Forest Practices Code

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

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FDP Content Requirements and Approval of an FDP Subject to a Condition

Introduction

On December 3, 1999, a Review Panel rendered a decision in response to the Forest Practices Board's request for review of a district manager's determination approving a forest development plan ("FDP") submitted by International Forest Products Ltd. ("Interfor"). The Panel decided to grant the relief requested by the Board, namely rescission of the district manager's approval of 51 cutblocks (of a total of 263) because the plan did not meet the content requirements of section 10(1) of the *Forest Practices Code of British Columbia Act* (the "Code").

Background

During public review and comment, Interfor advised the district manager by letter that, due to an operational schedule change, it was altering its FDP by changing the status of 106 cutblocks from Category "I" to proposed Category "A". The public was notified and the review and comment period extended. Enclosed with Interfor's letter were several updated Appendices along with 2 updated maps. The Appendices described the change in status of the 106 cutblocks. The two FDP maps included block boundary revisions to 4 of the 106 cutblocks, as well as the change from Category "I" to proposed Category "A". However, the other 21 maps describing the remaining 102 cutblocks were not revised to include the change from Category "I" to proposed Category "A".

Of the 102 cutblocks, the district manager approved 51 blocks. The Board's request for review centred on the FDP maps associated with these blocks and the fact that the true status of the 51 blocks was to be found only in the schedules to the FDP. The Board argued, among other things, that for a FDP to meet the content requirements of section 10(1) of the Code, the FDP maps must show which cutblocks are proposed Category "A" and which are not. Showing this information in a FDP schedule but not showing it on the maps does not meet this content requirement. As a result, the Board argued the cutblocks in question should not have been approved because they did not meet the test set out in section 41(1) of the Code.

The government, on behalf of the district manager, and Interfor each argued that the Code does not prescribe any particular format for a FDP. It is sufficient for a FDP to identify the change in harvest status of cutblocks in FDP schedules because a FDP has to be considered as an overall package and FDP maps, taken with the schedules, fulfil the content requirements of section 10(1) of the Code.

Issues

1. **Section 10(1) of the Code**
   Section 10(1) of the Code states that a FDP must include maps and schedules describing the size, shape and location of cutblocks proposed for harvesting during the period covered by the plan. The Panel found that this section had not been met. The Panel decided that the information in each of the maps and the schedules must be accurate and that schedules cannot be used to correct inaccuracies in maps.

2. **Section 41(5) of the Code**
   Once the Panel found that Interfor's FDP had not met the content requirements of section 10(1) of the Code, the Panel had to decide whether it had the jurisdiction to grant the Board's request to rescind approval of 51 cutblocks or whether to rescind approval of the entire FDP.

   The Panel decided that it did have the jurisdiction to vary the district manager's determination by rescinding approval of the 51 cutblocks. The Panel relied on section 41(5) of the Code that allows a district manager to make an approval of a FDP subject to a condition. It took the view that this section gives the district manager the flexibility to approve a FDP subject to a condition that certain blocks be deleted.

The Panel also decided that, since the 51 cutblocks were not 'core' to the FDP (i.e. their absence would not significantly alter the licencee's plan), it was appropriate in this case to rescind approval of the cutblocks rather than to rescind approval of the entire FDP.

Commentary

Decisions of Administrative Review Panels do not set precedent and are not binding on statutory decision makers or the Forest Appeals Commission. However, the Panel's decision in this case raises 2 issues concerning FDP approval that are worth examining.

1. **To what extent will factual inaccuracies in a FDP result in a failure to satisfy the content requirements of section 10(1) of the Code ?**
   The Panel found that use of FDP schedules to correct inaccuracies in FDP maps will result in a failure to satisfy the content requirements of section 10(1) of the Code. The Panel interpreted this section to mean that FDP maps and schedules need to include accurate information so that, when taken together, they form a description of the cutblocks proposed for harvesting. The Panel concluded that a FDP does not accurately describe the cutblocks proposed for harvesting if the maps describing the size, shape or location of the blocks are inaccurate and the inaccuracies are corrected by amending only the schedules and not the maps.

