



FRPA ADMINISTRATION BULLETIN

Number 3

November 7, 2005

INTERPRETIVE GUIDANCE RESPECTING FOREST STEWARDSHIP PLAN QUESTIONS

Introduction:

The *Forest and Range Practices Act* (FRPA) and the *Forest Planning and Practices Regulation* (FPPR) address Forest Stewardship Plan (FSP) content, review and comment and approval.

As can be expected with any new legislative scheme, questions have arisen related to these matters.

This Interpretive Guidance identifies some of these questions and provides guidance on the interpretation of relevant legislative provisions.

This Guidance relies on the fundamental principle that an FSP be prepared and assessed on the basis of legislated content and approval tests. If these tests are met, the FSP must be approved.

1. Content required or permitted under the legislation: subject to some legislated exceptions, FRPA and the FPPR require that FSP's contain:

- **Licences** to which the FSP applies (except in the case of BCTS),
- **Term** of the FSP,
- **Results or Strategies** for the objectives that apply to the FSP,
- **Stocking Standards** for areas subject to the FSP where the holder must establish a free growing stand,
- **Measures** related to invasive plants and natural range barriers,
- **A Map** showing the boundaries of the forest development units (FDU) under the FSP,
- **Land designations and rights**, such as ungulate winter ranges, wildlife habitat areas, scenic areas, cutting permits, road permits, declared areas and similar matters,
- **Transition** elections related to existing blocks, roads, permits and obligations,
- **Signature** of the holder (s) of the plan, and
- **Other Matters** specified in the legislation (none currently, but FRPA or the FPPR can be amended to revise the list of required content).

Some content, although not expressly listed, forms part of the foregoing list and can be included, such as appendices to the FSP.

2. Approval Tests: Among the key tests for approving FSP content are:

- **Results and Strategies:** must meet the requirements of the definitions of the terms and be consistent with the objectives to which the results or strategies relate to the extent practicable;
- **Stocking Standards:** the FSP must specify
 - applicable regeneration dates and stocking standards that
 - will result in the area being stocked with species and to a density that is consistent with maintaining or enhancing the supply of commercial timber and with the applicable timber supply analysis and forest management assumptions, or
 - stocking standards that are reasonable having regard to the future timber supply for the area, and
 - applicable free growing heights that are sufficient to demonstrate that the crop trees are growing well and likely to continue to do so;
- **Measures:** the FSP must specify measures to:
 - prevent introduction or spread of invasive plants, if likely to be caused by the holder of the FSP; and
 - mitigate removing or rendering ineffective natural range barriers

The foregoing is simply a general paraphrasing of the approval tests contained in the legislation and plan preparers and reviewers should refer to the legislation for a complete and accurate description of these tests.

This Interpretive Guidance applies these content requirements and approval tests in answering the questions posed.

QUESTION 1: Can a FSP incorporate interpretive provisions?

Yes, provided that the interpretive provision does not directly or indirectly change or limit the meaning of a provision contained in the Act or regulations.

Interpretive provisions can increase certainty and clarity within the plan.

Examples:

1. acronyms for terms used in the plan (including terms such as “FDU” means forest development unit’);
2. adopting a definition used in the legislation (e.g. “Act” means the *Forest and Range Practices Act*’);

3. including a definition of a term that is used in the plan which appears in the legislation or an objective, provided that the FSP defines it for the purposes of the contents of the FSP and does not define it for purposes of the legislation or an objective (i.e. the FSP should not state: “For the purposes of Section [x] of the FRPA, “[term]” means...”, but it is acceptable for the FSP to specify: “For the purposes of the following result or strategy, “[term]” means...”);
4. including definitions in the results or strategies for terms that are used or defined in the practice requirement from which the holder is now exempt (e.g. if a result or strategy is being included for the soils objective, the holder will be exempt from Section 35 FPPR and the definition of “sensitive soils” used there, so can propose an alternative definition, which will be subject to the approval tests).

Definitions in an FSP are subject to any applicable approval test and may not be accepted if they do not meet the approval tests. For example, if a definition applies to a result or strategy, the minister must assess whether or not the proposed result or strategy, given the application of the particular definition, is consistent with the relevant objective.

Using example 3 above, the minister must evaluate whether or not a term defined in the FSP for the purpose of a result or strategy is consistent with the same term that is used but not defined in the objective to which the result or strategy relates.

