



POLICY BRIEF #8

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# ADDRESSING THE SHORTFALLS OF THE COMMUNITY RIGHTS LAW: TO AMEND OR ADAPT?

PEOPLE, RULES, AND ORGANIZATIONS SUPPORTING THE PROTECTION OF  
ECOSYSTEM RESOURCES

## POLICY ISSUE

Following passage of the Community Rights Law of 2009 with Respect to Forest Lands (CRL), and the subsequent promulgation of the implementing regulations (“the Regulations”), stakeholders identified numerous inconsistencies between the two legal instruments.<sup>1</sup> In response, the Forestry Development Authority (FDA) effectively halted the expansion of the community forestry program until the law and regulations could be harmonized. With support from the Voluntary Partnership Agreement’s (VPA) Joint Implementation Committee (JIC) a Regulations Harmonization Committee (RHC) and a USAID-supported consultant identified inconsistencies between the two instruments, and made recommendations as to how the Regulations should be altered.

The analysis revealed that some of the provisions within the Regulations directly contradict what is written in the CRL, and are therefore unenforceable. Moreover, some of these regulatory provisions were likely intended to protect communities from being unduly influenced and exploited by those with commercial interests in the forestry sector. In response, some stakeholders have called for the CRL to be amended, so the intended protections can be enshrined.

However, the passage of the CRL was tortuous, and the rights of communities hard won, so reopening the process would likely be difficult and there would be no guarantee that the amended legislation would accomplish this objective. This policy brief explores whether it would be more constructive, and effective, to focus upon implementation within the existing legal framework, rather than seek amendment of the CRL.

## THE COMMUNITY RIGHTS LAW

### *Intent and Purpose*

The CRL establishes that all “forest resources on community forest lands are owned by local communities” (Chapter 2, Section 2.2.a); community forest lands are further defined as, “Forested or

### **BOX 1: SMALL- AND MEDIUM SCALE COMMERCIAL ACTIVITIES ON COMMUNITY FOREST LANDS UNDER THE CRL**

**Section 6.1:** A community may enter Small-Scale Commercial use contracts with other parties to engage in Small-Scale Commercial enterprises for timber and/or non-timber forest products on Community Forest Lands. The said use contract shall not be allocated on a competitive basis.

**Section 6.2:** A community may enter Medium-Scale Commercial use contracts with other parties on Community Forest Land ranging from 5,001 to 49,999.99 hectares on non-competitive basis for harvesting of forest products on Community Forest Lands. MLME Department of Lands, Surveys and Cartography (DLSC) is responsible for surveys and mapping.

<sup>1</sup> Some of these inconsistencies can be found in the “Final Evaluation of the Land Rights and Community Forestry Program (LRCPF),” USAID (October 31, 2011). And the report by the Environmental Law Institute, “An Assessment of the Legal, Regulatory, and Policy Framework Governing Community Forestry in Liberia” (October 17, 2013), which was commissioned by PROSPER.

partially forested land traditionally owned or used by communities for socio-cultural, economic and developmental purposes” (Chapter 1, Section 1.3 of the CRL). Although the CRL recognizes the inherent rights of communities over their forest resources, “the right to control the use, protection, management and development of community forest resources” is subject to “regulations developed by the Authority in consultations with the connected Community Assembly” (Chapter 3, Section 3.1.a). In this sense the CRL represents a delicate balancing between the inherent rights of communities to own and control their forest resources, with the regulatory authority of the FDA.

### **Commercial Activities on Forest Lands**

As the regulatory agency of the forestry sector, the FDA has a degree of discretion to decide upon how the law should be implemented, but only when the law provides for this, or when it is ambiguous. In this regard, it is important to note that under the CRL, the regulatory authority of the FDA extends only to *how* forest resources on community forest lands are managed. The governing framework for this is the Community Forest Management Plan (CFMP), which lays out how the community intends to sustainably manage and use forest resources over a five-year period – the duration of a CFMP. The FDA then confirms that the CFMP accords with the principles established in Chapter 2, Section 2.2 of the CRL. Having met all “technical specifications based on regulations and guidelines,” the community has the “right to full management of forest resources” (Chapter 3, Section 3.1.e of the CRL). At this point, the FDA is limited to monitoring and enforcing the CFMP.

