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July 21, 2011

BY EMAIL

To: Regional Executive Directors
District Resource Managers
Timber Sales Managers
Branch Directors

From: Dave Peterson
Assistant Deputy Minister
Tenures, Competitiveness and Innovation Division

Re: **FRPA General Bulletin (Number 25) – A Comparison of FSP Results or Strategies Flexibility Options**



A new *Forest and Range Practices Act* (FRPA) General Bulletin (Number 25), "A Comparison of FSP Results or Strategies Flexibility Options" has been completed. This bulletin clarifies the mechanisms available to incorporate flexibility into Forest Stewardship Plan results or strategies.

The bulletin will be on 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 Paul Picard, Timber Tenures Forester, Forest Tenures Branch at (250) 387-8328.

Dave Peterson
Assistant Deputy Minister
Tenures, Competitiveness and Innovation Division

Attachment(s): 1

Regional Executive Directors
District Resource Managers
Timber Sales Manager
Branch Directors

pc: Jennifer Gunter, Executive Director, BC Community Forest Association
Les Kiss, Vice President, Forestry, Coast Forest Products Association
Archie MacDonald, General Manager, Forestry, Council of Forest Industries
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FRPA GENERAL BULLETIN

Number 25

June 23, 2011

A Comparison of FSP Results or Strategies Flexibility Options

The information contained in this bulletin does not constitute legal advice. The sections of legislation contained within have been selected to illustrate specific points and are not intended to be a comprehensive examination of all the pertinent legislation. Practitioners outside government should seek independent legal advice.

Introduction

The *Forest Range and Practices Act* (FRPA) is designed to provide agreement holders who are required to prepare and obtain approval of a Forest Stewardship Plan (FSP) with planning and practice flexibility consistent with government objectives for resource values. Flexibility is an important element in administering FRPA because conditions in BC's forests are variable, dynamic and constantly changing. FSP preparers need to be able to innovate and adapt to local circumstances, changing biophysical conditions, social values, management resource availability and global competition, all while maintaining high environmental and forest management standards and meeting socio-economic expectations.

FRPA provides plan preparers with several different mechanisms to incorporate flexibility into plans and practices to provide for operational and administrative efficiencies and/or improved forest management. The following discussion is intended to clarify the reader's understanding of the kinds of flexibility within FRPA.

Note: For greater certainty, the reader is reminded that while FRPA provides significant flexibility in how to address established objectives, there is less flexibility in whether or not established objectives must be addressed.

Definitions

FRPA planning and practice flexibility can be identified and defined as follows:

1. Exemptions

FRPA exemption references include;

a) **Exemption authorized by legislation:**

Legislation provides some "automatic" exemptions that may or may not be subject to specified conditions.

Example:

Forest Planning and Practices Regulation (FPPR), Section 12(8) *"A person who is required to prepare a forest stewardship plan is exempt from the requirement to prepare results or strategies for an objective set by government for timber."*

b) **Exemption requiring approval:**

Legislation specifies many different exemptions to planning and practice requirements that require Delegated Decision Maker (DDM) approval before they can come into effect. This type of exemption is often initiated at the request of the agreement holder, but in some cases may be initiated by the DDM. The decision is usually subject to an approval test specified within the provision. The approval decision may be discretionary (may) or mandatory (must) and may be subject to conditions specified by the DDM.

Example of exemption requiring **discretionary** approval:

FPPR, Section 92(1) *"The minister responsible for the Wildlife Act **may exempt** a person from Section 69 of this regulation in relation to a general wildlife measure, if satisfied that*

- (a) the intent of the general wildlife measure will be achieved, or*
- (b) compliance with that provision is not practicable, given the circumstances or conditions applicable to a particular area."*

Example of exemption requiring **mandatory** approval:

FPPR, Section 12(7) *"If the minister determines that it is not practicable, given the circumstances or conditions applicable to a particular area, for the person otherwise required to do so, to specify a result or strategy consistent with an established objective for that area, the minister **must exempt** the person from that requirement in relation to that area."*

Note: That in the example above, granting the exemption only becomes mandatory once the minister or his/her delegate has determined that it is not practicable given the circumstances or conditions applicable to a particular area for the person to specify a result or strategy consistent with an established objective for that area.

2. Exception:

Exception is not a term used in legislation, but it is a useful means of describing limited application of a requirement when specified conditions or circumstances exist, for example, a provision that applies “except” under specified conditions. When the specified conditions exist, there is no requirement to follow the provision and no requirement for approval. The concept of exceptions is used in the FRPA legislation and can be found in various Land Use Objective orders.

Example:

FPPR, Section 50(3) “A person who is authorized in respect of a road must not remove gravel or other fill from within a riparian management area ..., unless

(a) the gravel or fill is within the road prism

(b) the gravel or fill is a stream crossing, or

(c) there is no other practicable option”.

