Weyerhaeuser

SUSTAINABLE FORESTRY INITIATIVE

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SENT VIA EMAIL: j.nowakowska@fsc.org

Dear Dr. Nowakowska:

Re: Proposed changes to FSC Controlled Wood program

Thank you for the opportunity to comment on the proposed changes to the Forest Stewardship Council's (FSC) Controlled Wood (CW) system as embodied in FSC-PRO-60-002 v 3-0 and FSC-PRO-60-002b v 1-0. Weyerhaeuser is one of the world's largest forest products companies, with over 20 million acres of forests under management, and manufacturing, wood procurement, and other operations throughout the supply chain providing certified forest products worldwide. Weyerhaeuser participates in the FSC CW program, and holds an FSC Chain of Custody (CoC) certificate for wood products sourced throughout the United States, Canada, and Uruguay. Under this CoC certification, Weyerhaeuser provides millions of tons of controlled wood to customers making FSC-labeled products. Although not perfect, we view the current CW system as a reasonable and manageable way to achieve common goals of avoiding wood from sources widely viewed as unacceptable, especially as it operates in the United States and Canada where the risk of such sources is very low.

Weyerhaeuser has serious concerns, however, about the proposed changes to the CW system, which we believe will be unworkable and likely unlawful if implemented. If FSC adopts the proposed changes reflected in FSC-PRO-60-002 v 3-0 and FSC-PRO-60-002b v 1-0, Weyerhaeuser and many other forest products companies may be forced to stop participating in the FSC CW program.

Summary of Weyerhaeuser's Concerns

The proposed changes to the CW framework represent a fundamental shift from a well-tailored program meant to *reasonably minimize the risk* of wood from sources widely viewed as unacceptable to an unreasonable, overreaching, burdensome program requiring landowners and CoC certificate holders to undertake the nearly impossible task of *proving the absence of any risk* and expanding the list of "unacceptable" sources well beyond those restricted by regulation or trade today. In practice, these fundamental changes to the CW framework – particularly the High Conservation Value (HCV) element – could amount to an untenable trap requiring forest landowners to "prove a negative" by demonstrating the absence of harm against a set of subjective and broadly-defined goals. In the end, landowners (or CoC certificate holders) could be required to survey individual timber harvest units in an attempt to

confirm the absence of a long list of plants and animals, similar to the flawed "survey and manage" approach attempted by the United States Forest Service under the 1994 Northwest Forest Plan. Under "survey and manage" the government could never survey enough to please all stakeholders, leading to an endless cycle of surveys, appeals, and litigation. If adopted, we expect the new CW system would be doomed to the same fate, making it completely unworkable for landowners and CoC certificate holders alike.

The new CW system may also violate U.S. antitrust laws. As proposed, the new system takes standards and processes that certain landowners accept voluntarily to obtain FSC certification of their own forests, and imposes them on *all* forest landowners, including those who object to or may not even be aware of the CW standards. The practical effect of such a system will be to create regions that buyers of wood products will collectively boycott, either permanently or until the landowner(s) pay for expensive studies or surveys to prove the absence of certain "undesirable" qualities. And even then, if stakeholders complain or are not satisfied that the landowner has sufficiently proven the absence of these undesirable qualities, the landowner may be required to conduct yet more studies or face the risk of having its land excluded from the CW system and ultimately boycotted. Group boycotts are illegal per se under the U.S. antitrust laws. Landowners that are negatively impacted by such boycotts will likely complain to the federal or state antitrust authorities and those authorities are likely to intervene, particularly where, as here, there is an anticompetitive motivation behind the boycott. In this case, FSC itself has acknowledged that it is "strengthening" the CW system not necessarily because the current system is failing to meet its goal of avoiding wood from unacceptable sources, but instead because FSC desires to increase uptake of its own forest certification scheme.[1]

We believe this significant overreach will lead to one of two consequences for the CW system, neither of which advances FSC's long-term interests of promoting sustainable forest management: 1) the CW system will collapse because landowners will neither participate nor allow CoC certificate holders access to their property, and certificate holders will not, as a practical matter, be able to confirm compliance with the new CW risk criteria; or 2) the world's working forests will be arbitrarily "redlined" into management units deemed to be FSC CW-compliant and those that aren't, resulting in an unlawful group boycott of products from regions or owners deemed (without due process) not to meet the new CW standard. We urge FSC to avoid such an undesirable result by reconsidering its proposed changes to the CW system.

