Forest Practices Code

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

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Application of Section 41(1)(b) of the *Forest Practices Code of British Columbia Act*

This bulletin replaces the previous bulletin on this topic, titled "Compliance and Enforcement Bulletin No. 4 - The Role of Public and Referral Agency Comments in the Application of Section 41(1)(b) of the Forest Practices Code of British Columbia Act", dated February 12, 1999.

Introduction

Virtually every forest development activity undertaken by a tenure-holder must first be included in an operational plan approved by a statutory decision maker ("SDM") authorized under the *Forest Practices Code of British Columbia Act* (the "FPC Act"). In most cases the SDM is a Ministry of Forests ("MOF") district manager. Section 41(1) of the Act provides that a district manager **must approve** an operational plan if:

a. *the plan... was prepared... in accordance with this Act...; 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.*

In other words, the proposed operational plan *must* satisfy both tests before the district manager can approve it. If the proposed plan does satisfy both tests, then the district manager *must* approve it.

The first test, in section 41(1)(a), is relatively easy to apply. It requires that an operational plan must contain all the information required by the Act, and that it be submitted in accordance with the procedures set out in the Act. **Section 41(1)(b) is more difficult to apply, since it is not as expressly limited in scope as is section 41(1)(a), and it requires SDMs to struggle with a less tangible concept: "adequately manage and conserve"**.

The 1998 decision of the Forest Appeals Commission (the "Commission") on the Brooks Bay/Klaskish forest development plan ("FDP") [*Appeal No. 96/04(b)*] considered, among other things, the two-part test for operational plan approval set out in section 41(1). The Commission held that:

a. the mandatory content requirements for a FDP are those set out in the Operational Planning Regulation (the "OPR"); and

b. neither section 10(1)(c)(ii) nor the test of "adequately manage and conserve" in section 41(1)(b) can be used to impose mandatory content requirements over and above those set out in the OPR.

Prior to the Commission's decision in the Brooks Bay/Klaskish case, SDMs often applied their discretion under 41(1)(b) too broadly, requiring FDP proponents to incorporate new categories of "mandatory content". After the Brooks Bay/Klaskish decision, however, there was some concern that the decision could be interpreted as narrowing SDMs' discretion too far toward the other extreme, by removing any ability to address in an FDP forest resources that were not expressly listed in the OPR.

That concern regarding the risk of interpreting the Commission's decision too narrowly resulted in part because given the circumstances of that case, the Commission did not find that it needed to fully analyze and discuss the issue of forest resources that were not part of the mandatory content. This includes forest resources of which the SDM is made aware through any means, including being identified through referral comments, the public review and comment process, in an approved strategic land use plan that has not been designated as a higher level plan, or through information otherwise available through professional and local knowledge. There is, therefore, considerable uncertainty with respect to how this issue will be addressed by the Commission and the courts if and when it is directly raised.

The purpose of this bulletin is to assist statutory decision makers in considering information related to forest resources that are not "mandatory content" during the evaluation of forest development plans (the principles identified in this bulletin for evaluating risk and weighing evidence are also applicable when considering the "mandatory content" resources). It is hoped that the result will be statutory decisions that fall within legally defensible limits of reasonableness between the two extremes referred to above.

Consideration of "Mandatory Content" and "Other" Forest Resources

The term "forest resources" is very broadly defined in section 1 of the FPC Act. Section 10 of the FPC Act and the OPR specify the information, including certain forest resources, which forest licensees must address in their FDPs. In other words, those forest resources that are specified in the FPC Act and the OPR are mandatory content for an FDP, and must be addressed in the FDP to the extent required by the FPC Act and regulations. If any of the mandatory content forest resources are present in the "area under the plan", the licensee must include in the FDP "measures that will be carried out to protect" them.

