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February 23, 2012

BY EMAIL

To: Regional Executive Directors
District Resource Managers
Timber Sales Managers

From: Jim Snetsinger
Assistant Deputy Minister / Chief Forester
Resource Stewardship Division

Re: FRPA General Bulletin (Number 26) – Government may fund extra expenses or waive obligations under *Forest and Range Practices Act* (FRPA) Section 108 and Forest Planning and Practices Regulation, Section 96



A new *Forest and Range Practices Act* (FRPA) General Bulletin (Number 26), “Government may fund extra expenses or waive obligations under *Forest and Range Practices Act* (FRPA) Section 108, and Forest Planning and Practices Regulation, Section 96” has been completed. This bulletin provides information and advice to delegated decision makers (DDM) and forest professionals for their consideration when submitting or reviewing applications made by an obligation holder under FRPA, Section 108.

The bulletin will be on the Provincial FRPA Implementation Team’s website at the following address:

<http://www.for.gov.bc.ca/hth/frpa-admin/frpa-implementation/bulletins.htm>

If you have any questions about this bulletin, please contact Nigel Fletcher, Resource Practices Branch at (250) 387-8738 or Paul Picard, Forest Tenures Branch at (250) 387-8328.

Jim Snetsinger, RPF

Attachment(s): 1

FRPA General Bulletin (Number 26)

pc: Les Kiss, Vice President, Forestry, Coast Forest Products Association
Archie MacDonald, General Manager, Forestry, Council of Forest Industries,
Dave Peterson, Assistant Deputy Minister, Tenures, Competitiveness and Innovation Division
Doug Stewart, Director, Forest Tenures Branch
Jim Sutherland, Director, Forest Practices and Investment Branch
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FRPA GENERAL BULLETIN

Number 26

February 14, 2012

Government may fund extra expenses or waive an obligation to establish a free growing stand under *Forest and Range Practices Act (FRPA) Section 108* and *Forest Planning and Practices Regulation, Section 96*.

The information contained in this bulletin does not constitute legal advice. Practitioners outside government should seek independent legal advice. This bulletin does not cover related provisions in the Woodlot Licence Planning and Practices Regulation nor does it cover provisions in FRPA, Section 108 (1).

Introduction

The purpose of this bulletin is to provide information and advice to Delegated Decision Makers¹ (DDM) and forest professionals for their consideration when submitting or reviewing applications made by the holder of an obligation to establish a free growing stand (“obligation holder”) under FRPA, Section 108.

Determining If the Free Growing Obligation Had Been Achieved

Before proceeding with a FRPA, Section 108 application, the obligation holder should first consider if the free growing obligation was met prior to the damaging event. Obligation holders who believe they have met the prescribed requirements may submit a declaration under FRPA, Section 107 specifying that the obligations have been fulfilled. Supporting documentation should be included, such as previously completed free growing surveys, surveys of undamaged portions of the stand, or surveys of undamaged blocks with a similar history in the vicinity.

The declaration in RESULTS will be FG. The date of this declaration must be prior to the damaging event. This will assist other programs when querying the data base looking for non-obligated NSR ground.

¹ Through the Minister’s delegation, the DDM is the District Manager.

Eligible Damaging Event

FRPA, Section 108 addresses the funding of extra expense or waiving of an obligation after a damaging event. As per Forest Planning and Practices Regulation (FPPR), Section 96 (1.1), a damaging event under FRPA, Section 108 is defined as:

- a) a wildfire,
- b) an outbreak of *Dothistroma* in a lodge pole pine plantation, if the plantation was established before July 31, 2006, or
- c) a landslide, or a flood, that makes it impossible to establish within 20 years of the commencement date a free growing stand on the area affected by the flood or landslide.

Granting Relief or Funding

If an eligible event, as described under FPPR, Section 96 (1.1), causes damage to a stand prior to the achievement of free growing, the Minister, under authority of FRPA, Section 108 (2), must either grant relief as per FRPA, Section 108(3) or provide funding as per FRPA, Section 108 (4) to an obligation holder. Relief or funding may only be granted if the DDM is satisfied that the obligation to establish a free growing stand cannot be met without **significant extra expense** than would have been the case if the damage had not occurred. This relief or funding will only be granted if:

- i) the person did not cause or contribute to the cause of the damage,
- ii) the person exercised due diligence in relation to the cause of the damage, or
- iii) the person contributed to the cause of the damage but only as a result of an officially induced error.

While the obligation holder can submit a request for either relief or funding, it is the DDM who makes the decision to grant relief or fund the free growing obligation. Consistent with provincial policy to reforest areas harvested, the intent is not to relieve the obligation but to fund the majority of FRPA, Section 108 applications.

Relief of obligation, or funding in respect of an event causing damage, is not available if the event occurred before December 17, 2002 [FRPA, Section 108(6)].

