Forest Practices Code

Advice to Statutory Decision Makers and Their Staff from Compliance & Enforcement Branch

Number 1 July 30, 1998

Forest Appeal Commission's Decision Regarding the Approval of MacMillan Bloedel's FDP for Brooks Bay/Klaskish

Introduction

On June 11, 1998 the Forest Appeals Commission (the "Commission") released its reasons for decision in Appeal No. 96/04(b), which was an appeal from a determination by the District Manager in Port McNeill, dated May 31, 1996, approving a five year Forest Development Plan ("FDP") submitted by MacMillan Bloedel Limited ("MB"). The appeal was initiated under section 131 of the *Forest Practices Code of British Columbia Act* (the "FPC Act") by the Forest Practices Board (the "Board"), which sought an order rescinding the approval of the FDP. There were several stated grounds for appeal, but the primary concerns were the alleged deficiency in the content of the FDP, and the alleged failure of MB to fulfill the public review and comment requirements. The Sierra Club of British Columbia (Sierra Club) joined the appeal as an intervenor.

> The end result was that the appeal was dismissed and the Commission did not rescind the approval of the FDP.

Decisions of the Commission do not set a precedent and are not binding on district managers or other statutory decision-makers. However, in this case, the Commission's application of some basic principles of statutory interpretation is particularly compelling, and consideration of the decision may therefore be of assistance to district managers and other statutory decision makers under the FPC Act.

In this case, the Commission dealt with the following issues:

1. What is meant by "substantial compliance" ?
2. What are the content requirements for a FDP ?
3. How is the test of "adequately manage and conserve" to be applied ?
4. What is adequate review and comment ?

1. What is Meant by "Substantial Compliance" ?

Now that the transition period is over, there is likely to be less interest in the first issue. However, the Commission's approach to interpreting "substantial compliance" may still be useful as an example of the application of basic principles of statutory interpretation. The Commission took as its starting point the dictionary definition of "substantial":

> "The common meaning of "*substantial*" as found in Webster's New Collegiate Dictionary is "*important or essential or being largely, but not wholly what is specified*."

The Commission held that the interpretation of "substantial compliance" which most closely reflected this definition was that set out by the District Manager for the Queen Charlotte Island Forest District in a letter dated February 1, 1996 to all major licensees in the district:

> "Simply put, the term 'substantial compliance' means that the objective is to be in full compliance wherever possible. However, the degree of flexibility allowed by this interpretation needs further clarification. Substantial compliance means 'in compliance with the requirements of the *Code* Act and regulations, except for minor omissions or defects that will not effect the intent of the legislation.' Unimportant omissions or defects in FDP submissions may be tolerated if the essential requirements of the *Code* are met. The expectation is that variation from the requirements of the *Code* will be minimal and that in such cases [the] final decision on the matter will be based on individual circumstances and the context of the *Code* as a whole..."

2. What are the Content Requirements for a FDP ?

The Commission observed that the FPC Act does not define a FDP. However, as the highest level of operational plan, it is implicit that a FDP should contain sufficient information about the "area under the plan" from which lower level planning regarding cutblocks can be developed. It should be a plan for developing the forest, and not just a collection of individual roads and cutblocks.

All parties to the appeal agreed that the purposes of a FDP are threefold:

1. to specify measures that will be carried out to protect forest resources;
2. to provide the public and resource agencies with a right to review and comment; and
3. to guide in the preparation and approval of lower level plans (e.g. SPs, LPs, cutting permits, and road permits).

However, the parties disagreed as to the breadth or scope of the FDP's content requirements. There were three main areas of disagreement:

a. the meaning of the phrase "area under the plan";

b. the requirements of Section 10(b)(ii) – "matters required by regulation"; and

c. the requirements of Section 10(c)(ii) of the FPC Act – "measures that will be carried out to protect forest resources".

a. the meaning of the phrase "area under the plan"
As the Commission notes in its decision, the phrase "area under the plan" is crucial to assessing a FDP as it sets the parameters for the information required to be contained in the plan. To determine the meaning of this phrase, the Commission looked at its use in section 13 [now section 9] of the Operational Planning Regulation (OPR). Section 13 states:

> **13.** 1) A person must ensure that a forest development plan addresses an area ***sufficient in size to include all areas affected by the timber harvesting and road construction or modification operations proposed under the plan***. [emphasis added]
>
> 2) If the district manager determines that the area under a proposed forest development plan does not meet the requirements of subsection (1), the district manager may, in a notice given to the person, specify the area that the plan must address.