Forest resources that are not specifically identified in the OPR are not "mandatory content requirements", and licensees are not automatically required to address these "other" forest resources in their FDPs. **This does <u>not</u> mean that they are not to be considered or, if necessary, addressed**. There are some situations in which these other forest resources may be considered and subsequently addressed in the FDP. For example:

- Licensees, in accordance with principles of professional accountability, may choose to include measures to address other forest resources on a strictly voluntary basis; and

- The SDM may be of the opinion, on the basis of a defensible risk analysis, that the FDP as proposed does not "adequately manage and conserve the [mandatory and 'other'] forest resources", in accordance with section 41(1)(b) of the FPC Act.

However, SDMs must not use the "adequately manage and conserve" test in section 41(1)(b) to create new categories of mandatory content. For example, SDMs cannot require licensees to incorporate Wildlife Habitat Areas (WHAs) until they are established by the chief forester and the deputy minister of MELP as provided in section 70 of the OPR. The same applies to land use plans such as LRMPs that have not been designated as higher level plans in accordance with the FPC Act, and to regional or district "policies", "standard operating procedures", "guidelines" or "directives" which purport to add to, supplement, or replace the requirements of the FPC Act or regulations. *However, this does not mean that a threatened species, or any "other" forest resource that is not mandatory content, cannot be considered by SDMs when evaluating a proposed operational plan under the section 41(1)(b) test*.

Sources of Information on "Other" Forest Resources

Information provided through public review and comment or agency referral, or information made available from any other source, regarding forest resources that are not mandatory content requirements must at least be considered by the licensee and the statutory decision maker. Statutory decision makers are also entitled to consider information which they have researched themselves, as was done by the district manager in the Brooks Bay/Klaskish case with respect to information on marbled murrelets. (The rules of administrative fairness would require the SDM in these circumstances to disclose that information to the plan proponent in advance of decision making.)

The act of considering does not necessarily mean the SDM will request that the licensee modify its FDP proposal or refuse to approve the plan. **However, the SDM may feel that the information provides adequate evidence to convince him or her that the proposed FDP does not adequately manage and conserve the forest resources in the area under the plan, as required by section 41(1)(b)**.

Referral agencies or others may provide information to the licensee and the SDM at any time, including prior to submission of the proposed FDP, and the district manager should consider that information. In fact, communication of relevant information ahead of plan preparation should result in submission of higher quality plans that contain the information needed for review and consideration for approval, thereby helping to streamline the review and approval process. The person presenting this information may wish to follow up and ensure the same information is provided to the licensee during the legislated review and comment period to ensure that the licensee can at least consider it during preparation of the proposed plan.

Introduction to Risk Assessment

The discretion granted to SDMs by section 41(1)(b) is not limitless. The Brooks Bay/Klaskish decision, while not binding authority, served as a reminder that statutory

discretion must be exercised within the boundaries set out both in the enabling legislation and by the common law principles of administrative fairness.

A SDM determines the **statutory** limits of his or her discretion by applying the rules of statutory interpretation. This involves a consideration of the context within which the statutory power is granted. A fundamental part of the context to be considered by FPC Act SDMs is the Preamble to the FPC Act. Since the FPC Act and the *Forest Act* are both part of the province's statutory forest management regime, they both form part of the context within which statutory interpretation should be determined. For example, the contractual rights of licensees as reflected in the terms of their *Forest Act* tenure agreements form part of the context for decision making. This is not to say that the terms of the tenure agreement can fetter the SDM's discretion with respect to evaluating whether or not a proposed plan satisfies the "adequately manage and conserve" test. However, the existence of those contractual rights is one factor to be considered as part of the balancing of economic, environmental, and social values. SDMs should also consider the *Ministry of Forests Act* that sets out the ministry's mandate, as well as other relevant legislation (e.g. the *Forest Act*).

The **common law** rules of administrative fairness, on the other hand, limit the discretion of SDMs by requiring that decisions on whether to approve or reject a proposed operational plan must be made in a manner that is fair, reasonable, and legally defensible. It is not defensible for SDMs to base statutory decisions on irrelevant considerations, or to exceed their statutory authority. For example, the courts have recently confirmed that SDMs must avoid mixing political issues with their duties as SDMs, and that broad land use decisions should be made by cabinet, unless the power to make them is expressly or by necessary implication granted to the SDM in the enabling statute. (This doesn't mean that SDMs must wait for provincial direction or a higher level plan to address specific habitat requirements for wildlife such as spotted owl or caribou within the area under a FDP – indeed, providing advice as to the extent and limitations of the SDMs power in this regard is one of the objectives of this bulletin.)

