



FRPA GENERAL BULLETIN

Number 12

March 30, 2007

Use of the Term “Practicable” in Results or Strategies

The information contained in this bulletin does not constitute legal advice. Practitioners within government should seek legal advice from the Ministry of Attorney General, while practitioners outside government should seek independent legal advice.

Background:

This bulletin discusses the general principles for using the term “practicable” in a result or strategy and the implications for the approval tests.

All results or strategies, regardless of the use of the term “practicable”, must meet the two FRPA approval tests – meeting the definition test in Section 1 of the FPPR, and the consistency test in Section 25.1 of the FPPR, if the result or strategy meets the approval tests, it must be approved.

All results or strategies must be practicable. FRPA does not compel licensees or BC Timber Sales Managers to undertake forest practices that are impracticable. The use of the term “practicable” in a result or strategy does not necessarily mean that the result or strategy is approvable or not: it depends on the manner in which the term is used and the context.

The term “practicable” is used in eight practice requirements in the FPPR – Sections 36(1), 36(2), 39(2), 50(1), 50(3), 51(1)(a), 64(2)(b) and 79.1(5)(b).

General Principles:

The discussion and illustrations listed below outline five general principles for proposing and conducting the approval test on a result or strategy containing the term “practicable”.

1. Results or Strategies may Contain the Term “Practicable”

The inclusion of the term “practicable” in a result or strategy does not, by itself, make the result or strategy approvable or not.

2. Use of the Term “Practicable” must Satisfy FPPR, Section 1

Inclusion of the term “practicable” within practice requirements demonstrates that the term itself can be enforceable, and therefore, if used in the same way in a result or strategy, is likely measurable or verifiable as per the applicable definition in FPPR, Section 1.

However, to be measurable/verifiable, the term “practicable” must be used objectively – it cannot be based on a subjective assessment by a particular person.

Example 1:

The Holder of this FSP will not carry out primary forest activities in the (*watershed*) if the area that is greened-up within the watershed is less than 80 percent of the watershed, unless in the opinion of the Holder, or its qualified professional, there is no other practicable option.

This result or strategy is not likely approvable because it uses the term “practicable” subjectively. It could be made objective simply by removing the words “in the opinion of the Holder or its qualified professional”. That would eliminate the measurable/verifiable problem. Whether this result or strategy meets the consistency test will depend on whether or not the DDM is satisfied that, should there be “no other practicable option” and primary forest activities are carried out in the watershed despite the greened-up area being less than 80 percent of the watershed, the result or strategy will nevertheless be consistent to the extent practicable with government objectives.

3. Results or Strategies may use the Term “Practicable” to Satisfy FPPR, Section 25.1

In conforming to FRPA, Section 5 (1.1) to the prescribed extent FPPR, Section 25.1 requires that results or strategies be “consistent with established objectives to the extent practicable”. Inclusion of the term “practicable” in a result or strategy may be functional for two reasons:

a) To permit overall consistency with other established objectives.

Proposed results or strategies are tested simultaneously against all applicable objectives. In some cases, there may be tension between objectives. Qualifying results or strategies using the term “practicable” can be one way of addressing this while retaining overall consistency.

b) To address issues of practicability.

All results or strategies must be practicable. Not addressing issues of practicability in the result or strategy could mean that, in some circumstances, either impracticable results or strategies would have to be implemented in order to comply with Section 21 of FRPA, or amendments would have to be submitted each time impracticable situations are encountered. Using the term “practicable” within the result or strategy itself can address these problems while also avoiding unnecessarily extensive, cumbersome and complex results or strategies if each potential practicable circumstance and extent of variance needed to be presented. A balance can be struck between the overly complex result or strategy that tries to anticipate every possible situation or circumstance and the overly simplistic result or strategy that avoids describing the situations or circumstances that determine where in the FDU the result or strategy will be applied, or what will be achieved or carried out. To the extent that the term “practicable” can facilitate this, it can be used.

4. Appropriately Addressing Uncertainty in Applying FPPR, Section 25.1

Use of the term “practicable” in a result or strategy may introduce some uncertainty to its consistency with the objective for which it is written. This does not automatically mean it cannot be approved, as absolute certainty in all aspects of a result or strategy is rarely achievable and is not the case even for the FPPR defaults. Ultimately, the DDM must decide whether, despite some uncertainty, the result or strategy is within the bounds of the approval test (see comments under item #2 and 3) or not. One of the key issues when using the term “practicable” in a result or strategy will be whether the DDM can reasonably apply the test given uncertainties that may exist. This potential uncertainty can be addressed by one or more of the following approaches:

a) Using “practicable to vary a base result or strategy, not create an exemption.

