Risk Management
&
The Principles of
Statutory Decision Making

Handbook

October 1998
Risk Management & The Principles of Statutory Decision Making

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The Forest Service is facing many challenges. Diminishing financial and human resources, increasing awareness of environmental issues by the public and various high-profile interest groups, falling lumber prices and job-losses all combine to make government’s attempt to efficiently manage the province’s forest resources more difficult.

However, perhaps one of the most important and least understood of these challenges is the introduction of a forest management regime founded in statute.

Before 1995, forest management decisions were generally based on policies and forest management guidelines and implemented through contractual tenure agreements. All this changed when the Forest Practices Code of British Columbia Act and associated regulations (the “Forest Practices Code”) came into effect on June 15, 1995.

The profound implications of this shift from a contractual regime founded on policies and procedures to a statutory regime cannot be over emphasized. The move to a statutory regime has affected every facet of contemporary forest management decision making.

Amid the many and often competing pressures, members of the Forest Service are charged with the important responsibility of making lawful and sound forest management decisions. The long term repute of the Forest Service will depend on its ability to achieve both these values.
Making sound forest management decisions does little good if those decisions lack legal authority. Often, however, it is not enough merely to focus on whether the decision is lawful. The law frequently permits a range of possible decisions and/or responses to a situation. It falls to the decision makers to assess the risks and benefits and to determine which of the possible legal responses is the most effective response to the circumstances before them.

Two areas of concern with regard to forest management decisions under the Forest Practices Code are:

1. Some statutory decision makers fail to recognize the full scope of the authority conferred on them under the legislation, and constrain their judgment and discretion within artificial limits. These decision makers “fail to explore the four corners of the legislative box”; and

2. Other statutory decision makers exceed the authority conferred on them under the legislation. They ignore the limits set down in legislation and substitute their vision of how things should be done. These decision makers “jump right out of the legislative box”.

One of the primary objectives of this handbook is to help statutory decision makers and their staff address these concerns and make lawful and sound decisions.

These mistakes suggest some decision makers and their staff do not fully understand or appreciate the importance of the “rule of law” - the foundation of any statutory regime.

**Rule of Law**

The rule of law requires statutory decision makers to abide by the language and purposes of the legislation upon which their decision making authority is founded. In this regard, statutory decision makers are the “servants” of the Legislature and must carry out the will of the Legislature – not their own – according to the legal principles established to protect those affected by their decisions.

**Forest Service staff must possess an expert understanding of their role as civil servants, and the legal principles of statutory interpretation and administrative law, if they are to successfully manage risk within a statutory framework.**
Assessing and managing risk is the foundation of all forest management decisions, including decisions relating to operational planning, compliance inspections and enforcement actions. Risk management is essentially the “art” of weighing risk against expected benefits to make the “best” forest management decision. It must be founded on a sound risk assessment process that addresses all types of forest management risks, including:

- environmental risk,
- economic risk, and
- social risk.

To succeed, risk assessment and risk management must also grapple with concepts such as:

- uncertainty,
- “real” versus “perceived” risk, and
- optimal, acceptable and unacceptable risk.

Risk management is not a simple exercise with a one size fits all methodology to address every situation. There are multiple combinations and permutations for managing forest management risks and each of them is constrained by impediments such as uncertainty and limited resources. However, an understanding of the principles of risk management and the ways in which uncertainty can be addressed and what the expectations around limited resources are, is critical for statutory decision makers and their staff to manage the risks when carrying out their legislated responsibilities.

Forest Service staff must understand and apply the basic concepts of risk and the principles of risk assessment and risk management to all forest management decisions.

Therefore, the key objectives for this handbook are:

- To help Forest Service staff understand the principles of risk assessment and risk management as they apply to their roles and responsibilities in managing the province’s forest resources; and

- To help statutory decision makers and their staff understand the legal principles guiding forest management decisions and how these principles influence the assessment and management of risk.

The basic concepts of risk are introduced in chapter two. Although the terms risk, uncertainty, risk assessment and risk management are used every day, they often mean different things to different people. A full understanding of these concepts is essential to any discussion of
contemporary forest management.

**Chapter 3**
The basic principles of assessing risk within a forest management context are discussed in chapter 3.

**Chapter 4**
Chapter four examines risk management within a statutory forest management regime.

**Chapter 5**
The role of the civil servant is reviewed in chapter 5. This discussion begins with a brief introduction to the separation of powers defining our statutory forest management regime and concludes with a discussion of the challenges civil servants face under the Forest Practices Code of British Columbia Act.

**Chapter 6**
The sixth chapter explores the salient principles of statutory interpretation and how they define the parameters for decision making within a statutory forest management regime.

**Chapter 7**
The principles of administrative law and their practical applications to forest management and statutory decision making are briefly discussed in chapter 7.

**Chapter 8**
Chapter eight highlights and outlines the appropriate use of policies, procedures, guidebooks and various forms of advice (e.g., technical, professional, legal) when making statutory decisions.

**Chapter 9**
The ninth chapter investigates the various forms of challenge facing statutory decisions in the statutory forest management regime. Understanding how and why decisions are challenged, and the ramifications when they are, provides decision makers with a practical look at how they can make their decisions more defensible.

**Chapter 10**
A detailed review of the operational planning process and how to manage the intricate interface between forestry and the rule of law is discussed in chapter 10. This discussion builds on, and consolidates, the material covered in earlier chapters.

**Chapter 11**
Chapter eleven reviews how the compliance program (e.g., carrying out inspections, reviewing the effectiveness of operational plans and legislation) must operate within, and take guidance from, the statutory forest management regime.

**Chapter 12**
The role of risk assessment and risk management in the Forest Service’s enforcement program and how the program is influenced and directed by the statutory forest management regime is discussed in chapter 12.
It should be noted that many of the staff members reading this material will have taken previous courses prepared by the Compliance and Enforcement Branch such as; Basic Law, Administrative Law for Managers, Making Effective Determinations and Defending Determinations. Although this handbook is meant to stand on its own as a reference book, it is not meant to replace previous material, but rather to supplement that material and to incorporate the concepts of risk assessment and management.

Chapter Summary

- The Forest Practices Code has shifted forest management from a contractual regime, based on policies and procedures, to a statutory regime.

- Two concerns with regard to forest management decisions under the Forest Practices Code are:
  ⇒ Statutory decision makers are constraining their judgment and discretion within artificial limits; and
  ⇒ Statutory decision makers are exceeding the authority conferred on them under legislation.

- The objectives of this handbook are to help Forest Service staff:
  ⇒ understand and apply the principles of risk assessment and management; and
  ⇒ understand the legal principles guiding management decisions.
Basic Concepts of Risk

"Great deeds are usually wrought at great risks."

Herodotus

This chapter focuses on the basic concepts of risk and relates these concepts to the forest management context.

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 the loss or damage. Risk management is the “art” of weighing the assessed risks against the expected benefits to make the “best” decision.

People assess risk everyday and base their decisions on that assessed risk. They weigh assessed risks against benefits they hope to accrue. They allocate resources based on assessed risks. However, while this balancing act seems straightforward it isn’t. People don’t always deal with risk as effectively as they could.

When faced with risk, some people attempt to avoid it at all costs rather than trying to balance the likelihood and magnitude of loss against the benefit that may be gained. This aversion to risk often results in benefits forgone or the realization of fewer benefits than if appropriate
risks had been taken.

Like all other decisions, forest management decisions, including those made within a statutory regime, involve the assessment and management of risk.

For example, in the operational planning context, potential benefits that may result from forest management activities must be weighed against the likelihood and magnitude of different types of potential losses. Within a statutory regime, the statutory decision makers must put their minds to the likelihood and magnitude of loss and weigh these against the potential benefits that may be realized, having regard to any criteria laid out in the legislation.

The risks that must be dealt with in the forest management context are varied, often qualitative, and almost always interrelated. This is not to say that they can’t be assessed and managed, but the process for doing so requires statutory decision makers and their staff to fully understand the complexities of these risks and to communicate to the public how they manage these risks on the public’s behalf.

In addition it must be recognized that different decision makers can apply precisely the same methodology around risk assessment and management and arrive at a spectrum of different results. In discussing the risks that need to be considered and the application of risk assessment and risk management in chapters 3 and 4, it is not intended to teach an exact methodology but rather, to promote sound judgment based on the principles of risk, risk assessment and risk management.

To understand how risk relates to forest management, it is necessary to distinguish various types of risks resulting from forestry activities. The three key risks that will be discussed are: environmental, economic and social.

Environmental risk is the chance of loss or damage to physical and ecological factors as a result of actions taken or decisions made. This risk is perhaps the most easily recognized and understood by Forest Service staff as well as staff in other resource management agencies. As a result, it is the most actively managed of all the risks that arise within the forest management context.

Examples of the environmental risks that may result from forestry activities include the potential for loss or damage to fish or wildlife habitat, water quality or biodiversity.

Economic risk is the chance of monetary loss as a result of actions taken
Economic risk is the chance of monetary loss as a result of actions taken or decisions made. The monetary loss may be to the government, to individual companies or to the general public. Examples of economic risk include the potential for loss of stumpage, reduced profitability, or loss of employment.

The valuation of monetary losses can be simple and straightforward as in the case of lost stumpage revenue, or more complex as in the case of valuing the damage to a local recreation area. One approach to determining a monetary value of non-commercial goods is contingent valuation. This is the determination of what someone (e.g. the public) would be willing to pay to retain the resource “as is” compared to what someone else (e.g. a licensee) would be willing to accept in the form of compensation for not accessing the resource. Although people generally demand more in compensation than they are willing to pay to retain the resource, this approach provides one means of determining a range of values for consideration of economic risk.

Some types of economic risks are even more difficult to ascertain. Costs such as the costs of inaction, the costs of missing the peak market and opportunity costs are often ignored in economic risk evaluation.

Social Risk

Social risk is the chance of loss or damage to cultural, aesthetic or social values as a result of actions taken or decisions made.

Social risks are the potential losses that may be borne by a group of people, for example an aboriginal band, a community, private land owners or users of a recreation facility. Social risks include the potential for loss or damage to a cultural heritage resource, visual quality or recreation features.

Social risks are largely qualitative, usually multi-layered and multi-dimensional, and often subjective and volatile. They generally do not lend themselves to the means normally used to identify forest management risks. All this makes social risks particularly difficult to assess and manage. However, such risks are no less important than other types of risks that may be more easily assessed and managed. The challenge for Forest Service staff is to overcome the difficulties that stand in the way of successfully assessing and managing this type of risk by making the best use of all available tools.

One of these tools is the public review and comment process established under the Forest Practices Code.

The purpose of the public review and comment process is to elicit input on a range of issues. However, its greatest value may in the area of social risks. It is often the only means of obtaining information on this
type of risk, and ensuring its effectiveness may be one of the keys to successfully assessing and managing social risk.

Social risks can escalate into provincial, national or even global issues. When they do, they may raise questions about the fundamental nature of British Columbia’s statutory forest management regime. For example, input on social risks may challenge underlying land use decisions. These types of questions fall outside the jurisdiction of a statutory decision maker, who is bound to follow the dictates of the statutory forest management regime. In such cases, the only way for a statutory decision maker to manage the social risk may be to recognize that he or she simply does not have the authority to do so.

This is not to say that all land use decisions are outside the legislated authority of the statutory decision makers because ultimately every planning decision is a land use decision. However, for the purpose of this handbook, reference to land use decisions implies broad land use decisions.

The B.C. Court of Appeal in the “spotted owl case”, Western Canada Wilderness Committee v. The Chief Forester for British Columbia, Larry Pedersen, Vancouver Registry, CA021741, April 8, 1998, made a distinction between large scale and smaller scale land use decisions. The Court stated:

“While it is correct to say… that forest management and land use are not distinct concepts in the overall forestry scheme and that environmental values affecting land use form part of the decision making process in establishing AAC’s, the fact remains that large scale policies affecting land use should be made by the government.”

Risk Factors

There are a number of factors that affect environmental, economic and social risks. These factors can raise or lower the risk depending on the circumstances.

Common risk factors are performance, market and timing factors.

The performance factor is the operational history or economic capacity of a licensee proposing to undertake a particular forest activity. In some circumstances the licensee’s financial track record may also affect the risk rating of the activity.

Market factors reflect the potential for profit or loss for the licensee, and can therefore affect the risk rating of an activity. For example, market considerations such as the demand and price for wood products directly impact economic risk. They can also influence a licensee’s approach to environmental or social risks. For example, when the markets are weak,
a licensee may be more inclined to reduce costs by not taking all appropriate measures to protect the environment, thereby increasing the environmental risk rating.

Timing or seasonal factors reflect the change in risk associated with different seasonal conditions. For example, some forestry activities will have a very low environmental risk when performed on an appropriate snowpack. However, the same activity may create an unacceptably high risk of soil damage during the rest of the year.

Each risk factor may adjust the risk of a given action or decision. Since the risk factors are based on changeable and dynamic issues, such as market forces or weather conditions, it is imperative that they are considered close to the event to be assessed. Accordingly, the information that is associated with a risk factor must be up to date to be applied usefully.

Risks generally fall into two categories: real risk and perceived risk.

Real risk is risk determined through expert analysis and is based primarily on scientific evidence and grounded in scientific principles. This is not to say that one analysis will definitively determine real risk. In fact, real risk of any given situation can vary depending on the information and assumptions used in the analysis. It is often necessary to make assumptions when determining real risk because of the existence of scientific uncertainty. Uncertainty is discussed later in this chapter and throughout the chapters on assessing and managing risk.

An example of an analysis of real risk in contemporary forestry is the determination of the risk of a landslide occurring. A terrain stability field assessment determines the likelihood of a landslide occurring. The assessment does not determine an exact probability, however it will identify whether the area has a low, moderate, high or very high likelihood of a landslide occurring and when combined with the potential consequence of a landslide occurring, real risk is determined.

The real risk of a landslide occurring may vary due to availability of information or because of the assumptions made in the assessment. This variance in real risk may appear problematic from a decision making point of view. Provided the analysis used accurate information and the assumptions were realistic and applicable to the situation at hand however, the analysis of real risk can be used for the purpose of decision making (more details on the use of expert advice is provided in chapter 8).

Perceived risk is based on an individual’s or society’s impressions, experience or intuition. Perceived risks are more often influenced by a
person’s values and fears than by empirical proof or fact. This does not mean that perceived risks need not be considered in risk management decisions. In fact, depending on the situation, perceived risks may be considered equally if not more important than real risks (the management of perceived risks is discussed in chapter 4).

For example, the real risks associated with clearcutting vary given different assumptions. This is not unlike the terrain stability example. However, the perceived risks associated with clearcutting are equally, if not more able to influence policy decisions, and are not encumbered with clinical assumptions and acknowledgments of uncertainty. However, that is not to diminish the impact of these arguments; large companies are poised to change management practices associated with clearcutting, not to affect the generally accepted ‘real’ risks, but to mitigate the problems associated with deemed unacceptable perceived risks.

Statutory decision makers need to be careful in their consideration of perceived risk where there is limited scientific basis. Just as the broad land use decisions are best left to the government, it is often best for the government to address the public’s perception on broad forest management risks. For example, restricting clearcutting practices to address a public concern is best left to the Legislature.

Similar to real risk, perceived risk is influenced by the information provided to an individual or society and the assumptions made when considering that information in the context of the potential for loss or damage. Perceived risks generally fall into two types.

First, there are perceptions based on statements of interest groups and the media where feelings of dread or inordinate concern over catastrophic loss (environmental, economic or social) are projected.

Second, there are perceptions based on an inherent distrust of scientists or the ‘system’.

An example of the first might be the perceived risk of a landslide occurring, based on the impressions people receive through media reports that current harvesting techniques result in landslides.

The assumption behind this perceived risk is that media reports are accurate and consistent with the scientific evidence. People often fail to account for the propensity for natural landslides, the benefits that were associated with the resource use, the actual detrimental effect (e.g. can the area be easily replanted, or has it been scoured down to rock thereby affecting the productivity of the area for hundreds of years?).
The second type of perceived risk arises because of the assumption that the experts aren’t always right and that things that are deemed to be safe one day, may be in fact a hazard the next. Although it is often difficult to reconcile this ‘gut feel’ with scientific evidence of real risk for the purpose of making a decision, some caution should be exercised based on the recognition that some areas of uncertainty are simply unknown.

Real and perceived risks in the forest management context

There are both real and perceived risks in the forest management context. It is important for Forest Service and staff in other resource management agencies to consider both when assessing and managing risks. The relative weight applied to the risks will depend on the circumstances, however where either is used as the basis for a decision, the decision maker must be able to rationalize its use. That is, she should be able to refer either to the science behind the real risk or to the scope of uncertainty behind the real risk which warrants the consideration of perceived risk.

The ability of the media and interest groups to influence the public’s perception of risk cannot be underestimated. Media often present stories and images that play upon people’s fears and affects their perception of risk. Interest groups from both ‘sides’ of the forestry debates attempt to change the public’s perception of risk. The uncertainty associated with real risk assessments is often overestimated, and expert differences of opinion, often due to different assumptions, are highlighted to reduce the public’s trust of the real risk assessments.

Communication

One of the Forest Service’s roles as the regulatory agency most directly involved in forest management is to provide accurate information to the public on resource management activities and the real risks they pose. The goal of such communication is to achieve a state of ‘informed consent’ to its activities by the public. This goal will produce a public with the information to participate in forestry legislation and policy making through a position of strength and equality through knowledge. It does not displace expert led real risk assessment, but provides the best possible accompaniment.

Risk and Uncertainty

Risk is inextricably linked to uncertainty. After all, if there were absolute certainty about the chance and magnitude of an outcome, decisions would be easy to make.

