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OPERATIONS DIVISION

MEMORANDUM

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VIA EMAIL

To: Regional Executive Directors
District Managers
Branch Directors

From: T.P. (Phil) Zacharatos, R.P.F.
A/Assistant Deputy Minister
Operations Division

Re: ***Forest and Range Practices Act, General Bulletin Number 17 – Effects of Orders Made Under the Forest and Range Practices Act, Government Actions Regulation on Forest Stewardship Plans***



A new *Forest and Range Practices Act* (FRPA), General Bulletin Number 17, "Effects of Orders made under the FRPA, Government Actions Regulation (GAR) on Forest Stewardship Plans" (FSPs) has just been completed. This bulletin clarifies for Ministry of Forests and Range staff:

- the effect of GAR objectives and orders on FSPs;
- the relationship of GAR actions to land use objectives; and
- FSP amendment options where land use objectives are cancelled.

The bulletin will be available soon from the Provincial FRPA Implementation Team's website at the following address:

<http://www.for.gov.bc.ca/rco/pfit/index.htm>

If you have any questions about this bulletin, please contact Brian Westgate, Senior Timber Tenures Forester, Resource Tenures and Engineering Branch at (250) 387-8620, or by email at brian.westgate@gov.bc.ca.

T.P. (Phil) Zacharatos, R.P.F.
A/Assistant Deputy Minister
Operations Division

Attachment(s): 1

Regional Executive Directors
District Managers
Branch Directors

pc: Les Kiss, Vice President, Forestry, Coast Forest Products Association
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Bruce Fraser, Board Chair, Forest Practices Board
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FRPA GENERAL BULLETIN

Number #17

February 6, 2009

Effects of Orders made under the *Forest and Range Practices Act* Government Actions Regulation on Forest Stewardship Plans

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.

This bulletin describes the effects of actions made under the *Forest and Range Practices Act* (FRPA's), Government Actions Regulation (GAR) on existing approved Forest Stewardship Plans (FSPs) under FRPA, including those situations where a land use objective is cancelled and followed (replaced) by an action under GAR.

Decision-makers from four agencies can undertake actions that may have a legal impact or influence on FSPs. These are:

- Ministry of Agriculture and Lands;
- Ministry of Forests and Range;
- Ministry of Environment; and the
- Ministry of Tourism, Culture and the Arts.

The nature of the legal actions that can be taken by each decision-maker and the procedures they should follow are described within several procedural and policy documents. These documents provide approved policy guidance and should be used by staff contemplating orders under the GAR or the Land Use Objective Regulation (LUOR). These documents are listed as follows:

- "Government Actions Regulation: Policy and Procedures", and the "Considerations for Selection of LUOR and GAR". Both of these documents are accessible from the Ministry of Forests and Range (MFR) via the provincial FRPA implementation team (PFIT) website at: http://www.for.gov.bc.ca/hth/timten/FRPA_implementation/index.htm.
- "Land Use Objective Regulation: Policies and Procedures" is accessible through the Integrated Land Management Bureau (ILMB) website at: <http://www.ilmb.gov.bc.ca/slrp/lrmp/policiesguidelinesandassessments/index.html>.

The following situations describe some of the effects of new orders made under the GAR on existing approved FSPs.

1. Effect of GAR order Objectives on FSPs.

As per FRPA, Section 5(1)(b)(ii), FSPs must include results or strategies that address any established objectives that pertain to the FSP. This includes objectives established, varied or cancelled under the GAR, however, as of January 1, 2006, only new objectives for water quality, a fisheries sensitive watershed, or a wildlife habitat area require a mandatory FSP amendment. As per FRPA, Section 7(1.1)(a)(iii) and FPPR, Section 23(3), **amended FSPs must be submitted for approval within two years of the date the objective is established, varied or cancelled.** Note that FRPA, Section 8(1.1) provides that a longer or shorter amendment period may be specified within the order. Also, keep in mind that other events unrelated to GAR may also trigger mandatory amendments under Section 8(1).

Other objectives established under GAR such as those for ungulate winter range, visual quality, lakeshore management, or recreation, **do not require** a FSP to be amended. However, this does not prevent licensees or their professionals from considering how *any* objectives changed under GAR might affect the public interest or their own forest management goals and operational activities.

