

Policy – Silviculture Security¹ Requirement for Major Non-Replaceable Licences April 2012

*This update is provided for the information of Forest Lands and Natural Resource Operations Staff and Decision Makers. While every effort has been made to ensure accuracy, this policy is only intended to provide an overview. It should **not** be interpreted as legal advice, and it should **not** be used in place of the relevant legislation.*

Preamble:

The minister has delegated the decision-making authority under the Security for Forest and Range Practice Liability Regulation (SFRPLR) for the holders of certain agreements to provide security with respect to an obligation to establish a free growing stand to regional executive directors and district managers. The purpose of this update is to provide guidance to delegated decision makers (DDMs) when making determinations related to the amount of silviculture security that a holder of a major licence that is non-replaceable (NRL)² may be required to provide for the performance of an obligation to establish a free growing stand³.

This policy captures a change in ministerial policy, dated March 31, 2009, regarding security requirements for First Nations Direct Award Tenures. It also addresses the new decision-making test in Section 1 (1) of the SFRPLR under the *Forest and Range Practices Act* (FRPA) as well as principles to guide determinations.

Guidance:

1. The Legislative Test

Section 1 (1) of the SFRPLR specifies that:

- 1) The minister may require the following holders of agreements under the *Forest Act* or *Range Act* to provide security for the performance of the following obligations, if satisfied that the requirement is in the public interest, after considering the likelihood of, and the consequences of, the obligation not being met:
 - (a) with respect to an obligation to establish a free growing stand, the holder of
 - (i) a major licence that is non-replaceable,
 - (ii) a woodlot licence, or

¹ Security is the term used by FRPA's SFRPLR in referring to the silviculture security. Deposit is the term used by the *Forest Act – Advertising, Deposits, Disposition and Extension Regulation* in referring to sums of money deposited with the government as a licence performance security.

² NRL is referring to a non-replaceable forest licence, a forestry licence to cut that specifies it is a major licence, is issued to satisfy the obligations of the government under a pulpwood agreement, or is entered into under the Section 47.3 (1)(a) of the *Forest Act*, or a timber licence.

³ The guidance outlined in this document may be applied to security determinations made upon award of a new NRL including agreements that may be impacted by Section 29.1 or 30 provisions.

(iii) a community forest agreement;

(b) with respect to an obligation under a range use plan, range stewardship plan, the *Range Act* or the Range Planning and Practices Regulation, the holder of an agreement under the *Range Act*.

It should be noted that this policy only speaks to (i) a major licence that is non-replaceable.

In deciding how much security to collect, the DDM should carry out a risk assessment that involves a consideration of the likelihood that the obligation to establish a free growing stand will not be met as well as its consequences.

After carrying out a risk assessment, the DDM should be in a position to know whether it is in the public interest to require security, and how much security is required. The public interest is broader than simply the government's interest in having the obligation fulfilled. While protecting Crown revenues and limiting exposure to future liabilities will be key concerns in the determination, the public also has an interest in such things as economic and social development, forest stewardship, and environmental sustainability.

The range of silviculture security that may be required is anywhere from 0 to 100 percent of the expected cost of establishing a free growing stand, with the amount depending on the principles outlined in this policy.

The DDM must make a determination and give written notice of the silviculture security requirement to the agreement holder. The notice *must* contain the following information:

- the amount of security that is required;
- the form of security; and
- when the security must be paid.

Acceptable forms of security include Cash, certified cheques, bank drafts, money orders and irrevocable lines of credit. Personal checks and safekeeping agreements should be avoided.

2. Principles to Consider

As independent decision-makers, DDMs are required to make determinations unfettered by outside influences⁴. Policy is not binding on DDMs; however, DDMs should only depart from it when there is a sound rationale for doing so.

The following is a principled approach aimed at promoting consistency while still allowing flexibility for DDMs to exercise their discretionary authority. These general principles should guide DDMs in developing a process for determining the amount of security required:

- **Consistency of the determination process:** Security determinations should be consistent for similar licence types and circumstances. Consistency between districts is desirable, but may not

⁴ The public interest is not an 'outside influence' as it is integral to the legislative test.

always be feasible. Where possible, adjacent districts with common licensees should work together to develop processes for security determinations in a way that is consistent and fair for clients in both districts.

- **Fairness:** All licence holders should be treated fairly by ensuring that a consistent risk assessment process, as determined by each DDM, is followed for each NRL. This risk assessment process should consistently evaluate the same factors when determining the risk of the obligation not being met and the associated consequences.
- **Administrative process:** Administrative process associated with the security should be kept to the minimum level necessary to ensure proper management of the security and to reduce the burden on the licence holder and government. Security should be collected as soon as is practicable without adding undue hardship to the NRL holder (e.g. do not wait until after harvesting to collect the deposit without acceptable rationale).