Uncertainty

“uncertainty results in a higher perception of risk”

Uncertainty is directly related to perceived risk as an increase in uncertainty results in a higher perception of risk.

Real risk is also influenced by uncertainty. While real risk is based primarily on scientific evidence and grounded by scientific principles,
science can rarely offer 100% certainty. In addition, science, by its very nature, thrives on uncovering other uncertainties and subsequently attempting to reduce them. Unfortunately the identification of uncertainty often comes well before any ability to reduce it, thereby exacerbating the mistrust of expert opinion by affected individuals or the public.

The management of uncertainty first requires that it be fully considered and acknowledged when decisions are made. Second, where uncertainty results in different potential outcomes, these outcomes should be evaluated against each other to determine how the degree of uncertainty affects the end result. This is called sensitivity analysis and in some cases large levels of uncertainty can be managed effectively this way. That is, where the uncertain variables have little if no effect on the outcome, the impact of the uncertainty is not a concern. If the uncertain variable has a large impact on the desired result, such as the calculation of potential loss, then an attempt should be made to mitigate the uncertainty, or a more conservative decision made. A detailed discussion of uncertainty is embodied in the chapters on risk assessment and risk management.

## Optimal Risk

Faced with uncertainty, people often become overly risk adverse to the point of delaying or not making a decision. However, a person – or society as a whole – may actually lose more, or forgo future benefit, in the vain attempt to avoid risk altogether. As previously discussed, a certain level of risk is always beneficial. This level of risk is the optimal risk.

The art of risk management is essentially a trade off between the benefits of a certain activity and the likelihood of the loss if it does not turn out as expected. The optimal risk is achieved when the net benefits of a decision are maximized. It is said that the legislation is the Legislature’s attempt to portray the optimal level of risk for difficult societal issues. However, this ideal is not always achievable. Often, a lower standard is acceptable, although not optimal. This is the acceptable level of risk.
Acceptable Risk

Acceptable risk is the point where the benefits of a decision slightly outweigh the likelihood and magnitude of the loss that may be incurred. In a statutory framework, it is always desirable to attempt to reach the optimal level of risk, but it isn’t always attainable. Often, the statutory decision maker must make a decision where the benefits outweigh the potential for loss, not in an ideal way, but in an acceptable one. These decisions, the difficult ones, are compromises to the ‘ideal’, but in the circumstances are acceptable as defined by the statutory requirements. Unacceptable risks are those that don’t meet this criteria.

Unacceptable Risk

Unacceptable risk is risk that, because of an extremely high likelihood or magnitude of loss is always unacceptable, regardless of the benefits that might be gained. For example, where the magnitude of consequence is such that the impact can not be mitigated over any period of time and is therefore likely to create irreversible damage, the risk could be considered unacceptable.

THERE ARE SOME CHANCES WE JUST WON'T TAKE!

The challenge for forest resource managers is to assess as accurately as possible the short and long term risks associated with resource development, and to evaluate both the short and the long term costs and benefits of that development.

In order to balance the environmental, social and economic risks associated with the forest industry, the risks must first be assessed and then managed according to the specific situation. Risk assessment and risk management are discussed in some detail in chapters 3 and 4.
Chapter Summary

- Risk is the potential for loss or damage resulting from a particular action or decision.

- The three key forest management risks are:
  ⇒ Environmental;
  ⇒ Economic; and
  ⇒ Social.

- The objective of risk management is to achieve the optimal level of risk.

- Sensitivity analysis can be used in some cases, to effectively manage large levels of uncertainty.

- There are optimal, acceptable and unacceptable risks. The latter reflects the fact that there are some risks we just won’t take.

- To balance environmental, social and economic risks associated with forest management, the risks must first be assessed and then managed according to the specific situation.
“Take calculated risks. That is quite different from being rash.”

George S. Patton

Introduction

This chapter applies the basic concepts of risk as discussed in the previous chapter for the purposes of assessing risk. Risk assessment is defined and discussed within the context of it being a tool for statutory decision makers to make wise, defensible decisions. It is not until all risks are known and understood, that they can be managed. The management of risk is detailed in the following chapter.

Risk Assessment

Risk assessment is the estimation of the likelihood of loss or damage and the magnitude of the consequence should the loss or damage occur. The level of risk resulting from an assessment may or may not be a quantifiable value. Some risks lend themselves to statistical or numerical values, while others, like social risks, do not. However, risks that are largely qualitative can be assessed in such a way as they can be compared to other similar risks, and as such, managed accordingly.

Forest Management Risk Assessment

In the past, the Forest Service has used risk assessment as a tool for determining inspection priorities. Although this is one valuable application of risk assessment principles, it is important to remember that risk assessment is equally important to other forest management
decisions. Also, the traditional approach to risk assessment has usually been too restrictive in relying primarily on quantitative measures to assess risk.

Adequately assessing forest management risks, particularly with respect to operational planning decisions, requires an analysis of both quantitative and qualitative risks.

When assessing forest management risk each of the various types of risk is assessed separately, that is: environmental, social and economic. Although there is some overlap between these risks, each has its own unique variables, uncertainties and risk factors and consequently must be assessed on its own. The risk rating of each type will give the statutory decision maker the necessary information to make an informed risk management decision.

**Risk Assessment Process**

The following process of risk assessment is meant to guide most risk assessments. It is not intended to be the definitive way to assess risk, but a workable approach that can be tailored to fit specific situations.

The risk assessment process can be divided into six steps. These steps provide the basis for determining risk regardless whether the risk is being determined for plan approval or compliance purposes. Additional details on how risk may be assessed for inspection allocation and compliance activities are discussed chapter 11.

1. Identify potential detrimental events and the potential values that may be impacted.
2. Determine the likelihood that the detrimental events will occur.
3. Determine the magnitude of consequence to each of the values (environmental, social, economic) if the detrimental event occurs.
4. Determine the initial risk rating.
5. Adjust the initial risk rating based on risk factors such as: performance, market and timing.
6. Final assessment of each risk: environmental, social and economic.
Step 1 Identify Detrimental Events

The first step in assessing risk is to identify all the detrimental events that may occur. Detrimental events are those events that may cause loss or damage to environmental, social or economic values. For example, soil disturbance, terrain instability, windthrow, unauthorized harvesting, missing required deadlines or failure to carry out an activity are all detrimental events. To accurately assess the risk in any given situation, it is necessary to identify all potential detrimental events.

Value Identification

In addition to the identification of the potential detrimental events, the values that may be affected by these potential events should be determined. Many forestry situations may affect numerous, and intertwined, environmental, social and economic values. For the purposes of the assessment of risk, each value should be assessed separately, potential detrimental event, by potential detrimental event.

Examples of environmental values include fish habitat, riparian areas, water quality, and wildlife habitat areas. Clearly these values could be negatively affected by events such as a landslide, unauthorized harvesting in a riparian reserve zone or windthrow. Environmental values tend to receive the most attention and are often the easiest to identify, however, all risk assessments must identify social and economic values as well.

Examples of social values include public safety, visual quality objectives, recreation features or sites and cultural heritage resources. Often, the detrimental events affecting environmental values also affect social and economic values.

Examples of economic values include Crown revenue from stumpage or range rent, previous investments by the Crown or by licensees, licensee profitability and employment levels. Some detrimental events affecting economic values include, unauthorized harvest or unauthorized occupation of range land, fire or a broad decline in market prices for wood products.

Although certain values may not be directly affected by the detrimental events, information about all values is important for determining the appropriate risk level. Being aware of all values, both those identified as being directly affected and those in the vicinity of the proposed activities, aids the assessor in putting the entire risk assessment together. This is not intended to become an overly onerous task, but rather an identification of the applicable values and an estimation of the effect that the identified potential detrimental effects could have on the values.
Step 2: Determine Likelihood

The second step when assessing risk is determining the likelihood of each detrimental event occurring. Rather than determining an exact probability of an event occurring (which is often impossible), it is usually sufficient to determine that the likelihood of the event occurring is low, moderate or high. That said, likelihood should be linked to a tangible value wherever possible and not a relative chance within the operating area, district or province. For example, the likelihood of failing to achieve regeneration obligations could be deemed high, based on the variables of expected survival rates, number of replant activities expected and the potential for reduced stocking density. It is not sufficient to say that the likelihood is high relative to another area of the district, licensee or area of the province.

Formal methods for determining the likelihood of some detrimental events already exist. For example, the Mapping and Assessing Terrain Stability Guidebook provides the methodology for conducting a terrain stability field assessment and determining the likelihood of a landslide.

However, methods for determining the likelihood of other events are not formalized and the determination will be left to the risk assessor. In these cases it is necessary to use all available information to estimate the likelihood in a reasonable and defensible manner. For example, although there are field guides to assessing windthrow potential of trees in a reserve zone, they do not necessarily determine the likelihood in absolute terms. The determination of likelihood will be left to the risk assessor, who will have to rely on experience and historical knowledge to quantify the chance of the detrimental event.

Likelihood and Uncertainty

When determining likelihood it is necessary to recognize the uncertainties that affect the determination. Where uncertainty exists, such as in the quantification of the likelihood of the windthrow event, it is necessary for the risk assessor to make a reasonable assumption and continue with the determination of the likelihood. However, if the likelihood could vary significantly given different assumptions, it may be worthwhile to determine the range of possible likelihoods associated with different assumptions. The resulting range of likelihoods, with one ‘best guess’ will prove valuable when and if sensitivity analyses are conducted during the next step.
Step 3 Magnitude of Consequence

The third step in assessing risk is to determine the magnitude of consequence to each of the environmental, social and economic values if the detrimental events do occur. Determining the magnitude of the consequence is often more subjective than determining the likelihood of an event occurring but is similarly determined to be either low, moderate or high. As with the evaluation of likelihood, the magnitude should be tied to tangible factors and not simply relative to the magnitude of consequence elsewhere.

Magnitude is dependent on two primary factors, the impact and the time over which the impact exists. When determining the magnitude of consequence it is necessary to estimate both. If the impact on a value is high but it is anticipated that the impact may be short lived or easily mitigated in a short time, the magnitude may be considered as low.

Where the impact is low but it is anticipated that the impact can not be mitigated, the magnitude of the consequence may be moderate or high. When considering the time over which the impact is anticipated to exist, uncertainty must be acknowledged because the longer the time before the impact can be mitigated, the less certainty there is around the ability to effectively mitigate the undesirable consequence.

Since determining the magnitude of the consequence is not based on a clearly defined methodology, it is probably best to review some examples of how it can be done.

When determining the magnitude of consequence of potential damage to a fish stream there are numerous considerations. Some questions that may be asked in the determination include;

- Is the damage likely to create an immediate loss to fish habitat and subsequently harm the fish that currently live in the stream?
- Even if the anticipated impact is small, could it pose potential problems for current and future fish?; and
- What are the estimated costs for any remediation work that may be required to repair or create an alternative habitat for the fish?

Determining the magnitude of consequence to a recreation site may include determining the usage levels for the site, its accessibility and proximity to comparable sites.

Determining the magnitude of consequence to local employment levels may include determining the number of employees potentially affected by the action, whether or not the anticipated unemployment is likely to be temporary or permanent, the availability of alternative employment in the area and composition of the local labour force.
Magnitude and Uncertainty

Similar to the determination of the likelihood of a detrimental event occurring, uncertainty must be considered when determining the magnitude of consequence. Uncertainties may be present both in the consideration of the potential impact and in the consideration of the time over which the impact exists. When determining the magnitude of consequence, it is necessary to make assumptions to account for the uncertainties that exist. Depending on the assumptions made, there may exist a range of potential impacts on the environmental, social or economic values. This range of impacts may need to be addressed by a sensitivity analysis.

Step 4: Initial Risk Rating

The fourth step in assessing risk is to calculate the initial risk level to each specific environmental, social and economic value based on the likelihood and potential magnitude of each potential detrimental event that may occur. Where detrimental events affect a combination of values, separate risk ratings should be developed for each value.

The calculation of the risk rating is often expressed as a simple product of likelihood and magnitude of consequence. Although in most cases, risks may be calculated this way, a more involved process is required where qualitative issues are dealt with, such as social risk issues. In these cases the assumptions made, the uncertainties and results of any sensitivity analysis must be weighed to determine (rather than calculate) the risk rating.

Initial Risk

The following formula and table represent a guide for calculating the risk rating. Initial risk is calculated as:

\[
\text{Risk} = \text{Likelihood} \times \text{Magnitude of Consequence}
\]

where the likelihood is the likelihood of the specific detrimental events occurring and the magnitude of consequence is the magnitude to each individual environmental, social or economic value that may be at risk.

The calculation is based on the following table:

Table

By multiplying the likelihood of each associated detrimental event with the magnitude of consequence to each value and then determining the highest risk to the value, the initial risk rating is calculated.

When differing risks to one value are determined, the overall risk to that value is not simply an average of the risks, but a true assessment of the risk to that value. Although in some cases, this may be an average of the risks to that value, it may also be the most restrictive rating, or the
Chapter 3 Risk Assessment

The fifth step in assessing risk is to consider risk factors and adjust the risk levels accordingly. As discussed in chapter 2, some common risk factors are performance, market considerations and timing considerations. The consideration of risk factors and the subsequent adjustment of the risk levels is a qualitative exercise where the consideration of risk factors is used to adjust the overall risk levels in a logical and defensible manner. These risk factors are often associated with variables too volatile to fully assess during the determination of the initial risk rating. That said, these factors may change the risk rating significantly and as such, are extremely important to consider.

Since risk factors are variable, there are two ways to utilize them. One is to determine the variance that may occur to the risk factor. Then, much like the sensitivity analysis, approach the final risk rating with a range of possible results. Obviously, the best guess, or current application of the risk factor will be represented in the final risk rating, but the range of possible final risks will enable the risk assessor to provide the risk manager with extremely useful information.

For example, if there is some risk that a plan proponent may cause soil damage with a proposed activity during atypical summer rainfall events, the seasonal risk factor may be based on normal summer rainfall events, but an additional modeled result may be based on an uncharacteristic summer rainfall event. Although the final risk may be moderate, the possible alternative may indicate a high risk if over five inches of rain is experienced from July to August. This information then, is invaluable to the risk manager.

The alternate method for adjusting risk based on variable risk factors is to adjust the initial rating of risk just before the activity commences. This has the effect of increasing the certainty that the risk factor will change little between the risk assessment and the activity. Although this may be appropriate in some circumstances, it may not be workable where plan approvals apply months or years before the activity is implemented.

Once it is determined how and when the risk factors will be applied to
adjust the initial risk rating, it becomes a matter of how to do it. When assessing risk factors it is important to consider them in terms of how they may affect the likelihood of an event, their potential impact on the values, and the period of time the impact is anticipated to exist. If the risk factors increase any of these, it is reasonable to adjust the initial risk level up.

For example, the initial risk to fish habitat may be calculated as high. However because of the season of operation and the excellent record and experience of the licensee in similar settings, the adjusted risk may in fact be low. The performance factor and seasonal influence in this scenario may reduce the likelihood and impact if the detrimental event does occur.

The Influence of Perceived Risk

Another important factor to consider when adjusting the initial risk rating is the perceived risk. Although perceived risks will be considered during the evaluation of the potential detrimental events, the values at stake and the likelihood and magnitude of the consequences, they are generally not formally considered until this step. Perceived risks, generally those expressed by the public, may be equally compelling as those expressed by affected parties and staff, but are often removed from the more clinical assessment of risk that occurs to determine the initial risk rating. As discussed in chapter 2 though, these perceptions form part of the ‘best relevant information’ that should be applied when determining the final risk rating. Also, perceived risks often do not ‘appear’ until the 11th hour; perceptions of risk by the general public generally take the form of a concern about the overall risk and therefore perceived risk is better considered at this stage.

An assessment of perceived risks should categorize them at this stage as either compelling and therefore applicable or not. If deemed applicable, they will affect one of the risk factors, or may be included as a separate risk factor. Nevertheless, perceived risks can often affect the risk rating of an activity and must be addressed before determining the final risk assessment.

Step 6: Final Risk Rating

The final step in assessing risk is to determine the final environmental, social and economic risk rating respectively. In order to do this, the adjusted risk level for each of the environmental, social and economic values must be examined. As in the determination of the initial risk rating, the issue of average or most restrictive risk rating by value must be addressed.

The above six steps can be used either informally to help prepare a decision or more formally as accompanying documentation for the decision or determination. The benefit to documenting the risk
Economic Risk

assessment is that it improves the defensibility of the decision or
determination and provides documented proof for the consideration of
the environmental, social and economic values.

In summary, any risk assessment should be done using the best
information available, with all relevant factors considered in an attempt
to provide an assessment of risk that allows for appropriate risk
management strategies.
Chapter Summary

- Risk assessment is the estimation of the likelihood of loss or damage and the magnitude of the consequence should the loss or damage occur.

- The risk assessment process can be divided into the following six steps:
  1. Identify potential detrimental events and the potential values that may be impacted.
  2. Determine the likelihood the detrimental events will occur.
  3. Determine the magnitude of consequence to each of the values (environmental, social, and economic) if the detrimental event occurs.
  4. Determine the initial risk rating.
  5. Adjust initial risk rating based on risk factors such as: performance, market and timing.
  6. Final assessment of each risk: environmental, social and economic.
In this chapter:
- Introduction
- Risk management
- Managing forest management risk at four key stages
- Managing the different forest management risks
- Impediments that must also be managed
- Conclusion

Risk Management

"It's all very well in practice, but it will never work in theory."
French management saying

Introduction

Managing risk requires a unique and challenging interplay between technical and managerial disciplines.

