

GUIDANCE TO C&E PROGRAM STAFF ON THE APPLICATION OF SECTION 105.1 OF THE FOREST ACT AND THE “CHANGED CIRCUMSTANCE” PROVISIONS OF THE APPRAISAL MANUALS

Purpose

The purpose of this bulletin is to provide guidance to C&E program staff on the question of whether or not it is appropriate to proceed with an allegation of non-compliance with section 105.1 of the *Forest Act* (FA) where the effect of the alleged error is less than the changed circumstance allowances in the Appraisal Manuals (AM, Coast and Interior).

Introduction

Consultation and input from Ministry of the Attorney General legal counsel, Revenue Branch Timber Pricing staff, and the Managers for Litigation and Issues inform the following guidance.

C&E program staff have wondered about the linkage between s.105.1 of the FA and the changed circumstance allowances in the AMs. The answer, in brief, is that there is **no** linkage between them.

Section 105.1 of the FA requires the licensee to submit accurate information for the appraisal, and for any other purpose under the FA. Inaccurate appraisal information is information that does not accurately represent site specific conditions, least cost development, harvesting or transportation methods, or the timber authorized for harvest.

“Changed circumstances” in the AMs means that circumstances or plans are different from what they were at the time of the appraisal or reappraisal. Each of the AMs provides for an allowance (25% in the Coast AM and 15% in the Interior AM). The allowance simply means that unless the changed circumstance is at least 25% on the Coast or 15% in the Interior, the licensee need not immediately notify the District Manager of the change and a reappraisal need not be done.

Clearly, section 105.1 and the changed circumstance provisions of the AM are different concepts and relate to different concerns. Accordingly, there is no reason why one would trigger the other (i.e. why a changed circumstance under the AM would trigger an allegation under s.105.1 of the FA, or why a changed circumstance of less than the threshold amounts would lead you to believe that s.105.1 had not been contravened).

Revenue Branch's view is that the changed circumstance thresholds are triggers for licensees to inform the district manager of changed circumstances, period. They do not indicate how much inaccuracy the government is willing to accept in appraisal submissions. This is consistent with the C&E view.

In a nutshell, s.105.1 requires accurate appraisal information. If activities on the ground ultimately do not reflect the information submitted on the appraisal data sheet, the licensee must ensure that any subsequent submission for reappraisal reflects the realities/costs of those activities. However, between the effective date of the original appraisal and any subsequent reappraisal, the licensee is only obliged to submit the new information where the changed circumstances meet or exceed the percentages in the appropriate AMs.

Questions and Discussion

So what about a situation where a Licensee submits data they believe is accurate, discover a changed circumstance, and it's below the appraisal manual tolerance level, so they don't submit new information for re-appraisal?

Do I proceed with an allegation of non-compliance?

A changed circumstance could be below the appraisal manual benchmark and still have a significant financial impact on the Crown.

We are interpreting section 105.1 to mean accurate on the date of submission, be it for the initial appraisal or the re-appraisal. The licensee has no legal obligation to report the changed circumstance where it is below the appropriate tolerance level until the licensee submits new data sheets. Where C&E staff discover changed circumstances, you would investigate to determine if there is evidence to support the view that the changed circumstances were either known or should have been known at the time the appraisal information was submitted.

If the evidence supports an allegation of inaccurate information at the time of the submission, then you would decide whether or not to proceed to determination. Your decision would be based on the strength of the evidence (including evidence of defences) and, as well, on the real or potential impact to the Crown. Note that you should report the changed circumstances to Revenue program staff whether or not you decide to bring the matter forward for determination. Either way, Revenue program staff will need to decide whether or not to re-determine stumpage under section 105.2 of the FA.

For example: the licensee submits an appraisal with 65% slopes over 85% of the blocks in a CP. They go out there and discover that the 65% slopes are only over 70% of the block areas, so rather than cable log, they can conventionally log a larger area. The impact is less than the 25% tolerance on the Coast and less than the 15% tolerance in the Interior.