MB and the government argued that the phrase "area under the plan" should be interpreted as a fluid concept providing for different geographic areas depending on the specific provision of the FPC Act or the OPR at issue, and the actual or potential impact of each proposed forest management activity on the particular resource feature or value being considered.

The Commission disagreed.

> The Commission held that the plan and the "area under the plan" are the same thing. The area, after it is initially identified or defined by the licensee, does not change. The area must be large enough to include all the areas affected by the proposed timber harvesting and road construction or modification activities, and the resources in the entire area must be identified in accordance with the legislation. It is not adequate merely to address the cutblocks themselves and the areas immediately adjacent to the cutblocks.

The Commission noted, however, that the individual content requirements set out in the OPR do not always apply to the entire "area under the plan". The licensee and the district manager must look to the specific legislative requirements to see whether information is required for the entire "area under the plan", for "an area" under the plan, or just for the cutblocks or roads themselves.

b. Section 10(b)(ii) of the FPC Act - "matters required by regulation"
The Board and Sierra Club argued that the FDP failed to meet the requirements of Sections 10(b)(ii) [now Section 10(1)(b)(ii)] of the FPC Act in that the FDP did not include "for the area under the plan", "matters required by regulation". The specific issues raised by the Board were:

i. stream identification and classification;

ii. wildlife;

iii. cultural heritage resources;

iv. operability information;

v. unstable terrain;

vi. watershed information; and

vii. other resources.

The Commission proceeded to assess each issue against the content requirements set out in the OPR in effect at that time.

i. **Stream Identification and Classification**

The Board argued that the FDP was deficient in that it only included stream classifications for the cutblocks identified in the FDP, and did not show classifications for the rest of the "area under the plan", including in particular the areas downstream from the cutblocks. The Commission looked at the content requirements relating to stream classification set out in section 15(6) of the OPR, which references assessments required to be carried out under Section 28. Section 28 [at that time] provided that

> "… a person proposing to carry out timber harvesting or road construction or modification operations **in an area** under a forest development plan must … determine the riparian class for each stream, wetland and lake in **the area**. [emphasis added]

The Commission concurred with the government's interpretation that the word "an area" in Section 28 "narrows the scope of the classification from the entire area under the plan to the areas in and around proposed timber harvesting and road construction or modification".

Sierra Club's challenge was to the method used to classify fish streams. Sierra Club argued that the default provision found in the definition of "fish stream" in section 1 of the OPR should have applied. However, the Commission noted that the default provision only applies if there has not been a "fish inventory acceptable to the district manager".

The Commission noted that "fish inventory" is not defined. Although Sierra Club argued that MB should have carried out minnow trapping or electro-shocking, the district manager testified that the information provided in the FDP was acceptable to him. The Commission was also satisfied that, while some of the information was based on an old classification system and minnow trapping and electro-shocking were not done, the information provided by MB met or substantially met the requirements of the

OPR.

ii. **Wildlife**

The Board and the Sierra Club argued that the FDP was deficient since it contained no information on marbled murrelet, roosevelt elk, or trumpeter swans, all of which were species found in the area under the plan.

The Commission held that the only requirements for wildlife encompassed under Section 10(b)(ii) were those spelled out in the OPR, namely the "known" locations of "wildlife habitat areas" (OPR sec. 15(2)(f)) and objectives for the management of "identified wildlife" (OPR sec. 15(7)(c)). The Commission noted that the terms "known", "wildlife habitat area" and "identified wildlife" are all defined terms.

"Known" is defined as meaning "contained in a higher level plan, or … otherwise made available by the government at least 4 months before the operational plan is submitted".

"Wildlife habitat area" is defined as meaning "a mapped area of land that the Deputy Minister of Environment, Lands and Parks, or a person authorized by that deputy minister, and the chief forester, have determined is necessary to meet the habitat requirements of one or more species of identified wildlife."