Generally, good management decisions are grounded in the best available scientific or technical information, including a sound understanding of the limitations and uncertainties of this information. Without this critical underpinning, managers lack the fundamental building blocks needed to make good decisions.

However, once the basic blocks are in place, “science” must give way to the “art”. The art of decision making draws on the decision maker’s experience, judgment, instincts and intuition.

In the previous chapter, the fundamental principles of assessing forest management risks as they relate to making statutory decisions were discussed. The risk assessment process is largely a technical exercise. That is not to say that it is entirely quantitative or that it deals in discrete variables, but that the process is basically a fact finding mission, whereby information is accumulated and critically assessed. It isn’t until the risk management stage that the information is actually used to
form a decision, or in the case of compliance activities, allocate inspection resources.

Understanding the assessment of risk is only half of the task, it is equally important to understand how to manage the assessed risks.

Risk Management is the "art" of weighing the assessed risks (i.e., the likelihood and magnitude of a potential loss to an environmental, social or economic value) against the potential benefits that may be gained (or costs that may be avoided or reduced) in order to make the “best” forest management decision.

The balance that is sought is always the optimal level of risk – the level of risk where the net benefits are maximized. In some circumstances however, appropriate management decisions may be made that simply ensure that risks are acceptable. That is, that the chance and magnitude of loss is acceptable given the benefit to be gained. In addition, unacceptable risks must be identified and avoided.

The art of risk management also involves managing the decision making process to ensure it provides an effective framework for addressing all types of risk. As implied by the term ‘art’, risk management is not a set procedure, but a defensible, thoughtful approach to decision making given the assessed risks, changeable risk factors, perceived risks and the inherent uncertainty of all the variables. Forest management decisions made with a subjective, but consistent approach to the management of risk, are not only better decisions, but more defensible.

Risk management is based on the key principles articulated later in this chapter. These principles will then set the stage for a more in depth discussion later in this handbook on the application of risk management to statutory decision making during operational plan approval, and to non-statutory administrative decisions about resource allocation for compliance and enforcement.

Principles of Risk Management

The term risk management is often confused with an avoidance of risk. True risk management is the attempt to optimize risk. Without attempting to optimize risk, potential losses may be too great, or benefits lost or forgone.

Effective risk management requires effective risk assessment. The risk assessment should be clear, defensible, accurate and where appropriate deal with the following factors:

- identification of all potential detrimental events and values at stake;
- determination of the likelihood of any of the detrimental events occurring;
• determination of the magnitude of loss should the detrimental events occur; and
• the final risk rating should be updated to account for changeable risk factors.

There is no set approach to risk management. Although there are key principles, it is the decision maker that must tailor these principles to the situation and to the management process in place.

One of the key ways in which risk can be managed is to manage each potential detrimental event associated with each type of risk (environmental, economic and social). By reducing the likelihood that a detrimental event will occur, the overall risk can be reduced. Once this stage of risk management is done, then any interactions between detrimental events or different values at risk, may be managed to determine if interactions have compounded or negated risks and thereby require a different risk management approach.

Risk management is not isolated from risk assessment. Risk management requires an initial rating of risk, but the process of risk management may identify weaknesses in the assessment specifically, or deficiencies in the process. This feedback loop ensures that not only the actual risk assessment is appropriate for the specific decision, but that the future process of risk assessment for similar issues is refined to better reflect the risks involved.

Managing Forest Management Risks at Four Key Stages

Under the Forest Practices Code, forest management risks are managed at four distinct stages:
1. when the stage is set, during the development of the legislation;
2. at the operational plan approval stage;
3. during compliance inspections; and
4. when enforcement actions are taken.

The first stage of risk management occurs during the development of the legislation. In British Columbia, forest management is guided by legislation, which represents the Legislature’s attempt to balance competing values and short-term and long-term goals to achieve an optimal, or at least an acceptable, level of risk.

In some countries, risk is explicitly addressed in forest management legislation. In British Columbia, forest management legislation is less explicit, but generally reflects an implicit understanding of values,

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1 One of the most complex statutory decisions involving forest management risks is under the Forest Act rather than the Forest Practices Code, namely the chief forester’s allowable annual cut determinations. This handbook does not address allowable annual cut determinations, but does draw on many of the principles exemplified by the Chief Forester’s decision making process.
potential losses and potential benefits. One of the tasks of a statutory decision maker operating within such a regime is to determine the Legislature’s intent with respect to risk assessment and risk management and to make forest management decisions in a manner that is consistent with that intent.

Stage 2: Approving Operational Plans

Certain forest management issues are either too technical, fact specific or detailed to be simply guided by the application of the legislation, without the discretion of a statutory decision maker. Generally, operational plans, and their approval, provide an opportunity to manage risk on behalf of the public, affected parties and the plan proponent in a way that is acceptable to society. It is the achievement of the level of risk as defined by legislation that is the goal of the operational plan approval. Activities that are allowed under an operational plan are deemed to be an acceptable trade-off between the likelihood and magnitude of loss and the benefits that may be realized. However, since there is always the chance that the plans may be imperfect, or simply not followed, additional risks may need to be managed during the implementation of the approved activity. It is at this stage that compliance and enforcement, and in particular, the use of periodic inspections, is the tool for managing these additional risks.

Stage 3: Compliance Inspections

Inspections are critical to the successful management of environmental, economic and social risk. First, inspections provide “quality assurance” - the assurance that the activities are carried out in a manner that is consistent with risk management decisions and legislated requirements. They also serve as a “safety check” to avert contraventions before they occur.

Second, inspections provide feedback to the operational plan approval process, updating and refining information on the different categories of risk and the risk factors.

Third, inspections provide feedback on the effectiveness of operational plans and the decisions to approve these plans, and on the effectiveness of legislated requirements.

Stage 4: Enforcement Actions

Risk management plays a key role in choosing an appropriate enforcement action. Making this choice involves determining:

- whether to take formal, informal or no enforcement action;
- whether to proceed by way of prosecution, administrative remedy or both; and
- if the appropriate action is by prosecution, whether to prosecute by way of Violation Ticket or Information.

Similar to making other decisions under the Code, the statutory decision
The following discussion looks at the different types of forest management risks; environmental, economic and social. For purposes of illustration, the discussion focuses on the management of these risks during the approval of operational plans.

The management of environmental risk is not a new concept in forest management. It is however constantly evolving as the science, legislation and society’s valuation of forest related values change. It is the duty of the risk manager to ensure that the assessment of risk is defensible and as accurate as possible. Assumptions made in the process of assessing the risks should be fully understood and critically evaluated at the stage of risk management. It is often on the strength (or weakness) of these assumptions that the decisions affecting environmental values hinge; environmental variables, by their nature, are often difficult to quantify. Accordingly environmental risk assessment is often based on many assumptions, with each attempting to manage uncertainty.

Often a process of sensitivity analysis is completed during the assessment of risk to further define the potential impacts that these assumptions and uncertainty may have on the overall risk assessment. It is this information, within the context of the legislated planning requirements, that the statutory decision maker can use to fully understand the scope of, and where required mitigate the effects of the likelihood or magnitude of potential detrimental events.

Specific legislative provisions for managing environmental risk at the plan approval stage are discussed in the Guide to Approving Operational Plans after June 15, 1998 which is included as appendix 2. For example, risks may be managed by the judicious use of the provisions that allow for additional information or assessments to be completed, or provide for approval subject to conditions.

Managing economic risk is often the least obvious of the risk management considerations. Statutory decision makers have very limited authority to consider economic criteria when approving operational plans. Nonetheless, the potential for economic loss to the Crown, a licensee or the public must be considered in the same manner as are environmental or social risks. This point is illustrated by the Metecheha case referred to in chapter 8, where the judge held that the potential economic effect on a licensee was a relevant consideration for the district manager in deciding whether to approve a cutting permit.
application.

The costs of inaction, additional assessments or information or delayed decision making need not be explicitly accounted for, but should come to bear on the risk manager’s application of judgment.

For example, the cost or economic loss to a licensee of meeting “Code plus” planning requirements may only marginally serve to reduce environmental or social risk. Therefore, the cost of requesting additional information should be considered together with the likelihood that the additional information will reduce environmental or social risk to an acceptable level before the request for additional information is made.

Managing Social Risk

The process for managing social risk in the context of operational plan approval follows two fundamental tenets: First, the operational plan requirements of the Forest Practices Code of British Columbia Act and Operational Planning Regulation expressly detail the social risk issues that must be managed, and the review and comment provisions give some guidance as to how they will be managed. Second, the management of social risks that are based solely on unsubstantiated perceived risks, or that are so broad in nature that it is inappropriate for an non-elected official to manage, should not explicitly come to bear on the plan approval. That said, all of this information is relevant to the statutory decision maker and should be considered prior to the approval of the plan.

Social risk assessments often are intertwined with environmental and economic issues. The management of social risks then, often requires specific risk management attention, and should additionally be considered when managing environmental and economic risks for the entire area or plan.

For example, the management of risk to a private recreation facility bordering Crown land may involve establishing a scenic area with visual quality objectives, but to establish the objectives requires considering the impacts on any environmental or economic values.

Impediments that must also be managed

Just as it is not appropriate to manage environmental, social or economic risks in isolation, it is equally inappropriate to attempt to manage these risks without considering problems uniquely inherent to the risk management process. These inherent problems include uncertainty, the differences between real and perceived risk and the limited resources available for managing risk.

Real versus

When managing risks, decision makers need to be aware of both the real
Perceived Risks

risks, as assessed by themselves or other experts, and perceived risks. This is because government officials are responsible for managing the forest resources for the public and therefore it is not sufficient to manage only the risks determined by experts.

Perceived risks that are substantiated by credible or logical arguments should be assessed alongside the “real” risks during the risk assessment process. In essence, these risks become real risks and are managed as such.

Other perceived risks that are acknowledged during the risk assessment, but aren’t founded on a credible argument need not be explicitly managed, but should be considered on their merits during the risk management process.

One way government attempts to manage perceived risk is to communicate to the public about the real risks in an attempt to reduce the disparity between the real and perceived risks. This is done by providing the public information which, when added to their impressions, experience or intuition can create perceived risks that are more compelling and substantive than simply those based on fear or misinformation.

Uncertainty

One of the key impediments to effectively managing risk is the uncertainty. Where possible, decision makers should attempt to reduce any uncertainties influencing their decisions.

One of the approaches to reducing uncertainty is to invest in further research or study, however, this approach often leads to the discovery of additional uncertainties, rather than a reduction in uncertainty. Usually for the purpose of making a decision in the short term, it is unrealistic to expect further research or analysis to be conducted for that purpose. However in the long term the role of science is integral to the future mitigation of uncertainty and to credible risk communication.

Although it may be unrealistic to conduct scientific research before making every decision, decision makers should ensure that they consult all available resources before they make a decision. The uncertainties that can not be eliminated or reduced can be managed in the decision making process by sensitivity analysis. The cost of reducing uncertainty can be justified by the potential benefit it will incur or the loss it will mitigate. To determine whether the cost is justified requires the same process of sensitivity analysis as needed to determine if it has much effect on the outcome in the first place.

Sensitivity analysis is used frequently by the chief forester when making

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AAC determinations. Often, the variables associated with timber supply are difficult or impossible to model with any degree of certainty.

For example, computer models are used to estimate the rate of growth for regenerated stands. These models use ideal assumptions to calculate the growth of the new forest based on several key variables. However, since the areas to be modeled do not always achieve the ideal (e.g., having full site occupancy or being free of insects or disease), operational adjustment factors are applied to account for the expected losses of timber from the ideal. Assumptions play a key role in setting these operational adjustment factors and may be fraught with uncertainty. Likewise, the site productivity estimates used in the model are often based on imprecise numbers.

To help determine if the model can be relied upon in light of these uncertain variables, each variable is independently varied up and down a certain percentage to determine its effect on the outcome. In the case of site productivity estimates, relatively large changes do little to affect short term timber supply forecasts, but do affect the medium and long term forecasts. This simulation resulted in using the original number for the short term forecast, but for the future timber, uncertainty should be mitigated by better understanding the site productivity data. The idea of planning to reduce future uncertainty is equally applicable to plan approvals.

Areas listed outside of the five-year planning horizon for “information only” can be considered within that context. Variables can be identified at this point, and those with high levels of uncertainty can be addressed by the plan proponent through sensitivity analysis to determine the urgency, benefits, feasibility and cost of reducing the uncertainty. By the time these areas are included for approval on the development plan, the proponent will have had a clear understanding of what was required to reduce the level of uncertainty to an acceptable degree for the statutory decision maker.

Limited Resources

The ability to effectively manage risk is affected by the resources available to do so. In the case of the executive arm of the government (in particular the “civil service”), the availability, or lack of, resources must be considered in all strategies for managing risk.

“The government is only able to assess and manage risk relative to its available resources... resources must be allocated so as to optimize risk given the constraints... the process..."
However, the courts expect government to make the most efficient use of the public resources at its disposal. These resources must be allocated so as to optimize government’s ability to assess and manage risk. The resource allocation process must be able to withstand the scrutiny of the courts and the public.

Examples where the ability to manage risk are confined by the resources available include the evaluation of operational plans and the allocation of inspection resources.

When reviewing operational plans, it is unrealistic to expect that the accuracy of all the information provided can be independently verified through field visits. Therefore, the resources available to evaluate plans must be allocated in an efficient manner to ensure that the risks can be assessed and managed effectively.

Similarly, for the purpose of allocating inspection resources, it is necessary to assess risk, but it is useless to expend all resources to assess the risk without any resources to actually conduct inspections.

Limited resources are an everyday reality facing decision makers and their staff when attempting to assess and manage risk.

Conclusion

In summary, managing risk is not a simple exercise with a one size fits all methodology to address every situation. There are multiple combinations and permutations for managing forest management risks and each of them is constrained by impediments such as uncertainty and limited resources. However, an understanding of the principles of risk management and the ways in which uncertainty can be addressed and what the expectations around limited resources are, is critical for statutory decision makers and their staff to manage the risks when carrying out their legislated responsibilities.

Having approved a plan or conducted an inspection where one of the objectives is to manage risk, it is incorrect to assume that the task is complete. Instead both the assessment and the management of risk are ongoing processes. Risks must continually be reassessed and subsequently managed. The re-assessment of risk provides a feedback loop into the management process, that is, if the risk is increasing after a management strategy has been employed to reduce some of the risk, it may be necessary to consider an alternative management strategy.

Another key component for decision makers and their staff is the understanding of the “rule of law” that is discussed in chapters 5, 6 and 7.
Chapter Summary

- Forest management risks are managed at four stages:
  1. Development of legislation;
  2. Approval of operational plans;
  3. Compliance inspections; and
  4. Enforcement actions.

- In enacting legislation, the Legislature attempts to manage competing values to achieve an optimal level of risk.

- The approval of operational plans provides another opportunity for statutory decision makers to assess and manage risk in a way that respects the rights of the licensees and protects the public interest.

- Compliance inspections provide “quality assurance” and a “safety check”. They also provide critical feedback on risk to the operational plan approval process, and feedback on the effectiveness of the plans, the decisions to approve the plans, and the effectiveness of legislated requirements.

- Risk management plays a key role in choosing an appropriate enforcement action.
There are two defining features of the Canadian system of government. The first is the “federal” nature of our system. In many nations, all government powers are exercised by a central government. In Canada, government powers are divided between the federal and provincial governments.

The second defining feature of the Canadian system is the separation of government powers among three separate branches of government: the Legislature, the Judiciary and the Executive. The existence of – and relationship between – these three branches ensures we have “a government of laws and not of men”.

The principle behind this separation of powers was described by William Paley in 1785:

“When these offices are unified in the same person or assembly, particular laws are made for particular cases, springing often times from partial motives, and directed to private ends ... the consequence of which must be, that the subjects of such a constitution would live ... without any
known pre-established rules of adjudication whatever”.

To this end, the power to “make law” is confined to two of the three branches of government: the Legislature and the Judiciary. The former does so by enacting statutes, while the latter is the interpreter of this “statute law” and the custodian of a body of unwritten law called the “common law”.

The third branch of government, the Executive, administers in accordance with the statutes enacted by the Legislature and the common law principles laid down by the Judiciary.

**Legislature**

The Legislature acts primarily through the statutes it enacts. These statutes must comply with the division of powers established in the Constitution Act, 1867, that distributes powers between the federal and provincial governments. These statutes must also respect the constitutional rights conferred in the Charter of Rights and other provisions of the Constitution Act, 1982.

The Legislature may delegate some of its legislative powers by conferring the authority to make regulations in a statute. Normally, this power is conferred on the Lieutenant Governor in Council. However, there are a couple of restrictions on what can be done through regulations.

First, whoever makes regulations must do so on behalf of the Legislature in order to carry out the will of the Legislature. Second, whoever makes regulations must not exceed the authority conferred in the enabling statute.

The Legislature may also delegate decision making authority in a statute. Normally, this is done where discretion and judgment is required to carry out the will of the Legislature. Again, there are restrictions on how this decision making authority may be exercised. First, the statutory decision maker must remember that she or he is acting on behalf of the Legislature – to fulfill its will. Second, the statutory decision maker must not exceed the authority granted under the statute conferring the decision making authority.

**Judiciary**

In a society that values the “rule of law”, an independent Judiciary is vitally important. The Judiciary serves two main functions in our system of government.

The first function is the traditional role of resolving disputes:

- between citizens; and
• between citizens and the government.

In fulfilling this role, judges first look to see if a statute has been passed that governs the dispute. If so, the judge will interpret and apply the statute to the dispute. In this regard, the Judiciary is the final authority on interpreting statutes and regulations.

If there is no statute that governs the dispute, judges apply the “common law”. The common law is a series of principles and rules made by judges themselves. The common law has evolved slowly; its history can be traced from hundreds of thousands of judgments in court cases that have arisen over hundreds of years in England, Canada and other Commonwealth countries.