SFRPLR, Section 2 (b) states that security is held until there is no further need for it. Normally, this is when the free growing obligation has been met, but does not exclude a partial refund at an earlier stage. Partial release of security is acceptable provided that the risk has decreased relative to the object being secured (i.e. the licensee has demonstrated that part of the obligation has been met, for example, free to grow was achieved on 50 percent of the area). The DDM should follow a consistent process for the release of security.

Accessing silviculture security funds during the term of a licence to remedy the obligation holder's failure to perform its obligation may be possible. It is highly recommended that any terms in this regard be agreed to in writing by all parties at the time the security is initially collected.

- **Site conditions addressed:** Take into account circumstances of a licence as they relate to site specific conditions to the extent known at the time of the determination (e.g. reforestation difficulties and silviculture costs in the area).
- **Acceptable risk to the government:** It is acceptable for DDMs to assume risk to the government by not collecting the full 100 percent security required to sufficiently bring every block to a free to grow state. One outcome of this policy is that in the event of default by the licensee, the government assumes the responsibility (but not the legal liability) to reforest the harvested areas. While the DDM has the option to collect no security, consideration should be given to the importance of ensuring that government holds enough security in the event of a default on a free to grow obligation of the licence holder.
- **Finality of determinations:** Once rendered, a statutory determination is final, see C&E Bulletin Number 11 – *Functus Officio*. However, circumstances may arise, such as where the obligation being secured expands in scope (e.g. greater area, higher standards) where an additional security determination may be warranted and an additional amount of security could be imposed to cover that new area of risk.

3. First Nations Direct Award Tenures

Sections 43.51 (1)(a), 43.54, and 47.3 (1)(a) of the *Forest Act* allow the government to direct award a tenure to a First Nation or its representative to implement or further an agreement between the First Nation and the government [i.e. Forest Tenure Opportunity Agreement (FTOA) Forest and Range Opportunity Agreement (FRO), Forest and Range Agreement (FRA), etc.]. The NRLs awarded through these agreements are subject to the SFRPLR like all NRLs. Under a Forest and Range Consultation and Revenue Sharing Agreement (FCRSA), a First Nation may receive periodic revenue sharing payments from the government. Under the minister's policy of March 31, 2009, if the DDM is satisfied that the FCRSA or similar agreement contains a provision, or has been appropriately amended, that allows the government to withhold revenue sharing payments, this may act in lieu of security for that NRL, to ensure a free growing stand is established in accordance with FRPA, Section 29 (1).

Revenue sharing payments are available under only certain direct award agreements – FCRSAs, FRAs and FROs. FTOAs provide for the opportunity to harvest timber without revenue sharing payments. A First Nation must agree, through an amendment of their FCRSA, FRO/FRA, to the use of revenue sharing as security for unfulfilled silviculture obligations associated with their licence. The option is not available if the First Nation does not agree to sign the amendment. Once enacted, this is deemed to be security in and of its self. Revenue sharing funds are not actually diverted into a form of deposit but used to defray actual projects, if required.⁵

If the FCRSA, FRA or FRO provides FLNRO access to revenue sharing payments for unfulfilled silviculture obligations and those funds adequately secure the performance of the obligations, a silviculture security determination will still be necessary at the time of licence issuance. The following considerations are important in assessing the adequacy of the security provided by the revenue sharing option:

- a) Silviculture liabilities are dependent on the amount harvested and take up to 20 years to be fulfilled. The result is that higher levels of liability may occur when available revenue sharing payments become more limited.
- b) The revenue sharing agreement may expire before the term of the tenure and the culmination of the silviculture obligations.
- c) A First Nation may have forest tenure issued over multiple districts, requiring communication and coordination with DMs who may be using the same revenue sharing as security for multiple liabilities.
- d) Revenue sharing payments may already be dedicated to satisfy other mutually agreed upon purposes between a First Nation and government. DDMs should be satisfied that adequate revenue sharing funds are available to cover the determined silviculture security.

If the security provided through access to the revenue sharing payments does not adequately secure the performance of the obligations, additional form(s) of security should be considered.

⁵ FCRSAs already have this clause in the 'default' template. FRAs and FROs do not have this clause so these agreement holders would need to amend their agreement. The FRAs and FROs are being replaced by FCRSAs as they expire.

For direct award tenures, it may be appropriate to include language that states:

- The security determination for licence XYZ is for \$X.
- That amount will not be requested at this time as xyz First Nation has agreed under their Forest and Range Consultation and Revenue Sharing Agreement (agreement) with government, that BC may apply revenue sharing payments in order to satisfy any unfulfilled obligation from a licence(s) entered into as a result of the invitation to apply under a Forest Tenure Opportunity Agreement entered into between «First_Nation» (or a legal entity controlled by the xyz First Nation and British Columbia.
- If the agreement expires and no new agreement with a similar commitment is signed, the \$x security may be due and payable to government if silviculture obligations are not found to be in compliance Prior to doing so, we will contact you within at least 90 days to inform and advise you of the issue.