   The extent to which factual inaccuracies in a FDP will result in a failure to satisfy the content requirements of section 10(1) of the Code is in the discretion of the district manager. However, the Panel's decision makes it clear that where a FDP

has the potential to mislead (i.e. by leaving room for doubt that changes have been made), a decision to approve the FDP is open to challenge. Therefore, it is critical that the district manager be satisfied that a FDP clearly shows what operations are planned. A clear, unambiguous FDP will also facilitate the review and comment process and may avoid the potential of future non-compliance with the plan. Any changes to a FDP should be scrutinized by both the district manager and licencee to ensure that the maps, schedules and text are accurate and are not open to misinterpretation as a result of any changes made.

2. **To what extent is it possible to approve a FDP on condition that certain proposed Category "A" cutblocks within the FDP are deleted ?**
   The Panel decided that where certain proposed Category "A" cutblocks are not 'core' to the FDP, it is possible to approve a FDP subject to a condition that they are deleted. This decision was based on the particular facts before the Panel and continues to be valid and enforceable. However, the decision differs from the guidance on section 41(5) of the Code that has been provided to statutory decision makers by the Ministry of Forests.

   The application of section 41(5) has been considered in Forest Practices Code Administration Bulletin #5 (dated May 26, 1998) and in Forest Practices Code General Bulletin #18 (dated December 18, 1998). The guidance contained in these publications is that section 41(5) is meant to apply to the FDP as a whole, and is not available as a means for statutory decision makers to reserve the right to unilaterally reject or approve individual cutblocks or individual parts of the plan. Further, these publications state that section 41(5) should not be used as a tool for communicating to licencees, as part of the plan approval process, which blocks are not currently acceptable and why, since the determination is in respect of the FDP as a whole and not individual blocks.

Although the Panel concluded that section 41(5) may be interpreted as permitting the rejection of individual cutblocks, the guidance contained in these publications will remain unchanged. Statutory decision makers should continue to be very careful in exercising their discretion under this section, for several reasons:

First, it is important to note that under section 41(1) of the Code, approval requires the operational plan to comply with the Code's requirements. The Code speaks to only one operational plan, not to a series of 'mini-plans'. If any part of an operational plan fails to comply with section 41(1), the district manager cannot under section 41(3) approve the plan as a whole. Although it is important to give meaning to section 41(5), which allows approval of a FDP subject to a condition, unilateral deletion of certain cutblocks from a plan may not be an interpretation that a court would support. The view expressed in the Ministry's bulletins is that the applicability of section 41(5) is more limited and should be used primarily to address minor concerns with respect to individual blocks in the assessment of whether or not the plan will 'adequately manage and conserve the forest resources'.

Second, even if a court were to agree with the Panel's interpretation of section 41(5), district managers should not normally find it necessary to approve a FDP on condition

that certain proposed Category "A" cutblocks are deleted. The FDP is the licencee's plan, prepared by the licencee in accordance with the licencee's own requirements and designed to meet the requirements of section 41(1) of the Code. The licencee typically has the benefit of input of Ministry of Forests staff in FDP preparation and continues to be in a position to alter its FDP at the request of the district manager at any time prior to approval. If the district manager considers that certain proposed Category "A" cutblocks cannot be approved, the district manager can easily notify the licencee and request that the licencee make the necessary changes.

Third, if a district manager does not request the licencee to make the necessary changes to a FDP and instead approves the FDP subject to a condition that certain proposed Category "A" cutblocks are deleted, there is a risk that the licencee will challenge the decision. While refusal to approve certain cutblocks may be a reasonable approach to the district manager, it may not be to the licencee. The licencee may have a different response to the district manager's concerns in light of the importance the licencee attaches to the particular cutblocks in question. In order to avoid a judicial review of a FDP approval decision, it is preferable for the district manager to let the licencee respond in advance to specific concerns rather than to unilaterally address those concerns by approving the FDP subject to a condition that certain proposed Category "A" cutblocks are deleted.

Finally, if a district manager does approve a FDP subject to a condition that certain proposed Category "A" cutblocks are deleted, and the Forest Practices Board requests a review of the district manager's determination, problems arise for government on review and appeal. Counsel is in a position of having to argue that the Board cannot request certain blocks be deleted, and the review panel or Forest Appeals Commission cannot make a decision deleting certain blocks, in the face of the district manager having done the very thing that counsel is arguing cannot legally be done.

The Ministry of Forests Bulletins #5 and #18 referred to above provide some examples of when it might be appropriate for a FDP to be approved subject to a condition. For the reasons noted above, statutory decision makers should consider taking the necessary steps, where possible, to avoid approving FDPs on condition that certain proposed Category "A" cutblocks are deleted.

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