Specifically, we urge that FSC reconsider and address four fundamental problems with the proposed changes to the CW system:

1) **Change in spatial scale for risk assessments:** The spatial scale at which risk assessments are conducted is critical to the viability of the CW system. In the existing system, it is clear that assessments are to be conducted at a broad scale (global, national, or at the finest the eco-region), which is appropriately tailored to the goal of "avoiding" sources widely accepted as controversial in global markets.[2] The proposed changes to the CW system remove this clarity, instead requiring assessment at an ill-defined "functional scale" or "as fine of a scale

[1] See, for example, *FSC Evaluation of the Impacts and Implementation of the Controlled Wood System (Discussion Draft)*, June 2011, p. 13: "Stakeholders involved in the negotiation of Motion 23 of the 2008 General Assembly state that the motion makes this direct linkage, calling for Controlled Wood to be evaluated based on its success in accelerating the uptake of FSC certification." (Emphasis added.)

[2] See FSC-STD-40-005 v2-1 and FSC Advice Note FSC-ADV-40-16 v2-0 EN, sec. 13.2 (referring to CW HCV assessment at "ecoregional level").

as sufficient" to identify certain risks.[3] This scheme is unworkable and likely to lead to unending disputes about the appropriate scale of analysis, particularly with respect to HCVs. For example, a local stakeholder may assert that a county contains a rare plant that should be classified as an HCV. Under the proposed changes to the CW system, the stakeholder could then assert that the appropriate spatial scale of assessment, in order to "sufficiently" identify a "risk" to this HCV, is a stand-level spatial scale.[4] In this scenario, the landowner could potentially be required to prove the absence of risk on an acre-by-acre basis. This is more than might be required even under FSC's *forest certification standard,* and should clearly be beyond the intent of the CW standard.

2) **Definition of HCVs:** The definition of HCVs in the proposed CW system has been significantly expanded to include all six different categories. Most of these are overly broad, redundant with existing forest practices regulations and other laws in the U.S. and Canada, and/or redundant with other risk criteria. The proposed CW standard would also incorporate all of the HCV-related standards in the *FSC Principles and Criteria* or national standards, effectively leaving little difference between the CW program and FSC forest certification. These overly broad and redundant definitions are difficult enough to interpret in the context of a forest management certification, in which a landowner may voluntarily choose not to be certified. In the context of CW, in which the definitions will be imposed on landowners, potentially without their knowledge or participation, there will inevitably be inconsistent interpretations of HCV requirements, both by stakeholders during the development of risk assessments and by auditors during implementation. This, in turn, will lead to disputes, complaints, and inconsistent enforcement of HCV risk criteria.

   To address these defects, FSC should strictly limit and clearly define HCVs for purposes of the CW program, so that the definition is narrowly tailored to achieving commonly supported goals of avoiding wood from truly "unacceptable" sources. At a minimum, the CW system should retain the existing criteria to assess risk to HCVs <u>at an eco-regional or coarser level</u>, which have become reasonably well defined through the existing risk assessments.

3) **Criteria for forest conversion:** The applicable risk criteria for forest conversion appears to have been changed to an outright ban on using wood from *any* conversion of natural or semi-natural forests to other uses, regardless of spatial scale or the reason for conversion.[5] Such a standard would be difficult to enforce and in many cases would not further the core principles of FSC (for example, in cases of wood harvested from areas where there are adequate protections, no significant forest loss, and conversion is due to a legitimate public purpose such as right-of-way expansion for a highway or power line). And of course the failure to use salvaged wood to make wood products will result in the wood being burned on site or sent to landfills, producing carbon emissions that should be avoided by processing

[3] See, for example, FSC-PRO-60-002b v1-0 National Risk Assessment Framework, p. 47 of 66.
[4] It should be noted that this scenario is not made up out of whole cloth. These sorts of complaints have, in fact, been made under the existing CW program, but have largely been addressed by auditors and certificate holders correctly pointing out that the complainant is attempting to apply a finer scale of assessment than the existing CW program requires. This defense would no longer be available under the proposed CW system, leading to protracted disputes about the appropriate scale of assessment.
[5] We take note of FSC's footnote on p. 52 of FSC-PRO-60-002b v1-0 (National Risk Assessment Framework) indicating that the presented approach for forest conversion is still under discussion within FSC.

the wood into long-lived wood products or using it for energy, displacing fossil fuels. In order to further FSC's goals, the treatment of wood from converted forests requires a more nuanced approach that truly seeks to identify and minimize risks in regions where forest lands are systematically being lost to other uses due to poor management or misaligned economic incentives. Painting with the broad brush of an outright ban will not further these goals in many cases, and is not the "least restrictive means" to accomplish them as required by antitrust laws (discussed further below). At a minimum, FSC would be better served to retain the existing indicator of losses to forest land (not suburban land) not exceeding 0.5% per year at the eco-regional level.

