreasonable adverse effect. It is the responsibility of the proponent to investigate concerns identified during consultation, determine the potential for an adverse effect, and ensure plans are modified as necessary to prevent an unreasonable adverse effect."

- It is a serious issue to leave companies and other third parties in charge of deciding whether or not their actions will have an unreasonable adverse effect and whether actions need to be taken to address issues raised by First Nations. The third party will always be in a conflict of interest and will always be inclined to make decisions that minimize costs and delays.
- Further the determination of an adverse effect is specifically the obligation assigned to the honour of the Crown.

Proponents are required "to conduct research to determine the nature of potential First Nation aboriginal interests or treaty rights in the area".

- In our experience provincial ministries often find it very difficult to determine the nature of potential rights, title and interests. Provincial ministries have access to extensive staff, resources, legal advice and documentation and research and yet they still struggle with these issues. How can an individual or company be expected to carry out this analysis, particularly if they are not able to get to square one by approaching a First Nation in a respectful manner?
- This undertaking is specifically the obligation assigned to the honour of the Crown.

"Proponents must make reasonable efforts to contact First Nations who assert aboriginal interests...The Chief should be the first point of contact...proponents should advise the First Nation that the communication forms part of the Crown's consultation process for the proposed activity".

- This oversimplified activity will not achieve consultation with a significant number of First Nations: this is already well understood by provincial ministries. Consultation from one Traditional Territory or First Nations cultural group to the next can be vastly different, or subtly different and either difference can trip up a consultation process.

- Using this as advice to proponents sets proponents and First Nations up for unnecessary conflict.
- The Ministry has failed to consider the following: hereditary systems, First Nations with a referral official or a designated person(s), or an organization who carries out their consultation, existing First Nations protocols or agreements with the Crown specifying how consultation will be carried out, other issues may be identified in the regional information workshops.

"A minimum of three efforts using methods that include telephone, registered letter or personal visits over a 2-3 month period, allowing a minimum of 30 days for a First Nation to reply, is generally considered to be a reasonable effort at making contact."

- This is not consistent with court decisions; this applies only when the determination of the nature of the infringement of Aboriginal title and rights is considered to not be an 'adverse impact'. It is not a 'general' consideration; neither does it meet the legal test of what is considered 'reasonable' as expressed by the courts.
- In addition, this kind of approach is a step backwards from the New Relationship. It is even backsliding from the status quo since most Ministry representatives have received enough complaints from First Nations to know that it is highly disrespectful to send a form letter and demand a response within 30 days.
- Even though the Ministry recommends proponents contact First Nations well in advance of official timelines for pesticide applications, contact may still occur only within the 'required" and shorter timelines.

"If a First Nation indicates that it opposes a proposed activity but will not engage in an information exchange with the proponent, the proponent should advise the Ministry headquarters office... The ministry will request from the proponent an assessment of the details of the First Nation's aboriginal interests or treaty rights as known by the proponent and what, if anything, the proponent proposes to do to address potential adverse impacts on those interests."

- The potential issue here is that it places the Ministry in the position of trying to accomplish a determination of First Nations title and rights impact with second hand information what the Ministry itself has a difficult time doing through direct contact with First Nations.

- Additionally, this suggests that First Nations are 'refusing' to engage, where it is far more likely the various government processes have overtaxed a First Nations resources to the point the First Nation simply cannot respond to an issue. Without any requirement or provisions to ensure First Nations are resourced to assist them through the variety of government processes, First Nations are being unreasonably burdened.

"When the Ministry receives the Pesticide Use Notice, the Ministry will assess whether the applicant has conducted consultation appropriately and whether potential adverse impacts on asserted aboriginal interests or treaty rights were adequately addressed".

- This is an issue that has already been spoken to, however it bears repeating. In this simple summary, the Ministry will assess consultation activities second-hand, and then make a determination related to adverse impacts that the Ministry itself has not conducted an assessment. A proponent led assessment that is fraught with conflict of interest issues.
- Further this is inconsistent with the New Relationship and more importantly with the honour of the Crown.

