

Due to ongoing regulatory changes as part of the FRPA improvement initiative, this document is outdated, and may not accurately reflect current legal requirements.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.

Forest and Range Practices Act



FRPA GENERAL BULLETIN

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Managing Forest Health under the Forest and Range Practices Act (FRPA)

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 explain the various legislative requirements related to forest health contained under the *Forest and Range Practices Act* (FRPA) and the Forest Planning and Practices Regulation (FPPR) and to provide some guidance with respect to those provisions. This is intended to assist practitioners to develop consistent administrative advice, practices and support across the province when dealing with forest health issues governed by FRPA. Issues involving the salvage of beetle killed timber and visual resource management are addressed in a separate FRPA General Bulletin (in preparation).

Requirements and Authorities under FRPA for Forest Health:

There are four main sections of the Act that deal directly with forest health and mainly facilitate treatments for bark beetle management.

FRPA, Section 17: This section states that:

If the minister determines that timber subject to a forest stewardship plan, a woodlot licence plan, or an amendment to either should be harvested without delay because it is in danger of being damaged, significantly reduced in value, lost or destroyed, the minister, in prescribed circumstances, may approve the plan or amendment even though the plan or amendment does not comply with Section 16.

Q: When should or can the Delegated Decision Maker (DDM) apply this section?

This section could be used where it is the most reasonable option within the FRPA regime to permit forest health related harvesting (or related activities covered by an FSP) where it needs to proceed without delay and there is:

- insufficient time to revise a proposed plan or amendment to comply with Section 16;
- compliance is not possible without revision to or exemption from the problematic plan requirement(s) and there is insufficient time to pursue required revisions or exemptions; or
- compliance is not possible and revision to or exemption from the problematic plan requirement(s) is not available.

FRPA, Section 25: Provides the minister [delegated to the district manager (DM), regional executive director (RED) or the bark beetle coordinator (BBC)] with the authority to exempt a person in writing from specified provisions in the Act, regulations or standards for the purpose of limiting or mitigating, or both, the spread of forest pests. This section provides a very broad and powerful exemption power. These powers are tied to the minister considering it “necessary or desirable” so that a person may follow a course of action **specified** by the minister. For example, exemptions could be limited to bark beetles within an emergency management area where a management unit objective has been set as aggressive or sanitation by the provincial bark beetle coordinator. In doing so, it gives the DDM parameters within which to make operational decisions such as direct control for “leading edge” or new infestations.

Q: When should or can the DDM apply this section?

Although there is nothing in the legislation that requires specific factors to be considered by the minister (or delegate) before making an Section 25 determination, some basic considerations could be that:

- the benefits of taking action outweigh the costs / impacts of the action itself or of doing nothing; and
- activities need to occur expeditiously and there is insufficient time to pursue a specific exemption within the Act for the item in question; or
- exemption is otherwise unavailable in the Act.

Specific factors that may be considered by the DDM in their determination might include the potential spread rate, the values at risk, availability of other options, cost and the potential time constraints to treatment. Possible sources of information include the TSA Forest Health Strategy, district and regional forest health specialists, aerial survey and ground survey information and current treatment plans and licensee harvesting plans. Secondly, the DDM should determine if there really are administrative barriers that are preventing the licensee from expediting sanitation harvesting. Appraisal issues should not be considered as the purpose of this section is to reduce or eliminate administrative, not cost, barriers.

The application of Section 25 powers can be to both significant and relatively minor activities. Arguably, the more a proposed exemption departs from the Act's fundamental provisions, the more compelling the analysis for applying this section would need to be.

FRPA Section 26: Provides the minister (delegated to the DM or RED) with the authority to require a proposal to be submitted by an owner of private forest land [Section 26(1)] or by a holder of an approved operational plan, for an area of the private forest land or the area subject to an approved operational plan [Section 26(2)] if the minister determines that insects, diseases, animals or abiotic factors are causing damage to the forest. The proposal must specify reasonable measures to be carried out to control or dispose of the insects, diseases, animals, or abiotic factors within a stated time frame, as required by Section 26(3). The minister can approve or reject the proposal under Section 26(4). If the owner or holder of the plan does not submit a proposal as required, or does not comply with the measures in an approved proposal, the minister may make an order, under Section 26(6), requiring the owner or holder to carry out measures specified in the order by a date specified in the order. In both cases, concerning the approved proposal or the order under Section 26(6), exemption powers exist in Subsections 26(7) and (8) to facilitate carrying out the proposal or the order. These exemptions not only extend to the FRPA, but agreements under the *Forest Act* and the Forest Stewardship Plan, or Woodlot Licence Plan.