Administrative fairness also requires that decisions must not be made arbitrarily. Having an adequate evidentiary basis is a fundamental test for reasonableness of any statutory decision. Unlike determinations made by the courts with respect to criminal matters, which have to be proved "beyond a reasonable doubt", the standard of proof for plan approval is the "balance of probabilities". *This means that prior to approving a proposed plan, a SDM must be satisfied that it is more likely than not that the plan satisfies both the 41(1)(a) and 41(1)(b) tests*. The corollary is that prior to rejecting a proposed plan, a SDM must be satisfied that it is more likely than not that the plan fails to satisfy one or both of those tests. An adequate evidentiary basis, therefore, is one that has enough weight to tip the balance one way or the other – either toward plan approval or toward rejection of the plan. In weighing the evidence, the SDM must be unbiased, and must not start with a preconceived presumption either against or in favour of approval of the plan.

So how does a SDM balance what may appear to be conflicting statutory requirements? How is he or she to weigh the evidence and information related to mandatory content, along with information concerning "other" resources? It is recommended that the balancing of these factors and the weighing of the evidence should be achieved by means

of a defensible risk assessment, and application of risk management principles by the SDM. To be legally defensible, that risk assessment should be supportable by a reasonable interpretation of the relevant legislation. This would include an analysis of the risks to the three key categories of forest management values – environmental, social, and economic – as implied in the Preamble to the FPC Act, and section 4 of the *Ministry of Forests Act*. Risk assessment can provide SDMs with a rational, structured, consistent, and legally defensible methodology for determining whether a proposed operational plan satisfies the "adequately manage and conserve" test in section 41(1)(b).

Risk Assessment and Consideration of Forest Resources

Any decision on approving or not approving a proposed plan will inherently present some degree of risk to one or more forest resources. "Risk" is the potential for loss or damage resulting from a particular action or decision. "Risk assessment" is the process of determining the likelihood and magnitude of that loss or damage. When do the anticipated benefits outweigh the expected costs, or losses? How much risk is acceptable, and what risk(s), to which forest resource(s), is acceptable?

Risk consists of two components – the **likelihood** of a loss occurring and the potential **magnitude** of the loss. The magnitude of the loss includes not just the immediate impact of a particular event, but also a consideration of cumulative impacts over time.

At opposite extremes there are the concepts of "real risk", which is risk determined through expert analysis and based primarily on empirical or scientific evidence, and "perceived risk", for which there is only intuitive or anecdotal evidence. Perceived risk often arises where there is uncertainty, in that the scientific information base is not yet adequate to allow us to know whether a resource may be affected or to what extent it may be affected.

The terms "perceived" and "real" are terms of art in the field of risk management, and are not meant to reflect a value judgement for or against one or the other form of evidence. Perceived and real risk are also not discrete categories. Instead, they form the extremes of a "*risk continuum*" as follows:

REAL RISK **PERCEIVED RISK**

Expert analysis based on scientific principles	Sensitivity analyses & judgement	Experience & judgement	Intuitive recognition of uncertainty	Unexamined beliefs

Information at the "real risk" end of the spectrum is, by its nature, generally entitled to be given more weight than information in the range of "perceived risk". Perceived risks should only be given substantial weight where the risk to a forest resource is at a level that could not reasonably be considered to "adequately manage and conserve." In situations where there are no offsetting benefits to be gained by taking a particular risk, then that risk is probably unreasonable, regardless of its rating as high, moderate or low. Also, some risks have such a high likelihood or high potential magnitude of loss that

accepting them is likely to be unreasonable regardless of the potential benefits, say where there is the risk of elimination of a species or a population of a species, or the triggering of a landslide into a major fish stream or a residential area.