In many cases a Pest Management Plan will be for a large area and will not specify the exact sites of proposed treatment (because not all treatment sites will be known at the plan development stage). Interested individuals, including First Nations, may want to continue consultation after they can be informed of the specific treatment sites.

The IPMR allows a proponent to make an agreement during initial consultation to directly notify an individual before the pesticide use. If this is done, the IPMR [section 28(2)] specifies that the proponent must notify the individual in the agreed time and manner.

- Pest Management Plans and Pesticide Use Notices are intended to indicate that over a large area that a range of pesticide treatments will be applied, who is responsible for managing the work, but do not have to indicate the timing or the specific areas treated. A proponent only has to notify a First Nation about proposed pesticide applications through a Pesticide Use Notice, 45 days before the work occurs.
- A Pesticide Use Notice can be up to 5 years in duration, but only one consultation process is required. The First Nation has to enter into an agreement

with the proponent to ensure they will be notified when an annual notice of work is provided to the Ministry. There is no commitment to consult by the proponent or the Ministry. The Ministry will decide if further action is required. The proponent only has to provide an annual notice of work, 21 days before applying the pesticides

- This highlights a serious issue with the legislation. It is difficult for the Crown or a proponent to meet the Crown's legal duties to consult if the proponent does not provide specific information to the First Nation about how, when and where pesticides will be applied. A First Nation cannot be meaningfully engaged in consultation without this basic information and neither can a First Nation return consultation. This scenario sets the First Nation up and will likely lead to conflict.
- This is inconsistent with the principle of the honour of the Crown and inconsistent with the intent of the New Relationship.

"Permits are required by a person who uses a pesticide for situations of highest public concern or for types of use for which no standards have been incorporated into the regulation. Applicants for a permit must conduct public consultation as specified by the Ministry and then submit to the Ministry a description of the proposed pesticide use and the results of the consultations. Requirements for public consultations are specified in section 60 of the *IPMR.* The applicant must advertise in newspapers or may give written notice to persons who may be affected by the treatment, allowing 30 days to receive submissions. The applicant for a permit must then submit a statement of the action the applicant intends to take in response to information provided in the notice. The Ministry will evaluate the statement and decide whether additional information or consultation is required before issuing a permit or whether to impose terms or conditions on the permit that requires additional consultation in relation to First Nations consultation."

- First, consultation with First Nations is a higher duty than consultation with the Public;
- Second, consultation with First Nations requires more than the standard information provided to the public; and finally
- This is a potential issue of the type discussed above by both WCELaw and the AHTWG. The *IPMA* provides broad discretion to the Ministry to decide which pesticides are the most dangerous without first consulting with First Nations to identify infringements to title and rights; This type of broad discretion likely offends the legal requirements set out in *Adams, Haida* and other court decisions.

"If a First Nation informs the ministry that they have concerns regarding a proposed pest management activity that have not been resolved through the consultative procedures carried out by a proponent, the Ministry will review the process and relevant information and consider whether the proposed activity may result in an unjustifiable infringement of aboriginal interests or treaty rights. If the Ministry is not satisfied that adequate consultation has occurred, the Ministry may directly address the First Nation or proponent, or both, and, with respect to any unjustifiable infringement, propose options to achieve resolution or otherwise seek to appropriately address the potential impacts on asserted aboriginal interests or treaty rights.

A pesticide use that has an adverse impact on aboriginal interests or treaty rights could be considered to be an unreasonable adverse effect or a contravention of the *IPMA.* The Ministry can revoke or suspend a confirmation, licence, or permit, or order the person to refrain from using a pesticide for a specified period, if the Ministry considers that a person is not complying with the *IPMA* or believes on reasonable grounds that this activity has caused or is likely to cause an unreasonable adverse effect."