4) **Potential violation of U.S. antitrust laws through "greenlining" and group boycott of products:** U.S. fair competition and antitrust laws forbid the practice of singling out or "redlining" (perhaps more aptly called "greenlining" in this context) certain geographies and organizing group boycotts in order to gain a competitive advantage. By singling out and "greenlining" certain regions through its proposed National Risk Assessments, and then effectively organizing a boycott of products from those regions by barring entry to the CW market, FSC may be in violation of these unfair competition and antitrust laws. This is especially true in this context, where FSC and its allies have acknowledged an anticompetitive motive behind "strengthening" the CW system – namely, to force more landowners into the FSC forest certification scheme. A violation of the antitrust laws may also arise to the extent that companies that have embraced FSC determine that participating in a boycott will afford them a distinct competitive advantage over their non-FSC-compliant competitors.

Weyerhaeuser's primary concern lies with the overall paradigm shift represented by the new CW system, through which FSC would attempt to *force* a previously-voluntary certification scheme on landowners through a series of FSC-conducted risk assessments, resulting "greenlines," and ultimately organized boycotts of otherwise perfectly legal and conventional products. We view this proposed system as fundamentally unfair, unworkable, and potentially anti-competitive in violation of antitrust laws. Our core concerns over the anti-competitive nature of the proposed CW system are discussed in greater detail below. We request that FSC specifically address and resolve this issue, in addition to the other concerns summarized above, before adopting any of the proposed changes to the CW system.

Finally, to better address all of these concerns, we further recommend that FSC expand the current CW development process to include adequate representation of all of the landowners that would be materially affected by the standard. At a minimum this should include stronger representation from economic interests in North America. Over half of the existing Risk Assessments worldwide are for CW sourced out of the United States and Canada,[6] and virtually none of the assessments in these countries have ultimately concluded that North American sources are anything other than "low risk."[7] Thus, economic interests in the U.S. and Canada stand to be dramatically impacted by the proposed "strengthening" of the CW system, with little-to-no likely social or environmental benefit. Furthermore, over 90% of the wood production in the U.S. comes from privately owned lands, and 2/3rd of that comes from family-owned forests. Yet these materially affected interests are not adequately represented on

[6] *FSC evaluation of the impacts and implementation of the Controlled Wood System (Discussion Draft)*, June 20, 2011, p. 7.

[7] *Controlled Wood Public Summary Risk Assessments Report*, reviewed by J. Ward (QMI – SAI Global) for Weyerhaeuser NR and Weyerhaeuser Company Ltd., Appendix 3 – Summary Table of Findings in Reviewed Controlled Wood Reports.

the narrow Technical Committee developing these changes, and a mere public comment period is wholly inadequate to provide the inclusive, consensus processes required by established standard-setting processes and U.S. policy, most recently reflected in the U.S. Federal Trade Commission's amendments to its "Green Guides."[8] We strongly urge FSC to redesign its entire process in light of the fundamental nature of these changes to the CW system.

Potential violation of U.S. unfair competition laws.[9]

To be clear, Weyerhaeuser strongly supports forest certification and credible, efficient wood tracing systems. We are committed to managing our forests in accordance with internationally accepted principles of sustainable forest management and using responsible sources for our products. Weyerhaeuser operates in compliance with all laws and takes pride in being a recognized industry leader in sustainable forest management. As an industry leader in safe and sustainable forest management, Weyerhaeuser embraces third-party forest certification schemes and believes such schemes are appropriate and legal when enforced through fair, objective, and consistently applied voluntary consensus standards.