The common law is an important part of our legal system and is distinct from “civil law” systems founded solely on written laws or statutes. However, it is important to remember that this “judge made” law is always subject to being modified or overturned by statute.

The second important function of the Judiciary is to ensure the other branches of government stay within their powers. Just as citizens must obey the law so must the government, and the Judiciary acts as an “overseer” to see that it does.

In this capacity, the Judiciary has the power to scrutinize the constitutionality of any statute enacted by the Legislature. If a judge determines that the Legislature has exceeded the powers conferred under the Constitution Act, 1867, or has failed to respect the rights conferred under the Constitution Act, 1982, the judge may strike down all or part of the statute as unconstitutional.

The Judiciary also has the power to scrutinize the exercise of regulation making and decision making authority conferred under a statute. If a judge determines that a regulation exceeds the authority conferred under the statute, the judge may strike down the regulation. Similarly, if a judge determines that a statutory decision maker has exceeded the authority conferred under the statute, or has failed to comply with the common law principles governing statutory decision making, the judge may overturn the decision, or require the decision maker to revisit the decision.
Executive

The head of the executive branch of government is Her Majesty the Queen in right of the Province, who is represented by the Lieutenant Governor in Council. It is the Lieutenant Governor in Council who chooses the Premier. However, the Lieutenant Governor in Council rarely has any real choice in the matter; usually, he or she must choose the leader of the political party that has the majority of the seats in the Legislature. The Premier in turn chooses other ministers and advises the Lieutenant Governor in Council to appoint them. In this case, the Lieutenant Governor has no choice whatsoever; he or she is obliged by convention to make the appointments. The Premier then chooses those ministers to form the Cabinet.

In most matters, the Cabinet is the supreme executive authority. The Cabinet formulates executive policies and is responsible for the administration of all provincial ministries. The Cabinet generally delegates most decisions relating to the affairs of a particular ministry to the minister responsible for that ministry. However, each minister recognizes the supreme authority of the Cabinet should the Cabinet choose to exercise it.

The Lieutenant Governor in Council does not preside over or attend meetings of the Cabinet. The Premier presides. Also, where a statute delegates regulation making or decision making authority to the Lieutenant Governor in Council, that authority is in fact exercised by the Cabinet. The regulation or decision is then forwarded to the Lieutenant Governor for his or her signature, which by convention is automatically given.

Even though many in government wield considerable power and influence, no one is above the law. Her Majesty, the Lieutenant Governor, the Cabinet and every other member of the Executive are subject to the laws of the land.

The Executive when administering its ministries and carrying out its programs, must comply with the statutes enacted by the Legislature and the common law principles laid down by the Judiciary. The Executive is also accountable to the Legislature in other respects, for example, its expenditures must be approved by the Legislature.
Ministers who have been given responsibility for a ministry “represent” that ministry in the Legislature. The minister pilots the ministry’s estimates of proposed expenditures through the Legislature, introduces proposed legislation on behalf of the ministry for the Legislature’s consideration, and defends the actions of the ministry if these are challenged in the Legislature. However, the day-to-day administration of the ministry falls to the civil service.

The senior civil servant in each ministry is usually called a “deputy minister”. The deputy minister is the link between the minister and the civil service, and his or her role is two-fold. She or he is both the minister’s advisor and the senior administrator of the ministry. The deputy minister is not appointed in accordance with normal civil service procedures but instead is appointed through an “order in council” signed by the Lieutenant Governor. Also, most powers conferred on the minister under a statute can also be exercised by the deputy minister.

The deputy minister is often assisted by one or more senior civil servants called “assistant deputy ministers”, who are also appointed by an order in council signed by the Lieutenant Governor. Assistant deputy ministers can, in certain circumstances, carry out some or all of the functions of the deputy minister. They also fulfill both the role of the minister’s advisors and the role of senior administrators of the ministry. The deputy minister and their assistant deputy ministers are often referred to as the “ministry’s executive”.

The ministry’s mandate is carried out by civil servants who are appointed in accordance with normal civil service procedures. In carrying out their duties, civil servants generally look to their minister and their ministry executive for direction in the form of ministry policies, procedures and memoranda to staff. In general, compliance with such direction is entirely appropriate and sometime even mandatory. But not always.

While the Cabinet is the supreme Executive authority, it is not the supreme government authority. The authority of the Cabinet is always subject to the authority of the Legislature and the Judiciary.

There are times when civil servants must take their direction from the Legislature or the Judiciary rather than from the Executive. However, they must also remember that they are accountable to all three branches of government.

Figure 3

image
Before the Forest Practices Code, the Forest Service received comparatively little direction from the Legislature or the Judiciary on forest management matters. Prior to 1987, such direction was largely confined to the award of tenure agreements: forest licences, tree farm licences, timber sale licences and licences to cut. In 1987, as a result of amendments made to the Forest Act, that direction extended to forest management matters relating to recreation and silviculture. For the most part however, Forest Service staff quite properly looked to the Cabinet, their minister and their ministry executive for direction. The role of the other two branches of government was secondary to the role of the Executive branch.

After the Forest Practices Code

On June 15, 1995, everything changed. When the Forest Practices Code came into effect, the role of legislative and judicial branches of government became paramount. The executive branch continues to have a role but it became secondary to the other two branches of government. In particular, the Legislature has delegated decision making authority on a broad range of forest management matters to key civil servants and, in many cases, has entirely excluded the Cabinet, the minister and the ministry executive from this decision making process.

The Role of the Statutory Decision Maker

Civil servants, who are also statutory decision makers, must apply the principles of statutory interpretation laid down by the Judiciary to properly interpret the direction intended by the Legislature. They must neither exceed the authority that has been conferred on them, nor shrink from exercising that authority to its fullest extent. Civil servants must also apply the principles of administrative law laid down by the Judiciary to govern statutory decision making. To assist statutory decision makers in this regard, chapter 6 reviews the principles of statutory interpretation and chapter 7 discusses the principles of administrative law.

As statutory decision makers, these civil servants must also ensure that they deal appropriately with information or advice relevant to their decisions. This sometimes thorny exercise is addressed in chapter 8.

Finally, chapter 9 discuss something of the things that can happen when “things go wrong” for a statutory decision maker.

However, before turning to these chapters, there is another facet of government that should be discussed.
Independent Administrative Agencies

While the Legislature, the Judiciary and the Executive form the three traditional branches of the Canadian system of government, any review of that system would not be complete without briefly describing the emergence of a relatively new set of bodies exercising government power. These bodies are often referred to as “independent administrative agencies”. These are agencies such as the Forest Appeals Commission, the Ombudsman, and the Forest Practices Board.

These agencies are often created when the Legislature has perceived a need to create an agency outside the Judiciary and outside the Executive in order to carry out public policy.

Sometimes, the functions of these agencies are very “court like”, as in the case of the Forest Appeals Commission. In other cases, these agencies exercise more specialize functions, such as the complaint investigation powers of the Ombudsman and the Forest Practices Board, and the audit powers of the Board.

The uniqueness of these agencies lies in the gray zone they occupy in our system of government. Because of the powers they can wield and their appointed status, these agencies have often been controversial.

While it is important to acknowledge the issues that arise with respect to independent administrative tribunals, it is beyond the scope of this handbook to address those issues in any depth. Instead, the following chapters focus on the world of the civil servant, especially those civil servants who have been endowed with statutory decision making authority.
Chapter Summary

- The Canadian system of government is based on the separation of powers among the three branches of government: the Legislature, the Judiciary and the Executive.

- The Legislature creates statutory law.

- The Judiciary creates common law and oversees the other two branches of government.

- The Executive administers in accordance with the Law.

- Civil servants are the “servants of the people”. Unlike their minister, they are supposed to be politically neutral.

- With the introduction of the Forest Practices Code, the Legislature has delegated decision making authority on a broad range of forest management matters to key civil servants.
In this chapter:
- Introduction
- Basic rules of statutory interpretation
  1. Legislature makes the law, not civil servants
  2. Plain meaning of words in their context
  3. Avoiding absurdities
  4. Resolving ambiguities in favour of person affected
  5. Not rendering any section meaningless
- Interpretive tools

Assessing and Managing Risk within a Statutory Forest Management Regime -
The Rule of Law Part 2:
The Principles of Statutory Interpretation

“It is highly unjust to bind men to laws too numerous to read, too obscure to understand. If laws are not clear, they are useless. There might as well be no laws at all as to have laws which only men of great ability can interpret.”
Sir Thomas More

Introduction
Statutory decision makers must exercise their authority according to their enabling legislation. At times however, legislation is not always as clear as decision makers might wish. Even so, statutory decision makers must make an honest effort to interpret the legislation on their own. This is not to say that they cannot seek assistance from legal counsel; however, it does mean that the responsibility for the final interpretation of the legislation rests solely with the statutory decision maker.
The principles governing the interpretation of legislation have been articulated by the courts in a set of rules. These rules are numerous and often complex. Fortunately, there are some basic rules that should assist statutory decision makers and their staff to operate effectively within a statutory forest management regime.

**Rule No. 1**

*Rule number 1: The Legislature creates the law. The Executive does not, and neither do civil servants. Civil servants must disregard their own opinions about what the law should be. If laws need to change, it is the responsibility of the Legislature to change them, not the civil servant.*

**Statute Law**

Statute law reflects the Legislature’s attempt to regulate an activity in a manner consistent with the public interest. Ideally, when the Legislature observes a problem or a social ‘evil’ they enact legislation to address or alleviate it.

**Role of the Civil Servant**

The role of the civil servant is to apply the law as the Legislature intended. Civil servants may feel that the legislation ‘misses the mark’ or fails to adequately address an issue and may be tempted to apply the law in a manner consistent with their belief on how the Legislature should have written the law. Applying the law in this manner puts the civil servant at risk because he or she is operating outside and beyond his or her authority.

One example where a civil servant faced this dilemma was the chief forester’s decision in the “spotted owl case” heard by the B.C. Court of Appeal. Western Canada Wilderness Committee v. The Chief Forester for British Columbia, Larry Pedersen Vancouver Registry, CA021741, April 8, 1998.

An environmental group challenged the decision by the chief forester where he set the allowable annual cuts (AAC’s) for the Fraser and the Soo Timber Supply Areas without factoring in a cut reduction for the protection of the spotted owl. The chief forester’s rationale demonstrated that he agreed that the AAC’s should be reduced to protect the owl, but he felt that a proper interpretation of his enabling legislation put it beyond his legislated authority to do so. The chief forester, a civil servant, resisted the temptation to “stretch” the meaning of the legislation to include this broad land use decision within the scope of his authority. Other statutory decision makers must also focus on their own matters within their own statutory authority.

This point is illustrated with respect to a district manager in the Chetwynd Environmental Society case referred to more extensively in chapter 7. There the Ministry of Energy, Mines and Petroleum
Chapter 6 The Principles of Statutory Interpretation

Resources had issued a permit for an access road to a proposed oil well site. Though he was personally opposed to the road because it crossed some fragile alpine habitat, the district manager issued the oil company a Licence to Cut for the road right-of-way. He put aside his own personal preferences and looked strictly and honestly at his legal jurisdiction, which he decided in the circumstances extended only to the cutting of the timber on the right-of-way, not to the merits of the road itself. His interpretation of his jurisdictional authority was upheld by the B.C. Supreme Court.

Civil servants may believe that certain legislation is either too restrictive or not restrictive enough, but this does not give them the right to subvert or manipulate their interpretation of the legislation to achieve their own ends. To do so is an abuse of their authority and contravenes the basic principles of administrative law. It is important that each statutory decision maker understand his or her own authorities and recognize where they differ from the authority of other statutory decision makers.

Another example is seen in section 11 of the Operational Planning Regulation specifying a default maximum cutblock size for each forest region.

The prescribed default maximum applies unless a higher level plan provides for larger cutblocks within the area of the higher level plan. The Operational Planning Regulation section 11(3)(a) describes limited circumstances where the statutory decision maker may refuse to approve a proposed block that meets the requirements of the default maximum, and section (11)(3)(b) goes on to set criteria allowing a statutory decision maker to approve cutblocks larger than the default maximum.

Establishing a default maximum was a decision made by the Legislature to achieve a compromise between different societal values. Depending on her or his point of view, a person might believe that cutblock size should be either larger or smaller than the default maximum. However, she or he must recognize that that choice has been made by the Legislature.

The Operational Planning Regulation section 11(3) recognizes that there may be sound scientific and technical reasons for varying the default maximum up or down. The regulation is formulated to allow the statutory decision maker to vary cutblock size but it must be done according to the conditions set out in the regulation.
### Rule No. 2

Rule number 2: Whenever possible apply the plain and ordinary meaning of the words as determined from their context and from the general purpose and object (spirit and intent) of the legislation. If the wording of the legislation is clear, and its application straightforward, do not “play with the words”.

When determining the meaning of specific words in the legislation, it is first important to check whether the words are defined in the legislation. If not, then the definition, if included, in the Interpretation Act (British Columbia) would apply. For more details on Interpretive Tools, see pp. 6-10.

### Plain Meaning

Where the meaning of the legislation is clear and unambiguous, and can lead to only one reasonable interpretation, that is the meaning that must be complied with. Determining the plain meaning of the legislation requires looking at the surrounding words and adjacent sections of the act or regulation, and the purpose and objects of the act as a whole.

Most words have several different meanings or connotations. Understanding the context in which the words are used helps determine the meaning the Legislature intended them to have. To focus on single words or phrases out of context can lead to absurdities and interpretations of the statute that are different from those intended by the Legislature.

The “plain meaning” rule has been articulated by the courts:

> “In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there is something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.”


### Context

“Context” means the immediate context of the subsection (that is, the adjacent words) and the general context of the act. It is also necessary to consider the “purpose” or “object” of the act, which is accomplished by “having regard to the declared intention of the act and the obvious evil it is designed to remedy.”

It is not, of course, always possible to determine what evil was sought to be remedied or what other object was sought to be achieved, but where these can be determined, the common law rules of statutory interpretation and section 8 of the Interpretation Act (British Columbia)
require that they be considered. Section 8 is referred to in more detail later in this chapter.

The “plain meaning” rule was also referred to by the Forest Appeals Commission when interpreting section 96(1) of the Forest Practices Code of British Columbia Act.

A licensee’s equipment operator had scraped or rubbed bark from trees located outside the authorized cut block. The district manager and the review panel found that the licensee had contravened section 96(1) which provides that:

“A person must not cut, remove, damage or destroy Crown timber unless authorized to do so...”

On appeal, the licensee argued that the word ‘damage’ should be restricted to cases where the Crown has suffered a loss of timber volume or revenue. The Forest Appeals Commission, applying the “plain meaning” rule and basic statutory interpretation principles, accepted the Ministry’s position that such a restrictive interpretation would be inconsistent with the legislative purposes contained in the Forest Practices Code of British Columbia Act as a whole. The Forest Appeals Commission cited the preamble to the Forest Practices Code of British Columbia Act, that states that its purpose is to seek sustainable use of the forest resources in the province, and determined that the word ‘damage’ in section 96 means “damage in the ordinary sense of the word, and is not restricted to damage related to economic loss.” Rustad Bros. & Co. Ltd. v. Gov’t of B.C., Appeal No. 96/08, March 26, 1997.

The B.C. Court of Appeal used the same approach to interpret section 28(1)(b)(i) (now section 35(1)(b)(i)) of the Forest Act in Council of Haida Nation and Miles Richardson v. The Minister of Forests et.al., Vancouver Registry No. CA021200, November 7, 1997. The issue in the case was whether aboriginal title is capable of constituting an ‘encumbrance’ within the meaning of section 28(1)(b)(I), that reads:

“A tree farm licence entered into under this act must:
   (b) ...describe a tree farm licence area composed of
    (i) an area of Crown land, the timber on which is not otherwise encumbered...

The chambers judge had held that “encumbered” was “intended to refer more narrowly to forest tenure concepts” and would not recognize aboriginal title as an encumbrance that could preclude issuing a tree farm licence. The Court of Appeal took the view that the broad object of the Forest Act “is to provide for forest management which will allow
a number of competing interests to be met in a balanced way”, and found no basis for rejecting the plain meaning of “otherwise encumbered”.

An encumbrance is any legally recognized interest in land, and if aboriginal title is an interest in land, then it, too, can be an encumbrance. Even though the Court of Appeal recognized that interpreting section 28 so as to permit ‘aboriginal title’ that might constitute an encumbrance and negatively influence the issuance of Forest Act tenures, the Court was compelled to accept the plain meaning of the legislative words.

**Rule No. 3**

**Rule number 3:** If applying the plain and ordinary meaning of the words as determined by their context would lead to an absurd result that could not reasonably have been the intent of the Legislature, the statutory decision maker can apply any secondary meaning of which the words are reasonably capable.

**Avoiding Absurdities**

“...[I]n statutes...the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction or fulfill the purpose of the statute..” Maunsell v. Olins, [1975] A.C. 373, at 391.

However, be aware that the courts only allow a secondary interpretation when the primary interpretation leads to an absurdity, and if the secondary interpretation is one which can reasonably be made. Statutory decision makers are to apply the law as intended by the Legislature, not create the law by selective interpretation.

As one judge put it: “[Judges] fully appreciate the importance of avoiding, so far as the words and context fairly and reasonably permit, a construction which would lead to ...unreasonable results. On the other hand, it is to be remembered that the desirability of avoiding such results must not be allowed to give to the language used a meaning, which it cannot fairly and reasonably bear. If the Legislature has used language which leads to such results it is for the court to give effect to it. The function of the court is interpretation, not legislation. The limits thus imposed on the court prevent the twisting of words and phrases into a sense they cannot fairly and reasonable bear.” R. v. Mohindar Singh [1950] A.C. 345

Remember, statutory decision makers must bear in mind that they can only apply the law as the Legislature intended it, they cannot create or amend the law. If the meaning of the statutory or regulatory provision is clear as it is written, the statutory decision maker has no choice but to
apply it.

