

Forest and Range Practices Act



Due to ongoing regulatory changes as part of the FRPA improvement initiative, this document is outdated, and may not accurately reflect current legal requirements. As soon as the new legal provisions have been finalized, the required changes will be incorporated into an updated version. Readers are advised to refer to the wording of applicable legislation and regulations themselves and obtain their own legal advice. August 2022.

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Transfer of Obligations to Establish a Free Growing Stand under *Forest and Range Practices Act* (FRPA) Section 29.1

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.

Introduction

The purpose of this bulletin is to provide information and advice to district managers for their consideration when:

- i. Reviewing written agreements to transfer obligations to establish a free growing stand under FRPA, Section 29.1.
- ii. Assessing the likelihood that the transferee is likely to meet the free growing obligation.
- iii. Establishing the security requirements for the transferee for FRPA, Section 29.1 transfers.

Licence transfers under the *Forest Act* (FA) automatically transfer the silviculture obligations, thus, FRPA, Section 29.1 does not apply in those cases.

Administrative advice to Delegated Decision Makers:

Free Growing Obligations that can be Transferred (FRPA, Section 29.1)

FRPA, Section 29.1(1) enables the transfer of the following free growing obligations:

- i. Free growing obligations under FRPA, Section 29, which are associated with harvesting under a Forest Stewardship Plan by a holder of a major licence, community forestry agreement, or timber sales manager as well as those associated with harvesting under a woodlot licence.
- ii. Free growing obligations under FRPA, Part 11, which include Forest Practices Code (FPC) and transition period obligations.

FRPA, Section 29.1(1) does not provide for transfer of governments free growing obligations incurred under the Forestry Planning and Practices Regulation (FPPR), Section 46 (free growing stand – forestry licence to cut), transferred to the government via FRPA, Section 30 or any other free growing obligations it holds. As well, FRPA, Section 29.1 does not provide for the transfer of obligations between licences if the obligations are held by the same “person” as transfers must be from one person “to another person”.

Timing of Transfers

A free growing obligation does not arise until trees have been harvested. Therefore, transfers cannot be approved before the commencement date of a specific obligation. However, the DDM can review the general terms and conditions of a written agreement. While a transfer cannot be approved until the commencement date [FPPR, Section 1 (1)] starts on each individual block and each block must be approved individually, agreement on the framework in advance would streamline subsequent block by block approvals. It is important to note that agreement on the framework does not constitute approval under FRPA, Section 29.1 (1)(c) or Section 29.1 (3)(c). Therefore, FPPR, Section 94(2), whereby the transferor is relieved of the transferred free growing obligation, only applies once the transfer of specific obligations are approved. The legislation enables the transfer of a free growing obligation at any stage between the initiation of the commencement date and free growing. For example, an obligation could be transferred after the regeneration date and the transferee would take over responsibility from that point onwards.

Submissions to transfer a package of several free growing obligations at the same time are acceptable as long as individually each obligation meets the transfer test. For administrative efficiency, District Managers should consider recommending that parties proposing to transfer groups of obligations submit them annually as a package rather than as ongoing individual submissions.

Conditions That Must Be Met Before a Transfer Can Be Approved

FRPA, Section 29.1 (1) requires that any transfer must be preceded by the preparation of a written agreement between the transferor and transferee. This is a legally binding agreement between the two parties setting out the terms and conditions of the transfer. The agreement must be submitted to and approved by the DDM. Government should not be referenced as a party to the written agreement.

FRPA, Section 29.1 (1)(b) also states that the transfer must also meet “prescribed requirements”. The “prescribed requirements” for transfers of free growing obligations are outlined in the FPPR, Section 94 and the Security for Forest and Range Practices Liability Regulation (SFRPLR). FPPR, Section 94 requires that the DDM be satisfied that the person to whom the obligation is transferred is likely to meet the obligation and that security, if any is required by the DDM, is provided in a form and amount specified by the DDM.

Reviewing the Written Agreement

The legislation does not specify content requirements for the written agreement and so provides significant flexibility. The DDM is responsible for ensuring that it is a legally binding contract. Steps to accomplish this include ensuring that:

- the document clearly sets out the obligations being transferred and is otherwise clear in its contents;
- the agreement is not conditional on anything;
- the parties are continuing legal entities; and
- the agreement is signed by persons who have the authority to bind the company or person.

It is recommended that all agreements be referred to the Compliance and Enforcement Branch for possible referral to the Attorney General’s Resource, Environment and Land Law Group for review prior to a final decision regarding approval.