But we must also be clear about what we see as the practical effects of FSC's proposed changes to the CW program, and why those effects, if adopted, would be unacceptable under antitrust laws in the U.S. and presumably other countries. The practical effects of the proposed CW program can be summarized as follows:

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[8] The Federal Trade Commission (FTC) recently reinforced the importance of voluntary, consensus standards in its revision to the Guides for the Use of Environmental Marketing Claims (the Green Guides). Among other things, the FTC added a new subsection at 16 CFR §260.2, Certification and Seals of Approval. Example 2 of that subsection says that, to avoid misleading consumers, marketers must meet standards that have been "developed and maintained by a voluntary consensus standard body." In footnote 2 the FTC defines voluntary, consensus standards as those meeting the requirements of OMB Circular A-119. OMB Circular A-119 defines voluntary, consensus standards as "defined by the following attributes:

(i) Openness.
(ii) Balance of interest.
(iii) Due process.
(iv) An appeals process.
(v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reason why, and the consensus body members are given an opportunity to change their votes after reviewing the comments."

Section 102(5) of the Standards Development Organization Advancement Act of 2004 (Public Law 108-237) provides more in-depth guidance on the terms used in OMB Circular A-119. Openness means "[p]roviding 'all parties known to be affected' by a standard with the opportunity to participate in its development or modification." Balance of interest means standards development activities "are not dominated by any single group of interested persons." Consensus means "[s]ubstantial agreement . . . on all material points," and due process means "[t]he right to express an opinion, to have it considered, and to appeal an adverse decision." The Act provides a limited antitrust "safe harbor" for standards development organizations that register under the Act and follow the defined voluntary, consensus processes. Given the antitrust risks presented by FSC's CW standard, FSC should consider registering under the Act and adopting appropriate consensus processes to achieve the Act's protections for the organization itself and participants in the program, including CoC holders, with exposure under U.S. law.

[9] This discussion is not intended; nor should it be interpreted as, legal advice. We encourage FSC to seek legal advice on its own behalf regarding the antitrust risks posed in the U.S., E.U., and elsewhere by the proposed changes to the CW system.

- First, FSC proposes to ignore the work of hundreds of previous risk assessments (the vast majority of which have found "low risk," especially in North America) and create a new presumption that much of the world is once again "unspecified risk," and therefore potentially off limits to the CW program.

- Next, in order to overcome this presumption of "unspecified risk," forest landowners will be subjected to an FSC-controlled risk assessment under a broad new set of criteria and a new spatial scale with apparently no limits on its fineness. These FSC-controlled risk assessments will also include requirements for input from both local and non-local stakeholders, which experience shows will lead to conflicts over the appropriate spatial scale and interpretation of the broad new standards, and demand for surveys and mitigation to address perceived risks.

- Without such an assessment, forest landowners will be subject to having their products excluded from the CW system – that is, purchasers of forest products participating in the CW program will be required to boycott products from forest lands without an assessment under the new CW system. This is true whether or not the owner/operator of the land in question has voluntarily "opted in" to the FSC system.

- Additionally, if a risk assessment conducted under the expanded new CW criteria does find "specified risks" for the forest lands in question, FSC may impose specific "controls" – that is, required changes to the landowner's management – before products from those lands can be included in the new CW system. Again, this is true whether or not the owner/operator of such land is a voluntary participant.

- The end result of this new CW system is that some forest landowners – whether or not they choose to participate – will be subject to having their products boycotted by all participants in the CW system, either because an "adequate" risk assessment has not been conducted, or because FSC has seen fit to require "controls" that the landowner is unwilling or unable to meet.

We believe the effects of the proposed CW system outlined above are not only unfair, but likely illegal under U.S. antitrust laws. The primary antitrust law in the United States is the Sherman Act[10], which makes certain activities in the restraint of trade illegal. Violations of the Sherman Act can lead to civil or even criminal penalties. Certain activities, because they are so blatantly anti-competitive, are deemed to be "per se" violations the Act. Among these is a concerted refusal to deal, in which one group of market participants agrees to boycott another group's products in order to gain a competitive advantage. A concerted or joint refusal to deal on any terms with the targeted group is a boycott. Of course, individual market participants are free on some level to do business with whom they please, but any organized restrictions must be incidental to a convincing legal or pro-competitive rationale, and must be accomplished through the least restrictive alternative to achieve pro-competitive goals (in other words, restrictions on trade may be no more than is necessary to achieve benefits of standardization). Under U.S. law, these principles also apply to non-profit entities[11] and standard setting bodies.[12] The