**Rule No. 4**

**Rule number 4:** Be fair and reasonable, especially when operating within the enforcement context. Resolve any ambiguities in the legislation in favour of the person affected to the extent possible while still satisfying the intention of the legislation.

One of the fundamental principles underlying any democratic society is the recognition of every person’s freedom to carry on his or her affairs without government interference -- unless the law expressly provides otherwise. The courts jealously protect this freedom by enforcing, as a rule of statutory interpretation, the presumption that legislation does not intend to constrain that right unless there is no other reasonable way to interpret the legislation. Furthermore, even when faced with express and unequivocal legislation, the courts will still require any civil servant who applies that legislation to act in a fair and equitable manner (see chapter 7 on the application of administrative law principles).

“...ambiguities should be resolved in favor of the person whose actions are the subject of an inspection or an investigation.”

Therefore, when assessing compliance or contemplating enforcement action, staff must be very sure of their legislative interpretation. If there are two reasonable interpretations of a statutory provision, one which is administratively easier, and one which is more fair to the person affected, the goal shouldn’t just be to take the easier choice. The interpretation which is less onerous to the individual while coming closest to achieving the intention of the Legislature is to be preferred.

**Rule No. 5**

**Rule number 5:** One section of an enactment is not to be interpreted in such a manner as to leave another section meaningless.

Although not directly referred to, this principle was illustrated by the decision of the Forest Appeals Commission in the Klaskish case (Appeal no. 96/04(b), June 11, 1998.), that considered a district manager’s approval of a forest development plan.

Section 10(b)(ii) of the Forest Practices Code of British Columbia Act (now 10(1)(b)(ii)) provides that a forest development plan must:

“... include, for the area under the plan ... matters required by regulation”.

The Commission found that the relevant regulation in this case is the Operational Planning Regulation that sets out the “matters required by regulation”.

In contrast, section 10(c)(ii) of the Forest Practices Code of British
Columbia Act (now 10(1)(c)(ii)) requires a forest development plan to specify

“... measures that will be carried out to protect forest resources”.

“Forest resources” are defined as “resources and values associated with forests and range including, without limitation, timber, water, wildlife, fisheries, recreation, botanical forest products, forage and biological diversity”.

The Forest Practices Board and Sierra Club argued that this provision requires a forest development plan to specify measures for every type of forest resource, regardless of whether or not it had been identified in the content provisions of the Operational Planning Regulation.

This argument, if accepted, would have had the effect of making section 10(b)(ii) and the content requirements of the Operational Planning Regulation virtually meaningless, since section 10(c)(ii) would incorporate all the resources referred to in those sections and more. The Commission disagreed, and decided that the “measures” required under section 10(c)(ii) are limited to those resources identified under section 10(b)(ii) and the Operational Planning Regulation. The bulletin that was sent out by the Ministry of Forests which summarizes the findings of Forest Appeals Commission in this case can be found in appendix 3.

In most cases, the five rules discussed above, should be sufficient to assist statutory decisions makers and their staff to deal with most straightforward cases of statutory interpretation. However, this complex area of law includes many other rules and in more complex cases, the decision makers should consider contacting the Legal Services Branch in the Ministry of Attorney General.

However, even when facing difficult decisions, there are some tools to assist the statutory decision maker.

**Interpretative Tools**

These brief examples highlight the need for statutory decision makers to use every interpretive tool and resource available when interpreting and applying legislation.

**Definitions Within the Legislation Itself**

Many statutes, including the Forest Practices Code of British Columbia Act, the Forest Act, the Range Act and many of the regulations, contain sections that define words or phrases for the purposes of that act or regulation. Such definitions “override” any other potential definitions or meanings that might otherwise apply.
Definitions in an act apply to the regulations made under it, unless they are specified not to apply.

However, definitions in one regulation do not necessarily apply to another regulation, unless expressly provided for.

For example, the Timber Harvesting Practices Regulation in section 1(1) states that definitions from the Operational Planning Regulation will apply to the Timber Harvesting Practices Regulation “unless otherwise indicated”, so most (but not all) of the Operational Planning Regulation’s definitions apply to the Timber Harvesting Practices Regulation. However, one exception is the definition of “known” because the Timber Harvesting Practices Regulation provides its own definition of “known”.

Further, a definition in a regulation does not automatically apply to its superior act unless expressly provided for in the regulation. For example, section 30 of the Silviculture Practices Regulation defines “inordinate soil disturbance” and “significant damage” for the purposes of section 45 of the Forest Practices Code of British Columbia Act.

Exceptions

The general rule is that definitions in one act do not apply in another act unless:

1. one of the acts expressly provides for it, or
2. unless the context requires it.

The first exception is evident in section 1(2) of the Forest Practices Code of British Columbia Act:

“Words and expressions not defined in this act have the meaning given to them in the Forest Act and Range Act except where the context indicates otherwise.”

The second exception is evident when two or more statutes deal with similar subject matters, such as the Forest Practices Code of British Columbia Act and the Forest Act, or the Land Act and the Property Law Act. In these situations, the statutes “should be construed together, as one system, as explanatory to each other.” R. v. Loxdale, (1758), 1 Burr. 445 at p. 447.

There are also instances where two statutes fall into the same broad category, but they are so different that they could not reasonably be read as one. Nevertheless, one statute may influence the meaning of the other so as to produce harmony within the body of law as a whole (Ontario Social Assistance Review Board, 1995).
One example of this principle is the Forest Practices Code of British Columbia Act and the Fish Protection Act. Although the acts have different subject matters (forests and fish), they can be considered in the same broad class of resource management statutes. Definitions in one act would not necessarily be transferable to the other, but each may have some influence on how provisions of the other are interpreted.

In addition to the definitions section of the particular act or regulation being interpreted, the Interpretation Act (British Columbia), also provides definitions for certain words and other aids for statutory interpretation.

**Interpretation Act**

Section 8 of the Interpretation Act (British Columbia) provides that:

> “Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”

In other words, every enactment is to be considered as having been enacted for the purpose of remedying some ‘evil’, and is to be interpreted, as far as the words reasonably allow, in such a manner as to best achieve its purpose or object.

Other salient sections of the *Interpretation Act* (British Columbia) are:

**Section 9** “The title and preamble of an enactment are part of it and are intended to assist in explaining its meaning and object.”

**Section 11** “Head notes and references after the end of a section or other division do not form part of the enactment, but must be construed as being inserted for convenience of reference only.”

**Section 12** “Definitions or interpretation provisions in an enactment, unless the contrary intention appears in the enactment, apply to the whole enactment including the section containing a definition or interpretation provision.”

**Dictionaries**

If a word in an enactment is not defined in the enactment or in another enactment, it is appropriate to refer to a reputable dictionary to assist in finding the likely meaning intended by the Legislature. Indeed, the courts have a strong preference for dictionaries.

**Judicial Consideration**

Many words and phrases have been considered by the courts, and in consequences develop a legal ‘pedigree’. In many cases, words and phrases are specifically selected for use in legislation because of this pedigree.
However, if these words or phrases are subsequently defined in the legislation, the definition prevails and the pedigree is no longer relevant. For example, the word “consistent” has been considered many times by the courts, and that consideration was relevant to the interpretation of “consistent” as used in the context of the Forest Practices Code. However, in 1997 the legislation was amended to include a definition for “consistent”. From that point, the definition became the only relevant consideration.

**Use of Technical Terms**

As stated above under rule 2, you should assume the plain and ordinary meaning of the words in any enactment. One exception is in the use of technical language.

With respect to technical terminology, the following quote from a case illustrates the use of an act’s purpose and object as an aid to statutory interpretation:

> “If the act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction knows and understands to have a particular meaning in it then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.” Unwin v. Hanson, [1891] 2 Q.B. 115, at 119

When determining the technical meaning of a word, a court will usually require an expert witness to testify in order to define the term and its significance to the business or industry to which the enactment applies.

**Legislative History**

Determining the purpose of a particular legislative or regulatory provision may require an analysis of the historical development of the legislation.

For example, prior to the Forest Practices Code of British Columbia Act, logging plans were a requirement under the licence agreements between the Ministry of Forests and the licensee. With the enactment of the Forest Practices Code of British Columbia Act in 1995, logging plans were mandated by statute. Since the Legislature has expressed its intention to do away with the logging plans for major licensees through recent amendments to the Forest Practices Code of British Columbia Act, it would be wrong for a civil servant to try to re-establish logging plans as a requirement in licence agreements or cutting permits.
Using Legal Opinions

“A statutory decision maker who obtains legal advice is not bound by that advice.”

A statutory decision maker who obtains legal advice is not bound by that advice, but it is an important factor to consider in making a determination. There is frequently enough uncertainty as to the meaning of a provision and its application to a particular fact pattern that the decision maker may still feel able to use his or her own judgment. However, if the statutory decision maker gets a firm legal opinion from a lawyer who has been adequately informed of the facts related to a particular matter, the decision maker would be adding substantially to his or her level of personal risk to act contrary to that opinion without a sound, defensible, good faith rationale.

The rationale for not following the legal advice doesn't have to be included in a written rationale of the decision, but the statutory decision maker must have a valid reason for not following the legal advice. If included without the consent of the lawyer that gave the advice, it violates the government policy that legal opinions are not to be disclosed without first getting the consent of the lawyer involved.
### Chapter Summary

- **Rule #1**: The Legislature creates the law, not civil servants.

- **Rule #2**: Whenever possible apply the plain and ordinary meaning of the words as determined from their context and the general purpose and object (spirit and intent) of the legislation.

- **Rule #3**: If applying the plain and ordinary meaning of the words would lead to an absurd result that could not reasonably have been the intent of the Legislature, the statutory decision maker can apply any secondary meaning of which the words are reasonably capable.

- **Rule #4**: Be fair and reasonable, especially when operating within the enforcement context. Resolve any ambiguities in the legislation in favor of the person affected to the extent possible while still satisfying the intention of the legislation.

- **Rule #5**: One section of an enactment is not to be interpreted in such a manner as to leave another section meaningless.

"[L]eave all causes to be measured by the golden and straight mete-wand of the law, and not to the incertain and crooked cord of discretion."

Sir Edward Coke

Introduction

All government officials are required to act within the limits of their legal authority. Administrative law principles establish the parameters upon which government and its citizens interact.

Administrative law:
- sets limits on the actions of government officials;
- sets standards of fairness for the actions of public servants as they affect the public; and
- provides remedies to those affected when there is a transgression of those limits.
The proper application of the principles of administrative law ensures that statutory decisions are not only fair, but are also perceived as being fair by a neutral outside observer.

**Principles of Administrative Law**

The principles of administrative law will be discussed in this chapter:

- **Jurisdiction - who can decide?**
- **Delegation of authority**
- **Procedural fairness:**
  - Keeping an open mind – avoiding bias or even the perception of bias
  - Providing an opportunity to be heard
- **Mandatory versus or discretionary decisions**
- **Proper use of decision making authority:**
  - Deciding for proper purposes
  - Reasonableness
  - Avoiding fettering
    - Consistency
    - Policies and procedures
    - Expert advice
    - Guidebooks
- **When can the decision be revisited?**

**Jurisdiction - Who Gets to Decide?**

Before making a decision, a civil servant must be sure he or she has the jurisdiction, or legal authority, to act. In the case of a statutory decision, the power to make the decision must be established by the legislation.

Statutory decision makers and their staff have multifaceted jobs that include duties other than administering the legislation. However where their duties are governed by the legislation, they are confined by the jurisdiction given by that legislation.

The management of the public forests in British Columbia has become a high profile issue which generates strong and often conflicting opinions from various interest groups. District managers have to deal with these conflicting viewpoints on a daily basis and sometimes tend to lose sight of the fact that they are not personally responsible to resolve every controversy in the woods. **District managers are only responsible for dealing with those matters for which the Legislature has expressly granted them jurisdiction.**

The “spotted owl case” referred to earlier in chapter 6 is a prime example of this. Even though the chief forester in that case felt strongly that the AAC’s in the Soo and Fraser timber supply areas should be decreased to reflect reductions in the land base for protection of spotted
owl habitat, he realized that his enabling legislation did not give him the authority to do so. The fact that the government had prepared a draft spotted owl strategy was not enough to bring this matter within his jurisdiction. Only when the spotted owl strategy was finalized and expressly brought within his jurisdiction would he be able to act on it.

**Before making a decision or taking any action, a civil servant must be sure he or she has expressly been granted the jurisdiction to do so by the enabling legislation.**

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**Can a Statutory Decision be Delegated?**

The legislative branch of government is the supreme lawmaker under our parliamentary system. In order to give effect to those laws, however, the Legislature confers certain powers on the Executive branch (as discussed in chapter 5). This legislative delegation is achieved by provisions in statutes.

For example, section 2 of the *Forest Act* delegates to the chief forester the power to develop and maintain an inventory of the land and forests in British Columbia. Dozens of sections in the *Forest Practices Code of British Columbia Act*, *Forest Act* and *Range Act* delegate extensive powers to district managers.

The question that frequently arises is “Can the person to whom the Legislature delegates these powers pass them on to someone else?”

Generally, the powers conferred by statute are to be exercised only by the person to whom the statute applies.

This general rule can be overruled when there is an express power of delegation set out in the statute, or in rare instances, by any contrary indications of the Legislature’s intention as seen in the language or the purpose and object of the statute.

One example is section 43(1) of the *Forest Practices Code of British Columbia Ac*, that expressly authorizes a district manager to delegate the power to approve or give effect to an amendment to an operational plan. Another example is section 23 of the *Interpretation Act* (British Columbia) that extends a minister’s powers to the deputy minister, or to other senior government officials in certain circumstances.

**In the absence of either explicit powers to delegate or a necessary implication, a statutory decision maker may not delegate his or her decision making powers.**

The statutory decision maker may however, delegate specific tasks to his staff to help them gather the necessary information or facts.
pertaining to the decision. He or she can also ask staff to prepare a summary of the circumstances around an event and offer their recommendations as long as the decision maker retains the discretion as to whether to adopt any of the recommendations.

In addition to the delegation of powers to specific persons or offices in the forestry statutes, a general delegation of the minister’s powers is also provided for in section 1(2) of the Forest Act and section 1(3) of the Forest Practices Code of British Columbia Act. Both provide that a reference in either act to the minister, the minister’s designate or a person authorized by the minister, means any appropriate official in the Ministry of Forests. This is an explicit recognition that while the minister is directly responsible to the Legislature for everything that happens in his ministry, the sheer volume of work makes it imperative that staff fulfills some of the functions for which the minister is responsible. The Forest Service has taken a narrow view of who can be an “appropriate official”.

Generally, administrative functions do not require explicit delegation. These are general matters that have broad application. However, decisions or functions that are quasi-judicial in nature, that is, where a particular individual’s rights may be affected or a penalty imposed, may not be delegated unless the legislation clearly allows it.

Without being specifically authorized to do so by the legislation, the minister cannot delegate his powers when a person’s rights are at stake (i.e. a quasi-judicial decision). This was illustrated by a recent B.C. Supreme Court decision, The Regional District of Fraser-Fort George v. The Ministry of Forests and John Tigchelaar, Vancouver Registry No. A962698. The case concerned a Fire Centre Manager who made a determination finding the holder of a burning permit responsible for the Ministry’s costs of fighting a fire which resulted from the permittee’s failure to comply with the terms of the permit. The court held that the power to assess liability and to charge costs against a person is a quasi-judicial power, and that since the Forest Act does not specifically allow the minister to delegate this power to a Fire Centre Manager, the decision of the Fire Centre Manager was of no effect. The general delegation power in sec. 1(2) of the Forest Act was not specific enough to override the presumption against delegation of quasi-judicial decisions.

The reasoning in this case was subsequently followed by another B.C. Supreme Court justice in Kenneth James Simons v. Her Majesty the Queen in right of the Province of British Columbia as represented by the Ministry of Forests - SCBC Action No. 9999 - Terrace Registry, May 25, 1998.
Choosing your Delegate

When considering to whom powers can be delegated, a statutory decision maker should be conscious of common sense situations where delegation should not occur. For example, she or he should not delegate her or his authority to someone who has been, or is likely to be, involved in an issue where a perception of bias may be present. If a particular official has already been involved with a given issue at a lower level, he or she should not be asked later to render a subsequent decision on the same matter. Likewise, if an official has to deal with an issue later on in an appeal, he or she should not be involved in the day-to-day administrative discussions of that particular case.

Delegating Work

Delegating work associated with the gathering of information for the statutory decision maker is an every day occurrence. It is unreasonable to expect that a district manager is an expert in every area in which he or she needs to render decisions. Therefore the district manager may rely on factual findings and reports by his or her staff and experts. By choosing to accept and rely on that information, the statutory decision maker is, in effect, making it his or her own. Accordingly, statutory decision makers need to be aware of a number of issues related to basing their decisions on the work of others (see pp 7-21 - 7-23).

What Happens When the Power to Make a Statutory Decision Has Been Delegated?

In those situations where the delegation of statutory decision making power has clearly been authorized by legislation, it is essential that the person doing the delegating (the “delegator”), and the person to whom the power has been delegated (the “delegate”) is aware of the rules of the delegation.