Under Section 26(9), expenses for measures other than timber harvesting, if included in an approved proposal or under an order, are to be paid by government, to the extent presently bounded by the phrase "...that (which) the minister is satisfied that the expenses were reasonably incurred" (Section 7 of the Administrative Orders and Remedies Regulation.) At this time, such an order is unlikely as single tree treatments are conducted by either the MOFR or a licensee using Forest Investment Account (FIA) funding. In other words, the most common use of this section would be to order harvesting of specific infestations posing significant threats to Crown forests.

Some examples of measures that might be covered by either the proposal or order are: fall and burn, conventional clearcutting, small patch or single tree harvesting, use of trap trees and disposal of landing debris.

This section departs from the results-based approach under FPRA, but it reflects the government's need to be able to direct treatments using the resources available to it in specific circumstances, particularly after all forest practice and tenure-related mechanisms have been considered. In the normal results-based regime, a forest health objective for the timber resource value [currently defined by FPPR, Section 6(a) as to "maintain or enhance an economically valuable supply of commercial timber from British Columbia's forests"] and outcomes desired are set by government at the planning / permitting level (i.e. harvest priority, proportion of damaged timber addressed, etc.) However, no such forest health specific objective has been set by government thus a results-based legislative option is not available to address this situation.

Q: When and how would the DDM apply this section?

When insects, diseases, animals or abiotic factors are causing damage on:

- private land; or
- Crown land subject to an FSP, WLP or other operational plan (i.e. within an FDU) and the damage is not being appropriately addressed by other available legislative or contractual mechanisms. (See comments above.)

For example, the Beetle Management Unit (BMU) Strategy designated by the MOFR (district and region) and with industry input, set treatment targets with the assumption that the licensees will be harvesting as much of the infested, operable timber as possible, particularly in suppression BMUs before the next flight. If the DDM is not satisfied that the cutting permit applications submitted are adequately addressing, the district treatment priorities and the test in Section 26(1) or (2) is met, the DDM can apply this section to obtain a revised treatment proposal in a specified time frame (keeping in mind when the next beetle flight would occur). These same conditions apply to private forest land that is located within high priority BMUs. Application of this section would be considered only after attempts to use all other legislative or contractual mechanisms have failed to achieve the desired damage control result. Its use would likely take into account the licensee's demonstrated performance on similar issues.

How:

Before making a determination under Section 26(1) or (2) that insects, diseases, animals or abiotic factors are causing damage to the forest, and before requiring the person to submit a proposal to control the pests, procedural fairness requires that the minister offer the person an opportunity to be heard (OTBH) commensurate with the potential effect of the determination upon the person. Depending on the particular circumstances, the OTBH need not be the full dress hearing that is accorded to a person in the contravention determination or licence suspension or cancellation context. However, where the determination would have serious cost implications or cause significant disruption to a person's life or operations, care should be taken to provide the person with a full opportunity to state their case. In every case, at the very least, the person must be given notice of the fact that a determination regarding forest damage may be made and that a decision may follow resulting in the requirement for a proposal from the person. The notice should set out the reasons why the minister is contemplating making the determination (along with any supporting documentation) and offer the person an opportunity to discuss the situation before the determination is made. The person must then be given an opportunity to provide information, if they so choose, within reasonable time constraints. The character of the OTBH will depend on the particular circumstances. Aside from the risk to Crown timber from the protracted proceedings, the most important consideration being the potential impact on the person's rights, privileges, reputation, or interests. The OTBH could be as simple as a conversation or consultation conducted with an open mind as to the outcome of the determination. In some situations, a well-documented telephone conversation with the person might suffice. Thus, the two key points about these conversations are that 1) they must cover the specific considerations that the decision-maker believes will affect their decision, and 2) that they happen early enough to allow the licensee enough time to properly provide the required information and response.

The determination under Section 26(2) that insects or other pests are causing damage sufficient to require a proposal can be reviewed and/or appealed under Sections 80 and 82 of the Act.

If a review or appeal is requested, the order is stayed unless the minister or chief forester orders that a stay would be contrary to the public interest (FRPA, Section 78).