"Identified wildlife" is defined as meaning "... those species at risk that the Deputy Minister of Environment, Lands and Parks or a person authorized by that deputy minister and the chief forester, agree will be managed through a higher level plan, wildlife habitat area or general wildlife measure."

Evidence was given at the hearing that neither the roosevelt elk nor the trumpeter swans have been designated as "identified wildlife". Although the marbled murrelet had been placed in draft documents indicating that they will be designated as "identified wildlife", it too had not yet been designated. Indeed, at the time the FDP was approved, no wildlife had yet been designated as "identified wildlife".

Based on this evidence, the Commission held that the OPR content requirements for wildlife did not apply to the FDP, and that there were no other specific statutory requirements for the species in question.

The Commission flagged the fact that the District Manager for the Port McNeill District did obtain additional information regarding the marbled murrelet as a result of concerns raised by the Sierra

Club in April, 1996, prior to the approval of the FDP. However, the district manager did not require MB to include this additional information in the FDP, and the Commission agreed with his assessment that "there was no requirement to do so."

iii. **Cultural Heritage Resources**

The Board and Sierra Club both argued that the FDP was seriously deficient in making no reference to cultural heritage resources. The Commission looked at Section 15(2)(a) of the OPR, which provided that a FDP must identify and describe for the area under the plan the "known" locations of cultural heritage resources. The Commission held that since there were no such "known" resources in the area, the FDP was not deficient in that regard.

Furthermore, while the Commission noted that it would have been convenient for the FDP to have stated that no cultural heritage resources had been made "known", there was no legislative requirement for MB to expressly identify the provisions of the OPR which did not apply to the FDP.

The Commission also held that the district manager did not err in failing to exercise the discretion granted to him under the OPR to require MB to perform an archaeological impact assessment.

iv. **Operability Information**

Section 15(3)(d) of the OPR required a FDP to describe for the area under the plan "the location of all forest areas identified as operable for timber harvesting". The FDP contained little or no operability information for the area outside the proposed cutblocks.

The Commission held that while the FDP did not contain all the information required by section 15(3)(d), the lack of information in the circumstances was relatively minor, and the plan "substantially met" the legislative requirements.

v. **Unstable Terrain**

Section 15(3)(b) of the OPR required a FDP to describe "for the area under the plan... the location and nature of areas with unstable or potentially unstable terrain". "Unstable or potentially unstable terrain" was defined in section 1(1) of the OPR as "an area where there is a moderate to high likelihood of landslides". The FDP did not have information on terrain stability outside of the proposed cutblocks. However, as neither the Board nor Sierra Club presented any evidence of "unstable or potentially unstable terrain"

outside the cutblocks, the Commission had no evidence to support a finding that the FDP did not comply with section 15(3)(b).

The other sections dealing with terrain stability were sections 15(6)(f) and 30(1) of the OPR. Section 30(1) only required a person proposing to carry out harvesting operations "in an area" to conduct a terrain stability assessment to the satisfaction of the district manager. That had been done with respect to the proposed cutblocks. Section 15(6)(f) required that the results of any such terrain stability assessment be included in the FDP. That had also been done. Thus, the Commission found that those two requirements had been met.

vi. **Watershed Information**

The Sierra Club contended that the FDP did not contain watershed level information which the Ministry of Environment, Lands and Parks (MELP) had wanted. The Commission looked at the requirements of Section 32(1) of the OPR, which provided that a watershed assessment must be performed by

> "… person proposing to carry out timber harvesting or road construction or modification operations under a FDP in the following areas ….
>
> a. a community watershed;
>
> b. a watershed that has significant downstream fisheries or watershed sensitivity as determined by the district manager and a designated environment official; or
>
> c. a watershed for which the district manager determines that an assessment is necessary.

The district manager had concluded that Section 32(1)(a) and (b) did not apply. As for Section 32(1)(c), the district manager had concluded that a watershed assessment was not required because:

d. it was not one of the watersheds identified as a priority in the joint consultation process with MELP officials; and

e. consultation with a hydrologist and ministry staff indicated that, in the circumstances, a watershed assessment of an un-logged watershed with a FDP proposing harvesting in less than 1% of the watershed area would have no value.