Other than for large-scale commercial activities (Chapter 6, Section 6.3), the CRL does not require any particular procedure to be followed before an Authorized Forest Community signs a commercial agreement with a third party. Nor does the CRL provide the FDA with the authority to determine whom an Authorized Forest Community may contract with.<sup>2</sup> Authorized Forest Communities are able to freely contract with partners, without the need to seek authorization from the FDA, as is clear from the wording of Chapter 6, Sections 6.1 and 6.2 of the CRL (see Box 1). This, however, is not reflected in the Regulations.

### **INAPPLICABILITY OF THE IMPLEMENTING REGULATIONS**

#### **Small-Scale Commercial Activities**

In contrast to the CRL, the Regulations attempt to limit small-scale commercial activities to community members, “either collectively or singly in support of livelihoods” (see Box 2, Section 2). They unconvincingly attempt to introduce a rationale for why such activities are not subject to competitive bidding – because only community members are to take part in commercial activities (see Box 2, Section 1, paragraph 2). The law, however, is clear: “A community may enter Small-Scale Commercial use contracts with other parties to engage in Small-Scale Commercial enterprises for timber and/or non- timber forest products on Community Forest Lands.”

### **BOX 2: SMALL- AND MEDIUM SCALE COMMERCIAL ACTIVITIES ON COMMUNITY FOREST LANDS UNDER THE REGULATIONS**

#### **Section 1: Small-scale commercial activities**

Small scale commercial activities shall cover forest land areas of not more than 5,000 hectares. These shall be commercial activities undertaken by community members either collectively or singly in support of livelihoods. These shall involve timber and non-timber forest products extracted for sale in the domestic Liberian market.

[...]

Because small-scale commercial activities are undertaken by communities themselves, they shall not be subject to the competitive processes required by the Public Procurement and Concessions Act. They shall, however, be governed by Community Forestry Rules established by the Community Forest Management Body with the participation of community members.

#### **Section 2: Medium-scale commercial activities**

Medium-scale commercial activities shall cover forest land areas between 5,000– 49,999 hectares. These activities shall cover both timber and non-timber products. These commercial activities shall seek to market forestry products to either the domestic market or international market, or both.

[...]

When medium-scale commercial activities are to be sourced out to a third-party business agent on behalf of the community, the relevant provisions of the Public Procurement and Concessions Act regulations shall apply.

<sup>2</sup> It is understood and acknowledged that the FDA screens and authorizes logging companies, which may ultimately limit the pool from which Forest Communities may draw a commercial partner. However, the FDA cannot then prevent a Forest Community from contracting with any of these companies who have been pre-approved to engage in commercial forestry operations.

### Medium-Scale Commercial Activities

The Regulations also attempt to introduce additional requirements for medium-scale commercial activities when undertaken by third parties (see Box 1, Section 2, paragraph 3), by requiring application of the Public Procurement and Concessions Act (PPCA). The CRL, however, provides that communities “may enter Medium-Scale Commercial use contracts with other parties...on non-competitive [sic] basis.” Under the law, communities have the option of engaging in competitive bidding, while under the regulations it is required.

### IMPLICATIONS OF THE PROPOSED CHANGES TO THE REGULATORY REGIME

If the Regulations were enforceable, companies would not be able to contract with communities to engage in small-scale commercial activities, and would have to compete against each other in order to gain access to a community’s forest resources on lands covering 5,001–49,999 hectares. This would mean that “small” areas (5,000 hectares or less) of community forest land would be less likely to be deforested and/or degraded, since community members would be undertaking operations themselves.

It would also mean that communities would be assured a better commercial arrangement when contracting with third parties to engage in medium-scale commercial activities, because companies would have to take part in a competitive bidding process, overseen by the Public Procurement and Concessions Commission (PPCC). Importantly, this would remove incentives for logging companies to approach communities directly and, more to the point, for them bribing influential community members, as there would be no guarantee that illicit payments would have the desired effect of securing a commercial contract.

Although it was not possible to access the FDA’s administrative record at the time of writing, it is assumed that the agency became concerned with the implications of communities being able to freely contract with third parties, without FDA oversight. Support for this assumption was provided by various stakeholders – including the FDA – when, during consultations for this brief, they voiced alarm over the proposed regulatory changes. They believed that by removing the moratorium on outsourcing small-scale commercial activities to third parties, and the application of the PPCA to medium-scale commercial activities, communities will be far more susceptible to exploitation by those with commercial interests in the forestry sector. The question is, what is the best way to address these concerns?

### BOX 3: SCOPE OF THE PUBLIC PROCUREMENT AND CONCESSIONS ACT

Some stakeholders question whether the PPCA applies to medium-scale commercial activities independently of the Regulations, but this is unlikely for two reasons.