Specifically, statutory decision makers who delegate their authority may limit the circumstances in which the delegated power may be exercised, but cannot structure or confine the decisions of their delegates. For example, a district manager who has delegated the power to approve amendments to operational plans under section 43 of the Forest Practices Code of British Columbia Act may restrict the delegate to only dealing with silviculture prescriptions rather than forest development plans. However, the district manager cannot then tell the delegate what the decision must be with respect to a silviculture prescription. Once decision making authority has been delegated, the delegate must be free to exercise his or her discretion without influence by the delegator.

If a manager is concerned about the abilities of a subordinate’s statutory decision making, the manager should either provide the proper training or withdraw the subordinate’s statutory decision making authority. If the subordinate’s statutory decision making power has been delegated by statute, rather than by the district manager, the district manager can only restrict the subordinate’s authority by either withdrawing the
person’s authority altogether (e.g. dismissal or reassignment to another position) or may partially restrict the person’s authority with the approval of the minister, deputy minister or assistant deputy minister.

For example, the discretionary power for a forest official to issue stopwork orders is granted by section 123 of the Forest Practices Code of British Columbia Act. If a district manager wishes to restrict the circumstances in which a designated forest official may issue stopwork orders, he or she would have to formally request the assistant deputy minister to restrict that forest officer’s designation. Ministry policy is not to use partial designations however.

Summary

In summary, the power to make statutory decisions in specific areas, i.e. jurisdiction, must be specifically provided by statute. A person to whom a discretionary power is granted may, in almost every instance, only delegate that authority to another person if the legislative provision expressly allows him or her to do so. A civil servant must make sure he or she has the statutory authority before he or she tries to exercise it.

Having established who is entitled to make a statutory decision, the next step is to ensure that the decision is made fairly.

Procedural Fairness

“Natural justice” or the “duty to be fair”, imposes the requirement that statutory decision makers, when reaching a decision, must do so with procedural fairness. If they fail to do so, the decision may be quashed by the Court.

Procedural fairness has two elements:
- the decision maker must be unbiased; and
- any person directly affected by the decision must be given an opportunity to be heard by the decision maker before the decision is made.

The policy underlying both aspects of procedural fairness is that justice must not only be done, but must clearly and undoubtedly be seen to be done.

Keeping an Open Mind

The first principle is that the person directly affected by a decision has the right to be heard by a decision maker who has an open mind, or in other words has not already made up his or her mind before hearing the affected person’s evidence.

Avoiding Bias or the Perception of Bias

If a decision maker is found to have been biased in making a decision, the courts will usually decide that she or he acted outside her or his jurisdiction and possibly be subject to a successful judicial review. Because the rule against bias lies in the appearance of justice being
done, it is not necessary to demonstrate that a decision maker is actually biased (*Principles of Administrative Law, Jones & De Villars*). The decision maker must avoid even the perception of bias.

The test for bias is whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator, *Newfoundland Telephone Co. v. Newfoundland*, [1992] 1 S.C.R. 623 at 645. Mere suspicion of bias is not enough however, there must be some evidence upon which a reasonable person could conclude that the decision maker had an impartial mind, *Adams v. WCB* (1989), 42 B.C.L.R. (2d) 228 at 231-32.

The threshold for finding a perception of bias may be quite low, as demonstrated by a recent B.C. Supreme Court case involving the challenge of a district manager’s decision to approve a cutting permit, *Chief Bernie Metecheah and the Halfway River First Nation v. the Ministry of Forests and Canadian Forest Products Ltd.*, Vancouver Registry No. A963993, June 24, 1997. The Indian band who challenged the approval of the cutting permit alleged that the district manager had demonstrated actual bias by

> “the overwhelming accumulation of evidence of improper conduct, failing to consult [the Band], considering irrelevant considerations, failing to consider relevant considerations, ignoring reasonable requests, making errors in law and making patently unreasonable findings of fact”

While the judge accepted previous case law showing that a combination of legal errors and ‘foolish and immature rulings’ directed against one party can demonstrate real bias on the part of the decision maker, the judge held that there was no actual bias in this case.

However, the judge went on to find that the district manager had demonstrated the perception of bias. In a letter to the Indian Band attempting to elicit its input, the district manager had written

> “I must inform you that if the application is in order and abides by all Ministry regulations and the Forest Practices Code I have no compelling reasons not to approve their application.”

The Court took the view that the statement suggested that the district manager had already concluded that there was no infringement of treaty rights before he had obtained input from the Band, and that his only remaining concerns were with respect to *Forest Practices Code of British Columbia Act* and its regulations. The Court decided that this
“prejudgment” by the district manager raised a reasonable apprehension of bias, and quashed the approval of the cutting permit.

The second element of procedural fairness (or natural justice) is that the person affected by a decision has the right to tell his or her side of the story to the decision maker before a decision is made. In order to exercise this right, the person is entitled to know “the case he or she has to meet”, and any factors the statutory decision maker may be using to “structure” her or his thought processes. In order to know “the case he or she has to meet”, the person is entitled to access the information that will be presented to the decision maker by Forest Service staff, whether this is the investigation file in the case of an enforcement action, or an evaluation of an operational plan in the case of a plan approval. The exception (see pp. 7-11) is privileged information, such as information from confidential informants or solicitor client privilege. In order to know any factors the statutory decision maker may be using to “structure” his or her thought processes, the person is entitled to access any policies or guidelines the decision maker intends to consider in making his or her decision. Finally, the person is entitled to tell his or her side of the story to the decision maker. The decision maker cannot delegate this function to his or her staff.

Providing an Opportunity to be Heard

There is no fixed rule as to what kind of a hearing is necessary. The requirement is variable and depends on the circumstances of the case, statutory provisions and the nature of the matter to be decided. Greater procedural fairness is expected if the decision could have a strongly detrimental and specific impact on a person.

An oral hearing is usually required when credibility is a central question or where there is a possibility of a severe penalty. On the other hand, if the potential consequences of the decision are not significant, written submissions or a telephone discussion may be adequate. In any event, the person is entitled to have her or his information heard or read by the decision maker.

What Kind of Hearing is Required?

In some very limited circumstances, no opportunity to be heard may be required at all.

For example, in a recent appeal to the Forest Appeal Commission, Canfor v. BC v. FPB - Appeal No. 97-FOR-30, Mar. 24, 1998, the Commission decided that under section 118(2) of the Forest Practices Code of British Columbia Act, the notice of determination and the remediation order can be contained in the same document. The district manager has discretion to suspend or set aside a person’s opportunity to be heard in appropriate circumstances, such as in the case of an emergency. What constitutes an
emergency must be examined on a case by case basis. It is not always necessary to hold a full hearing to satisfy the opportunity to be heard requirement. Instead, the decision depends on what is reasonable in the circumstances. In this case the district manager felt that a licensee’s road design was introducing sediment into a fish stream, constituting an emergency. He issued a remediation order. The licensee did not agree that there was any significant damage being done, refused to comply with the remediation order, and requested an administrative review. Rather than do the remedial work itself, the Ministry waited for the results of the review and appeal process. The Commission held that the district manager’s decision to wait was evidence that he did not really consider the remedial work to be an ‘emergency’, and that he should accordingly have given the licensee an opportunity to be heard before issuing the remediation order.

There is no formal requirement to conduct a hearing for plan approval determinations. However, it is becoming common practice for district managers to meet with licensees to discuss issues related to a forest development plan and to provide the licensee an opportunity to hear any issues than have been raised by ministry staff or through the public review and comment process.

Operational Planning
In particularly complex or sensitive approvals, it is a good idea for the district manager to request written reports or submissions from both the licensee and his or her staff. By meeting with all parties at once, the district manager can feel confident that he or she has provided an equal and transparent opportunity to discuss all relevant information.

Disclosure
All non-privileged information to be considered by the district manager should be made available to the licensee. The underlying principle is that the person affected by the decision is entitled to know what evidence has been given to and considered by the decision maker, and is entitled to an adequate opportunity to explain or respond.

Exception for Privileged Material
One exception to this rule concerns privileged material - generally legal advice. It is government policy that legal opinions are not to be disclosed without first getting consent from the lawyer that gave the advice. Therefore, district managers are not to disclose legal opinions they have received from the Minister of Attorney General or other legal counsel. Nor are they required to disclose information from confidential informants.

The issue of disclosure arose in a recent decision of the Forest Appeals Commission, Dean Foisy v. Gov’t. of B.C., Appeal No. 97-FOR-35, June 30, 1998. Mr. Foisy had been issued a salvage timber sale for...
some beetle-killed timber, but he harvested more than the volume stated in the licence and was subsequently found to be in contravention of section 96(1) of the *Forest Practices Code of British Columbia Act*. The Review Panel confirmed the district manager’s finding of a contravention, but increased the amount of the penalty. In coming to its conclusion about increasing the penalty, the Review Panel had phoned Mr. Foisy after the hearing to ask him about the prices he had obtained when he sold the timber - without telling him why they wanted the information. The Review Panel then used that information to calculate a higher penalty. The Commission held that the Review Panel’s actions in calling him after the hearing and seeking information without advising him that the information might be used to vary the penalty, breached Mr. Foisy’s right to know the case against him and to have an opportunity to respond.

### Mandatory versus Discretionary Decisions

Statutory decisions can be either mandatory or discretionary. Mandatory decisions are those that **must** be made once particular criteria are met, while discretionary decisions allow the decision maker to choose whether to make a decision or not. Mandatory decisions are usually, but not always, identified in a statute or regulation by the terms “shall” or “must”, and a discretionary decision is usually identified by use of the word “may”.

Mandatory decisions may require a decision maker to exercise her or his **judgment** to determine whether a particular decision falls within the criteria set out in the legislation. It is at that level that she or he applies her or his personal knowledge and expertise to the evidence or information which is relevant to the decision. However, once that judgment is made, and the decision maker is convinced that the matter falls within the legislated criteria, she or he has no **choice** but to make the mandatory decision.

For example, section 41(1) of the *Forest Practices Code of British Columbia Act* states that a district manager must approve an operational plan if:

- it is prepared and submitted in accordance with the Act, regulations and standards; and
- the district manager is satisfied that it adequately manages and conserves the forest resources in the area.

The assessments of whether or not the plan meets the legislated requirements, and adequately manages and conserves the forest resources, are considerations to which the district manager must apply his or her expertise and discretion. However, the decision resulting from that judgment is mandatory. If the plan satisfies the legislated requirements he or she **must** approve it. If the plan does
Discretionary Decisions Involve Choice

Discretionary decisions are usually, but not always, identified by the use of the term may. There are several instances of discretionary decisions in the Forest Practices Code of British Columbia Act. For example, section 4(1) establishment of landscape units; section 53(4) granting an exemption from the requirement to have a road use permit, section 115(1) forfeiture of timber, chattels, hay, livestock etc. These provisions give the district manager the choice as to how he or she will exercise his discretion and does not mandate what the choice should be. The discretion will, however, have to be exercised reasonably in accordance with administrative law principles.

Proper Use of Decision Making Authority

The primary concern underlying the rule of law is the prevention of arbitrary action by government officials. People need some certainty as to what the law is and what the consequences are if it are not followed.

There has always been tension between the notion of certainty in the law on one hand, and flexibility and the exercise of discretion on the other. The complexities of modern life and legislation are such that the use of discretion has been continually expanding.

Why Does the Legislature Delegate Decision Making Authority to Civil Servants?

There are two principle reasons why the Legislature delegates decision making authority:

- Governments at all levels must regulate areas, such as the management of public forests, where the complexity, uncertainty and variety of potential applications require an individual’s judgment or discretion. It would be impossible to create a written rule for every possible combination of facts and circumstances; and
- Even when detailed rules are present, discretion allows individual circumstances and extenuating factors to be considered.

However, the discretion granted in decision making is not absolute. Discretion must be exercised within the limitations of the enabling legislation and administrative law principles. The rules of administrative law have been developed by the courts to guide the use of discretion and to try and ensure it is used appropriately and responsibly.

The following is a discussion of the principles guiding the proper use of decision making authority.

- Deciding for proper purpose
- Consider only relevant information
- Reasonableness
- Avoiding fettering
Deciding for Proper Purpose

The principles of administrative law require that discretionary powers are not used for improper purposes. All decisions must be made and rendered in good faith and for the purposes set out in the enabling statute. For example, it would not be proper for a district manager to refuse to issue a road use permit to an individual cedar salvager to reduce local competition in the salvage business.

Consider only Relevant Information

Another administrative law principle is that a decision maker may only consider relevant information, and she or he must consider all relevant information. Relevant information includes facts and reliable opinions that are pertinent or logically related to the matter at hand. In some cases, many relevant considerations will be listed in the legislation or regulations. For example, the Forest Practices Code specifies the content and joint approvals required for approving an operational plan. Other sections provide factors to be considered when granting exemptions. When relevant factors are not specified in the legislation, the statutory decision maker must use her or his best judgment to determine which considerations are relevant and which are not. There are no hard and fast rules for determining relevancy. The challenge is for the statutory decision maker to rely on her or his expertise and ability to sort out the relevant issues from the irrelevant ones.

The mental process the decision maker relies on to determine what is relevant and what is not, must be grounded and articulated in a logical and defensible rationale.

In the Metecheah case referred to above under the section on Bias, the Indian Band argued that the district manager had failed to take into account the following relevant considerations:

1. the presence of archaeological sites in the cutting permit area;
2. the fact that the Ministry of Environment, Lands and Parks recommended further wildlife studies; and
3. the way in which the permit would interfere with the Band’s use of the area.

The court held that the exercise of a decision maker’s discretion will be outside his jurisdiction for failure to consider relevant factors only if it

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2 Sections 117(4)(a) and 122(2) of the Forest Practices Code of British Columbia Act require that policy established by the minister be considered.
3 See sections 10 to 17 of the Forest Practices Code of British Columbia Act.
4 See sections 28 to 33 of the Forest Practices Code of British Columbia Act.
was a factor that the enabling legislation expressly or by implication obliged him to consider. The court found that all of the factors raised by the Halfway Band, i.e. archaeology, wildlife, and aboriginal use were to be found in the preamble to the *Forest Practices Code of British Columbia Act*, so were relevant considerations. However, because the district manager *had* considered these factors and had addressed them in his written rationale, his decision was not struck down on this basis.

In some sections of the *Forest Practices Code of British Columbia Act*, public review and comment are required. One example is section 4(6) of the *Forest Practices Code of British Columbia Act* requiring a district manager to provide for a review of, and comment on, any proposed establishment or change to a landscape unit or landscape unit objective. In this situation, the comments received must be considered and recognized before a final decision is made. The district manager need not follow what the comments recommend but they must be reviewed and considered. The district manager’s rationale must document the process she or he used for dealing with these comments. In other cases, such as when the public is likely to be substantially affected by a decision, a review and comment process is recommended, even when it is not mandatory.

**Do not be Influenced by Irrelevant Considerations**

Again, looking at the *Metecheah* case as an example, the Band argued that the district manager had based his decision on irrelevant considerations such as the need to make a decision quickly, political pressure, the economic impact of non-approval on the licensee, government policy, and the threat of litigation.

The court held that a decision maker may consider irrelevant circumstances, as long as the decision is not based predominantly on them. Government policy and the economic impact on the licensee were held to be *relevant* considerations. As for the other factors which the Band argued were irrelevant, the court was able to determine from the district manager’s rationale that he had *not* given them any weight in making his decision.

**Reasonableness**

In reviewing a statutory decision, the courts will look into the reasonableness of both the process and the decision itself. The courts will overturn a decision more readily if there has been an error in the procedure rather than in the substance of the decision. Judges may defer to a statutory decision maker’s expertise on the merits of the decision if it is reasonable.

The test for what is reasonable is an objective standard. In other words, there must be some evidence upon which a reasonable person could

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reach the same decision.

The legislative context should be examined to determine the limits of reasonableness. Section 41(2) of the *Forest Practices Code of British Columbia Act* requires a district manager to be reasonable in requesting additional information from a plan proponent. It would not be reasonable for the district manager to request, for example, information about potential pest hazards when Operational Planning Regulation section 13 only requires information on detected forest health factors, or a forest health assessment.

Several provisions in the legislation give statutory decision makers the power to impose conditions on their approvals. A statutory decision maker should consider the intent of the Legislature when determining what conditions to impose. For example, section 41(5) of the *Forest Practices Code of British Columbia Act* allows the approval of forest development plans or amendments subject to conditions. Forest development plans must be approved if they meet the requirements of the Act, regulations and standards and adequately manage and conserve the forest resources. Any conditions imposed by the district manager must relate to, and be consistent with, those requirements. Imposing conditions that relate to issues like community planning that are more appropriately dealt with under a municipal statute, would not be reasonable. As a general rule, conditions cannot be imposed that relieve licensees of their statutory obligations. Additionally, they must be something that the licensee has the power to control or fulfill. Conditions that can be deemed to have been met or not to have been met at the whim of the district manager would not be reasonable.

**Avoiding Fettering**

“Because Administrative Law generally requires a statutory power to be exercised by the very person upon whom it has been conferred, there must necessarily be some limit on the extent to which the exercise of a discretionary power can be fettered by the adoption of an inflexible policy, by contract, or by other means. After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a [statutory decision maker] to exercise his or her discretion in a particular way may illegally limit the ambit of his or her power. A [decision maker] who thus fetters his or her discretion commits a jurisdictional error which is capable of judicial review.” *Administrative Law, Jones & De Villars.*

| Fettering involves imposing improper constraints on the designated decision maker, that in his or her eyes, constrains the ability to render an independent decision. |

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Fettering becomes a concern when policy manuals and guidebooks are followed too closely and are used in place of independent decision making. Policies and guidebooks are not laws, and thus, can only be used to help inform decision making, not determine the outcome of the decision. While there may be recommendations from staff intended to enhance district/region/provincial decision making consistency, they must be rejected when following them would be unfair or improper in the specific circumstances. The decision maker is responsible for looking and evaluating each set of circumstances on their own merit i.e., the decision maker cannot justify his or her decision merely by stating it is consistent with government policy.