At the hearing, a MELP representative testified that while MELP would have liked a watershed level plan or a watershed study completed prior to the harvesting of timber in the area, he agreed

that undertaking a comprehensive watershed management plan wasn't required under the FPC Act in the circumstances. The Commission held that no watershed assessment was required in the FDP.

vii. **Other Resources**

The Board argued that the FDP should have specifically mentioned all of the other resources or values listed in section 15(2) of the OPR, including for example wilderness areas, sensitive areas, resource features, forest ecosystem networks, and scenic areas. The Commission held that section 15(2) only required MB to identify and describe the "known" locations of the various items. If none existed, the legislation did not require MB to go the further step and say so.

Summary
In summary, the Commission held that Section 10(b)(ii) only requires information about certain forest resources to be included in a FDP, namely those forest resources which are set out in the OPR, and only in those circumstances and to the extent that such information is expressly stated to be required

c. Section 10(c)(ii) - "measures that will be carried out to protect forest resources"

The Board also argued that the FDP did not meet the requirements of Section 10(c)(ii) (now Section 10(1)(c)(ii)) of the FPC Act, which requires a FDP to specify "measures that will be carried out to protect forest resources". In particular, the Board stressed that no measures at all were specified in the FDP to protect forest resources outside the cutblocks.

"Forest resources" is defined in section 1(1) of the FPC Act as "resources and values associated with forests and range including, without limitation, timber, water, wildlife, fisheries, recreation, botanical forest products, forage and biological diversity."

The Board took the position that "forest resources" in the context of section 10(c)(ii) was something more than those resources identified and described in accordance with the provisions in the OPR. In its submissions, the Board said that since the FDP did not mention all the resources listed in the definition of "forest resources", it was impossible to know whether any of those resources were to be found in the area, or whether any measures were required to protect them. The Sierra Club took the same view. It argued that the district manager should turn his mind beyond whether the minimal requirements listed in the OPR have been met and look at whether the forest values in the area are managed and protected. In other words, both the Board and the Sierra Club argued that even if a particular resource (e.g. marbled murrelet) were not covered by the content requirements of the OPR, measures to protect that resource were still required under section 10(c)(ii).

The Commission disagreed. They held:

> "[T]he OPR provides a detailed account of the specific resources or values that are to be identified and described in a plan. There is no express requirement for the licensee to go beyond those specified resources and values when preparing its plan. In fact, section 17 of the *Code* sets out a guide for the preparation of a plan and only identifies those things required by regulation as matters to be included in the plan..."
>
> "The Commission finds that the forest resources which are to be covered in the plan are those set out in the various sections of the OPR. Once the resources have been identified, described or assessed in accordance with the OPR, section 10(c)(ii) requires the licencee (sic) to show how ***those*** resources will be protected - i.e., specify the "measures" that will be employed to protect them...." [emphasis in original]

In other words, the Commission held that Section 10(c)(ii) does not require a licensee to include information on a forest resource in a FDP, or to locate, map or otherwise identify the forest resource in a FDP, if there is no express requirement to do so in the OPR.

Section 10(c)(ii) cannot be used as a vehicle to impose mandatory content requirements over and above the requirements set out in the OPR. Neither can it be used to require a licensee to treat a forest resource that is not a mandatory content requirement as if it were a mandatory content requirement, or to afford it the same type or level of protection required in the OPR for a forest resource that is a mandatory content requirement.

In this case, the Commission concluded that if the OPR required forest resources to be identified for areas outside the cutblocks, and if the FDP failed to identify those forest resources, as required, and consequently failed to specify measures to protect those resources, then the FDP would be deficient. However, without specific evidence to that effect, the Commission had no basis for finding that the FDP was in fact deficient.

3. How is the Test of "Adequately Manage and Conserve" to be Applied ?

Under section 41(1) of the FPC Act, a district manager must approve a FDP if:

a. the plan was prepared and submitted in accordance with the requirements of the FPC Act, regulations, and standards; and

b. the district manager is satisfied that the plan will adequately manage and conserve the forest resources of the area to which it applies.