First, the “scope and application” (Section 1) of the PPCA does not appear to apply to communities who have signed CFMA’s. The closest applicable category listed in the PPCA is “public authority” (Section 1(2)(f)), but none of the Authorized Forest Community governance bodies receive public funds – their revenue comes from the profits and fees earned through the commercial exploitation of their own forest resources.

Second, an arrangement between a forest community and a third party business agent would probably not fall under the definition of a concession, as set out in Section 73(1) of the PPCA. A concession is the “grant of an interest in a public asset by the Government or its agency to a private sector entity,” which reverts back to the government once the term of the agreement is reached. As the CRL makes clear, “All forest resources on community forest lands are owned by local communities” (Chapter 2, Section 2.2.a). It is therefore clear that forest resources under CFMA’s are not public assets.

Furthermore, the CRL does not mention that community forest land reverts back to government control after a certain period of time. In fact the legal consensus is that land that has been granted to concessionaires by the government, which would now be considered to be part of community forest lands under the CRL, reverts to community control. Evidence for this can be found in the draft Land Rights Act (see Chapter 1, Art. 2(13)).

Consequently, the definition of concession under the PPCA does not appear to cover community forest lands.

## **POLICY OPTION #1 – AMEND THE COMMUNITY RIGHTS LAW**

### ***The Benefits of Amendment***

Given that regulations must conform to both the letter and the spirit of the law from which they are developed, the first option to consider is the amendment of the CRL. The FDA, as the regulatory agency, is best positioned to request and/or campaign for the CRL to be amended. It could raise concerns about the limited safeguards that the law provides communities, as well as the insufficient authority it grants to the agency to oversee commercial contracts between communities and companies. It could also point out that the CRL is deficient and/or ambiguous in other respects,<sup>3</sup> and that amendment is in the best interests of all involved.

### ***Considerations and Obstacles***

There are, however, numerous problems with this option. The law was intended to balance the inherent rights of communities with the regulatory authority of the FDA, and part of the balancing was recognizing that once all “management and technical specifications” had been met, communities had the “right to full management of forest resources” (Chapter 3, Section 3.1.e of the CRL). Further limiting how Authorized Forest Communities are able to manage and use their forest resources may risk disrupting this equilibrium. Legislators may object to this, as they likely considered other options during the original drafting. Moreover, communities already question why it is they have to adhere to the statutory and regulatory restrictions placed upon their forest resources; including more restrictions would likely cause further resentment, or worse. Moreover, there is no guarantee that amending the law would lead to improvements – progress can be reversed, as well as advanced.

Another important consideration is that the legislative process is inefficient and cumbersome, and any stated intention by lawmakers to amend the CRL would create a great deal of uncertainty about community forestry, which would last until an amended law had been passed. It should be remembered that the passage of the CRL took approximately three years. The FDA has delayed implementing the community forestry program already; to do so further would exacerbate, maybe dangerously, the frustration felt by all stakeholders.

## **POLICY OPTION #2 – CONTINUE TO WORK WITHIN THE EXISTING LEGAL FRAMEWORK**

### ***Making the Community Rights Law Work***

The second option is to accept the CRL as it currently stands and work within the framework provided. This seems to be the most sensible option, since the RHC is already moving forward with the process of regulatory harmonization. However, it is not yet clear how the FDA will address the effective annulment of the provisions introduced to protect communities from exploitation. One of the recommendations for the harmonization of the Regulations with the CRL provides a way in which the FDA may protect communities, while still remaining within the parameters of the law.

### ***Amending Chapter 9, Section 5 of the Regulations – A Way Forward***

Chapter 9, Section 5 of the Regulations asserts, “Agreement with third-party businesses for medium-scale and large-scale commercial activities on community forest lands shall be made with the advice and consent of the authority.” This requirement appears to go beyond the law in two ways. First, the FDA’s role is to monitor the implementation of the CFMP, and to enforce its terms. By requiring additional authorization for communities to sign commercial agreements with third parties, the Regulations arguably give more authority to the FDA than the law permits. And secondly, Chapter 9, Section 5 of the Regulations is worded too broadly: there is no standard or criteria the FDA has to consider before it makes a decision to “consent” to a commercial agreement between a Forest Community and third party.