Example 2:

The Holder of this FSP will retain 80 percent of the pre-harvest basal area, unless it is not practicable to do so.

Retaining 80 percent may be not practicable, but after that is determined, there is nothing else for the Holder to do, even though there may be many other practicable options. On this basis, it would not likely be approvable.

Where it is impracticable to propose a result or strategy at all, the Holder should seek an exemption from having to specify a result or strategy under Section 12(7) of FPPR.

b) Limit the circumstances where “practicable” considerations apply.

This should permit a more certain assessment of the result or strategy as it is likely application and extent of variance can be more easily evaluated. However, like the usage of “practicable” in practice requirements, precise conditions may not be necessary.

Example 3:

The Holder of this FSP will not carry out primary forest activities in the watershed if the area that is greened-up within the watershed is less than 80 percent of the watershed, unless there is no other practicable option in the following circumstances:

- a) timber has been damaged due to fire, insects, disease or other similar events; or
- b) the Holder of this FSP will be unable to exercise its timber harvesting rights unless it can construct a road in the watershed.

This result or strategy is likely approvable if the listed circumstances are consistent to the extent practicable with established objectives. To determine this, it would normally be necessary to assess considerations such as:

- the probability and likely extent of damaging events described in a);
- the potential impact in relation to the watershed objective of permitting vs. prohibiting additional harvest if these events occurred; and
- the need for a road through the watershed to enable the Holder to exercise its harvesting rights consistent with the timber objective.

If approved, and the Holder went farther below the 80 percent than was necessary to build the road or salvage damaged timber, they would be in contravention of FRPA, Section 21(1) [*must ensure results achieved/strategies carried out*] subject to one of the defenses.

c) Limit the extent of variance from the base result or strategy when applying “practicable” considerations (i.e. provide an alternate result/strategy in these cases).

This approach essentially replaces the base result or strategy with an explicit alternate when practicable conditions apply. In this approach, it may not be necessary to limit the types of practicable circumstances that permit variance.

Example 4:

- a) The Holder will not carry out any primary forest activities in the watershed unless the area that is greened-up within the watershed exceeds 80 percent.
- b) Despite a), if it is not practicable for the Holder to exercise its harvesting and road construction rights while maintaining 80 percent green-up in the watershed, the Holder may carry out primary forest activities in the watershed if the area that is greened-up exceeds 75 percent of the watershed.

This result of strategy is likely approvable if reasonable and informed people agree that 80 percent greened-up is consistent with the objective and that 75 percent greened-up is acceptable when practicable considerations apply.

d) Consider whether other applicable results, strategies or practice requirements adequately address the uncertainty.

If perceived uncertainty in a particular result or strategy is adequately bounded by other applicable requirements, the need for more certainty in the particular result or strategy may be adequately addressed.

e) Apply principles of risk management.

Risk management principles can greatly assist in evaluating the reasonable likelihood and impact (positive, negative or neutral) of applying the exceptions permitted by the term “practicable” especially if used in conjunction with approaches outlined above. Even though use of the term “practicable” in a result or strategy may permit a range of outcomes or approaches, the test should normally be evaluated against those that have a reasonable likelihood of occurring. (e.g. See commentary under Example 3.)

Other Examples:

- Constructs following FPPR, Section.50. In this construct, the result or strategy specifies that the Holder will *not* do some specified action, unless *there is no other* practicable option. That Section 50 construct narrows down the application of the term “practicable” itself to road construction in riparian management areas and prohibits the action if there is any other practicable option, so the full range of what is practicable must be considered before the Holder can take the action. In this section, the legislature has determined that this result is acceptable. When applied to result or strategies, the DDM will need to be satisfied that this construct meets the approval tests.
- Constructs using “to the extent practicable”, as the Holder is obliged to carry out the commitment to that extent. Provided that the basic commitment is consistent with objectives, this phrase can be acceptable. Depending on the objective and the context of the result or strategy, this usage may need conditions or limits on its potential application.
- Constructs using “to the extent it is not practicable”, as the Holder is limited in both the application and extent of variance from the basic commitment. The variance or exception can only be invoked where it is not practicable to comply with the basic commitment and only to the extent it is not practicable. Depending on the objective and the context of the result or strategy, this usage may need conditions or limits on its potential application.

CONTACTS:

Questions regarding the information contained in this bulletin can be directed to:

Charlie Western (250) 387-8306 Charlie.Western@gov.bc.ca

Mike Pankhurst (250) 356-7596 Mike.Pankhurst@gov.bc.ca