A decision to use section 41(1)(b) to request that a licensee address a forest resource that is not mandatory content should be based on the best information possible (i.e., as close as possible to the "real risk" end of the risk continuum) regarding: 1) the presence of the resource in the area under the plan, 2) the likelihood of a loss occurring, and 3) the magnitude of the loss or damage if it should occur.

Information provided to the SDM by referral agencies should, whenever possible, be expressed in terms that assist the SDM to determine the "real" risk. That is, it should as much as possible include, in order of preference, scientific evidence, evidence based on professional expertise and judgement, or evidence based on years of experience. If there is no scientific evidence, the referral agency should identify why that is so and explain the significance of its information.

As mentioned earlier, the standard for consideration of relevant information or evidence is the "balance of probabilities". That is, it should be more likely than not that the preponderance of the information before the SDM supports the conclusion that the plan either does, or does not, satisfy both parts of the section 41(1) test. In considering the information, the SDM should make his or her own assessment of how much weight to give it (i.e. its credibility, relevance, and importance) in tipping the "balance of probabilities" either for or against plan approval. The SDM must recognize that he or she has a statutory obligation to consider the whole range of environmental, social, and economic values. That is an obligation that the provider of the information (whether a scientific or professional expert, a plan proponent, or a member of the general public) does not share. Accordingly, while the fact that the provider of the information may feel that a particular risk is acceptable or unacceptable is itself a factor for the SDM to consider, it is not determinative of the SDM's final decision. In the end, the determination for or against approval of a proposed plan should be based on an assessment of risk *done by or adopted by* the SDM. In adopting someone else's risk assessment, the SDM must turn his or her mind to the information, and be able to justify accepting that other reasoning as the SDM's own.

The SDM's risk assessment does not always require a written, documented process. Nor do the details of the risk assessment necessarily have to be provided in a written rationale. In order to be defensible, however, the SDM should be able to explain, if challenged, how he or she turned his or her mind to the risk assessment process in a structured and logical manner. In those cases where the issue is particularly complex or controversial, it is recommended that the SDM provide details of the decision-making process to make it more understandable, and therefore more credible, and less subject to being challenged.

Considering the FDP Submission Using 41(1)(b)

A SDM should avoid directing a licensee to address the specific forest resource that is not a mandatory content resource in a particular manner in the final FDP submission. A SDM may provide the licensee with some guiding principles to enable the licensee to

understand how the SDM may subsequently make his or her determination under 41(1)(b), but must not fetter his or her own discretion by pre-determining how (i.e., what specific measures, or by what means) the plan should address the resource. The SDM must keep an open mind and be prepared to accept the licensee's proposal if the SDM determines that it adequately manages and conserves the resource, within the context of the legislation.

What does "adequately manage and conserve" mean? This is for the SDM to decide, as it is the SDM who must determine whether or not the plan meets this test to his or her satisfaction.

It may be helpful to consider some dictionary definitions of "adequate". For example, the definition in the *Merriam Webster's Collegiate Dictionary (Tenth Edition)* is:

1. "Sufficient for a specific requirement; also, barely sufficient or satisfactory."
2. "Lawfully and reasonably sufficient or satisfactory."

Note:
Other dictionaries upon which Canadian courts frequently rely include:

The Canadian Oxford Dictionary:
1 sufficient, satisfactory **2** barely sufficient.

The New Shorter Oxford Dictionary, (1993):
1 equal in magnitude or extent **2** commensurate in fitness; sufficient, satisfactory, *b* barely sufficient **3** Logic. Of an idea or concept: fully and clearly representing its object.

Gage Canadian Dictionary, (1997):
1 as much as is needed; sufficient: His wages are adequate to support three people. **2** suitable; competent: an adequate person for the job.

Synonym 1. See note at ENOUGH.
Enough Syn Adequate = as much as is needed to meet a specific, especially a minimum, requirement: To be healthy one must have an adequate diet.