However, rather than invalidating Chapter 9, Section 5 of the Regulations, the term “consent” could simply be removed, so that the provision reads: “Agreements with third-party businesses for small-scale, medium-scale and large-scale commercial activities on community forest lands shall be made with the *advice* of the Authority.” This is wholly in keeping with the FDA’s role, which is to regulate the use of forest resources, and to “[p]rovide and assist communities seek [sic] and access technical assistance and support for

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<sup>3</sup> For instance, there is a degree of ambiguity as to how community forest lands are to be classified under Chapter 2, Section 2.3 of the CRL, as well as to how alternative dispute resolution is to apply under Chapter 8.

management of forest resources” (Chapter 5 of the CRL). The FDA does not have the authority to decide whom a community contracts with, or to dictate the terms of any commercial agreement; however, it can require a Forest Community to listen to and acknowledge its advice before a commercial agreement is signed. Under this approach, the FDA would be able to ensure that community members were fully informed of their rights, as well as the potential consequences of any commercial agreement.

### **Recommendations**

This program of advice could include at least four elements, all of which fall within the mandate of the agency independent of Chapter 9, Section 5. However, due to the lack of explicit protection provided by the CRL to communities involved in commercial agreements with third parties, the imperative for such a program is even more urgent.

- **Education**

Communities should be made fully aware of the true economic value of their forest resources before they are permitted to sign a commercial agreement. Although communities use the forest in a variety of ways, they may not fully appreciate the array of services it provides. This includes the provision of clean water; resources for construction and cooking; lands for agriculture and hunting; as well as representing sites of cultural importance. Most importantly, communities should be made to consider how these services, which have real economic value, will be affected by any commercial agreement, and how they will be replaced and/or improved if certain areas are to be logged. The FDA, as the regulatory body of the forest sector, should also assist with the inventorying and appraisal of forest resources on community forest lands. This will provide communities with an authoritative evaluation, which can be used in any later negotiation with companies or organizations. Without an appreciation of the true economic value of the forest, communities are liable to undervalue resources derived from it, accept offers they might not otherwise, and inadvertently impoverish themselves.

- **Options**

The FDA should also ensure that before communities sign a commercial agreement, they are fully aware of the other options available to them. Commercial forestry offers certain benefits, such as a source of revenue, and, if included in the agreement with a company, services and amenities. However, communities should also be informed of the value of conservation and how they may be able to utilize such a program for their benefit. For example, Conservation Agreements and other mechanisms also present opportunities for economic benefits. Without being aware of options other than commercial forestry, communities are not truly able to make an informed decision.

- **Guidelines, Checklists and Model Agreements**

If a community ultimately decides that it wants to sign an agreement with a third party for the commercial exploitation of forest resources, the FDA should ensure that the community is given an opportunity to negotiate the best possible deal.

- **Guidelines** for the signing of such an agreement should be developed, to include an overview of the various stages of the process, requirements for operations plans, all concomitant legal requirements – for example, the need for all parties to comply with the CFMP – as well as recommendations based upon international best practices, such as the inclusion of a social agreement. FDA officials could then use these guidelines to instruct communities; however, the guidelines could also be provided to communities in written form, so that community members are able to trace the process themselves.
- **Checklists** should be generated, so that FDA officials and community members can both verify that the guidelines have been followed. These checklists could cover a range of issues including free, prior and informed consent, environmental impact assessments, and the development of operations plans.
- **Model Agreements** should also be developed by the FDA for communities to use. These should include provisions that clearly establish the roles and responsibilities of the various parties; the price to be paid for the different species of tree to be harvested; a defined payment structure and schedule; a legally enforceable social agreement; and an

acknowledgement of liability by the company for any environmental damage caused during felling and extraction operations. As with the guidelines, FDA officials could then use these model agreements to advise communities. Model agreements could also be provided to communities in written form, so that community members can compare them to companies' proposed contractual terms.

- **Review**

Finally, the FDA should encourage communities to submit to it proposed agreements. Although Forest Communities would already have guidelines, checklists, and model agreements, the FDA could play a valuable role by vetting commercial contracts.

***Final Note – The Importance of Capacity***

The importance of capacity, for both the FDA and communities, cannot be overstated. None of these recommendations will be of any use if the FDA is unable to adequately inform communities, or provide them with legally sound advice. Similarly, if communities cannot understand the material provided, it will be of little beneficial use. Donors must therefore be highly cognizant of the need for capacity building at the agency level, and should, where possible, support the development of guidelines, checklists and model agreements, in collaboration with the FDA. The FDA, meanwhile, must ensure that communities are fully aware of their rights, and of the benefits provided by the forest; after all, the best way of protecting communities from exploitation is to give them the tools to defend themselves.

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**People, Rules, and Organizations Supporting the Protection of Ecosystem Resources**

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