



General Bulletin

Number 18

December 18, 1998

Forest Practices Code Section 41(5) Approving Forest Development Plans After October 15, 1998

Introduction

This bulletin compares "total plan" versus "block by block" forest development plan approvals, and illustrates the proper application of section 41(5) of the *Forest Practices Code of British Columbia Act* (the "Code") with the intention of promoting consistency in the plan approval process.

Background

Prior to the Code coming into force in June, 1995, block by block approval of forest development plans ("FDPs") were standard procedure. This approach involved the approval of individual cutblocks, often with specific conditions being attached to each block. This was effective in some districts in that some degree of longer term development planning was achieved. However, in other districts the FDP evolved into an "amend and extend" document with an extremely limited planning horizon.

When the Code came into effect, mandating a five year planning horizon for the FDP, the block by block approval concept was to be replaced by "total plan" approval. In other words, if any one cutblock proposed in an FDP failed to meet the approval test set out in section 41 of the Code, the entire plan was to be rejected. The FDP was intended to be a logical and coherent plan for development of a *forest*, not of a piecemeal series of cutblocks. However, without some provision for allowing new blocks to be introduced into the FDP each year in a manner which didn't require either outright rejection or approval, the "total plan" approach was found by most forest districts to be inflexible and unworkable. Accordingly, most forest districts continued to use the block by block approach to FDP approvals, relying on section 41(5) of the Code which deals with "approval subject to a condition." This resulted in a planning horizon that in certain areas of the province was less than the five years anticipated by the Code, with usually only the first one or two year's cutblocks being fully approved to proceed to the cutting permit application stage.

On June 15, 1998, a new Operational Planning Regulation ("OPR") was brought into force which, among other things, incorporated the "gating" concept. The intention behind gating is to permit full achievement of the five year FDP planning horizon, by providing the ability for plan proponents to introduce new cutblocks each year in a manner which

doesn't carry the threat of rejection of the entire plan. The idea is that an FDP will contain five years of approved category A cutblocks, and possibly a number of category I cutblocks.

FDP Approvals

The mandatory test for plan approval in section 41 of the Code is to be applied to the entire FDP (other than the I blocks), not just to the individual cutblocks proposed within the FDP. This does not mean that the cutblocks themselves are not considered. A block by block review of the FDP is essential, and it is still important for the district manager to identify which cutblocks are not approvable and why. These unsatisfactory blocks must then, however, either be reclassified from being proposed as category A to category I, or be deleted from the FDP altogether prior to plan approval. This amendment must be initiated by the plan proponent and can be done efficiently via fax, highlighted maps etc.

Once the cutblocks otherwise become satisfactory for category A, the licensee may bring it forward for proposal as category A, either through the amendment process or in the next FDP submission. To avoid unnecessary duplication of documentation in the FDP amendment or the next FDP submission, in most cases a letter from the plan proponent specifying the changes will be satisfactory. That letter should then be attached to the FDP and will become part of the FDP. In most cases revisions to the maps and text of the FDP application will not be required.

With the introduction of the "gating" concept, government has made a clear commitment to licensees limiting "go/no go" decisions to the FDP stage as much as possible. This means that for any category A cutblock in an approved FDP, the district manager is expecting that a cutting permit will be issued (subject to the licence document and required assessments, i.e. terrain stability) and the approval of the silviculture prescription or road location and design will occur as a matter of course, as long as the respective legislated requirements are satisfied. Section 22 of the OPR sets out the degree of protection that a licensee can expect for category A cutblocks. Section 21 lists the circumstances in which approved category A cutblocks can subsequently be rejected.

Section 41(5)

Section 41(5) of the Code provides that *"A district manager may make his or her approval of a forest development plan or amendment subject to a condition."*

The following guidance for the application of section 41(5) has previously appeared in [Administrative Bulletin #05](#):

"The DM only may approve an FDP or amendment subject to a condition. However, FPC41(3) requires that all the requirements of the FPC and regulations be met and that the DM is satisfied that the plan or amendment adequately manages and conserves the forest resources before the approval with conditions is issued. Therefore, the DM may

find there are few situations when a conditional approval is appropriate. This practice should be limited to situations where valid concerns identified during the review process were addressed, but still may require some simple clarification to ensure that the intended actions are clearly identified or conveyed."

The main reason for the five year planning horizon is to require plan proponents, as well as the approving statutory decision makers to consider the broader effects of development in an area, rather than being focused on short-term issues. The purpose of gating is to provide some level of certainty for licensees, so they can know that once a cutblock has passed through the A gate, it can only subsequently be rejected in certain well-defined circumstances.

Section 41(5) is meant to be used for the FDP as a whole, not as a means for statutory decision makers to reserve the right to unilaterally reject or approve individual cutblocks or individual parts of the plan. It is also not to be used to expand on the mandatory content requirements set out in the Code and the OPR. The decision to impose a condition has to be considered on a case by case basis. In other words, a district manager cannot fetter himself or herself by creating a district policy that requires a particular condition to apply to all FDPs. Consistent with the need for certainty, a section 41(5) condition must be one that is within the licensee's power to fulfill. It can't be dependent upon the occurrence of some event or the action of some third party that is outside of the licensee's control. In other words, satisfaction of the condition can't be a matter left up to chance; it has to be something that the licensee can reasonably be expected to do.

The foregoing limits the use of section 41(5) to conditions that:

- are within the scheme of the FPC Act and regulations,
- do not add to the mandatory FDP content requirements,
- are made to fit a particular set of circumstances,
- are within the licensee's control.

Application of 41(5) is very limited. Some examples where the use of conditions may be appropriate are as follows:

1. A condition that a trapper, guide/outfitter, or water licence holder be advised by the licensee of the date logging will commence.
2. A condition that the licensee applies for a Licence of Occupation for a log dump site by a specified time, if the timing is relevant to the FDP.

The condition should include a statement that until it is fulfilled, no additional steps will be taken, that is, no cutting permits or silviculture prescriptions will be approved for that area under the plan that is subject to the condition.

Conclusion

An FDP approved after October 15, 1998 must contain only Category A and Category I cutblocks. Since Category A blocks are the only blocks that form the approved plan, all other blocks must be Category I. Section 41(5) may no longer be used as a tool for communicating to licensees, 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.

Neither does section 41(5) provide a means to add to, supplement, or replace the mandatory forest development plan content requirements set out in the OPR. For example s41(5) should not be used to say " the plan is approved on the condition that you do a grizzly bear habitat study".

The primary role of section 41(5) is in protecting certain third party interests and as another tool on ensuring licensees live up to any non-legislatively required commitments they may have made in a forest development plan.

Contacts

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