- The above two paragraphs are potentially helpful and useful. However, this is where the most serious disconnect occurs between the objectives of consultation with First Nations and maintaining the honour of the Crown. The Crown is relying on a third party to make an assessment that the courts have assigned to the Crown; the third party will always be in a conflict of interest in this assessment; and further will not have the legal training or trained resources to assist them in this assessment.
- Further, this activity relies on First Nations having the resources to attend to this matter; resources the Crown has not ensured are available to the First Nations.

IPMA Proposed Consultation Guidelines Appendix A Table: "Potential For Adverse Impacts to Use of Land or Resources in Relation to Categories of Pest Management".

- This type of table and hierarchy for assessing consultation requirements may have some merit. First Nations are typically being snowed under by referrals and First Nations, government and proponents likely share similar interests in streamlining consultation.

- However, it is likely that this type of table can only work if it is jointly developed by First Nations culturally or regionally.
- The current draft table contains a number of assumptions and approaches that are inconsistent with the New Relationship and legal requirements. For example, it is an issue to assume that an area that has already been disturbed once is open season for all future disturbances and contamination. This theory that past infringements of aboriginal rights justifies future infringements has been legally contested and found to be not legally supportable.

Key Question #3: Given all of the above issues, is the Ministry willing to work with First Nations to jointly develop appropriate guidelines and appendices that respect aboriginal rights and title and the New Relationship and address regional, cultural or Territorial differences relating to consultation?

Key Question #4: At the end of the regional information workshops and this discussion paper, will the Ministry work with First Nations to address issues with the *IPMA* and *Regulations?*

APPENDIX 1

REVIEW OF INTEGRATED PEST MANAGEMENT LEGISLATION AND POLICY
First Nations Ad Hoc Technical Working Group
Terms of Reference (February 21, 2007)

Background

The provincial Ministry of the Environment has agreed to engage First Nations in a review of pest management legislation and policy. A number of First Nations have raised concerns about the proposed process and the short timelines for a proposed series of regional workshops. First Nations have questioned why the Ministry has retained consultants and developed proposals for regional consultation workshops in the absence of full consultation with First Nations. First Nations participants at the design workshop expressed concerns about this approach to engaging consultation

Further, First Nations participants at the design workshop indicated a need for an independent understanding of the legal, legislative and policy issues related to the *Integrated Pest Management Act (IPMA)* and the DRAFT Consultation Guidelines. As well as, a need for technical support to better understand from an independent consultant, issues that might arise technically from the application and use of the *IPMA* and Consultation Guidelines.

The Ministry has agreed to work with an ad hoc First Nations Technical Working Group to try and address some of these issues and prepare for the proposed workshops.

Nature of the Terms of Reference

These Terms of Reference are without prejudice to aboriginal rights and title. The Ministry and Province agree they will not use the participation of any First Nation or representative against that First Nation or any other First Nations. Neither participation in drafting and trying to implement the Terms of Reference, nor participation in the ad hoc Technical Working Group constitute any form of acceptance of the proposed process or any admission that it constitutes any form of meaningful consultation.

The Ministry of Environment will provide:
1. a compilation and summary of all relevant policy and legislation;
2. a summary of how the legislation and policy have changed in the past 5 years;

3. a summary of how the provincial IPM Act relates to federal legislation the provincial Forest and Range Practices Act, and other relevant legislation,
4. planning, logistical services and funding for the Ad Hoc FN Working Group and for the workshops; and
5. a statement on what the Ministry intends to achieve from the workshops, whether this is a full legislative and policy review or just an exercise to rubber stamp draft consultation guidelines, and whether or not there are commitments from the Ministry and the government to carry out any relevant research or analysis requested by First Nations and to implement recommendations arising from the workshops.