Example:

- The relevant objective includes but does not define the phrase “sufficient habitat”;
- The FSP may specify “In the following result or strategy ‘sufficient habitat’ means 100 hectares of mature CWH”;
- The minister must determine if 100 hectares of CWH, in the context of the whole of the result or strategy, is consistent with the objective, including the natural meaning of the phrase “sufficient habitat”.

Approval of an FSP is an administrative, not a legislative, function. This means that the approval of an FSP **cannot** have the effect of directly or indirectly changing or limiting the FRPA or the FPPR.

Examples:

- An example of a direct change or limitation is to include *a definition* that limits the scope of a legislative provision:
(e.g. “For the purposes of Section 48 of the Act, ‘natural range barrier’ means...”)

QUESTION 2: Can a provision in a FSP provide for an alteration of a commitment based on a contemplated future event?

Yes, provided that

- ***the description of the future event is consistent with the legislative framework, and***
- ***the alteration of the commitment meets the applicable approval criteria.***

The use of specifying circumstances that will result in different commitments in the FSP being triggered is a very useful way of reducing the number of potential amendments.

Examples:

- Future events that may trigger an alternative commitment and which are consistent with the legislative framework include:
 - **Action of government:** government taking a particular type of action that applies to the area (e.g. the objective to which the results or strategies relate is rescinded by government);
 - **Environmental event:** an environmental event occurring that applies to the area (e.g. if more than 40 percent of the mature timber in the riparian reserve zone being blown down, then....);
 - **Plan holder specified impacts of result or strategy:** the implementation of the initial results or strategies has (or will have) a stated consequence (e.g. it is objectively determined that, if the initial results or strategies continue to be implemented, the effect will be to reduce the supply of timber in the area by an amount that exceeds the specified threshold).

The description of the future event must be clear and objective in other words not stated to rely on a person's opinion but rather stated as factual events. For example, describing the event as the holder's professional forester simply "determining that it would be appropriate", is not acceptable.

The new commitment (i.e. result, strategy, measure or stocking standard) that is to apply due to the occurrence of the future event must be able to meet the approval criteria that are applicable to that commitment.

QUESTION 3: Can a FSP limit liability between co-holders of the plan for matters not specifically addressed in Section 106.3 of the FPPR?

Yes, but the FSP cannot be used to try and modify the liability framework established under the FRPA and the FPPR.

A co-holder of a FSP ***is not liable*** for the acts or omissions of another co-holder of the plan associated with

- ***establishing a free growing stand*** – Section 29 of the FRPA requires that the free growing stand be established by
 - the holder of the major licence who harvested the timber, or
 - the timber sales manager if the timber was harvested under a timber sale licence,
- ***carrying out a measure*** – Sections 47 and 48 of the FRPA require the measures to be implemented by the person who carried out the particular forest practice, or

- *achieving a result or carrying out a strategy if the result or strategy applies to an area that is subject to*
 - *a cutting permit or road permit held by another co-holder, or*
 - *a timber sales or road permit issued by a timber sales manager (Section 106.3 FPPR).*

A co-holder of a FSP **is potentially liable** under Section 21 of the FRPA for the acts or omissions of another co-holder that relate to results and strategies that apply to areas outside of the areas addressed in Section 106.3. It would take a legislative amendment to completely remove this potential liability. However, in the meantime, government does not expect to pursue one co-holder when the FSP is clear that another co-holder is responsible for the result or strategy.

If the FSP tasks specific co-holders with specific results or strategies, it will be clear which co-holder failed to perform and should be held accountable. To limit the potential for a co-holder to be held liable for acts and omissions of another co-holder in these situations for example, a FSP can

- set out which of the respective holders is responsible for carrying out a particular strategy or achieving a particular result, or
- set out which elements of a particular strategy are to be carried out by particular holders.

This can be set out in a single provision that addresses all applicable results or strategies or can be addressed in one or more individual results or strategies.

If the FSP tasks specific co-holders with specific results or strategies, it will be clear which co-holder failed to perform and should be held accountable. As a result, these types of provisions should avoid a co-holder being held liable under Section 21 of the FRPA for the acts or omissions of another co-holder for areas not addressed in Section 106.3.