Confirming the transfer meets the prescribed requirements:

Assessing if Transferee is Likely to Meet the Obligation

FPPR, Section 94(1) requires that the DDM be satisfied that the person to whom the obligation is being transferred is likely to meet the obligation, but does not specify what criteria the DDM may use to evaluate whether the transferee is likely to meet the obligation. The evaluation criteria must be reasonable and be applied on a case by case basis. The following are some criteria that the DDM may wish to consider:

- i. Experience and expertise of the transferee.
- ii. Assessment of the performance of the transferee in regards to meeting other free growing obligations that they may have had or currently have.
- iii. The level of difficulty associated with managing the free growing obligations proposed for transfer in relation to the experience and expertise of the transferee (likelihood of plantation failure, brushing problems or significant forest health concerns, etc.).

- iv. Provisions to be made by the transferor to ensure the required physical access to the area for the transferee to manage the free growing obligations.

Assessing the Security Requirements

Except in prescribed circumstances, if the transferee is the holder of an agreement under the *Forest Act*, then, under Section 29.1(8)(a), the transferred obligations become obligations under the transferee's agreement. Under Section 29.1(8)(b), any security already associated with that agreement prior to the transfer is deemed to be security for the purposes of the transferred obligation, which means that no further security can be requested in respect of the transferred obligations, except in prescribed circumstances. The prescribed circumstances are set out in Section 1(1) of the Security for Forest and Range Practices Liability Regulation (SFRPLR). They refer to non-replaceable major licences, woodlot licences and community forest agreements. This means that in relation to non-replaceable major licences, woodlot licences and community forest agreements, the deeming provision in Section 29.1(8)(b) does not apply. In other words, the DDM may require security from the holders of these licences and agreements provided the test embedded in Section 1(1) of the SFRPLR is met.

Section 1(2) of the SFRPLR applies if the transferee does *not* hold an agreement under the *Forest Act*. This provision enables the DDM to require security for the performance of the transferred obligation in an amount equal to the cost of carrying out the obligation from the time of the transfer. For determining the cost of performing the obligation, the DDM could either use the payment agreed to by the transferee if that amount appears to be an accurate reflection of the cost of carrying out the obligation, or else prepare an independent assessment.

Other Issues:

Amount of Security

The determination of the security requirements should be based on a fair assessment of the risk factors associated with each situation. For each case, DDM's may determine an appropriate amount of security on the basis of unique operational circumstances and transferee specific factors. Consideration should also be given to the current MoFR policy guidance on the amount of security to request.

Form of Security

Various forms of security are acceptable to the government, such as cash or negotiable instruments (e.g. bank drafts, money orders), safe keeping agreements (a tripartite agreement executed by a chartered bank, credit union or trust company; the obligation holder, and the ministry), or an irrevocable letter of credit. While the form of security maybe tailored to provide the least cost to the obligation holder, it must still ensure that the primary goal of the deposit is the protection of the Crown.

Return of Security

Return of the transferor's security is governed by FPPR, Section 94(2), which provides that if the minister approves an agreement under Section 29.1 (1)(c) or (3)(c) of FRPA, the minister must return to the person who transferred the obligation any security deposit provided by that person specifically for that obligation. The FS45D form will be required to be filled out by district staff and forwarded to the Ministry of Provincial Revenue using the same procedures as for the return of any security.

Return of the transferee's security is governed by Section 2 of the SFRPLR, which provides that the minister must promptly return a security if the security is replaced with the permission of the minister and the minister is satisfied that the replacement security adequately provides for the payment of claims that could be made against it, or, simply, the minister is satisfied that there is no further need for the security.

Securities held can be returned upon completion of different phases of the obligation, such as $x\%$ returned after completion of any site preparation, a further $x\%$ after achievement of regeneration delay and the remaining refunded at the time of acceptance of free growing by the government. Development of a refund matrix based on the site factors and the risk associated to the government on remaining obligations left on a particular block is suggested. This matrix should remain flexible to accommodate any requirements where the basis of the original determination of an amount of security has changed and account for other risk factors that may need to be considered in any return of the security.

Stocking Standards That Apply to the Transferred Obligation

Through FRPA, Section 29.1 (5) and FPPR, Section 94 (3) the stocking standards assigned to the net area to be reforested either through a silviculture prescription or through the FDP or FSP stocking standards apply to the transferred obligation. The tracking of the stocking standards associated with transferred obligations can be managed through RESULTS where the cut block level obligations are reassigned to the transferee once the transfer is approved. RESULTS will have the existing stocking standards for the area and these standards will be one of attributes that will automatically be retained with the file when it gets changed over to reflect the new legal entity that is responsible for the obligation.