The data submitted in the original appraisal is inaccurate. The question is “did the licensee know or ought to have known that the information was inaccurate at the time it was submitted?” If the impact of the changed circumstances on the stumpage rate is significant, as opposed to trivial or slight, then an investigation may well be warranted.

You will need to be prepared for a due diligence defence and/or mistake of fact defence where you allege that a matter was or should have been known at the time of the appraisal submission. For example, if a licensee puts in a specific volume for end haul and the costs associated with that are based upon a reasonable and thorough examination of the site prior to road construction and the volume of rock is less than estimated, it may be that the licensee was duly diligent in estimating the volume of end-haul material.

The specific circumstances will determine the strength of your case and the licensee's defence. In this type of situation, you may very well require some expert consultation [geo-tech or engineer] prior to any decision to proceed with an allegation of non-compliance.

And, again, regardless of whether or not you elect to proceed to determination, you will need to provide your information to Revenue program staff for their assessment of whether or not to proceed with any re-determination of stumpage under Section 105.2 of the FA.

Remember, an investigation into a potential contravention of section 105.1 is not the same as recommending a re-calculation of stumpage under s. 105.2.

A determination of non-compliance with s.105.1:

- Is subject to review and appeal under FRPA;
- Is subject to the FRPA defences;
- May have an impact on the licensee's EMS record;
- Will be included in the C&E Annual Report as a part of the licensee's performance record; and
- May result in a re-calculation of stumpage.

The result of a section 105.2 re-determination:

- Is not subject to review and appeal (but is subject to judicial review);
- Is not subject to the FRPA defences;
- Is not included in the C&E Annual Report; and
- May result in a re-calculation of stumpage.

What criteria do I apply to the exercise of my discretion as to whether or not to proceed with an allegation of non-compliance with s. 105.1 of the FA?

You should consider the factors listed in s.71(5) of the *Forest and Range Practices Act* (FRPA) (reproduced below) and, as well, the same considerations you would normally apply to any decision to proceed with an allegation of non-compliance with respect to any section of the Acts or Regulations.

Administrative penalties 71 (5)

Before the minister levies an administrative penalty under subsection (2), he or she must consider the following:

- (a) previous contraventions of a similar nature by the person;*
- (b) the gravity and magnitude of the contravention;*
- (c) whether the contravention was repeated or continuous;*
- (d) whether the contravention was deliberate;*
- (e) any economic benefit derived by the person from the contravention;*
- (f) the person's cooperativeness and efforts to correct the contravention;*
- (g) any other considerations that the Lieutenant Governor in Council may prescribe.*

Let's consider an example. A check of cruise plots shows that the plot data was incorrectly entered into the cruise compilation and that the cruise plan missed a plot. The CP is to be 100% heli-logged. Helicopter cost allowances are such that regardless of the compilation error and the missed plot, the stumpage rate is still only \$0.25. There are no previous contraventions of a similar nature, gravity and magnitude are low, the contravention was not repeated or continuous, there is no evidence of intent, and there was no economic benefit. Do you proceed?

If all you looked at were the section 71(5) criteria, you might decide not to proceed. However, when we factor in the element of risk, there may be grounds for proceeding. It was merely by chance that the inaccurate transcription from the cruise cards to the compilation and the missing plot resulted in no change to the stumpage charged.

Had these same circumstances occurred on a conventional or cable block, the economic impact to the Crown may have been significant. Accordingly, the increased risk associated with this behaviour [missed plot and inaccurate recording of the plot data into the compilation program] might constitute grounds in favour of proceeding. In other words, where inaccuracies create a significant risk, despite little or no impact, proceeding with an allegation of non-compliance may be warranted.

Are you also saying then that there are circumstances where we shouldn't proceed with an allegation of non-compliance?