The Ad Hoc FN Working Group will:
Subject to funding, timelines, and support and resources from the Ministry of Environment, the Ad Hoc FN Working Group will:

1. Oversee independent reports for the legal, policy and legislative issues FNs may need to consider in reviewing the IPMA and related draft Consultation Guidelines
2. Oversee an independent technical review of the Integrated Pest Management procedures and related issues that First Nations may need to consider in reviewing the IPMA and related draft consultation guidelines;
3. Assist in developing a framework and initial analysis or questions for legal and policy issues including:
   a) identification of some current issues (consultation processes; potential problems with moving away from regulation towards industry self-regulation, forestry interface issues with the IPMA; and third parties approaches to First Nations: what works, what doesn't; interface with national legislation re: CEPA
   b) the extent to which the current legislation and policy comply with the common law and the commitments in the New Relationship;
   c) whether separate or additional consultation may be required with Douglas Treaty or Treaty 8 First Nations or First Nations that have already proven rights in court;
   d) whether changes in legislation and policy over the past five years have had an impact on consultation, rights and title, and First Nations' interests; and
   e) recommendations for improvements.

Recommended: After the first regional workshop, it is recommended the ministry meet with the FN Ad Hoc Technical Working Group to review the workshop format and agenda and, if necessary, make improvements.

APPENDIX 2

AHTWG Chronology of Events

DATE	ACTIVITY	PURPOSE
January 16, 2007	Design Workshop	• The purpose as stated by MoE was to develop consultation workshops with First Nations to take around BC for engaging discussion on the DRAFT Consultation Guidelines • Participating First Nations suggested developing a technical working group to develop an independent legal, legislative and policy analysis of the *IPMA* and Consultation Guidelines • FNs canvassed for their interest to participate, Jason Lee, Treaty 8; Elmer Derrick, Gitxsan; and Kathleen Johnnie, Hul'qumi'num Treaty Group
January 23rd – 25th, 2007	Communications	Phone and email discussions between Kathleen Johnnie and the MoE consultant delivering the workshop to discuss the concept of the technical working group
February 5, 2007	Email	MoE invites the interested participants to a technical working group meeting
February 5th – 7th, 2007	Series of emails	Seeking clarity between MoE and the AHTWG for the purpose, outcome and **independence** of the activity
February 12th – 14th	AHTWG begins	Development of 'what we need to know' and identification of resources
February 19th – 20th	Technical and legal Resources	Identified, contacted and confirmed, Norm McLean for technical review, Murray Browne, for legal review
February 21st	AHTWG TOR	Developed and confirmed
February 22nd, 23rd	Preliminary Draft	Development of the IPMA proposed backgrounder for the Report Outcome forwarded to MoE, to ensure funding for work to commence over the weekend.

February 24th, 25th	Technical Review	Work begins in the technical area
February 26th	MoE contract notice	Contract notification sent to HTG for the development of the Report
February 28th	Technical and legal Reviews	Technical and legal DRAFTS forwarded for the AHTWG
February 28th	2:07 PM DRAFT V1 Discussion Paper	Legal review incorporates technical review into DRAFT Discussion Paper Framework
March 1st	Contract review	HTG reviews contract and provides comment, sends back to MoE to confirm changes acceptable
March 2nd	AHTWG Meeting	Review the DRAFT Discussion Paper to agree on format, identify concerns with approach and revise to meet the purposes stated in the AHTWG TOR
March 3rd, 2007	AHTWG final	AHTWG final edits via email correspondence

APPENDIX 3

Budget and Expenditures Report

Hul'qumi'num Treaty Group
PROJECT REPORTING FORM

Project Title: Integrated Pest Management
Contact: Bruce Holmes
Percent Complete: Scheduled Completion Date: 02-Mar-07
Funding Source: **Ministry of Environment**

Description and schedule for activities with time lines:
Deadline for a Report is February 26th, 2007
Deadline requested to March 2, granted to March 3, 2007

Specific Costs:

Honorarium ▪ Jason Lee, Treaty 8 ▪ Elmer Derrick, Gitxsan ▪ Fred Fortier, SFC ▪ Kathleen Johnnie, HTG	$400 p/d	X 3 days	approx	$	5,000.00
Travel			approx	$	5,000.00
Meeting costs			approx	$	2,000.00
Consultant					
Legal (Murray Browne, Woodward)			approx	$	5,000.00
Technical (Norm McLean, LGL)			approx	$	4,000.00
Total Projected Costs				$	21,000.00
Administration Costs				$	2,100.00
GRAND TOTAL				$	23,100.00

APPENDIX 4 -- AHTWG Profiles:

ELMER DERRICK

Elmer Derrick is a First Nations Hereditary Chief of Gitsegukla, one of seven communities of the Gitxsan Nation, and is Chief Negotiator for the Gitxsan Treaty Society.

Elmer is the former Chair of the First Peoples Heritage, Language and Culture Council and the First Peoples Cultural Foundation. His directorships include Gitxsan Resources Trust, Muks ko mol Housing Society, Gitsegukla Economic Development Corporation and Northwest Tribal Treaty Nations, as well as a Director for BC Hydro.

Elmer has worked in the public service in B.C., Canada, and aboriginal organizations including the National Indian Brotherhood – Assembly of First Nations for many years. He has also been a lecturer at Northwest Community College where he taught economics and political science. Derrick served as a volunteer community member of the National Committee on Sustainable Development, Indian and Northern Affairs Canada for three successive reports to the Parliament of Canada.

Elmer has a Bachelor of Education from the University of Alberta and a Bachelor of Arts from Carleton University. His foundations in Gitxsan history, values and laws provide him with a unique perspective.

FRED FORTIER

Fred Fortier is a Simpcw person of the Secwepemc Nation and has served as a councilor for his community for the past two decades. Fred and his wife Mary reside in Kamloops and have four grown children and he is an organic gardener and an avid fisherman / hunter and is currently buying a business in the Kamloops area.

Fred Fortier has been working on fisheries related issue for the past 18 years and has served as the past chair of the BC Aboriginal Fisheries Commission, Secwepemc Fisheries Commission and the Canadian Columbia Fisheries Commission. Fred has been involved in the FN Environment Assessment Working Group and currently sits on the Executive Committee for the Fraser River Aboriginal Fisheries Secretariat.

Fred has also been involved in tracking and participating in the Convention on Biological Diversity since 1994 and has co-chaired the International Indigenous Forum on Biological Diversity which provides advise to the Conference of Parties to the Convention on Biological Diversity.

JASON LEE

Wildlife Biologist – Treaty 8 Tribal Association

Jason Lee is employed as a Wildlife Biologist with the Treaty 8 Tribal Association in Fort St. John , BC . Jason received a BSc from the University of Northern British Columbia , and a Science Technical Diploma in resource management and law from Malaspina University College . Jason has worked with the Treaty 8 Tribal Association since October 2004. He has worked in the natural resource management field for twenty years.

KATHLEEN JOHNNIE

Kathleen is a member of the Penelakut Tribe, which is located on Kuper Island across from the township of Chemainus, Vancouver Island. Kathleen is currently the Referrals Impact Assessment Coordinator at the Hul'qumi'num Treaty Group; the First Nations Co-Chair and Toolkit Workshop Facilitator on the First Nations Environmental Assessment Technical Working Group; and an Aboriginal Consultation Practitioner at Smart Raven Innovations Ltd.

Kathleen also regularly provides presentations on First Nations and lands and resources issues and participates in workshops encouraging government to develop effective engagement processes for consulting First Nations.

Kathleen has been involved in consultation on lands and resources from a First Nations perspective since 1998; has participated in the writing of the Hul'qumi'num Consultation Policy; and has written an as yet unpublished booklet on First Nations and marine protected areas. Kathleen is currently writing a consultation guide from a First Nations consultation practitioners perspective and developing workshops based on the guide for First Nations capacity building, government, industry, consultants and lawyers.