If the licensee fails to provide an adequate proposal, the DDM can reject the proposal under Section 26(4). If the licensee does not submit the proposal within the specified time or fails to carry out the measures in an approved proposal, the DDM can order the licensee under Section 26(6) to carry out measures to control the pests, as specified in the order. The DDM would have to consider how reasonable the order would be, particularly in terms of financial hardship and the availability of other options (i.e. single tree treatments funded directly by government).

Before rejecting a proposal under Section 26(4) or issuing an order under Section 26(6), procedural fairness requires that the minister offer the person an OTBH commensurate with the potential effect of the decision or order upon the person.

Section 111 of FRPA requires that an order be in writing and be given to any person “to whom the order pertains”. FRPA, Section 112 authorizes the order to contain conditions and authorizes the removal or variance of those conditions at a later date.

FRPA, Section 27: Allows the Lieutenant Governor in Council (LGIC) to designate an area by regulation as a forest health emergency management area (FHEMA) if the LGIC considers that a forest health emergency exists. The minister may order the holder of an agreement under the *Forest Act* to carry out measures in areas within a FHEMA covered by the holder’s agreement to prevent, contain or limit the spread of forest health factors. The minister may also order a timber sales manager to carry out such measures.

Q: When and how would the minister apply this section?

When:

Under Section 27, an OIC regulation is required to designate an area as a forest health emergency management area (FHEMA). Once this is done, the minister or DDM can make an order under Section 27(2). The essential difference between Section 26 and 27 is that Section 26 is confined to addressing damage caused by forest health factors on areas covered by an operational plan (for example, within a Forest Development Unit (FDU) in a forest stewardship plan) whereas Section 27 is less limited in its area of application, as explained above. Where it is determined action is required, and either Section 26 or 27 can be applied, Section 26 should be the preferred mechanism.

Note that the current Emergency Bark Beetle Management Area (EBBMA) designated by the minister is not enabled by Section 27. The authority to describe the EBBMA is enabled under Section 109 of the Forest Planning and Practices Regulation that provides specific transition provisions from the repealed Bark Beetle Regulation.

How:

Before making an order under Section 27(2), procedural fairness requires that the minister offer the person an OTBH commensurate with the potential effect of the determination upon the person. The guidance provided above concerning OTBHs in the context of Section 26 is also applicable here. An Section 27 OTBH is about what reasonable measures should be undertaken given the emergency situation. It is implicit that the measures must be reasonable.

All of the FPRA provisions referred to above in the discussion of Section 26, including stays under Section 78, review and appeal under Sections 80 and 82, and orders under Sections 111 and 112 apply equally to orders made under Section 27.

Forest Health and Stand Regeneration:

Forest health considerations apply to the obligation to establish free-growing stands which rely, in part, on the stocking standards approved in an FSP (FPPR, Section 26). Additional forest health considerations apply to free-growing declarations (FPPR, Section 97).

Free-Growing Obligations

Section 29(1) of FRPA requires that:

A holder of a major licence or community forest agreement who harvests timber to which a forest stewardship plan applies must establish in accordance with the plan, the prescribed requirements and the standards, a free growing stand [emphasis added] on those portions of the area of the harvest that are in the net area to be reforested.

Similar obligations apply to timber sales managers [Section 29(2)] and woodlot licensees [Section 29(3)]. Explicit forest health considerations are contained in both the content requirements of FSPs and the definition of a “free-growing stand”. The key components of the obligation that relate to forest health are explained in more detail below.

Free-Growing Stand Definition:

“Free-growing stand” is defined in Section 1 of FRPA as “a stand of healthy trees of a commercially valuable species, the growth of which is not impeded by competition from plants, shrubs or other trees” [emphasis added]. Therefore, by virtue of this definition, and its use in the obligation itself (see above), forest health is part of evaluating whether the obligation has been met. In cases where free-growing status can not be achieved under specific circumstances, FRPA, Section 108(2) provides options for relief from the obligation or compensation for extra expenses required to meet the obligation. More details are provided below in the description of the applicable FPPR sections.

The FSP:

Under FPPR, Section 26(3), the proposed regeneration date and the stocking standards must result in the area being stocked with ecologically suitable species that address immediate and long-term forest health issues on the area, among other considerations.

Under FPPR, Section 26(4), the stocking standards must result in the area being stocked with ecologically suitable species that address immediate and long-term forest health issues on the area, among other considerations.

