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Silviculture security requirements for Non-Replaceable Forest Licences

Purpose

The purpose of this bulletin is to outline the legislative framework that governs how Regional Managers (RMs) and District Managers (DMs) make determinations respecting the requirements for silviculture security for non-replaceable forest licences. It also provides advice to these statutory decision-makers that will assist them in exercising their broad statutory discretion.

Introduction

The goal of any security is to protect the government's interest. The requirement for security – and its form and amount – should be based on what is necessary to protect whatever interest is at risk. Criteria such as amount, timing and form will vary depending on the potential harm that could occur (i.e. the financial cost to government if it has to rely on the security)

Legislative Base

Section 70 of the *Forest Practices Code of British Columbia Act* (the FPC of BC Act) requires the holders of major licences (which, by definition, includes non-replaceable forest licences) to reforest harvested areas in accordance with the terms of their approved silviculture prescriptions.

In particular, unless they elect to request the Crown to assume the prescription obligations under section 71(2) of the FPC of BC Act, the holders of non-replaceable forest licences (NRFLs) bear full financial responsibility for the establishment of the free growing crop.

The Security for Forest Practice Liabilities Regulation (the SFPL Regulation) under the FPC of BC Act states the RM or DM **may**, in a notice given the holder of a NRFL (or any other major licence or woodlot licence that is not replaceable), require the holder to provide security of any kind, including money, for the performance of the holder's duty to carry out their obligations under a silviculture prescription. In their role as statutory decision makers, RMs and DMs are given broad discretion in deciding whether and how to require such security.

Advice to RMs and DMs

Is security required?

Section 1(1) of the SFPL Regulation states the RM or DM **may** require security, i.e. it is not mandatory to require security. This decision is made based on an assessment of the financial risk to the government.

A number of factors may influence the assessment of risk associated with determinations made under the SFPL Regulation:

- difficulties associated with reforestation. (likelihood of plantation failure, brushing problems, etc).
- the objective of the forest licence (e.g. to recover damaged and dead timber from leading cedar hemlock stands having a high pulp content).
- term of the licence.
- licensee specific factors

Consideration may be given to include the requirement for silviculture security when the NRFL is tendered and included as part of the licence particulars so that the bidders clearly know what they are applying for. However, when silviculture security requirements are included in the advertising tender all silviculture prescriptions (SP's) should be reviewed and the factors being utilised in the determination of the need for a security should be restricted to those factors related to the timber type and site conditions on blocks being offered under the licence. The objectives of the tendering process should be carefully thought out to ensure that the security requirements proposed adequately cover the risk to the government. Putting the deposit requirements in the tender would restrict the changes that could be made to the security at a later date. If a bid proposal tendering process has been selected and the amount of security is going to be determined and fixed prior to the award of the licence, conditions can be included within the tender document itself to ensure any risk based on potential applicant factors, such as status of payments to the crown, represented by a successful applicant is within acceptable levels. Whereas in a bonus bid situation there is less opportunity for screening out of high risk applicants through the inclusion of conditions within the tender documents therefore it is recommended that the determination the security requirements be completed after the signing of the licence.

How much security and in what form?

Once the RM or DM decides to require security, he or she must make three more determinations under the SFPL Regulation:

(a) when the security must be paid;

- It is recommended that one of the following approaches be used
 - i) at the issuance of the cutting permit, or
 - ii) at the commencement of harvesting, or
 - iii) as payments made on a quarterly or other periodic basis,

however the determination must be done on the basis of each individual SP covered in the cutting permit or any other method used to group blocks together. The determination for each SP should be documented and communicated to the licence holder as part of the administration of the licence.

(b) the amount of security that is required

- Consideration should be given to requesting a deposit that would fall within 50-100% of the calculated cost of carrying out the silviculture obligations. Therefore the level of risk assumed by the government generally would not exceed 50%. However, each RM or DM must make a decision on their own in each case which can be justified to unique operational circumstances or licensee specific factors.
- Appraisal cost estimates could be used as a guide to determine the per/ha or per/m³ security amount. Appraisal cost estimates are determined utilising very broad groupings and treatment regimes and may not specifically reflect the costs of completing the silviculture work for the timber types being harvested under the licence. Specific costing calculations for determining the amount of security should be completed on timber types being harvested that may differ from those that have been utilised to determine the appraisal cost estimates.
- The determination of the security requirements for non-replaceable tenures should be based on a fair assessment of the risk factors associated with each license situation.

c) the form of the security

- various forms of security are acceptable to the government, such as safe keeping agreements (non-negotiable security or cash), or an irrevocable letter of credit. Guidance has been provided under Chapter 9 of the Government General Management Operating Policy (<http://www.fin.gov.bc.ca/ocg/fmb/manuals/gmop/gmop-word/gmop9.doc>) on the forms of acceptable security. An examination of the licence specifics may indicate the most acceptable form which maybe tailored to the timber type (marginal quality/high costs), the least cost to the licence holder while still ensuring the primary goal of the deposit is the protection of the Crown.
- The regulation states that the district manager must promptly return a security when satisfied that there is no further need for the security. As part of the form of security, any return of the security should be based on a fair assessment of the continued risk to the achievement of free growing. For example, securities held can be returned upon completion of different phase of the obligation such as, x % returned after completion of any site preparation, a further x % after achievement of regeneration delay and the remaining refunded at the time of acceptance of free growing by the government. Development of a refund matrix based on the site factors and

the risk associated to the government on remaining obligations left on a particular block is suggested. This matrix should remain flexible to accommodate any requirements where the basis of the original determination of an amount of security has changed and account for other risk factors that may need to be considered in any return of the security.

Linking of silvicultural obligations under an NRFL to the security held under a replaceable tenure is not recommended. It is not clear if the deposit for a replaceable tenure governed by a different regulation and a different Act, i.e. the Advertising Deposits and Disposition Regulation under the *Forest Act* can be linked.

NOTE: The SFPL Regulation does not restrict the ability of the RM or DM to revisit the security requirements at any time during the term of the licence. The regulation states that the determination must be made on a SP basis. Once a determination has been made for a particular SP it cannot be changed. A periodic review of the performance of the licence holder is recommended and the risk factors utilised in determinations made on previous SP's should be reviewed and updated where necessary. However if the determination has been made prior to the tendering of the licence and covers all cutting permits associated with the license, then revisiting the determination after the signing of the licence is not recommended. In this situation there maybe fairness to bidders issues that may arise.

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