QUESTION 4: Can a FDU include designated areas?

Yes, subject to any contrary written order under Section 170(2)(b) of the Forest Act.

If these statutory designations are removed during the term of the plan, the areas formerly subject to the designation will be subject to potential harvesting and road building.

The inclusion of a designated area within an FDU, on its own, does not give the holder of the FSP any right to harvest timber or to construct a road.

Section 170(2)(b) of the *Forest Act* gives the minister authority to order that a plan that relates to a designated order not be approved, or approved with conditions.

QUESTION 5: Can a FSP specify circumstances that limit the application of a result or strategy?

Yes, provided that the result or strategy, with the limitation, meets the approval tests.

There are two key elements in the approval tests for results and strategies that enable the use of limitations:

- **Consistent, Not Achieve:** The Act requires that intended results or strategies specified in a FSP be *consistent* with the objective to which they relate *to the extent practicable* (taking into account the circumstances or conditions applicable to that FDU). Both the “consistent” and “to the extent practicable” aspects of this test enable the plan to provide for different results or strategies in different circumstances. This could include a reduced result in defined circumstances. The plan must clearly specify what standard will apply in any particular circumstance.
- **No Universal Application:** The legislation requires the plan to specify where a result or strategy will be implemented; it does not require that a particular result or strategy must be implemented in all circumstances. Therefore, it is open to the plan preparer to identify those circumstances where a result or strategy will be (and by inference, where it will not be) implemented.

Examples:

- An example of creating flexibility through alternative circumstances (the example illustrates drafting technique, not necessarily a suggestion for an actual result or strategy) is:
 1. *Subject to 2, the result or strategy is to not remove timber from within a wildlife tree retention area.*
 2. *Timber may be removed from within a wildlife tree retention area if the timber blows down becomes infected with root rot or is infested with mountain pine beetle.*
- An example of creating flexibility through including the concept of practicability is:
 1. *To conserve soil within cut blocks, the holder will ensure that roads constructed by the holder are of the minimum width practicable, having regard for the intended use of the road and the safety of those using them.*

Once specified in the plan, Section 21 of the FRPA requires that results be “achieved” and strategies “carried out”.

Thus, the drafting of the limitation must be done in a manner that it is not construed as an attempt to disapply FRPA Section 21. To avoid any possible concern that a qualification or limitation on a result or strategy is seeking to do so, that qualification should avoid using the terms “not achieve” or “not carry out”, as those words come from Section 21 and their use may be construed as an attempt to avoid its application. For example, it is unacceptable to say “the holder is not required to achieve the specified results or carry out the strategies if....”

However, it is acceptable for the FSP to specify where a result or strategy does not apply, by using the words “does not apply”, because the concept of where the results or strategy “applies” comes directly from the definition of those terms. Thus, language such as “This result or strategy does not apply...” is acceptable.

The distinction is simply to state where or when the result or strategy “does not apply”, rather than to state “the licensee will not achieve or carry out this result or strategy in the following circumstances”

QUESTION 6: Is there flexibility in how FPPR “defaults” are specified as results or strategies in a FSP?

Yes, provided that the election is clear and distinguished from the option of complying with defaults as practice requirements.

For some objectives specified in the FPPR, the FPPR enables the holder of an FSP to elect to either:

- comply with the related practice requirements specified in the FPPR (in which case the holder is exempt from specifying a result or strategy for that objective) [see QUESTION #7]; or
- specify a result or strategy for that objective (in which case the holder is exempt from the related practice requirement).

If a person elects to prepare results or strategies in respect of an objective, the person may further elect to

- specify any results or strategies that meet the approval tests, or
- specify the related performance requirements in the FPPR as the results or strategies (e.g. for the soils objective, Sections 35 and 36 are the related performance requirements and could be accepted as a result or strategy).

If the holder decides that the result or strategy will be the wording in the practice requirements in Sections 35 and 36, the language should be similar to the following:

“For the objective for soils that is set out in Section 5 of the FPPR, the holder adopts, as a result or strategy, Sections 35 and 36 of the FPPR as those sections were on the date this FSP was submitted for approval.”

Note also that the reference to “as those sections were ...” has a substantive effect in that it effectively fixes the result or strategy to that version of the practice requirements. This provides certainty to the holder of the FSP that any changes to the practice requirements do not automatically become part of the FSP.