Submission of a FRPA, Section 108 Claim

A person claiming relief from, or funding for, the obligation to establish a free growing stand under FRPA, Section 108 must submit the following as per FPPR, Section 96 (2):

- (a) the nature of the relief sought and why the person is entitled to it;
- (b) if funding is sought under FRPA, Section 108 (4), a proposal for returning the stand to the condition referred to in that subsection; and

- (c) an estimate of the extra expense involved in carrying out the course of action, as described in FRPA, Section 108 (3).

All FRPA, Section 108 applications to be processed either for relief or funding must be submitted through RESULTS. If an opening has both relief of obligation and request for funding then two separate applications must be completed.

Step-by-step instructions on how to complete the Section 108 application online in RESULTS can be found in the following online training guide:

http://www.for.gov.bc.ca/ftp/hfp/external!/publish/fft_standards_on_cms_web/FRPAs108/RESULTSFRPA108APPLICATION_v2.pdf

For additional information on how to fill in an application see

<http://www.for.gov.bc.ca/hfp/publications/00220/resultsSubmission.pdf> and <http://www.for.gov.bc.ca/ftp/HIS/external!/publish/OnLineClassroom/Results/Amalgamations/RESULTS-s108-process-diagram.pdf>

FRPA, Section 108 Determinations

The onus is on the obligation holder applying for FRPA, Section 108 (2) relief or funding to satisfy the DDM that, because of the damaging event, the obligation to establish a free growing stand cannot be met without significant extra expense. It is then up to the DDM to adjudicate the tests as set out in FRPA, Section 108 and determine whether to:

- (a) grant relief,
- (b) provide funding as proposed by the obligation holder [FPPR, Section 96 (2)],
or
- (c) provide and fund an alternative course of action [FPPR, Section 96 (3)].

Funding for Obligations

Funding for obligations under FRPA, Section 108 (4) that may be granted under FRPA, Section 108 (2)(b) by the minister to a person, is only to the extent required for the purpose of restoring the stand of trees on the area affected by the damaging event to the stage:

- (a) the stand had reached at the time of the damage caused by the event, or
- (b) that is consistent with an agreement between the person and the minister.

Funding includes all costs reasonably necessary to restore the stand of trees either to the stage it had reached at the time of damage or the stage that is consistent with an agreement between the person and the minister.

Any treatments carried out using approved funding must be entered into RESULTS using the “FRP” funding source code and activity codes as per the submission. It is acknowledged that some changes in treatments may occur over time due to changing conditions.

Significant Extra Expense and Necessary Costs for Restoring the Stand

The DDM should consider the following questions when determining if funding is to be provided:

1. Is the extra expense required as a result of the damaging event significant?
2. Is the extra expense necessary to restore the stand to fulfil the obligation?;
and
3. Are the proposed costs reasonable?

Expense eligibility is described below.

Significant Extra Expense

Prescribed obligations are only eligible for funding under FRPA, Section 108(4) where they meet the significant extra expense test:

Because of the damaging event, the obligation on the area cannot be met without significant extra expense.

“Significant” is not defined in the legislation and therefore is determined by the DDM on a case-by-case basis for each impacted obligation.

Only extra expenses that are necessary for restoring the stand of trees on the area affected by the damaging event are eligible expenses. The following guidelines are recommended for determining the eligibility of expenses.

Eligible Expenses

- Those costs incurred while preparing an application, where a convincing case can be made that they were necessary for restoring the stand. This could include the costs incurred in determining what obligations were impacted by the damaging event.
- If a new treatment prescription must be developed, then the cost of the preparing the prescription, even though incurred before submitting the FRPA, Section 108 application.
- Costs that are incurred prior to approval of the FRPA, Section 108 application and which are necessary for restoring the stand of trees on the area affected by the event.

Ineligible expenses

- Costs needed to meet FSP requirements but not required to restore the stand of trees on the area affected by the event (e.g., treatment of invasive plants which were introduced in association with wildfire).
- Direct costs of preparing and submitting a FRPA, Section 108 application (i.e., any extra costs that would be incurred as a result of applying for and receiving funding through FRPA, Section 108 compared to carrying out the obligation without the assistance of the FRPA, Section 108 are generally not eligible).
- Any expenditures associated with planned activities that were not executed prior to the damaging event (e.g., if the damaged stand would likely have required brushing even if the event had not occurred, then brushing is not an extra expense).
- Applications for relief of the obligation because it is not related to restoring a stand of trees.

The DDM may require the following from the obligation holder to be satisfied that the activities and associated costs required to restore the stand to its original condition before the damaging event are reasonable:

- a rationale to support the cost estimates;
- average annual cost data for equivalent sites; and
- Consideration of costs that obligation holders have historically expended to meet their silviculture obligation on similar sites (i.e., costs of what is usually required and is successful).