NORM MACLEAN, BSC
Wildlife Biologist- AHTWG Technical Support

Norm MacLean is a Wildlife Biologist with LGL Limited. He is a graduate of the University of Alaska - Fairbanks and has 20 years of professional experience in Alaska, Northwest Territories, British Columbia and the Yukon Territory. Prior to joining LGL Limited in 2002, Norm worked with provincial and territorial environmental agencies in northwestern British Columbia, and several regions of the Northwest Territories. Since 2002, Norm has had the opportunity to provide technical support for several northern First Nations on community-based ecosystem management plans (including both strategic and operational plans), wildlife management issues, natural resource agreements, independent environmental assessment reviews, and GIS analysis.

MURRAY W. BROWNE
Lawyer- AHTWG Legal support
excerpted from the Woodward and Company website:
http://www.woodwardandcompany.com/

Murray is a lawyer with a Master's Degree in Public Administration. He has been involved in aboriginal law and Treaty negotiations for the past nine years. He is legal counsel for several First Nations in the forefront of Treaty negotiations and also works on Specific Claims, and aboriginal rights and title litigation.

Murray has a diverse background and has worked as a land-use planner, GIS consultant, office manager, mediator and governance consultant. His legal practice includes environmental and municipal law and he has worked with First Nations all across the Province to protect aboriginal rights and title and work towards more meaningful roles for First Nations in managing, protecting and benefiting from their Territories. Murray also teaches environmental law and ethics in the Environmental Restoration program at the University of Victoria.

APPENDIX 5
Issues with Results-Based Regulation and Self-Monitoring

Although there have been some recent scholarly articles regarding Results-Based Regulation, the concept has not yet been subjected to much rigorous scientific analysis. Cary Coglianese, Harvard Associate Professor of Public Policy and one of the leading commentators on RBR, states:

> "Despite growing interest in the performance of government regulation, researchers have yet to subject performance-based standards to close empirical scrutiny. Moreover, in many areas of regulation, the use of performance-based standards has remained less frequent than might be expected."[12] Indeed, it was generally acknowledged that there is a dearth of empirical studies aimed at measuring the effectiveness of performance-based standards, especially in comparison to the effectiveness of other regulatory instruments.[13]

Professor Coglianese has also called for an evidence-based approach to environmental regulation.[14] Here are some examples of his critiques:

> "There may well be good reasons why government regulators do not rely more extensively on performance targets. Performance-based standards depend on the ability of government agencies to specify, measure, and monitor performance, and reliable and appropriate information about performance may sometimes be difficult if not impossible to obtain. When implemented in the wrong way, or under the wrong conditions, performance-based regulation will function poorly, as will any regulatory instrument that is ineffectually deployed."[15]
>
> …
>
> "For example, when direct and continuous monitoring of smokestack emissions is possible, performance can be clearly verified. In contrast, performance cannot be directly measured for rare and catastrophic events, and instead must be predicted, making implementation more difficult… …
>
> "One participant voiced concern that performance standards based on predictive models could lead to "legitimate self-delusion" on the part of

[12] Coglianese, Cary, Jennifer Nash, and Todd Olmstead, "Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection," Regulatory Policy Program Report No. RPP-03 (2002) at p. 2.
[13] Coglianese, *Performance-Based Regulation* at p. 8.
[14] Coglianese, Cary, and Lori Snyder Bennear. "Appendix E: Program Evaluation of Environmental Policies: Toward Evidence-Based Decision Making" *Social and Behavioral Science Research Priorities for Environmental Decision Making.* Ed. National Research Council. National Academies Press, 2005, 246-273.
[15] Coglianese, *Performance-Based Regulation*, at p. 2.