Fettering in the context of issuing a Licence to Cut was considered in two 1995 cases in the Supreme Court of British Columbia. The cases involved the application by Imperial Oil for a permit from the Ministry of Energy, Mines and Petroleum Resources for an access road to a wellsite, and the concomitant issuance of a Licence to Cut by Dawson Creek Forest District.

In the first case, the acting district manager was opposed to the road because it opened up a rare and fragile alpine wilderness area. However, once the Ministry of Energy, Mines and Petroleum Resources issued the permit for the road and wellsite, he felt he had no choice but to issue the Licence to Cut. On judicial review initiated by a local guide outfitter, the court held that the acting district manager had “failed to exercise his discretion properly and make an independent decision within the relevant statutory framework. By erroneously believing his decision to be bound by the Ministry of Energy, Mines and Petroleum Resources’ decision, he fettered his discretion, thereby falling into jurisdictional error.” Accordingly, the court quashed the Licence to Cut.

In the second case, Imperial Oil had applied for, and the district manager had issued, a second licence to cut for the same access road. The district manager had provided a written rationale for his decision, which showed that while the Ministry of Forests was still opposed to the road, he had reviewed all the relevant information and the statutory provisions, and had come to the conclusion that his jurisdiction in considering whether to issue the licence to cut extended only to the cutting of the timber on the right of way, not to the construction of the

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road itself. The district manager decided that the road approval was within the jurisdiction of the Ministry of Energy, Mines and Petroleum Resources and that decision had already been made. The decision as to whether or not to approve the licence to cut was not a means of thwarting the decision of another Ministry which had made a decision within its jurisdiction. The cutting of the timber, in itself, was not a contravention of the “spirit and intent” of the Forest Practices Code. Accordingly, the district manager issued the licence to cut. On judicial review, the court decided that the district manager’s rationale showed that he had not considered himself fettered by the decision of the Ministry of Energy, Mines and Petroleum Resources to issue the access road permit. The court upheld the district manager’s reasoning and did not quash the licence to cut.

These cases illustrate the point that the same substantive decision may be either struck down or upheld by the courts, depending on whether it was arrived at in accordance with the rules of procedural fairness. A statutory decision made by a “fettered” decision maker gives rise to a jurisdictional error.

**Structuring Discretion while Avoiding Fettering**

The purpose of structuring discretion is to provide some certainty to the application of the law by containing discretionary authority within acceptable and visible boundaries. This is accomplished in a number of ways.

**Consistency**

Consistent decision making is desirable and reinforces the position that ministry decisions are not arbitrary or haphazard. Decisions may be seen as arbitrary when similar sets of facts do not produce the same decisions. However, this does not mean that a statutory decision maker cannot vary his or her decisions because he or she believes a previous decision was a mistake. The statutory decision maker is responsible for using sound judgment and demonstrating a logical rationale for reaching all decisions. The rationale is particularly important when decisions differ from what an outside observer would see as similar decisions based on similar facts. Due to the flexibility of discretionary powers, the statutory decision maker needs to be particularly careful that he or she can articulate, and defend, the process used to arrive at a decision.

**Referring to Previous Decisions**

As experience with the application of decision making authority grows, decision makers can systematically record their decisions and rationales for other decision makers to use. These can be used as a general guide to help enhance consistency between decision makers.

However, when statutory decision makers refer to their own previous decisions or the decisions of other statutory decision makers, it is important to remember:
• Each decision must be made on its individual fact pattern; and
• Decision makers should not fetter themselves by blindly following previous decisions.

**Using Policies**

Decision makers are entitled to adopt and consider policies as an aid but they must not feel that they are bound by policy. Decision makers who are faced with a large volume of decisions usually adopt some general policies to help with the administrative burden. However, each individual case must be decided on its own merits.

The Forest Appeals Commission considered fettering by the use of policy in *Canadian Forest Products Ltd. v. Gov’t of British Columbia, Appeal No. 97-FOR-06, October 10, 1997*. In that case the licensee had been found in contravention of *Forest Practices Code of British Columbia Act* section 67 by the district manager and review panel. The licensee argued that the district manager’s decision to find the licensee liable rather than its contractor was the result of the district manager fettering himself through blind adoption of Ministry of Forests’ Policy 16.10, which advised district managers to normally hold licensees responsible for a contravention, and implied that the contractor could only be held liable if his non-compliance was ‘willful or reckless’. The Commission held that the district manager had considered himself bound by the policy, and that he had fettered himself in his decision not to proceed against the contractor. However, the Commission went on to determine that the district manager had the authority to proceed against the licensee, or the contractor, or both, so the finding of contravention against the licensee was upheld.

The one exception against the strict adherence to policy is when the enabling legislation requires it. For example, section 105 of the Forest Act requires that stumpage rates be calculated “in accordance with the policies and procedures approved for the forest region by the minister.”

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<th>The Difference Between Policies and Procedures - The Doctrine of “Legitimate Expectations”</th>
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<td>The courts view established procedures differently than policies. If a decision maker has made public a set of procedures with respect to a type of statutory decision so that a person who may be affected by the decision has a “legitimate expectation” that he will be given an opportunity to be heard, the decision maker will be restrained from arbitrarily adopting a different procedure. A change of a published procedure will have to be done with adequate notice.</td>
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<th>Using Staff Expertise</th>
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<td>District managers cannot be experts in every area in which they must render decisions. Therefore, district managers may rely on factual</td>
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findings and reports by their staff and experts to provide as much pertinent information on the issue as possible. By choosing to accept and rely on that information, the decision maker is, in effect, making it his or her own. Accordingly, decision makers need to be aware of a number of issues related to basing their decisions on the work of others.

Knowledge of Staff

Decision makers should be aware of the knowledge, training, skills and areas of expertise of their staff. When a decision is challenged, the decision maker must be able to defend her or his staff and the information they provided. This does not mean that all staff have to be licensed professionals.

A decision maker needs to know the strengths and weaknesses of his or her staff in enough detail to assign tasks and take personal responsibility for what is produced. The decision maker is also responsible for ensuring staff have adequate time, support and other resources to complete the tasks assigned to them. This applies to the plan approval process as well as to compliance and enforcement functions.

Providing Clear Instructions to Staff

Decision makers should provide clear instructions to their staff on their expectations and the information they need to ensure sound determinations. When clear directions and expectations are offered, fettering is not a concern since no decision making authority has been delegated or interfered with. While a decision maker can provide direction to an employee on what needs to be investigated or verified, it is not defensible to alter the information that employee provides. If the decision maker feels the information is incomplete, he or she can ask the employee to address the specific concerns or can assign the task to someone else. Remember, under the rules of disclosure, all parties have access to staff reports - these requests should be expected and planned for.

Professional Advice

As accredited professionals, foresters and engineers have a formal obligation to perform their duties accurately and competently. Their professional associations are responsible for ensuring their members are held accountable for their actions and remain current in their areas of expertise. When professionals sign a report as employees of the Forest Service, they are putting their professional credibility and reputation “on the line”. Professionals are expected to decline, or refer an assignment to someone else, if they do not have the expertise in the area in question. When they sign-off on a report, silviculture prescription, forest development plan or other document, they are certifying that in their opinion the documents are complete and accurate.

As with policy however, the advice of staff, experts and professionals cannot be binding - it cannot be used to fetter the decision maker’s
discretion.

**Legal Advice**

A statutory decision maker who obtains legal advice is not bound by that advice, but it is an important factor to consider in making a determination. If the statutory decision maker gets a firm legal opinion from a lawyer who has been adequately informed of the facts related to a particular matter, the decision maker would be adding substantially to his or her level of personal risk to act contrary to that opinion without a sound, defensible, good faith rationale.

**Guidebooks**

The use of guidebooks as an aid to decision making is discussed in detail in chapter 8 however the general rule is that guidebooks are not binding unless they are expressly made so by the legislation, or unless they are incorporated by reference into a higher level plan, operational plan or cutting authority.

**Proper Use - Conclusion**

The use of discretionary powers has to be balanced with the need for certainty in the law. To help achieve that balance, the principles of administrative law structure the use of discretion to prevent its flexibility from degenerating into arbitrariness. The underlying principle in administrative law is the decision maker’s duty to be fair. There can be no fairness if the decision maker does not use his or her discretionary power for proper purposes.

But what happens when there is an abuse of discretionary power? What are the options for a person who feels that a decision was made in error or for an improper purpose?

**When Can a Decision be Revisited?**

The general rule is that a statutory decision maker may not revisit or amend one of his or her decisions once it is finalized, unless the legislation provides otherwise.

For example, section 121(2) of *the Forest Practices Code of British Columbia Act*, allows a district manager, a designated environment official, or a regional manager to extend the date referred to in certain notices of determination. Without that express provision, the decision maker would be bound to the original terms of the decision.

Like every rule, however, there are exceptions to the general rule about decision makers not revisiting their decisions. A decision maker should ask for legal advice if he or she is in a situation where they may want to reconsider a statutory decision.
How Can a Decision be Challenged?

Appeals

However, circumstances often arise in which the person affected by a decision feels that it should be amended either for substantive or procedural errors.

Statutory decisions can be appealed only if the legislation specifically provides a right of appeal. There is no such thing as an unwritten right to appeal.

The Forest Practices Code of British Columbia Act, the Forest Act and the Range Act each provide for the administrative review of some decisions, and the further right of appeal of those decisions. These reviews and appeals provide another look at both the procedural fairness and the substantive merits of the decisions. In most instances the right of appeal is limited to the person who is affected by the decision, and in the case of the Forest Practices Code, the Forest Practices Board.

The only right of appeal which is relevant to operational planning is the right of the Forest Practices Board to request a review and subsequently an appeal of a forest development plan approval.

Both the Forest Act and the Forest Practices Code of British Columbia Act contain provisions for appeals to the court system after the administrative review and appeal avenues are exhausted. Section 150 of the Forest Act and section 141 of the Forest Practices Code of British Columbia Act allow the parties to appeal to the B.C. Supreme Court for errors of law or jurisdiction only. The significance of this is addressed in more detail in chapter 9.

The review and appeal provisions in the Forest Act, Range Act, and Forest Practices Code of British Columbia Act only apply to decisions made under specified provisions of the acts. Does this mean there is no opportunity for the affected party to challenge other statutory decisions which are not specified for administrative review?

Judicial Review

Even when there is no statutory right of appeal to an appeal board or to a court from a decision affecting a person, every citizen affected by the decision has a constitutional right to ask the B.C. Supreme Court for judicial review of that decision. Decisions not subject to appeal are thus still subject to judicial review.

Judicial review is not the same thing as an appeal. Unlike an appeal which is always created by statute, judicial review is inherent in the very role and status of the B.C. Supreme Court as the independent body charged with upholding the rule of law. While the Judicial Review Procedure Act sets out the procedure by which judicial review takes
place, the power of judicial review is independently vested in the Court. It can not be taken away by statute.

The primary function of judicial review is to ensure that a decision maker has acted fairly and stayed within his or her legal jurisdiction. This is quite different from the broader role played by the Forest Appeals Commission on a statutory appeal. On judicial review, the courts are concerned only with legality - they are not concerned with the wisdom of the decision itself. As was recently stated in Koopman v. Ostergaard, [1995] B.C.J. No. 1822 (S.C.):

“The exercise of judicial review does not permit the Court to quash a decision because it failed to give adequate weight to environmental concerns”.

By contrast, appeals to the Forest Appeals Commission are much broader in nature. Potentially, every aspect of the decision is open to appeal before the Commission. In addition, appeals to the Forest Appeals Commission are often hearings where oral evidence is tendered, while judicial review proceeds based on written evidence of the “record” before the statutory decision maker.

Chapter 7 has been a very brief overview of the basic rules of administrative law. Chapter 8 looks in more detail at the use by statutory decision makers of policies, procedures, guidebooks and expert advice.
### Chapter Summary

- The principles of administrative law are:
  - Jurisdiction - who can decide?
  - Delegation of authority
  - Procedural fairness:
    - Keeping an open mind – avoiding bias or even the perception of bias
    - Providing an opportunity to be heard
  - Mandatory versus discretionary decisions
  - Proper use of decision making authority:
    - Deciding for proper purpose
    - Reasonableness
    - Avoiding fettering

- The general rule is that a statutory decision maker may not revisit or amend a decision once it is finalized, unless the legislation provides otherwise. There are, however, exceptions to this rule.

- Statutory decisions can only be appealed if the legislation provides for the right of appeal.
How to Use Policies, Procedures, Guidebooks and Advice

“The true secret of giving advice is, after you have honestly given it, to be perfectly indifferent whether it is taken or not, and never persist in trying to set people right.”

Hannah Whitall Smith

Introduction

“Improper use of either policy or guidebooks can increase the risk to the ministry and the personal risk to the decision makers.”

There exist a number of tools which can help statutory decision makers and their staff carry out their responsibilities and make well informed decisions. These tools include policies, procedures, guidebooks, technical and legal advice. Although helpful to the decision maker, it is important to realize that except in very limited circumstances, all of this information, while useful, is not binding upon the decision maker. This information is reference material only.

Where policies, procedures, guidebooks and advice are used wisely, they can assist the statutory decision maker, but if not used wisely, they could render a decision maker’s decision indefensible and subject to challenge.

If a statutory decision maker blindly follows policies, procedures, guidebooks and advice without putting his or her mind to the specific circumstance at hand, he or she could effectively be fettering his or her decision. This is not to say that if, in making a decision, the statutory decision maker comes to the same conclusion as the policy that he or she has been fettered. After all, it would not be an effective policy if it did not apply for most circumstances.
Policies

Policies are the general principles that guide government administration in the management of public affairs and normally do not have the force of law. Policy can not restrict the statutory decision maker’s discretion unless the legislation requires the policy to be followed. The Forest Practices Code of British Columbia Act provides authority for two mandatory policies, and the Forest Act provides for one.

The first mandatory policy under the Forest Practices Code of British Columbia Act is in the Higher Level Plans: Policy and Procedures. District managers must follow this policy in exercising their statutory obligations when establishing a landscape unit or a sensitive area or when establishing, varying or canceling an objective for a landscape unit or sensitive area. The directions of the chief forester contained in this policy must be followed by the district managers pursuant to their responsibilities under Part 2 of the Forest Practices Code of British Columbia Act.

The second mandatory policy is provided for under section 122 of the Forest Practices Code of British Columbia Act. This section provides for Minister’s policy that must be considered by the district manager in exercising his or her authority to levy penalties or remediation orders. At present, there is no policy approved under section 122.

Section 105(1) of the Forest Act requires that stumpage be determined, re-determined or varied in accordance with the policies and procedures approved for the forest region by the minister.

These mandatory policies carry the weight of law behind them and are in fact, an extension of the legislative framework within which statutory decisions are made.

It is with non mandatory policies that decision makers and their staff must exercise caution. For example:

- Ministry policies, such as the Ministry of Forests resource policies (e.g., enforcement policies); and
- Policies developed by individual statutory decision makers (e.g., district policies).

Where a statutory decision maker makes complex decisions by weighing similar fact patterns, the decision maker may create policy to communicate the thought processes and guiding principles they will use when making those decisions. These policies are often useful tools for communicating the statutory decision maker’s interpretations and application of legislated standards. In other words, when dealing with a certain recurring fact pattern, the policy will inform the affected parties of the ‘case to meet’. If additional information, or different fact patterns
arise that don’t match the ‘case to meet’, the staff and licensees must not expect the policy to apply as is, and expect that these additional or different facts will be considered on their own merits.

For example, a district manager may develop a policy that outlines what they expect to be provided in an operational plan to assess the adequate management and conservation of forest resources. However, with each submission of an operational plan, the district manager is still required to evaluate each plan on its own merit and be prepared to depart from the policy if circumstances warrant.

| Policies do not take the place of a statutory decision maker putting their mind around the unique considerations of each decision. |

To manage the risks associated with inappropriate use of policies, the following points should be considered when policies are being developed:

- Policies that are not provided for in legislation are not binding. At best, they are a tool for the decision maker to use when exercising their discretion.
- Policies that do not provide for consideration of the particular facts of each plan approval will not be viewed by the courts as fair policy and the statutory decision maker may be found to have abrogated their statutory authority.
- As a matter of good practice, policies should be clearly communicated to the licensee if they are to be considered as a factor in the approval process.

### Improper Use of Policies

The improper use of policy can arise when those who write policies, and those using them for decision making, do not understand their limitations and legal standing.

Since policies that are not provided for in legislation are not legally binding, policies should not be written in such a way that makes them appear binding. This may create confusion for the decision makers, their staff and licensees. It should be noted that policies on their own do not result in fettering. However, the way that policies are written or referenced in a decision can make it more difficult to defend against an allegation of fettering.

For example, a district manager’s policy may identify circumstances where a plan should be referred to another agency. If the policy is written in such a way that it appears to limit referrals to other agencies only when certain criteria are met, this policy may be improperly applied by the district manager’s staff. The staff may simply determine if the plan meets the criteria in the
policy without considering if there are other reasons that might require referral of the plan. This could result in key comments on the plan not being received.

Procedures

As noted above, policies are the general principles that guide government administration in the management of public affairs. Procedures, on the other hand, outline the process or steps that should be taken to undertake an activity or achieve a given result. For a quick reference to the different and appropriate use of policies and procedures, see appendix # 4.

The courts view established procedures differently than policies. If a decision maker has made public a set of procedures with respect to a type of statutory decision so that a person who may be affected by the decision has a “legitimate expectation” that he or she will be dealt with in a certain manner or with a certain process, the decision maker will be restrained from arbitrarily adopting a different procedure. A change of a published procedure will have to be done with adequate notice.