It would also be acceptable to copy out the practice requirements in full.

A result or strategy in respect of an objective that adopts the related practice requirements exactly as written in the FPPR is considered to meet the applicable approval tests.

If the holder elects to adopt some, but not all of a practice requirement as its result or strategy, the language to signify this could be as follows:

“For the objective for soils that is set out in Section 5 of the FPPR, the holder adopts, as a result or strategy, [indicate relevant practice requirements (except that / subject to) (specify whatever modifications are considered appropriate)]”.

Any modifications to the performance requirements contained in the result or strategy would have to meet the approval tests.

QUESTION 7: Does the FPPR give guidance as to how a FSP should specify that the holder will comply with the FPPR default practice requirements as an alternative to preparing results or strategies?

Yes.

For some objectives specified in the FPPR, the FPPR enables the holder of an FSP to elect to either:

- comply with the related practice requirements specified in the FPPR (in which case the holder is exempt from specifying a result or strategy for that objective); or
- specify a result or strategy for that objective (in which case the holder is exempt from the related practice requirement) [see QUESTION #6].

Section 12.1 of the FPPR specifies that a person is exempt from specifying a result or strategy for specific objectives if the FSP includes in it “an undertaking to comply with” specified practice requirements.

Language in the FSP that utilizes the concept of an undertaking to comply will be sufficient to indicate the choice of the holder of the FSP is to follow the practice requirements rather than to propose a result or strategy.

For the objective set by government for soils is Section 5 of the FPPR, the related practice requirements are Sections 35 and 36 of the FPPR. If the holder of the FSP elects to comply with the practice requirements, the language used should be similar to the following:

“The holder of this FSP undertakes to comply with Sections 35 and 36 of the FPPR.”

QUESTION 8: Must a result or strategy specify *how* the result will be achieved or the strategy will be carried out?

No, provided that the specified result or strategy meets the approval tests without this content.

The approval tests for results or strategies include concepts of comprehensiveness and specificity.

“*Result*” is defined, in part, to mean “a description of ...outcomes”. A result must be approved if it articulates *sufficient* outcomes for the minister to conclude that the result meets the other aspects of the approval test (it is measurable and verifiable and consistent to the extent practicable). In no circumstances is a result ever required to include the steps for how a result will be achieved.

“*Strategy*” is defined, in part, to mean “a description of steps or practices...” A strategy must be approved if it articulates *sufficient* steps or practices for the minister to conclude that the strategy meets the other aspects of the approval test (it is measurable and verifiable and consistent to the extent practicable). If sufficient steps have been articulated, a strategy need not go further to articulate all steps that may be inherent in the strategy.

Example: Assessments

- The legislation does not require that a result or strategy must include a commitment that an assessment will be carried out.
- A person preparing a FSP *may* include a commitment to carry out an assessment as part of its strategy.
- If an assessment is included as a strategy, the assessment becomes subject to all of the approval tests for results and strategies.
- If the assessment is a well-known type of assessment (e.g. “a terrain stability field assessment”), the approval tests should be able to be applied without requiring the methodology for carrying out the assessment.
- If the assessment is not well-known, the strategy may require further detail of the steps or criteria involved to satisfy the approval tests.

QUESTION 9: Must a result or strategy for a “global” target in an Objective fully meet the target?

No, provided that the approval tests are met.

A result or strategy does not fail to meet the FRPA approval tests *only* because the result or strategy does not fully meet the target in the objective.

If a result or strategy that partially or proportionately addresses the target is consistent with the relevant objective to the extent practicable, the result or strategy must be approved.

QUESTION 10: Must areas associated with results or strategies for notices under Section 7 of the FPPR be spatially located on a map?

No. A result or strategy in respect of a Section 7 notice does not fail to meet FRPA approval tests only because the area described in the result or strategy is not spatially identified on a map. However, if not spatially identified, there must be enough textual detail in the FSP for the minister to know where the result or strategy will apply.

Example:

“During the term of this plan, the holder as a result of its harvesting activities will not cause the minimum number of hectares to fall below _____ hectares with the attributes ‘c, d and e’.”

QUESTION 11: Must a result or strategy provide current information on the state of a given established objective?