> regulated entities. In other words, regulated entities may present or interpret their models and data in a way that makes it look as if their proposed approaches will per-form well, when in fact a more disinterested examination would find problems with the analysis".[16]

Emily Walter is a PhD candidate at Osgoode Hall Law School. She published an article in the Journal of Environmental Law and Practice entitled "Decoding Codes of Practice: Approaches to Regulating the Ecological Impacts of Logging in British Columbia"[17] in which she assessed Results-Based Regulation in the forest industry in B.C. Her conclusion is that "the forest industry in B.C. continues to impose high ecological costs". After a careful review of the *Forest Practices Code* and the *Forest and Range Practices Act* she concludes that "Regulatory approaches that take as their objective a change in corporate behaviour while leaving existing patterns of authority largely aside may be less pragmatic than first appears… Although conceptually difficult, environmental regulatory models need to take better account of the normative, institutional and structural factors that shape the expectations and actions of policy actors including, but not limited to, firms."[18]

Peter J. May carried out a major analysis of performance-based regulation in New Zealand. Peter J. May is widely published author and professor of political science at the University of Washington and is where he is also affiliated with the Center for American Politics and Public Policy. His article entitled "Performance-Based Regulation and Regulatory Regimes: The Saga of Leaky Buildings"[19] addresses a number of problems with RBR. Here are some excerpts.

> "Regulatory reformers have widely endorsed greater use of a performance-based approach to regulation that defines objectives in terms of desired outcomes. The appeal of the performance-based approach is as much about introducing a regime that overcomes problems of overly rigid rules and inflexible enforcement as it is about regulating for results. The case of leaky buildings in New Zealand provides a cautionary tale of a flawed performance-based regulatory regime. It allowed for flexibility without sufficient accountability and in so doing showed the Achilles' heel of performance-based regulation.

[16] Coglianese, *Performance-Based Regulation* at p. 11.
[17] Walter, Emily, "Decoding Codes of Practice: Approaches to Regulating the Ecological Impacts of Logging in British Columbia", 15 J. Env. L. & Prac. 143 (April 2005).
[18] Walter at pgs. 144-146 (emphasis added).
[19] May, Peter J., "Performance-Based Regulation and Regulatory Regimes: The Saga of Leaky Buildings", Law & Policy, Vol. 25, No. 4, October 2003.

> "The case of performance-based regulation of buildings in New Zealand illustrates a leaky regulatory regime. The regime allowed for flexibility without adequate accountability."[20]

The last example we will cite here is an article by Professor Rena I. Steinzor entitled "Myths of The Reinvented State".[21] Professor Steinzor is the Director of the Environmental Law Clinic at the University of Maryland Law School. She begins by conceding that the command and control approach has had some excesses and problems in the United States but also points out that it has been successful in some areas:

> "…as documented in books such as *A Moment Here on Earth* traditional regulation has made real progress in controlling pollution from large point and stationary sources. Little of this progress would have been possible without the commands and controls of the last three decades".[22]

Professor Steizor goes on to highlight the problems inherent in the myth of a happy, effective, and cost-efficient self-regulated world under RBR.

> "If we abandon technology-based controls in favor of a performance-based system without a substantial reinvestment in gathering of such information, the result will be backsliding, perhaps on a catastrophic scale."[23]

These books and articles point out that while RBR has some merits, its benefits have yet to be proven by research and it is a problematic or inappropriate regulatory regime in many types of applications particularly relating to environmental protection

[20] May at pgs. 381, 397 and 398 (emphasis added).
[21] Steizor, Rena I., "Myths of the Reinvented State", 29 Cap. U. L. Rev. 223 20012002.
[22] Steinzor at p. 226.
[23] Steinzor a p. 238.

APPENDIX 6

Summary of TimberWest Forest Corporation v. Deputy Administrator, Pesticide Control Act (Cowichan Tribes, Particpant) 2002-PES-008(a).