3) Default Practice Requirement versus Results or Strategy:

- a) Under FRPA, agreement holders may utilize “default” practice requirements instead of meeting the requirement to specify a result or strategy in a FSP [FRPA, Section 5(1)(b)] by *undertaking to comply* with specified FPPR practice requirements, for example, Section 12.1 of the FPPR (no additional flexibility is enabled).
- b) Alternatively, agreement holders can choose to meet the requirement to specify a result or strategy in a FSP by either:
 - i. Adopting a FPPR practice requirement as a result or strategy with modification to enable some flexibility, given the agreement holder can modify the commitments made in the practice requirement and maintain consistency with the relevant established objectives to the extent practicable (some additional flexibility is enabled), or
 - ii. Proposing a unique result or strategy that is consistent to the extent practicable with established objectives (maximum is flexibility enabled).

Refer to FRPA Administration Bulletin #3 – Interpretive Guidance Respecting Forest Stewardship Plan Questions (Question 6) and the Administrative Guide to FSPs (AGFSP) Volume 1, Section 3.5 for further guidance on how to specify a result or strategy in an FSP.

3. Variance

This term is not widely used in FRPA, but one example does exist to authorize a DDM to “vary” a recreation resource feature.

Example:

FRPA, Section 56(2) *“The minister may order ...*

(b) the variance of the boundaries of an interpretive forest site, a recreation site or a recreation trail, ...”

Contrasting FPPR, Section 12(7) with Section 25.1(1)

Writing results or strategies capable of meeting approval tests can be a difficult task depending on local conditions. Sections 25.1(1) and 12(7) of FPPR provide result or strategy writing flexibility. It is important to note the distinction between how these two different planning flexibility features operate.

Section 25.1(1) of the FPPR is a prescribed requirement of FRPA, Section 5(1.1), and is integral in determining consistency of intended results or strategies with objectives set by government. As long as the result or strategy meets the test of consistent “... to the extent practicable...” taking “...into account the circumstances or conditions applicable to that area...” then the consistency test for approval is met. Section 25.1(1) qualifies the meaning of “consistency”. It does not mean that results or strategies that are inconsistent with objectives can be approved, nor does it mean that results or strategies should be as minimally consistent as possible with objectives.

Section 25.1(1) is available where competing objectives or local conditions make it difficult to write a result or strategy that is fully consistent with established objectives. Section 25.1(1) acknowledges that results or strategies may not be entirely consistent with objectives and that a compromise may be required. Section 25.1(1) is not an exemption; it does not exempt an agreement holder from the requirement to write a result or strategy to address an established objective. The DDM will need evidence to know what the issue or problem is, where it is, the reason why it is impracticable to meet an objective (e.g. wind throw event exceeds VQO scale criteria) and what the alternate result will be. The alternate result/strategy must be measurable and verifiable.

Section 12(7) of FPPR is an exemption from the requirement to specify an intended results or strategy in an FSP. It provides the authority for the DDM to grant an exemption from the requirement where it is not practicable, given the circumstances or conditions applicable to a particular area, and to specify a result or strategy consistent with an established objective. This exemption only applies to a “particular area” as defined in the exemption request (particular area may be smaller than the total area covered by the FSP) which means that a result or strategy will still be required for the area under the FSP outside the “particular area”.

Note that FPPR, Section 12(7) is an exemption from the requirement to *specify* a result or strategy in one's FSP, and is therefore, applicable at the planning and preparation stage; it is not an exemption from the requirement to achieve an intended result or carry out a strategy where doing so is impracticable due to circumstances or conditions that have changed since the approval of the FSP. There is no exemption provision from meeting the requirement to be in compliance with results or strategies approved in a FSP, i.e. FRPA, Section 21(1). If an agreement holder finds that circumstances and conditions applicable to a particular area make it impracticable to achieve an approved result or carry out an approved strategy, they can seek approval for an amendment of an existing result or strategy so that the result or strategy is achievable and meets the test in Section 25.1(1).

Alternatively, if circumstances and conditions applicable to a particular area have deteriorated or changed so significantly that it is no longer practicable to even specify a result or strategy that is consistent to the extent practicable with an objective, then the agreement holder can seek an exemption under Section 12(7) from the requirement to specify a result or strategy for that particular area. If an exemption is granted, the best practice for the agreement holder would be to amend their FSP, deleting the result or strategy for the particular area to which the exemption applies so that the agreement holder's obligations are clear. That will remove any possibility of action being taken under FRPA, Section 21 for failure to achieve a result or carry out a strategy.

In summary, FPPR, Section 25.1(1) is used when a result or strategy capable of meeting the consistency test can be written, but where some flexibility is required in terms of consistency with objectives; otherwise, an agreement holder can consider requesting an exemption from the requirement to write a result or strategy in relation to a particular area as authorized under FPPR, Section 12(7).

Note: Other partial result or strategy exemptions are available under FPPR, Sections 12(4), 12(5) and 25(2) and additional legislative direction related to the consistency test exists under FPPR, Sections 25(1), 25.1(2) and 27.

Result or Strategy Writing Considerations

FPPR, Section 12(7) result or strategy exemption is separate and distinct from the results or strategy approval test. An exemption request should not form any part of a proposed result or strategy. The exemption is in lieu of a result or strategy where it is impracticable to specify one. If a Section 12(7) exemption request forms part of an FSP submission, it is recommended that the submission clearly distinguish and identify the context of the exemption request and the particular area to which it applies.