No. A result or strategy does not fail to meet FRPA approval tests only because it does not provide current information on the state of a given established objective.

The content and approval tests do not require that the holder of a FSP commit, in a result or strategy, to undertake inventories of resources such as old growth or wildlife habitat.

A holder of a FSP who commits to not harvest a particular area or amount of area containing certain attributes, must consider what due diligence procedures it should have in place to ensure it can achieve that commitment. These procedures need not be specified in the FSP.

QUESTION 12: Must a result or strategy respecting the OSBG for cultural heritage resources include a commitment to communicate with First Nations regarding site level operations?

No. Provided that a result or strategy meets the approval tests, the person who prepares a FSP otherwise has complete flexibility in the design of the result or strategy.

While the approval tests do not preclude the inclusion of a communications commitment in a strategy, such a commitment is not required to meet the approval tests. The minister will have to determine if the proposed result or strategy is consistent with the objective in respect of cultural heritage resources to the extent practicable.

QUESTION 13: For FPPR Objectives that include “without unduly reducing the supply of timber from British Columbia’s forests”, can the results or strategies speak to this element of the objective?

Yes, provided that in doing so, the result or strategy otherwise meets the FRPA approval tests.

The timber supply impact concept is an integral part of several objectives. The legal effect of the inclusion of the statement “without unduly reducing the supply of timber” is that the objective has no effect to the extent that it would result in the undue reduction in the supply of timber. Put another way, above this “undue” threshold, there is no objective for which the FSP must specify intended results or strategies.

Given that the relevant FPPR objectives do not have any effect to the extent that they result in an undue reduction in the supply of timber, it is reasonable for the person preparing the plan to try to articulate that “undue” threshold in the context of preparing related results or strategies.

The government has made policy statements that address the degree of acceptable timber supply impact from certain forest practices restrictions. For example:

- the Chief Forester’s 1996 Analysis of FPC Impacts on Timber Supply, and
- the maximum impact of IWMS of 1 percent by District.

A person preparing a FSP may use these government policy statements when formulating results or strategies that are applicable to that specific FSP. Results or strategies related to the affected FPPR objectives do not fail to meet the FRPA approval tests only because they address the issue of impact on timber supply.

QUESTION 14: Can a FSP specify circumstances that limit the application of a stocking standard?

Yes, provided that

- *the stocking standards specified meet the requirements of the FPPR, and the provision does not try to eliminate the requirement to comply with Section 29 of the FRPA*

Section 29 of the FRPA imposes the obligation to establish a free growing stand within harvested cutblocks in accordance with the plan, prescribed requirements and standards that apply to the harvested area. The exceptions to this requirement are set out in the FPPR. Although the FSP cannot specify additional exemptions to the requirement to produce a free growing stand, FRPA provides flexibility regarding the attributes to be specified in the FSP regarding the type of free growing stand that must be established.

Such flexibility is permissible provided the approval tests in Section 26 of the FPPR are met. These tests generally require that the standards:

- will result in the area being stocked with species and to a density or basal area that, in either case, is consistent with maintaining or enhancing the supply of commercial timber and with the applicable timber supply analysis and forest management assumptions, or
- are reasonable having regard to the future timber supply for the area.

These tests are broad and enable the preparer of the plan to propose (and the minister to approve) standards for establishing a free growing stand that vary considerably from one circumstance to the next.

Examples

- Lower densities than might otherwise be provided are permissible where that is consistent with these tests (e.g. when providing for grizzly bear habitat, if that has been recognized in timber supply analysis and will still be consistent with timber supply requirements).
- Increased regeneration dates are permissible to account for damage to a plantation, such as that caused by fire.

QUESTION 15: Are measures respecting invasive plants required in every instance?

No. Measures respecting invasive plants must be included whenever:

- *there are species of invasive plant prescribed in regulation as of 4 months before the FSP is submitted for approval that could (if introduced) inhabit an area in an identified FDU if introduced, and*
- *it is reasonably foreseeable that the forest practices of a holder of the plan will likely result in the introduction or spread of one or more prescribed species of invasive plants.*

The possibility that a forest practice will introduce or spread invasive plants is not sufficient to trigger the requirement to include measures – it must be reasonably foreseeable that the forest practice will “likely” cause the introduction or spread.