This was an appeal by TimberWest. TimberWest wanted to spray herbicide over 119,500 hectares of private forest lands on Vancouver Island. It objected to the conditions set out in the original permit it received. The EAB summarized the issues as follows:

> "The *Guide for Developing a Pest Management Plan for Forest Vegetation* also requires applicants for pest management plans to consult with First Nations and other persons or agencies that may be affected by activities carried out under a pest management plan, and submit a separate "Consultation Report" as part of the documents supporting the pest management plan that is submitted for approval.
>
> The Crown's duty to consult with and accommodate aboriginal people is distinct from any legal obligations that statutory decision-makers may have to notify and consult with members of the general public who may be affected by a government decision. The duty of the provincial Crown, and government decision-makers acting on behalf of the Crown, to consult aboriginal people arises from a variety of legal sources, including the Crown's historical fiduciary relationship with aboriginal people, the common law, and the *Constitution Act, 1982*. Aboriginal rights, including aboriginal title, that have not been extinguished were recognized in the common law before 1982, and are now protected by section 35 of the *Constitution Act, 1982*. The scope of this fiduciary relationship and the duties that arise from it are still being defined through litigation. However, the current provincial policy on consultation with aboriginal people is set out in the *Provincial Policy for Consultation with First Nations*, October 2002 (the "*2002 Provincial Policy for Consultation*"). At page 18, it states that:
>
> > 'Where a sound claim of aboriginal rights and/or title is made out, consultation efforts must attempt to address and/or accommodate a First Nation's concerns relating to the impact of proposed activities on the aboriginal interests that it identifies or of which the Crown is otherwise aware.'"

The permit conditions from the Deputy Administrator included Condition 2.4:

> "2.4 Unless otherwise approved by the Deputy Administrator, *Pesticide Control Act*, within the Cowichan Tribes traditional use areas, no treatments of red alder or bigleaf maple, shall occur within 50 metres of fish-bearing streams or within 30 metres of streams that are directly tributary to fish-bearing streams, unless approved by a forest ecosystems or fisheries specialist qualified in conducting field assessments and experienced in protocols for assessing and documenting fresh water fisheries values and stream classifications in terms of the *Forest Practices Code* and federal *Fisheries Act*."

The EAB observed:

> "It should be noted that Operating Zone 3 corresponds with the areas of cultural and spiritual significance that were circled by Mr. Charlie [Arvid Charlie from Cowichan Tribes] during the July 5, 2002 meeting between the Deputy Administrator and representatives of the Cowichan Tribes. It should also be noted that a decision by the Deputy Administrator to approve pesticide treatment on a site within Operating Zone 3 is a "decision" under section 15(1) of the *Act* that can be appealed to the Board."
>
> "TimberWest requests that the Deputy Administrator's authorization be amended by deleting references to Operating Zone 3, deleting references to the Cowichan Tribes traditional use areas, and deleting references to the 50 metre and 30 metre no-treatment zones for red alder and bigleaf maple along fish-bearing streams and their direct tributaries."

Basically, TimberWest did not appreciate the limitations based on aboriginal rights and traditional uses and they appealed the permit conditions.

The EAB's ruling contained the following:

> "4. (a) The Deputy Administrator had a duty to consult with and accommodate the Cowichan Tribes before issuing his authorization of the PMP, and the Deputy Administrator has jurisdiction to impose conditions that necessitate further consultation before pesticides may be used in defined portions of the PMP area.

(b) Condition 2.4 is unnecessary for the accommodation of the Cowichan Tribes' asserted aboriginal rights and title. Accordingly, that condition is deleted from the authorization.

(c) Conditions 1.1 and 2.3 are necessary for the further consultation and accommodation of the Cowichan Tribes' asserted aboriginal rights. Accordingly, those conditions are confirmed."

In essence, the Board ruled that the Crown had a duty to consult and accommodate the Cowichan Tribes and that the Deputy Administrator had jurisdiction to impose conditions relating to consultation and accommodation.