It should be noted that a proposal does not have to optimize the management and conservation of a resource in order to satisfy the 41(1)(b) test. *Merriam Webster's Collegiate Dictionary* defines "optimal" as "the amount or degree of something that is most favourable to some end". Nor does the proposed plan have to eliminate all risk to the resource. There is always some risk. However, the proposed plan may have to include more than minimal measures to meet the required test. In the end, the plan must reflect a level of risk acceptable to the SDM, acting within the reasonable limits of his or her discretion as determined by an application of statutory interpretation and common law principles. Principles of administrative fairness require that decisions must not be arbitrary. Decisions may be seen as arbitrary, and therefore unreasonable, if they are not

founded on adequate evidence, or if similar sets of facts do not result in similar decisions. [See earlier discussion of reasonableness on page 4.]

Tenure-holders cannot be required under section 41(1)(b) to prove to the SDM that there are not any forest resources in the area under the plan, that are not mandatory content requirement, and that *may* be at an unacceptable risk from development. However, if the SDM has information that could reasonably lead him or her to believe that any forest resource may be at an unacceptable risk if development occurs as proposed in the plan, the district manager could request that additional information be provided under section 41(2). As with 41(1)(b), however, it is not justifiable to ask a licensee to gather an unreasonable amount or kind of information in an attempt to eliminate risk or uncertainty. What is reasonable will have to be objectively determined by the district manager considering all the circumstances in each individual case. Factors to be considered in deciding what is reasonable include, but are not limited to, the nature of the proposed activity, the nature of the resource, and the cost and the time involved in providing the information. Also for the district manager to consider here is the likelihood that the information will actually reduce the risk or uncertainty by any significant amount.

In this case, licensees will be expected to either convince the SDM that there is not an unreasonable risk to the specific forest resource, or to modify their FDPs to provide an adequate level of protection. The actions expected of the licensee will not normally be identical to the measures that would be proposed if the forest resource was a mandatory content requirement. For example, the FPC Act provides for specific strategies for dealing with certain forest resources such as identified wildlife (the IWMS) and landscape level biodiversity (higher level plans). Unless the forest resource is specifically covered by strategies that have been implemented in accordance with the requirements of the FPC Act, section 41(1)(b) cannot be used to direct licensees to address those resources in the same way that they would be if the strategies or a higher level plan were in effect.

For example, an SDM cannot select caribou management guidelines from an approved strategic land use plan that has not been declared as a higher level plan (HLP), and require a plan proponent to implement the guidelines in the same way as if the strategic land use plan had been declared a HLP. The SDM *could* decide, however, based on convincing evidence and a defensible risk analysis, that the proposed plan does not adequately manage and conserve the caribou (a forest resource). The SDM could then request that the plan proponent consider revising the plan to incorporate measures to maintain the caribou. The licensee could propose measures, including actions similar to the caribou guidelines of the approved strategic land use plan. It should be noted that the risk is not necessarily proven merely because caribou guidelines are provided in the strategic (non-HLP) land use plan. Preferably, the analysis of risk to the caribou should be based on sound evidence that is either part of the land use plan, or is otherwise provided to the SDM. The SDM will then decide what weight to give that evidence in making a determination.

In circumstances where the SDM feels the plan fails to meet the test of section 41(1)(b), and subsequently refuses to approve a plan, the SDM should prepare a rationale explaining why he or she believes the plan does not adequately manage and conserve the

specific resource and therefore cannot be approved. If the SDM does approve the plan, he or she should provide some feedback as to how the agency referral or public comments were considered. In addition, where the issue is complex or controversial, it is recommended that the SDM provide details of the risk assessment in the rationale.

Environmental Risk - An Example

Until the Wildlife Habitat Areas are established under the Identified Wildlife Management Strategy (IWMS), measures for the protection of marbled murrelet are not mandatory content. However, if a cutblock is proposed in an area where there is sound evidence of the existence of marbled murrelet nesting sites, and there is also adequate evidence that logging would create an unacceptable risk of damage to the murrelet population, the statutory decision maker may reject the plan or request that the licensee demonstrate that the plan adequately protects the murrelet. If the evidence of an unacceptable risk to the murrelet (that is, the likelihood of loss or damage and the potential magnitude of the loss or damage) is unconvincing to the SDM, and if the SDM feels the plan adequately manages and conserves the forest resources in the area to which it applies, the SDM must approve the plan.