Examples: Assessing if ‘likely’ include factors such as the following:

- Are there or has there ever been a history of a particular species of invasive plant growing within an identified FDU?
- Is it likely that any of the identified invasive plants would survive or spread if seed was introduced to an area within an identified FDU?
- If the harvesting is largely limited to winter operations, is it likely that seed could be introduced by the harvesting or that conditions would be created for seed establishment in the summer?

If the particular species of invasive plant has been identified in the Invasive Plants Regulation and is within the FSP plan area but the holder of the plan has not included a measure for this species because the holder believes their activities will not result in the spread etc., review and approval of the FSP is facilitated if the holder explains this in supporting documentation to make it clear to the approver because there will not be anything in the FSP itself.

QUESTION 16: Must the measures respecting invasive plants ensure that invasive plants will not be introduced or spread?

No. Section 47 of the FRPA requires a person carrying out forest practices to carry out measures that are either specified in an FSP or authorized by the minister, to prevent the introduction or spread of invasive plants. The legislation does not require that a person carrying out a forest practice must prevent the introduction or spread of invasive plants by carrying out the measures that are either specified in an FSP or authorized by the minister.

The measures specified in the FSP should be reasonable in the circumstances and need not provide certainty that the measures will prevent the introduction or spread. Reasonableness will be determined on the basis of both efficacy and what is practicable.

Examples: Assessing if measures are “reasonable” include the following:

- considering different measures for different species of invasive plants depending on the risk of a particular species being introduced or spreading;
- in cases where the invasive plant species is already fully established in the area, recognizing that it is not reasonable to expect the plan to include exhaustive measures;
- the period within which a particular invasive plant species is known to establish on exposed mineral soil will be relevant in assessing whether or not the proposed timing for grass seeding of these areas is reasonable;

- the measures should be those which a reasonable person would propose in similar circumstances – they need not be the most comprehensive measures that a person could propose in those circumstances. (e.g. While it is possible to grass seed immediately upon completion of each metre of road, it is operationally impractical to do so.)

QUESTION 17: Are measures respecting natural range barriers required in every instance?

No. Measures respecting natural range barriers must be included if 4 months before the FSP is submitted for approval,

- ***there exists an agreement under the Range Act, or an advertised agreement will be awarded before the date the plan is submitted that will authorize livestock to graze in an identified FDU,***
- ***there is a natural range barrier located in that FDU that impede livestock that are the subject of such agreement from moving through or across the barrier, and***
- ***it is reasonably foreseeable that the holder of the agreement will rely on the natural range barrier to control the movement of the livestock.***

QUESTION 18: Must the measures respecting natural range barriers completely eliminate the impact on the natural range barrier?

No. The legislation requires measures to mitigate, not measures that will completely eliminate the effect of the change to the natural range barrier.

Mitigation means a lessening of the impact, and action that is reasonable in the circumstances. The measures must be sufficiently comprehensive so that the reasonable person would believe that the measures would, if implemented, be reasonable in the circumstances. However, the measures need not be the most comprehensive measures that a person could propose in those circumstances.

QUESTION 19: Does a FSP that has been revised after being through referral and review and comment need to go through review and comment or referral again?

No, provided that a reasonable person would not view the revised FSP as being altered to such an extent that, in essence, it is a different plan.

FRPA and the FPPR clearly envisage that there may be changes to an FSP following review and comment.

The legislation contains no requirement that the FSP go through review and comment after these changes are made.

QUESTION 20: Can a FSP provide for the removal of a holder or a licence?

No, an amendment is required to remove a holder or a licence from the plan.

The legislation provides that a FSP:

- can apply to more than one holder and to more than one licence;
- must meet the prescribed requirements; and
- may be amended.

The legislation does not contain specifics respecting changing applicable licences and holders during the term of the plan. An amendment would be required to remove a holder or a licence from an approved forest stewardship plan.

An amendment to remove a co-holder or a particular licence does not require approval.

Contacts

Charlie Western	(250) 387-8306	Charlie.Western@gov.bc.ca
Ian Miller	(250) 387-8398	Ian.C.Miller@gov.bc.ca
Mike Pankhurst	(250) 356-7596	Mike.Pankhurst@gems6.gov.bc.ca
Bill Quinn	(250) 565-6102	Bill.Quinn@gems7.gov.bc.ca