Alternatively, when writing a result or strategy that meet the requirements of FPPR, Section 25.1(1), agreement holders need to ensure that content and approval requirements are met. The format used to build flexibility into a result or strategy can vary. Possible means of building flexibility into a result or strategy include:

1. Limit the application of the result or strategy – use in situations or circumstances where the proposed flexibility has no consequence to the established objective.
2. Provide flexibility in the application of a result or strategy to address unanticipated uncertainty, i.e. to avoid many, small and insignificant amendment requirements.
3. Define where and when result or strategy application limit can be used. This is like bullet 1 above, but defines where, when and how much flexibility will be utilized.
4. Provide alternate result or strategy for situations or circumstances where base case results or strategy will not apply.

Flexibility can be built into proposed results or strategies as long as the proposal meets the definition of a result or strategy and is deemed to be consistent with the established objective. If the circumstances or conditions applicable to that area are such that it is impracticable to write a result or strategy consistent with the established objective, then the agreement holder can request a FPPR s. 12(7) exemption to writing a result or strategy (see above).

For a more detailed explanation of result or strategy flexibility writing options and for some result or strategy writing options, refer to FRPA General Bulletin Number 12 Use of the Term "Practicable" in Results or Strategies.

Application of the consistency test is discussed in detail in the Administrative Guide to FSPs (AGFSP) Volume 1, Section 3.10.6.3 – Consistency within the FSP.

For additional discussion regarding circumstances that limit the application of a result or strategy, refer to FRPA Administration Bulletin #3 – Interpretive Guidance Respecting Forest Stewardship Plan Questions (Question 5).

Assessing Result or Strategy Flexibility Proposals

The basic approval test for any result or strategy includes an assessment of it being measurable or verifiable and consistent with established objectives to the extent practicable. Building flexibility into a proposed result or strategy has the potential to influence the extent to which the proposal is consistent with the established objective, i.e. depending on the wording, different results or strategies may be more or less consistent than others. When contemplating the use of flexibility provisions that may influence the consistency "...to the extent practicable..." portion of the test, the FSP proponent should try to anticipate and consider some or all of the following questions:

1. Why is a flexibility provision required, i.e. what is its purpose?
2. What are the flexibility provisions being proposed, i.e. is it clearly articulated?
3. Under what situations and circumstances will the flexibility provision be implemented?
4. Does the proposal include an alternate result or strategy or a limit on application of flexibility provision?

5. What is the consequence of not applying the result or strategy under defined situations and circumstances in relation to being consistent with the established objective?
6. Does the flexibility provision limit the scope of the result's or strategy's ability to fully address the established objective(s)?
7. What are the circumstances and conditions influencing ability of the proposed result or strategy to comply with the "extent practicable" provision?
8. Is the term "practicable" being objectively used in a proposed result or strategy to provide flexibility?
9. What is the level of uncertainty associated with flexibility provision, e.g. the probability of the situations and circumstances occurring and the likelihood of negative impacts associated with these situations and circumstances?
10. To what extent is the flexibility provision adequately bounded by other applicable requirements, e.g. legislated practice requirements, other enactments, etc.?
11. Is the proposed result or strategy inconsistent with the legislative scheme by providing an automatic exemption that would normally have to be approved by a DDM?
12. What is the risk associated with the proposed flexibility, i.e. evaluate based on a reasonable likelihood of the flexibility being used and an adverse result occurring?
13. What factors were considered when specifying the proposed result or strategy?
14. Does legislation provide direction on how flexibility provision meets approval test, e.g. FPPR, Section 25(1)?
15. Does proposed flexibility provision conflict with legal requirement, e.g. disapply FRPA, Section 21?
16. Is there scientific or technical information that supports the flexibility provision, e.g. independent published research, internal monitoring data, advice from independent specialists, and any other supporting information?
17. Where is the balance between social, economic and environmental factors that will influence the decision, e.g. DDM expectation meetings?

When utilizing a flexibility provision, it is important that the result or strategy and any supporting information sufficiently inform the DDM. Agreement holders are encouraged to consider submitting a rationale with a result or strategy request utilizing FPPR, Section 25.1(1). Answers to the questions listed above can be used to help focus the rationale and inform the DDM in his/her determination. If the result or strategy and the supporting information is sufficient for the DDM to determine that the result or strategy meets the test of consistent to the extent practicable with the established objective and it is measurable or verifiable, then the test for approval is met and the result or strategy must be approved.

Note: Plan proponents are encouraged to consider developing and submitting supporting rationale and to use the listed flexibility questions when contemplating a proposed exemption from the requirement to specify a result or strategy where it is not practicable to do so, i.e. FPPR, Section 12(7).

Summary and Conclusion

FRPA provides a number of result or strategy writing options to provide flexibility in dealing with forest management complexities. When utilizing these options, the FSP plan preparer needs to ensure that these flexibility options are being used in the right context. Operating conditions that make it difficult to write a result or strategy should be discussed with the DDM to find resolution options.

For further information about mechanisms to address flexibility in FSP results or strategies, can contact:

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