The SDM should not refuse to approve the plan merely on the basis that no marbled murrelet survey has been done, and that the murrelet may be present, or if the murrelet is present, that its population or habitat may be at risk. Furthermore, as part of the risk assessment and risk management process, the SDM must address the issues of economic risk and social risk and weigh them in the balance.

Social Risk - An Example

A cutblock is proposed adjacent to several residences in an area that has long been used by local residents as a *de facto* park. There are no biological forest resources at risk, but a socially valued forest resource, i.e. recreation, may be. Alternatively, a cutblock is proposed in an area that is important internationally, and to the local community and its businesses, for wildlife viewing. In these types of cases, the SDM should base any decision to require the licensee to address these other forest resources on a defensible assessment of risk, demonstrating that economic and environmental risks were also considered and balanced in the process. This example also serves to illustrate that the weighing of the social and economic values may be different depending on the proximity of the area under the plan to heavily populated areas. For example, a SDM may assess this situation differently if the cutblock is adjacent to a large urbanized area than if it is adjacent to a remote logging-dependent community.

Economic Risk - An Example

A licensee proposes to leave 50-m buffers around all slide tracks and 100-m buffers around all alpine ecotypes in its operating area to minimize the impact on a particular wildlife species. The SDM may feel that this proposal will result in a significant economic impact with respect to the timber supply, but may also believe that there is a potentially high risk to the subject wildlife species. As the result of a risk analysis the

SDM may decide either to refuse to approve the plan until the risks to economic, social and environmental values are brought into balance, or to approve the plan on the basis that it adequately manages and conserves the forest resources. If the risks to the timber supply or the wildlife resource are potentially critical, the SDM may decide to conduct or obtain an analysis, done either by the SDM or by another qualified professional, as to the short and long term impacts on the timber supply and the wildlife resource.

SDMs may wish to refer to the discussion of economic values in the MOF Compliance and Enforcement Branch publication Managing Risk Within a Statutory Framework – The Forest Practices Code, which makes the following observations:

> "*Even the management of economic values has become more complex as economic interests begin to diverge. Increasingly, the challenge is not simply to balance environmental and social values against economic values, but also to balance competing economic values...It is also important to keep in mind that, as with environmental values, some social values may also be linked to economic values. For example, the aesthetic values associated with visual quality are often linked to the viability of a growing tourist industry.*"

This is not to imply that SDMs are expected to undertake a rigorous economic analysis of the respective values of competing economic interests. All that can reasonably be expected is that the SDM should turn his or her mind to the relative magnitudes and implications of the impacts on the various values and weigh them in a reasonable, rather than an arbitrary, manner. The same can be said for the analysis of the other key forest values – i.e. social and environmental values.

Conclusion

Section 41(1)(b) is an important "safety net" which enables SDMs to consider all forest values, many of which have limited, or no, mandatory planning requirements. Statutory decision makers should consider all of the available information, the relevance and reliability of the information, and the benefits and risks presented by the proposed operational plan when determining whether or not the plan meets the test of section 41(1)(b). It is suggested that SDMs weigh all the relevant information to ensure there is an adequate evidentiary basis before using section 41(1)(b) to either approve or reject a proposed operational plan. Section 41(1) establishes a requirement for mandatory approval ("The [SDM] must approve …") if an operational plan passes the statutory tests in both 41(1)(a) and (b). The principles of administrative fairness require that statutory decision makers act within the limits of their statutory authority, and that they utilize judgement, balance, and reason in fairly weighing the evidence in front of them as to whether the proposed plan passes the tests or whether it does not.

Note: Please note that this bulletin is provided by Compliance & Enforcement Branch, Ministry of Forests, as non-binding operational or policy advice for consideration by statutory decision makers. It may have to be revised based on future Commission and court decisions. Also, statutory decision makers are reminded that the interpretation of

section 41(1)(b) is ultimately up to them, and that specific circumstances must always be considered.

Contacts

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