Thus, it is up to the licensee to ensure that the stocking standards take into account forest health issues and the DDM has the option to reject the FSP if the proposed stocking standards or regeneration date do not satisfy the DDM that forest health issues were addressed in a manner that meets the legislative tests.

It should also be noted that under Section 26(5), the minister may approve the stocking standards referred to in Section 16 (3) or (4), even though they do not conform to Subsection (3) or (4) of FPPR, Section 26, if the minister is satisfied that the regeneration date and stocking standards are reasonable, having regard to the future timber supply for the area.

Even where the approved FSP stocking standards have not considered all potential forest health factors or impacts, immediate forest health factors are still evaluated as part of the free-growing obligation. (See above.) Given this it can be argued that FSP's do not need to address immediate forest health factors that may affect the regenerated stand, with detailed commitments in the stocking standards thus simplifying the development, review and approval of them. The primary intent of including forest health considerations for stocking standards was to address known long-term, large-scale forest health threats (e.g. hard pine stem rusts in the central interior, *Armillaria* in the southern interior, *Dothistroma* in the northwest, etc.) in the selection of species.

For more detailed explanation of FSP stocking standards consult *An Overview Reference for the Evaluation of Stocking Standards under FRPA* (http://www.for.gov.bc.ca/hfp/silviculture/stocking_stds.htm).

The Free-Growing Declaration:

A licensee may declare, in accordance with FRPA, Section 107 and FPPR, Section 97 that a free-growing obligation has been met. Section 97 contains detail on information requirements, considerations, timing and acceptance criteria for these declarations. Given that the declaration is about the completion of an obligation, free-growing declarations are based on the obligation as outlined above. The only potential forest health consideration in addition to those contained in the obligation is contained in FPPR, Section 97(6) which states that:

a stand that is subject to a written declaration under FRPA, Section 107 is not free-growing on the date of the declaration if it is more likely than not that the stand, 20 years after the commencement date, will not conform to the applicable stocking standards or will be impeded in its growth because of the effects on the area [emphasis added] of forest health factors.

It must be noted that the above only applies to free-growing declarations, not compliance with the FG obligation. It must also be kept in mind that declarations, including free-growing declarations, are not required – they- they are submitted at the discretion of the licensee.

Applying Section 97(6) – An Example:

If the licensee had declared a stand free-growing at year 12, the DM, under FRPA, Section 107(4) might within the prescribed period (15 months) after reviewing a declaration and giving that person an OTBH, be in a position to make a determination that an obligation has not been fulfilled on the grounds that it is more likely than not that the stand, 20 years after the commencement date, will be impeded in its growth because of the effects of Armillaria root disease. The DM's determination would have to be based on the particular facts pertaining to that stand (the provision suggests there must be evidence that a forest health factor is likely to affect free-growing "on the area") potential and not simply on the fact that the stand is in an area that is known to have a high hazard of Armillaria. If the DM did not consider this risk to be significant enough to warrant rejection, the licensee would be relieved of further responsibility. If the stand is badly damaged after the declaration was accepted, the Crown is fully responsible for the management of the stand. If the licensee realizes that a free-growing stand cannot be achieved before their declaration is accepted, the licensee must advise the minister, pursuant to FPPR, Section 46.2, and submit to the minister a proposal for establishing a free-growing stand on the area. The proposal may include an alternative stocking standard, free-growing height, and date. The licensee is still bound to the requirements in FPPR, Section 26(3) (acceptable species and stocking and be consistent with timber supply and forest management assumptions).

Under circumstances where stands are damaged and the conditions of FRPA, Section 108(2) are met, the obligation for establishing a free-growing stand can be either waived or the costs be funded by government (FRPA, Section 108). FPPR, Section 96(1.1) limits the application of this exemption / funding option by defining the "events causing damage" to be either wildfire, Dothistroma (if the lodgepole pine plantation was established after July 31, 2006) or 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.

Practice Requirements

Bark Beetle Management:

There is one specific forest health related practice requirement expressed in the FPPR, Section 41 that requires an agreement holder or timber sales manager who uses trap trees or pheromones to concentrate insect populations to destroy the insect brood before the insects emerge. Although there are no requirements to promptly dispose of large diameter slash specifically for the elimination of potential breeding sites for bark beetles, the Wildfire Regulation, Section 12 may be used to reduce fire hazards which may include the disposal of potential brood material. FRPA, Section 26(6) may also specify large slash disposal as a measure to control or dispose of infested material.

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