Reliance on Natural Regeneration

On areas being managed for natural regeneration, a wildfire may alter site conditions such that reforestation through natural regeneration is no longer viable or is no longer a fully viable option, and the obligation holder is consequently faced with a significant extra expense (i.e., planting).

If a stand of trees had been established naturally, the application would be evaluated similarly to if the stand had been established through artificial regeneration.

If the stand had not germinated at the time of the damaging event or there is no convincing evidence to verify that a stand of trees did exist, the DDM must still make a determination whether to provide relief or funding. When making this determination, the DDM must be satisfied that natural regeneration was viable prior to the damaging event and now is either no longer partially or fully viable. Therefore, the onus is on the obligation holder to satisfy the DDM that if the fire had not occurred, natural regeneration would have been successful, but after the fire it is highly improbable that natural regeneration remains a viable option.

It is strongly recommended that the obligation holder submit appropriate documentation prepared by a forest professional that describes the rationale for the initial natural regeneration prescription and how the damaging event impacted the potential for natural regeneration as a viable option.

The DDM should then consider:

- If natural regeneration was a viable regeneration method for the site prior to the damaging event. Whether all components of the natural regeneration triangle had been, or would have been, met (*seed, disturbance, and environment*) prior to the damaging event.
- If natural regeneration has proven reliable on the unburned sections of the impacted cut block or similar sites in the surrounding area, and natural regeneration is either no longer viable or is no longer fully viable.
- If there will now be a significant extra expense to achieve free growing that would not otherwise have occurred, as well as whether the amount of the proposed significant extra expense is acceptable.

When an area is reforested by natural regeneration, often a portion of a block, or blocks, will require fill planting. If fill planting is a normal cost to achieve free growing, then the cost of fill planting is not a significant extra expense caused by the damaging event and should be deducted from the planting costs eligible for FRPA, Section 108 funding. For example, if the obligation holder can satisfy the DDM that had the damaging event not occurred, natural regeneration would have been successful on 80 percent of the area, then FRPA, Section 108 can be used to fund reforestation on 80 percent of the area. However, the cost of reforestation on the remaining 20 percent of the area would remain the responsibility of the obligation holder.

If the DDM is satisfied that funding should be provided and the amount proposed is acceptable, then, if there is uncertainty with respect to the previous stand condition to be restored due to the reliance on natural regeneration, an agreement between the DDM and the obligation holder could be entered into regarding the stage for which funding will be provided [FRPA, Section 108 (4)(b)] e.g., regeneration establishment.

Phase Payments for Extraordinary Circumstances that Create Uncertainty in Regards to Stand Establishment

Rare cases may exist in which the impacts of the damaging event on some areas have made the reliability and/or cost to re-establish a stand highly uncertain (e.g., fire severity creating extreme conditions that may adversely impact seedling establishment). In these limited cases, if the DDM decides to fund the stand's re-establishment, a multiple phase approach consistent with an agreement as per FRPA, Section 108 (4)(b) may be appropriate.

The agreement should:

- describe each phase and its cost.
- set a maximum payment for the entire FRPA, Section 108 claim.
- acknowledge that the DDM has the final decision in how many phases to fund.
- recognize that if payments are stopped, the obligation continues unless the person is otherwise relieved from the obligation under legislation.
- state that the DDM inherently recognizes that these sites have been significantly impacted by the damaging event and that after each phase the DDM will consider whether there are potential alternative options other than continued funding including reduced stocking standards and relief from obligation under FPPR, Section 97.1.

The intent of this approach is that funds are provided at the start of each phase but before commencing a subsequent phase, the DDM will reassess the situation and make a decision whether funding the next phase is a sound investment.

If no further funding is provided, the obligation holder may choose to submit a reduced stocking standard or submit a declaration under FPPR, Section 97.1.

Alternative Course of Action [FPPR, Section 96(3)]

If the DDM does not support the rehabilitation plan submitted to bring the stand back to the state at the time of the damaging event, then the DDM can provide and fund an alternate plan [FPPR, Section 96 (3)(c)]. Regardless of the outcome of the alternate plan, the obligation holder's free growing obligation continues, and if free growing is not met following this plan then the Obligation Holder may apply to the DDM under FPPR, Section 46.2 (requirements if free growing stand cannot be established).

Achievement of Free Growing Status in FRPA, Section 108 Funded Areas

After a damaging event destroys a stand of trees, the obligation holder must maintain the initial disturbance start date for the opening as it still applies to the opening's original obligation. The obligation holder must submit a new disturbance event to reflect the new catastrophic disturbance. The disturbance area should reflect the net area under the Section 108 application seeking relief of obligation or funding request. The date of this new disturbance event will not change the regeneration and free growing milestone dates.

