CHALLENGES OF REGULATORY REFORMS

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Outline

1) Regulations: Problems, causes, history
2) Emerging New Approaches and “Principles”
3) The Example of Montana
4) Challenges and Opportunities

Primary sources:

What do we mean by "Regulation"?

• A legal term: “Specific rules to enable implementation and enforcement of a law. Regulations have legal weight”

• Regulations differ from:
  o Laws: Passed by a representative body like a legislature. Sometimes new law’s regulations never developed.
  o Policies: Policies may be announced and treated as if they are a law or regulation – but they have no legal weight

• The process of “Rethinking Regulations” is largely about how to best use the state’s power to achieve publicly beneficial outcomes (e.g. sustainable forestry, jobs, etc.)
Why “Rethink” Regulations?

- Forestry’s record, in many places, is very disappointing, and it is clear that existing regulations are part of cause:
  - Continuing deforestation and degradation
  - Widespread illegal logging and trade of illegal products
  - Fostering corruption, ignoring local land rights, undermining governance and development
  - Unintended effects
    - Forestry is also one of the most socially regressive: e.g. rewarding large, penalizing the small – large/wealthy able to benefit despite, or because of regulations
    - Diminishing respect for law and judicial systems
Why “Rethink” Regulations?

- Forestry is also one of the most regulated; and some would say “over” regulated sectors and still fail in significant areas:
  - Harvest regulations tend to be highly prescriptive
  - Management plans – detailed, difficult to implement
  - Local communities are uninformed about their rights
  - Often forestry is more regulated than other sectors, such as agriculture and mining, making it easier to convert land in places than to manage sustainably for forestry.
Symptoms of Problems & Failures

- Logging bans (e.g. Asia) “simple, ineffectual solutions” to attempt to solve problems like illegal logging
- FLEGT (Forest Law Enforcement, Governance and Trade) Using trade to improve forest governance
- REDD (Reduced Emissions from Deforestation/Degradation) Global effort to stop deforestation
- ITTO (International Tropical Timber Organization) Report: Less than 10% of tropical forests are managed sustainably – after 25 years of effort and hundreds of millions of dollars spent
- Social unrest, protest and violent conflict

⇒ Of course, regulations (or the lack of them) in other sectors negatively affect forests (e.g. agriculture, mining, investment)
Emerging New Approaches

Four Principles for Re-Thinking Regulations

1. Recognize **land rights** and design different systems for each type

2. Carefully **identify priority problems** and then **prioritize** action

3. Create **favorable conditions** for key rights holders and stakeholders to promote best practice and compliance

4. Governments role: do only what no other entity can do, not “over reach” and judiciously use power
1. Recognize tenure and design different regulation systems

Must examine:

- Constitution, land laws, forest laws, customary rights
- Laws and treaties regarding Indigenous Peoples and other special groups
- Other sector laws (mining, transport, environment for overlaps)
- International commitments (e.g. ILO 169 UNDRIP)
2. Prioritize

Focus on:

- most important values/resources
- most important and critical locations and habitats; demonstration effect considered
- most relevant operators – those with potential to cause most damage
3. Creation of Favorable Conditions

- Establish political will through effective stakeholder engagement
- Build systems that reflect and take advantage of stakeholder rights, interests and incentives
- Ensure transparency, so stakeholders can monitor each other’s behavior and encourage progress
- Find the adequate mix between regulations and voluntary guidelines
4. Governments Do What Only Governments Can Do…

1. Catalyze and facilitate process to identify priority problems and new standards
2. Ensure transparent processes -- encourage action by civil society and private sector
3. Ensure respect of property and civil rights,
4. Limit, and judiciously use coercion (regulations)
5. Facilitate processes to compensate for “market failures” (e.g. ecosystem services)
6. Ensure education of all key stakeholders (on standards, costs, benefits)

Don’t have to “DO” all of these things, just need to make sure that they are done.
Emerging Tools

- Certification
- Voluntary “best management practices” (BMPs for timber harvesting and management)
- Independent, non-government monitoring and verification
- Transparency – of forest use, monitoring, impacts including community monitoring of projects
- Education and dissemination of standards, positions, issues, impacts
- Stakeholder interactions: conferences, committees, boards and other interactions to reach consensus
- Corporate codes of conduct – self-policing
- Joint management and partnerships between government and non-governmental organizations
Why it happened - Forestry at a Crossroads (1989)

• **Credible threat of federal enforcement**: Clean Water Act

• **Civil society & “alternative” forest use stakeholders pressure for stronger regulation**: Politicians and industry actors fearful of “California solution”

• **Traditional regulatory response by states**: Intense, detailed, prescriptive & complex
An Alternative, Non-Regulatory Approach On Private Lands:

- **Shared objective:** Assurance of water quality.
- **Best Management Practices (BMP) Law:** Focus on forest harvesting & site management practices.
- **Landowner Education:** Forest Stewardship Program, individual advice on-site.
- **Logger Education:** Accredited Logging Professionals Program & continuing education program for loggers.
- **Monitoring:** Field audits every 2 years, report to state legislature, additional regulation when justified by audits.

**Compliance with BMPs at 97%!**
Voluntary Approach to Regulation (Private Lands)

Elements of success:

- Credible threat of regulation
- Based on shared, local values
- Trust and patience on the part of the regulators
- Avoided trap of “perfection is the enemy of the good”
- Smart regulators
- Legal framework evolved based on need
- Innovative, low cost & effective monitoring program
- Simple & results-based
Some Challenges and Opportunities

Mustering political will to overcome resistance and perceived risks & revise regulations.

- **Within agencies**: to overcome internal resistance/vested interests in current system?
- **Across the government**: to develop constituencies for reform?
- **Across stakeholder groups**: to build understanding and relationships?

Overcoming the persistent myth that environmental regulation equals environmental protection.

Leveraging current global attention to trade agreements (SFM & illegal logging), FLEGT, REDD +, etc. for new approaches and regulatory reforms
Finally...

What is the most important thing your organization should do to improve your regulatory framework?