With respect to the first test, the Commission was satisfied that MB's FDP was prepared in accordance with the requirements of the FPC Act and the OPR for the reasons set out above.

With respect to the second test, the Board and the Sierra Club argued that the district manager could not reasonably have been satisfied with the FDP as there was not sufficient information in the FDP on areas beyond the proposed cutblocks.

The Commission concluded that:

> "Whether the plan 'adequately manages and conserves the forest resources' will largely depend on what resources have been identified and described in the plan and the adequacy of the measures specified to protect them with a view to achieving 'sustainable use'."

Earlier in the decision, the Commission put its conclusion another way:

> "The Commission finds that the forest resources which are to be covered in the plan are those set out in the various sections of the OPR. Once the resources have been identified, described or assessed in accordance with the OPR, section 10(c)(ii) requires the licencee (sic) to show how ***those*** resources will be protected - i.e., specify the "measures" that will be employed to protect them. It is only after both steps are taken that the District Manager is then in a position to determine whether the plan will 'adequately manage and conserve the forest resources of the area to which it applies' in accordance with section 41(1) of the Code." [emphasis in original]

As with Section 10(c)(ii), the Commission held that Section 41(1)(b) cannot be used to impose additional mandatory content requirements over and above those set out in the OPR. Section 41(1)(b) is a test for evaluating the contents of a FDP; it is not a vehicle for adding to those contents. Similarly, Section 41(1)(b) cannot be used to require a licensee to treat a forest resource that is not a mandatory content requirement as if it were a mandatory content requirement, or to afford it the same type or level of protection required in the OPR for a forest resource that is a mandatory content requirement.

As noted above, neither the Board nor Sierra Club provided evidence of any deficiency in meeting the content requirements set out in the FPC Act and the OPR. Based on what was included in the plan, the Commission held that the district manager "could have been reasonably satisfied that the plan adequately managed and conserved the forest resources identified in the plan".

4. What is Adequate Public Review and Comment ?

The Board and the Sierra Club argued that the public review and comment requirements of section 39(1) of the FPC Act and sections 2 through 7 of the OPR were not met, on the grounds that:

a. the information in the FDP was not organized and presented in a way that could be understood by the public; and

b. the public was not given the opportunity to review and comment on all of the contents of the plan.

With respect to the first ground, lack of organization, the Commission held that there are no format requirements under the legislation, and that the guidance in the relevant guidebooks had not been available at the time the FDP was prepared. The poor organization and presentation of the FDP did not contravene the review and comment provisions.

On the second ground, sufficiency of the draft FDP, the Board and the Sierra Club took the position that the public has the right to review and comment on the final plan, not a draft plan.

In this case, the FDP had been amended prior to approval in response to public review and comment, and some additional amendments were made that were not related to public comments.

> The Commission held that the OPR clearly contemplates that some changes will be made to the draft FDP submitted for public comment before it is submitted for approval.
>
> The Commission also held that the amendments, which consisted primarily of adjustments to cutblock boundaries and reclassification of some streams, were so minor as to fall within the scope of section 43 of the FPC Act and did not require additional public review and comment.

The Board made other arguments with respect to public review and comment, which the Commission concluded were actually aimed at the adequacy of the contents of the plan, which the Commission had already addressed earlier in its decision. The review and comment provisions do not provide an alternative avenue to challenge the adequacy of plan content.

Commentary

While the decision of the Commission is not binding, its analysis of the requirements applying to the preparation, submission and approval of FDPs is worthy of consideration. District managers may wish to pay particular attention to their findings respecting mandatory content requirements and the application of Section 10(1)(c)(ii) and the test of "adequately manage and conserve" in Section 41(1)(b) of the FPC Act. The Commission held:

a. the mandatory content requirements for a FDP are set out in the OPR; and

b. neither Section 10(1)(c)(ii) nor the test of "adequately manage and conserve" can be used to impose mandatory content requirements over and above those set out in the OPR.