2. Effect of a GAR Order creating General Wildlife Measures on FSPs.

General wildlife measures (GWMs) may be established for wildlife habitat areas, ungulate winter ranges or specified areas. Usually an established GWM only results in the obligation to comply with a practice requirement. Specifically, once the GAR order establishing the GWM comes into effect, FPPR, Section 69 requires that “any authorized person who carries out primary forest activities on an area must comply with each general wildlife measure that applies to the area”. As per GAR, Section 4, proper notice of a GAR order must be given, after which it takes effect on the later of being posted on the ministry’s website, being published in the Gazette, or on a later date as specified in the order.

To the extent that the order is applicable to the FDU, and affects an area under the plan, an amendment to the FSP may be required¹. Where GWMs create a conflict with FSP content, including existing results and strategies, or where GWMs require the addition of new plan content, an amendment will be required.

¹ Because measures are established by order, and the *Interpretation Act* defines orders as regulations, and defines regulations as enactments, these orders are captured by Section 7(1.1)(a)(i), and thus may trigger a mandatory amendment in Section 8(1).

There are no transition provisions with a new GWM. GAR, Section 2(2) provides a list of existing agreements and areas that are not affected by new GAR orders. That is, CPs, RPs, most TSLs, some FLTCs, declared areas, and FRPA, Section 196(1) areas are “planning protected” from new GAR orders, including GWMs. However, if any of these things take effect after the GWM takes effect then they must take into account the GWM. It is, therefore, important that agency and FSP holder staff be aware of any harvest authorities or area approvals that are in process and may not be issued by the date the GWM comes into effect, and should deal with those situations accordingly. One approach may be to use the “declared area” option. See FRPA Administrative Bulletin #2 should a situation like this arise despite consultations between agency staff and FSP and agreement holders leading up to the establishment of the GWM. **Note:** all of the authorities and approvals may continue to be processed normally up until the effective date of the order.

Additionally, it is important that an FSP not contain enduring results or strategies that are inconsistent with established GWMs as both types of provisions must be complied with. See #4 and 5 below for an explanation of associated considerations.

3. Effect of a GAR order concerning Resource Features, Wildlife Habitat Features or Temperature Sensitive Streams on FSPs.

As with new GWMs, the establishment of a resource feature (RF), wildlife habitat feature (WHF), or temperature sensitive stream (TSS) may create an obligation to prepare an FSP amendment (as described in 2 above). In many cases, however, it may only result in the obligation to comply with a practice requirement once the GAR order takes effect. As per FPPR, Section 70(1) and (2), the requirement is that an authorized person carrying out a primary forest activity must ensure that the primary forest activity does not damage or render ineffective a resource feature or wildlife habitat feature. Section 53 of the FPPR requires any authorized person who carries out primary forest activities adjacent or upstream to a TSS to comply with the TSS requirements under Section 53 for that area.

As with GWMs, it is important that FSPs do not contain results or strategies that are inconsistent with new GAR orders establishing RFs, WHFs, or TSSs. An example of that may include FSP results or strategies developed to address cultural heritage resources under the FPPR, Section 10 objective versus a new order that identifies specific cultural heritage resource features. Depending on the circumstances, it may be possible to comply with both provisions.

As with GWMs above, there are no transition provisions with a new RF, WHF, or TSS and any new CPs, TSLs, RPs, or FLTC issued after the feature comes into effect must take the new feature into account.

Additionally, the location of any resource feature or wildlife habitat feature identified in or contiguous to a cut block or road that the tenure holder is aware of, must be reported before June 1st of each year to the MFR district manager, if the order establishing the feature requires it (unless this feature was already reported by the tenure holder in the previous reporting period), as per FPPR, Section 86(3)(b).

4. Effect of new GAR orders on FSPs where Land Use Objectives remain in effect or are cancelled.

In some areas of the province, legally established land use objectives (LUOs), such as those contained in FPC Higher Level Plans, may be in effect or be cancelled at the same time new GWMs (RFs, WHFs, or TSSs) come into effect. There are several options for addressing the different situations:

i) Where objectives remain in effect after a new GAR objective is established.

Because GAR objectives are established by order, they may create an obligation to prepare an FSP amendment (as described in 2 above). Any new GAR objectives must be consistent with any other existing objectives that are in effect (this is a GAR order approval test). In situations where multiple objectives are in effect for a similar matter, the FSP holder may wish to develop results or strategies that address all the objectives in combination. It is expected that the most recent order likely contains the most relevant and current information; however, all existing objectives will have to be addressed. FSP results or strategies developed to address new GAR objectives will require DDM approval and will need to follow standard review, comment and submission processes. As described in FRPA, General Bulletin #4, some options are available to address multiple objective situations.

ii) Where objectives remain in effect after new GWMs are established.