Amending Stocking Standards Associated with Transferred Obligations

FRPA, Section 29.1 (6) enables the transferee to propose amendments to the transferred free growing stocking standards. FPPR, Section 94(4) establishes an approval test requiring consistency with FPPR, Section 26 consistent with all other holders of free growing obligations. FPPR, Section 94(5) enables the transferee to amend the regeneration date, free growing date, free growing height or stocking standards without approval if the changes are not a significant departure from what was originally approved. The procedures for processing amendments in RESULTS would follow the same process as for any other obligation holder.

Subsequent Transfer of a Free Growing Obligation

FRPA, Section 29.1(3) enables subsequent transfers of free growing obligations that have been previously transferred. This provision was developed in recognition that over the lifespan of a FG obligation significant changes can occur. For example, a non-agreement holder may decide to close down their business or else may be taken over by another company.

Transferor is Relieved of Free Growing Obligation Following Approved Transfer

Upon approval of the transfer of a free growing obligation, FRPA, Section 29.1 (7) relieves the transferor of any further liability with respect to the transferred obligations. If the transferee were to subsequently default on those obligations, action could only be taken against the transferee, not the transferor.

Transfers to *Forest Act* Agreement Holders Become Obligations Under Their Agreement

Under Section 29.1(8) of FRPA, if the transferee involved in the transfer of a free growing obligation is the holder of an agreement under the *Forest Act*, then the transferred obligations become attached to the transferee's agreement. For example, if a NRFL transfers their obligations to a TFL, the transferred obligations become liabilities under the TFL. In this scenario, the "security" to the Crown that the free growing obligations will be achieved is provided through the incentive of the agreement holder to retain the replaceable tenure. If a NRFL transferred their obligation to another NRFL the security already in place under the transferee's NRFL would also apply to the transferred obligations. The total amount of the security would likely need to be increased to reflect the increased free growing liability attached to the agreement.

Remediation Orders and Limitation on Liability

FRPA, Section 74 (Remediation Orders) and FRPA, Section 107 (limitation on liability of persons to government) refer and apply to a person who is a holder of an agreement under the *Forest Act* or *Range Act* or is in a prescribed category of persons. The Administrative Orders and Remedies Regulations (AORR), Section 2 (1) includes as prescribed persons, a person to whom obligations have been transferred under FRPA, Section 29.1. Thus, the transferee can be issued a remediation order even if they are not holders of agreements under the *Forest Act*. Similarly, AORR, Section 2(2) provides the same provisions to allow non-*Forest Act* agreement holder transferees to submit written declarations under FRPA, Section 107(1).

Requirements on Transferee

FPPR, Section 94(6) sets out a list of FPPR provisions that the transferee must comply with for transferred obligations. For example:

- FPPR, Section 44 requires the transferee to meet the applicable stocking standards by the regeneration date and the applicable stocking standards and free growing height by a date that is no more than 20 years after the commencement date.
- FPPR, Section 45 requires the transferee to establish stands on the net area to be reforested that conform to the applicable stocking standards by the applicable regeneration and free growing dates.

- FPPR, Section 86 (3)(b) requires the transferee to submit information to the DM advising as to the location of any resource or wildlife habitat feature not previously reported.
- FPPR, Section 86 (3)(c) requires the transferee to submit seed information.
- FPPR, Section 86 (3)(d) requires the transferee to update the forest cover inventory where the regeneration date requirements are met, where regeneration date has expired but requirements have not been met, where a free growing stand is declared, or where the free growing date has passed, but a free growing stand has not been established.
- FPPR, Section 86(3)(e) requires the transferee to submit a summary of any silviculture treatments during the previous year.
- FPPR, Section 87 (3) requires the transferee to submit a revised map if changes are made to standards units or standards that relate to standards units as per the submission requirements in this section.
- FPPR, Section 88 requires that the transferee maintain records of silviculture treatments until the earlier of 15 months after a free growing declaration or a date specified by the district manager.

Information Management

After approving the transfer of the silviculture obligations, the DDM should ensure that all appropriate information management and tracking systems (e.g. FTAS, RESULTS, etc.) are updated.

Further Information:

There are a number of topic areas related to the transfer of obligations under FRPA, Section 29.1 that are common to transfers enabled under FRPA, Section 30. These topic areas are not covered by this advice and can be found on Compliance and Enforcement Branch's (C&E) website under DDM Bulletin Number 10 (*Silviculture security requirements for Non-Replaceable Forest Licences*) and the subsequent update to this bulletin dated April 8, 2003.

DDM Bulletin Number 10 and its update contains administrative advice related to:

- the amount of the security deposit required;
- acceptable form of the security; and
- guidance around the return of the security.

This administrative advice is available at:

http://www.for.gov.bc.ca/hen/bulletins/bulletins_advice.html

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