If there is insufficient time for the newly established plantation to achieve free growing status prior to the 20 year free growing date, the obligation holder nevertheless continues to hold the obligation to bring the stand to a free growing state but has the option to request an extension to the free growing date. See 'Extending the Late Free Growing Date Beyond 20 Years' (FRPA General Bulletin #24).

Wildlife Tree Patches in FRPA, Section 108 Funded Areas

For the purposes of this bulletin, wildlife tree patch (WTP) refers to wildlife trees in patches located in cut blocks whether established under the Code or under FRPA as wildlife tree retention areas.

Management of wildlife tree patches (WTP) is not eligible for FRPA, Section 108 funding. Where WTPs have been killed but are still visible, these areas should be avoided when carrying out reforestation activities. However, where the WTP has been completely obliterated and there is no visible "cue" to avoid planting these areas, two suggested approaches are:

- Since "unidentifiable" wildlife tree patches do not need to remain in the same location as before the damaging event, an equal area of patches can be set aside as wildlife tree patches where identified by the obligation holder. These areas will not be planted and will not be included in the NAR. This process will require an amendment to the site plan and RESULTS.
- Or, the entire area can be planted, including WTPs that have no visible cues. The cost associated with planting WTPs is funded through another government program such as Forests for Tomorrow. This approach must be coordinated with Forests for Tomorrow (FFT) staff.

The approach taken should be discussed with the Ministry of Environment representative to determine the optimum yet cost-effective way to restore stand-level biodiversity.

Areas Damaged by Fire Management Activities

Damage caused by fire management activities is part of a wildfire event as per FPPR, Section 96 and is eligible for FRPA, Section 108 relief or funding. This includes both mechanical damage (fire guards, etc.) and backfires.

Under Wildfire Regulation, Section 17, the government may carry out rehabilitation for stabilizing and re-vegetating sites to prevent erosion, by re-establishing natural drainage and conducting grass seeding. The obligation holder should coordinate with the Fire Rehabilitation Coordinator carrying out rehabilitation activities to ensure that there is no interference with reforestation activities.

Relief of obligation on areas where it is impracticable² to reforest (FPPR, Section 97.1) may be considered.

Seed Supply for FRPA, Section 108 Funded Areas

The obligation holder remains responsible to manage the seed supply for areas where the obligation holder is required to establish a free growing stand.

Obligation Relief

Where the DDM decides to provide relief, FRPA, Section 108 (2)(a) provides the following options regarding the person's obligation:

- (a) to the extent only that the obligation cannot be met without significant extra expense related to the damage, or
- (b) in full if the minister considers that the remaining obligation is inconsequential.

The person making the request for relief of the free growing obligation should provide to the district manager a declaration document that:

- (a) identifies the area,
- (b) includes a statement of the extent to which the obligation had been met prior to the disturbance,
- (c) is signed by the person or on that person's behalf by an individual or individuals authorized in that regard, and
- (d) specifies the date on which the declaration is made.

There may be areas where it is practicable to establish a free growing stand, but the costs and associated risks are so prohibitively high that the DDM chooses to provide relief of obligation under FRPA, Section 108.

² "Practicable" is defined in FRPA General Bulletin Number 3

Rejection of an Application

The DDM should state the reason(s) for rejecting an application, after which the obligation holder should decide on the next steps.

Once a decision has been made, the DDM may not reconsider the same application. However, a new s.108 application can be submitted should conditions change or new information come available to support a claim. For example, an application might be rejected because the DDM was not satisfied that natural regeneration was no longer viable. If the obligation holder reassesses the area a few years later and new information shows that natural regeneration is not occurring, then the obligation holder may decide to submit a new application.

If the obligation holder submits a request for relief of obligation and the DDM makes a funding determination, the FRPA, Section 108 application for relief of obligation in RESULTS will need to be rejected by the DDM to enable the applicant to submit for funding.

Timing

If the DDM is satisfied that relief of obligation or funding is required, the DDM must, within one year of receiving information outlined below as per FPPR, Section 96 (3),

- a) grant the relief,
- b) determine whether or not to provide the funds necessary for the proposal under FRPA, Section 108 (2)(b), or
- c) provide and fund an alternate course of action to that proposed under FRPA, Section 108 (2)(b), if the minister determines that:
 - (i) the obligation to establish a free growing stand should continue, and
 - (ii) either
 - (A) the person has not provided a proposed course of action under FRPA, Section 108 (2)(b), or
 - (B) the proposed course of action under FRPA, Section 108 (2)(b) is unacceptable.

Dispute Resolution Process

The provisions governing reviews are set out in FRPA, Section 80 and in the Administrative Review and Appeal Procedure Regulation.

Contacts

Readers with any questions about this bulletin are asked to please contact:

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