In some situations, existing land use objectives have already been supplemented by GWMs. Some FSPs reference these existing GWMs as their FSP's result or strategy to address the objective. In situations where a GWM is amended or a new GWM comes into effect, it is important that the FSP be amended to correctly reference the GWM that is in effect. Until such time as the FSP is amended, both the new GWM and the FSP result or strategy will remain in effect. This would be a mandatory amendment and as per Section 29(f) of the FPPR, require DDM approval.

In some cases, new GWMs may be more "constraining" or restrictive than existing FSP results or strategies. Thus depending on the wording of the approved FSP, result or strategy it may be possible to comply with both provisions. For example, a new GWM that requires a minimum retention of 30 percent old Douglas fir forest will also meet a FSP result or strategy that requires a minimum retention of 20 percent old Douglas fir forest, but not vice versa. Thus, complying with the GWM would also result in achievement of the FSP commitment so there may not be an urgent need to amend the FSP provided there is a good understanding of the minimum measure that must be achieved, and the amendment occurs within the time specified by law.

iii) Effect on FSPs when Land Use Objectives are cancelled and new GWMs are established.

In some situations, land use objectives (LUOs) may be cancelled as new GWMs for a similar matter come into effect. This authority is exercised under Section 93.4 of the Land Use Objective Regulation under the *Land Act*. As per FRPA, Section 8(1) and Section 7(1.1)(ii), FSPs are required to be amended in order to take into account an objective set by government that is cancelled. FRPA, Section 8(1.1) provides that the **mandatory amendment must occur within two years or as otherwise specified in the order.**

In situations where objectives are cancelled and a GWM for a similar matter comes into effect, FSPs will already contain results or strategies that may not be entirely consistent with the new GWM. In these situations, it is recommended that the FSP holder promptly amend any results or strategies that may conflict with the GWM so it is clear which provision applies. Where an objective is cancelled, the result or strategy must be deleted from the FSP as there is no longer a relevant objective to be consistent with. However, as described in 4. ii) above, **it may also be possible that both provisions can be complied with.**

5. FSP amendment options where Land Use Objectives are cancelled.

- i) Some FSPs contain a provision that contemplates a future event, such as government cancelling an objective. (See FRPA, Administrative Bulletin #3, question #2). These types of provisions may specify that when an objective is cancelled, any results or strategies associated with the objective also cease to have effect. Accordingly, the plan holder may not need to amend its results and strategies to take into account the cancelled objective. It is important to note, however, that the results and strategies will continue to have effect in relation to any *other* objectives with which they are associated. The results and strategies do not disappear; they simply have no effect in respect of the cancelled objective. If the licensee subsequently amended its FSP to remove the result or strategy, the question of whether or not that amendment would require approval would depend on the interrelationship of the result or strategy with other objectives (the one to all relationship). Licensee and ministry staff should review the words of the FSP provision carefully to ensure that it operates as intended.
- ii) In situations where an FSP does not contain the provision as noted above and a LUO is cancelled, FRPA, Section 8(1) and FPPR, Section 29(f) will apply and an FSP amendment will need to be approved. Where the cancelled LUO is being followed by a new GWM for a similar matter, the most efficient means to complete this amendment (provided there is a good understanding between the parties) would be for the FSP holder to request approval for the amendment. The FSP holder could also request an exemption [as per FPPR, Section 20(3)] from most of the FPPR review and comment requirements. To aid the DDM in his/her decision, the request should note the circumstances and the extent to which review, comment and consultation have already occurred.

Before LUOs are cancelled, they should typically have been subjected to a consultation process and an opportunity for affected parties to review and comment upon the cancellation. One of the expected outcomes of an LUO cancellation will be amendments to any FSPs affected by the cancelled LUO. This is especially true where the establishment of a more current GWM is being contemplated. In these situations, additional review, comment and consultation on an FSP amendment to remove a result or strategy for a cancelled objective may not be necessary, though that will be the decision of the delegated decision-maker to whom the request is made.

- iii) Alternatively, standard procedures for FSP mandatory amendments can be followed. A description of these procedures is provided within the “Administrative Guide to Forest Stewardship Plans” at <http://www.for.gov.bc.ca/hfh/timten/AGFSP/index.htm>.

Further Information

If there are any questions about the content of this bulletin, please contact:

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