The Commission also flagged the district manager’s authority to require additional information under Section 41(2) and to impose conditions under Section 41(5). While the Commission did not expand on the scope of these sections, it is reasonable to assume that

neither of these sections can be used to expand the mandatory content requirements for a FDP.

There is also the review and comment process to consider. In this case, relatively little information was provided through the review and comment process (with the exception of the information collected by the district manager himself as a result of concerns about marbled murrelet raised by Sierra Club). Still, nothing in the Commission's decision suggests that if such information is forthcoming it is not to be considered.

> Clearly, all relevant information provided by Forest Service or MELP staff, or through the public review and comment process, must be considered.

However, there is a difference between:

a. considering information regarding a forest resource that is not a mandatory content requirement; and

b. requiring a licensee to include that forest resource in a FDP as if it were a mandatory content requirement, or to afford it the same type or level of protection required in the OPR for forest resources that are mandatory content requirements.

> The challenge for district managers will be to achieve a difficult balance by not ignoring relevant information on the one hand, and not imposing additional content requirements – over and above what the OPR requires – on the other.
>
> In particular, it will be up to district managers to determine what weight to give to information provided for their consideration which goes beyond the mandatory content requirements set out in the OPR.

In this case, the district manager did consider the additional information he collected on marbled murrelet, but he did not require MB to include this information in the FDP. The Commission held that he was correct in concluding this information was not required in the FDP.

> Also, district managers must be careful not to use the review and comment process, Sections 10(1)(c)(ii) or 41(1)(b) — or Sections 41(2) or 41(5) — to circumvent any of the processes established elsewhere in the legislation to deal with certain types of resources or issues (e.g. the procedures under Part 2 for establishing higher level plans, the procedures in the OPR for designating "identified wildlife", etc.).

Compliance and Enforcement Branch, in conjunction with other branches within both the Ministry of Forests and the Ministry of Environments, Lands and Parks will be consulting with the Ministry of Attorney General to determine whether further advice on this issue can be provided to district managers and other statutory decision makers under the FPC Act.

> In the interim, it is recommended that district managers apply their judgment – in accordance with the principles set out above -- on a case

> specific basis, having regard to the circumstances.

"Area Under the Plan"

It is also worth noting the Commission's comments with respect to the "area under the plan". Although many provisions of the OPR have been changed recently, this concept continues to be relevant to FDP preparation and approval.

It is recommended that district managers follow the Commission's lead in treating the plan and the "area under the plan" as the same thing.

> Those resources identified as mandatory content requirements for the entire "area under the plan" must be identified in accordance with the legislation. It is not adequate merely to address the cutblocks themselves and the areas immediately adjacent to the cutblocks.

However, as the Commission also noted, the individual content requirements set out in the OPR do not always apply to the entire "area under the plan". The specific legislative requirements should be carefully examined to see whether information is required for the entire "area under the plan", for "an area" under the plan, or just for the cutblocks or roads themselves.

> Also, it would be wise to ensure the boundaries of the "area under the plan" are clearly delineated on the maps submitted with the operational plan.

Finally, in their closing comments, the Commission noted that it is not acceptable that a complete copy of the approved FDP was not available in the district office for public viewing. The Port McNeill District has addressed this concern.

> If other districts have not already done so, it is strongly recommended that they also ensure one copy of any approved FDP is kept in the district office for public viewing.

Also, the Commission was clearly frustrated by the inability of MB or the government to recreate the FDP that was approved. The necessity of being prepared for potential challenges to the approval of an operational plan is another reason to ensure there is a complete copy of the approved plan in the district office.

In closing, it should be kept in mind that the Commission's decision was based on a particular set of facts. District managers should consider reading the entire decision in order to appreciate the context in which the findings of the Commission were made.

Where necessary, district managers should not hesitate to seek further advice from the Ministry of Attorney General. Alternatively, you may contact one of the Compliance and Enforcement Practices Foresters or Statutory Decision Advisors in Compliance and Enforcement Branch and, if legal advice is required, they can liaise with the Ministry of Attorney General on your behalf.

Contact

For any questions regarding this bulletin, please contact the following:

Dan Graham, Compliance and Enforcement Practices Forester, at
Dan.Graham@gems7.gov.bc.ca