[10] 15 U.S.C. §§ 1 – 7.
[11] *See, for example, NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).
[12] *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492 (1988); *American Society of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

fact that a restriction on trade by an economically-interested party may also serve some altruistic purpose is generally not enough to characterize those activities as non-commercial.[13]

We believe the new CW program, if implemented as proposed, would likely be viewed as an illegal group boycott. There are a number of reasons for this. First, the current CW system is not broken. Instead, FSC itself has acknowledged that one of the key reasons for the proposed strengthening of the CW program is competitive in nature – namely, the desire for increased "uptake" of its forest certification scheme.[14] In its current form, the CW program has actually operated quite well with only four formal complaints and eight informal complaints out of the approximately 20,000 CoC certificate holders.[15] But by making compliance with the CW program significantly more burdensome for landowners and CoC certificate holders, FSC seeks to incentivize participants to drop the CW system and take on the additional burden to meet its forest certification standard. While this would yield both financial benefit and increased market share for FSC, it is not a legitimate justification for a group boycott.

Second, the proposed scope of the new CW program is unnecessarily broad and overreaching, and exposes companies embracing FSC to needless liability. While some of the goals of the CW program are undoubtedly legitimate and pro-competitive in nature (such as the avoidance of illegally-harvested wood), the proposed changes to the CW system do not seek to accomplish those goals through the least restrictive alternatives available. Rather, the "greenlining" or boycotts created under the new CW system would be arbitrary, far-reaching, and based on a broad range of factors not sufficiently related to FSC legitimate goals. These boycotts could also result in serious fines being imposed on the companies that impose them at FSC's behest, particularly in those circumstances in which they afford the boycotting companies a market advantage over one or more of their competitors.

Finally, the standards proposed in the new CW program are not legitimate voluntary consensus standards. They are not voluntary because FSC seeks to impose them on *all* forest landowners without due process, and they are not consensus standards because most of these landowners, especially those in the U.S. and Canada, would actually not agree that many of these additional controls (for example, the broad HCV criteria or outright ban on forest conversion) are appropriate or necessary on top of existing regulatory regimes and other forest certification standards.

In essence, FSC is seeking to act as a private regulator by imposing non-consensus standards and organizing a group boycott of those who cannot or will not comply. The U.S. Supreme Court has long expressed serious doubts about the legality of such a practice:

> [T]he combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restrain of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus trenches upon the power of the nation legislature and violates the statute.[16]

In order to cure these potential antitrust violations and ensure the proposed CW system is legal, FSC should make several important changes. First, any standards developed for the CW system should be

[13] *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 427 (1990).
[14] See Fn. 2, supra.
[15] *FSC evaluation of the impacts and implementation of the Controlled Wood System (Discussion Draft)*, June 20, 2011, p. 9.
[16] *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 465 (1941).

voluntary and developed through a consensus process that adequately reflects the interests of those who stand to be harmed by a potential group boycott. Second, any standards developed for the CW system should be narrowly tailored, clear, objective, and uniformly applied. Finally, and most importantly, the scope of the proposed CW system must be significantly scaled back so that any restrictions on market participation are narrowly tailored to accomplish FSC's legitimate pro-competitive goals through the least restrictive means available. In practice, this means FSC should narrowly limit any restriction imposed on participation in the CW program (i.e., a group boycott or concerted refusal to deal under antitrust law) to the most serious incidents of "unacceptable" sources, such as areas known for illegal harvest. This is consistent with both the current CW program and U.S. antitrust law.

Conclusion

Weyerhaeuser is an industry leader in sustainable forest management and a strong supporter of forest certification. We have been a major participant in the FSC CW program, with CoC certification for our supply chain throughout North America. Although Weyerhaeuser supports FSC's core goal of avoiding wood from unacceptable sources, we are deeply concerned about the proposed changes to the CW system. We view these proposed changes as a fundamental shift from a reasonable program meant to avoid the risk of wood from sources widely viewed as unacceptable to an unreasonable, overreaching, burdensome regime requiring landowners to prove the absence of any risk or face an organized group boycott. If implemented as proposed, we believe such a program would not only be practically infeasible, but would violate the antitrust laws of the United States and possibly other countries. We urge FSC to cure these defects by reigning in the scope of the proposed CW program and making it a true voluntary consensus process. Without these changes, we fear the proposed CW system would collapse, as it would be subject to legal challenge and unworkable for current participants like Weyerhaeuser.

Thank you again for the opportunity to comment.

Regards,

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Sustainable Forests and Products