Yes. You should exercise discretion and not proceed where there is insufficient evidence to support the allegation that the appraisal data was not accurate at the time of the submission (and taking into account evidence related to the defences) or where the impact is slight or trivial. It is not reasonable to expect 100% accuracy in all circumstances with appraisal submissions. It is not an exact science. However, it is reasonable to expect licensees to have a fairly sophisticated knowledge of their harvesting systems, their operating areas, and the various costs involved.

The measurement of slight or trivial should be based upon the overall impact of the inaccurate data on the overall stumpage rate or dollar value of the Cutting Permit. If, for example, the licensee said they would gravel the road for 3600 metres, and only gravelled the road for 3000 metres. You calculate that this would result in a net change of .08 cents a cubic metre on a 120,000 cubic meter CP for a dollar value of \$9,600.00. The rate for that CP is \$36.00 a cube. So on a \$4,320,000.00 permit, you have to ask yourself, am I providing more value spending my time pursuing that \$9,600.00 when the next permit over or the next environmental inspection may reveal something of greater significance.

In all cases, you should consult with your colleagues, your supervisor, and your DCL when making this kind of decision.

We also need to remember that a series of minor incidents, where we have elected on an individual basis not to proceed with an allegation of non-compliance, may on the whole reflect a pattern of non-compliance. In these circumstances each minor incident must be documented through a compliance notice or other means, otherwise it cannot be used to establish a pattern of behaviour, or to show that the person responsible was aware of the behaviour.

So even minor instances of non-compliance should be documented and tracked in CIMS and/or ERA to ensure any future action that by itself may be considered minor could be a trigger for enforcement action when combined with a history of trivial incidents. While these compliance actions or history of minor events may be used to set the stage for a rationale to proceed with an allegation of non-compliance for a subsequent minor event, they cannot be used as "similar previous contravention" and they should not be used to make any recommendation for a higher penalty. Remember, the sound exercise of judgment is required before concluding that a series of minor incidents is significant enough to devote enforcement resources to.

When exercising your discretion you should always consider the resources available to the Crown and the question of whether or not limited resources would better serve the C&E mandate if applied to another area. In other words, while you are expending time and resources investigating a relatively small inaccuracy you may be foregoing

the opportunity to inspect numerous other CPs where there is a higher risk of significant impact.

In all cases you have to consider the specific circumstances. Decisions of this nature can be difficult, and no matter what you decide to do, your decision may be subject to criticism. You must always strive to make an informed decision, to document your decision, and be able to defend your decision. No decision should be made in isolation. No situation requires an immediate decision.

Consider, reflect, consult, decide, document and move on.

So what about where the error in the appraisal benefits the Crown?

Lack of care in submitting appraisal information, regardless of whom it benefits, may warrant an enforcement action. One purpose in taking an enforcement action is to deter future non-compliance.

Subject to the same criteria for the exercise of discretion as discussed above, taking enforcement action where a re-determination of stumpage may benefit the licensee is the ethical and correct course of action. It will demonstrate that C&E is both serious about obtaining compliance with the legislation and that we operate an objective, fair and professional enforcement program.

So where do Revenue staff fit in this and what role do we [C&E program staff] have with respect to the re-determination of stumpage under s. 105.2 of the FA.

Application of section 105.2 is a Revenue program function. However, C&E does have a role to play. It is our responsibility to inform Revenue staff of any inaccuracies that we might find during any inspection or investigation, regardless of whom they benefit. The decision on whether or not to pursue a stumpage re-determination is the mandate of the Revenue Program. We must be mindful that any information that we provide to Revenue staff may be used in a re-determination calculation so therefore we must provide the best evidence available and be able to defend that evidence if challenged.

Do we anticipate an appeal on this subject?

It is quite possible that a licensee may attempt to link the AMs' changed circumstance provisions to a section 105.1 determination in an appeal before the Forest Appeals Commission, or perhaps on a judicial review. So be it. If that occurs, it is the Ministry's position that the two are not linked and our legal counsel will make that argument.

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