Guidebooks

“the experts that assist in the preparation of guidebooks must not only meet the ‘expert advice’ test... but be willing to stake their professional reputation on the principles outlined in the guidebook”

Similar to policies, guidebooks are generally reference material except in the limited circumstances where they are cited by the legislation or regulations. Guidebooks have, and continue to be, prepared by experts to assist Forest Service staff, statutory decision makers and plan proponents determine the appropriate measures to address forest management issues. It should be noted that the experts that assist in the preparation of guidebooks must not only meet the ‘expert advice’ test outlined later in this chapter, but be willing to stake their professional reputation on the principles outlined in the guidebook. Without experts standing behind their guidebooks in the face of scrutiny, the reliance on the guidebooks for direction, or ‘advice’ becomes insupportable in court.

Guidebooks provide direction on the processes, practices and plans that are intended to meet legislated requirements. Common types of guidebooks today include those providing scientific or technical advice, ‘best management practices’ and guidance on procedures and planning.

Scientific or technical guidebooks provide current scientific and/or technical information to support a plan proponent when preparing and submitting an operational plan. Guidebooks also support decision makers to the extent that they provide a synthesis of scientific and technical information that may help inform their decision making.

Although some guidebooks provide the “best management practice” it is not appropriate to assume that these represent a provincial standard that must be followed.
Guidebooks are never enforceable as stand alone documents. However, information from guidebooks can be made binding when they are cited in higher level plans, regulations, approved plans or in the harvest authority.

A higher level plan declaration may cite specific sections of guidebooks, that makes them binding. Statutory decision makers need to ensure they know of any linkages between the higher level plans and sections of guidebooks that are referenced.

Portions of the following guidebooks are binding on the proponent of the plan with respect to specific definitions or procedures:
- Establishment to Free Growing;
- Hazard Assessment Keys for Evaluating Site Sensitivity to Soil Degrading Process;
- Mapping and Assessing Terrain Stability;
- Seed and Vegetation Material;
- Fish Stream Identification Guidebook;
- Interior Watershed Assessment Guidebook; and
- Coastal Watershed Assessment Guidebook.

Citing a guidebook within a regulation, operational plan or harvesting authority does not make the entire guidebook legally binding but instead, only the part that is cited. That part then becomes enforceable not as a guidebook, but as part of the regulation, the plan or harvest authority.

For example, in the Operational Planning Regulation two definitions are referenced in the Fish Stream Identification Guidebook: reach and fish stream. For reach, the entire definition is found in the guidebook and is therefore legally binding. However, the definition of fish stream refers to conducting an inventory as described in the guidebook. Therefore, it is the inventory methodology that is legally binding.

Improper Use of Guidebooks

The improper use of guidebooks is similar to the improper use of policy. Guidebooks can be used improperly when a decision maker or staff member requires objectives as described in a guidebook to be incorporated into a plan.

For example, a forest development plan must include, “general objectives … for wildlife trees” and the silviculture prescription must include, “the site conditions that must exist to accommodate known non-timber forest resources”. Plans may be proposed with blocks that do not include wildlife trees or where the site conditions after harvest are not those recommended in the Biodiversity Guidebook (best
practice). The statutory decision maker can not refuse to approve the plan only because it does not meet the guidebook requirements. The statutory decision maker may only refuse to approve the plan based on the fact that the plan does not meet the test of section 41 of the Forest Practices Code of British Columbia Act.

Advice

Statutory decision makers often ask for legal or expert advice. Although both types of advice may be pivotal considerations for the decision maker, they are not binding on them.

Legal Advice

A statutory decision maker who obtains legal advice is not bound by that advice, but it is an important factor to consider in making a determination. There is frequently enough uncertainty as to the meaning of a provision and its application to a particular fact pattern that the decision maker may still feel able to use his or her own judgment. However, if the statutory decision maker gets a firm legal opinion from a lawyer who has been adequately informed of the facts related to a particular matter, the decision maker would be adding substantially to his or her level of personal risk to act contrary to that opinion without a sound, defensible, good faith rationale.

The rationale for not following the legal advice doesn't have to be included in a written rationale of the decision, but the statutory decision maker must have a valid reason for not following the legal advice. If included without the consent of the lawyer that gave the advice, it violates the government policy that legal opinions are not to be disclosed without first getting the consent of the lawyer involved.

Expert Advice

Experts should be utilized where it is reasonable to do so. The experience of the experts should be commensurate with the gravity or magnitude of the task they are given. These experts must be able to state any assumptions upon which they base their report and be willing to stake their reputation on their recommendations.

In presenting issues and recommendations to the decision maker it is inappropriate for staff to filter out information as a result of the anticipation of what the statutory decision maker will allow or approve.

Additionally, where strictly technical issues are concerned, expert advice by consensus or by committee is generally not supportable in court. Where teams of experts are required due to the complexity of the situation, it is preferable to have each expert provide distinct advice, and subsequently support only that portion of the advice.
Chapter Summary

- Tools which can help statutory decision makers and their staff carry out their responsibilities and make well informed decisions include policies, procedures, guidebooks, technical and legal advice.

- Except in very limited circumstances, all of this information, while useful, is not binding upon the decision maker.

- Policies are the general principles that guide government administration in the management of public affairs and normally do not have the force of law.

- Procedures outline the process or steps that should be taken to undertake an activity or achieve a given result.

- Guidebooks are generally reference material except in the limited circumstances where they are cited by the legislation or regulations.
Risks to Statutory Decision Makers and their Staff:
What Happens when things go wrong in a Statutory Forest Management Regime?

“Those who trust to chance must abide by the results of chance.”
Calvin Coolidge

**Introduction**

Statutory decision makers are human and some of their decisions are going to be challenged and some of those, overturned. All that is expected of a statutory decision maker, or any civil servant for that matter, is to act in good faith; to honestly assess the limits of the power granted them under the relevant legislation, to honestly try to determine the intent of the legislation, to act within the limits and intent of the legislation and to abide by the administrative law protections afforded to those affected by the decision. In other words, **being wrong is not the problem; the problem is being wrong for the wrong reasons.**

**Type of Risks**

Each time a statutory decision maker exercises discretionary authority, there is risk. These risks are generally one of three types:

- Risk of legal challenge;
- Personal risk; and
- Professional risk.

**The Risk of Legal Challenge**

The **risk of legal challenge** is the risk of a civil servant being challenged on substantive, jurisdictional, or procedural issues.

**Personal Risk**

**Personal risk** is the risk of the civil servant being accused of intentional
or reckless wrongdoing. This risk exists when a civil servant is not acting in ‘good faith’.

**Professional Risk**

**Professional risk** is the risk that a licensed professional will be called upon to justify his or her conduct and standard of practice to a disciplinary committee of the professional licensing organization. Where a statutory decision maker is also a professional, this risk is also incurred.

**Grounds for Challenging a Decision**

The grounds on which a statutory decision may be challenged depends initially on whether the decision is subject to appeal or judicial review.

If the decision is subject to appeal (e.g. section 127 of the *Forest Practices Code of British Columbia Act* lists the various decisions that are subject to administrative review and appeal to the Forests Appeal Commission), the decision may be appealed based on a wide ranging review of any finding of fact, procedure, exercise of discretion or statement of law contained in the decision. As noted above, the statutory appeal system allows a more careful and critical review of a forest official’s decision than would take place on judicial review. Where there is a right of appeal, the Courts will not generally allow a person to ask for judicial review instead.

Judicial review applies where a forest service decision (e.g. the decision to grant or refuse a Licence to Cut) is not subject to appeal. As noted in chapter seven, judicial review is not the same thing as an appeal to the Forests Appeals Commission. Although a judicial review can be as all encompassing as examining the validity of the legislation itself, it is generally concerned with two “administrative law” questions:

1. the legality of the decision; and
2. whether procedural fairness has been granted.

The Court’s focus on the legality of the decision on judicial review has given rise to a number of issues. The first is whether and when the Courts will overturn findings of fact made by the decision maker. The law is clear that Courts on judicial review will not review a statutory decision maker’s findings of fact unless those findings are irrational and wholly without evidentiary support. Unlike a Forests Appeal Commission appeal, judicial review is not a forum to re-weigh evidence.

“Courts will not overturn an exercise of discretion merely because they might not have exercised it the same way”

The second issue flowing from the Court’s concern with the ‘legality’ of the decision is whether and when the Courts will overturn the exercise of discretion by a decision maker. The law is again clear that the Courts will not overturn an exercise of discretion merely because they might not have exercised it the same way. Their focus is on whether it was
exercised legally. If discretion was fettered, if the decision maker failed to consider an essential factor or based its decision largely on irrelevant factors, or if the result of the discretion is irrational, the Court will reverse the decision. Otherwise, the decision will be upheld.

Error of Law
The final issue flowing from the Court’s inquiry into legality is whether and when the Court will reverse a decision on judicial review for ‘error of law’ in interpreting the legislation. While the law in this area is quite complex, three basic propositions govern.

Correctness Test
First, a legal question that deals with the decision maker’s jurisdiction is always reviewed for correctness. If such a question is decided incorrectly, it is illegal. An example of a jurisdictional error would be if a forest official were to write someone a violation ticket for fishing without a licence.

Second, all other legal questions will also be reviewed for correctness unless there is a clause in the statute which requires the court to give deference (called a “privative clause”) or unless the court decides that the decision maker has relatively greater expertise than the Court to answer the question.

Patently Unreasonable Test
Third, where the Court decides to grant deference on questions or law within jurisdiction, the Court will only overturn the decision maker’s interpretation if it is unreasonable or patently unreasonable. Where this standard applies, a decision on statutory interpretation will be upheld even if the court would have come to a different conclusion, as long as it is not so clearly wrong as to be unreasonable. This is the test the Court applied to the Chief Forester’s AAC determination in the ‘spotted owl’ case referred to earlier.

The Chief Forester had made no provision for owl protection in the two AAC rationales because the interim ‘log around’ strategy was placing too much pressure on stands not located in spotted owl habitat. One basis for the Chief Forester’s decision was that he considered the Forest Service contractually bound to allow licensees to harvest according to their approved logging plans. The Western Canada Wilderness Committee disagreed and argued that the Forest Service can, as an exercise of its discretionary power, prevent over harvesting by reducing the licensee’s operations in affected areas.

“...it had not been shown that the Chief Forester’s view of the matter was patently unreasonable.”

The Court of Appeal looked at some evidence on the extent to which harvesting under forest licenses was subject to the discretionary authority of the Forest Service and decided that it was a matter that was better left to a case where the outcome depends on the issue. In other words, the Court did not finally rule on the issue, but based on the
evidence which had been presented to them, they said that it had not been shown that the Chief Forester’s view of the matter was patently unreasonable.

As noted earlier, Courts on judicial review are also concerned with the procedural fairness of the decision in question. Procedural fairness requires the decision maker to comply with the principles of objectivity and the right to be heard discussed in chapter seven. On questions of fair procedure, Courts on judicial review do not usually give any “deference”. If a decision is found to be procedurally unfair or tainted by bias, it will ordinarily be quashed. A lack of procedural fairness is often treated as a “jurisdictional” error.

Potential Remedies

What are the potential remedies against errors made by a civil servant? In most cases the enabling legislation includes provisions for review and appeal and sets out the powers of the review or appellate panel. The Forest Practices Code of British Columbia Act, for example, provides in section 129(5) that a review panel may make a decision:

- confirming, varying or rescinding the determination or making a determination;
- referring a determination or failure to make a determination back to the person who made it or failed to make it, with or without directions; or
- making a determination, if the review concerns the failure to make a determination.

On appeal to the courts, or on judicial review, the courts also will look to see if there are any specific statutory remedies that they should apply. If not, the courts will resort to one or more of a number of common law remedies, known as ‘prerogative remedies’. These prerogative remedies can allow a court to quash defective statutory decisions, prohibit decision makers from making certain kinds of errors, or compel decision makers to perform their statutory duties.

In some cases, the private law remedies of injunction and declaration may be available. Damages may be available as a remedy in appropriate circumstances.

Good Faith versus Bad Faith

The decision as to whether a civil servant was acting in good faith depends on the surrounding circumstances, the most important being whether the person was intentionally or recklessly (as opposed to unintentionally or negligently) abusing his legislated authority.

A recent decision by the B.C. Court of Appeal distinguished negligence from recklessness and bad faith in a case involving a district manager (Dorman Timber Ltd. v. British Columbia, 152 D.L.R. (4th) 271).
In this case the licensee had failed to comply with its clean-up obligations on a small business timber sale license. The district manager suspended the license, but subsequently allowed the licensee to continue logging as long as it dedicated a crew exclusively to meeting the clean-up requirements. During the ongoing logging and clean-up phase, the licensee was high bidder for a sale in another district. When staff from the second district called the district manager from the first district to inquire about the suspension, the district manager confirmed that the licence was suspended, so the second district decided the licensee was ineligible for the new licence. The licensee sued the district manager and the province for damages for negligence, and on appeal also asked for a finding that the district manager had acted in bad faith.

The courts found that the district manager had exceeded his statutory authority because section 59 (now section 76) of the Forest Act did not authorize a “conditional” suspension. In other words, by allowing the licensee to resume logging with no restrictions other than dedication to the clean-up requirement, the district manager had effectively lifted the suspension. The Court of Appeal held that the district manager’s failure to understand his statutory authority and the consequent excess of his authority alone could not constitute negligence. However, once he was ‘put on inquiry’ by the questions from the second district, and knowing that the licensee would be ineligible for the second licence while the first licence was under suspension, the district manager had a duty to reassess his interpretation of the Forest Act, and to at least inform the second district that he had allowed the licensee to resume logging operations. The district manager’s failure to meet this ‘duty of care’ constituted negligence.

On the question of whether the district manager had acted in bad faith, the Court of Appeal held that:

“...[T]he correct test of good faith is subjective: there is good faith if the public servant honestly believes ...that he or she has authority. There are of course limits to a belief that, even though genuine, a court can accept as honest. Where there is absolutely no foundation at all for the belief, it will not be honest. Likewise, if the public servant is willfully blind to the true facts, the belief will not be honest. In this context, the reasonableness of a belief will assist in determining whether the belief is honest. But a belief may be unreasonable and yet honestly held because of the subjective situation of the public servant.”
In this case the Court of Appeal held that the district manager had an honest belief that he could suspend the licence with conditions, and so he was acting in good faith.

**Personal Risk**

Any civil servants who act in **bad faith**, i.e., who knowingly or carelessly abuses their authority, subjects themselves to personal risk. In particular, both decision makers and their staff operating in a statutory forest management regime can subject themselves to personal risk if they fail to act in accordance with the rules laid down by the Legislature. A civil servant who does act in good faith, however, is granted substantial immunity in the exercise of his or her statutory powers.

Section 160 (1) of the *Forest Practices Code of British Columbia Act*, states:

“The ministers, persons employed under the Public Service Act and any other person who acts on behalf of the government are not liable in a personal or official capacity for loss or damage suffered by another person by reason of anything done or omitted in the exercise or performance or purported exercise or performance of a power or duty under this act, the regulations or the standards unless the person who brings the action proves that the person acting on behalf of the government was not acting in good faith.”

Section 142 of the *Forest Act* provides similar immunity to persons who act in good faith:

“No person who is a
(a) peace officer,
(b) forest officer,
(c) district manager,
(d) regional manager,
(e) chief forester, or
member of an appeal board or an arbiter or a person exercising a power or performing a duty in connection with an appeal provided for by regulation is personally liable for loss or damage suffered by a person because of anything done or omitted in the exercise or purported exercise of a power under this act or the Range Act or under regulations under either act unless it was done in bad faith.”

Section 3(2) of the *Crown Proceeding Act* confirms the immunity granted to a statutory decision maker, such as a district manager, acting
reasonably and in good faith while discharging responsibilities of a judicial nature (for example, making a determination where a potential penalty can be levied).

The consequences of acting in bad faith can be severe. A public servant who is found to have acted in bad faith is deemed to have acted outside their Oath of Office. Such conduct takes the person outside the protection of the limitation of liability provisions referred to above. The possible consequences to the individual are:

- compensatory and punitive damages
- dismissal; or
- in extreme cases, imprisonment.

Bad faith can also bring the Forest Service and government itself into disrepute.

Professionals are accountable for any and all work they do in their capacity, or in the expectation that they are acting in their capacity. Foresters are professionally accountable for the quality and content of any plans they prepare, as well as for any consequences that flow from the implementation of that plan as written. Statutory decision makers who are also professionals are at professional risk. The duties that statutory decision makers have to their employers, and their freedom to manage do not supersede their professional responsibilities.

Accountability is exacted through the complaints and discipline processes of the Association of British Columbia Professional Foresters.

Professional risk is the risk of being challenged based on a professional code of ethics and standards or practice. Professional accountability principles have not changed, but recent changes to the Forest Practices Code of British Columbia Act have resulted in more reliance on them.

Prescribing foresters (government, licensee, and consultants) are professionally accountable for operational plans whether or not they are approved by the statutory decision maker. When the prescribing forester signs and seals an operational plan, they are certifying that the work is accurate and represents the quality of work expected by the profession. The prescribing forester assumes full professional accountability for content whether or not implemented, and for results of the plan, if implemented as planned. With this accountability comes liability. The risk of liability increases when professionally prepared plans, and the process the professional uses to prepare plans, fail to achieve the high standards that are expected by the profession.

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7 This material is guided by the ABCPF’s professional accountability workshop entitled “A Guide to the Effective Application of Professional Discretion under the Forest Practices Code of B.C. Act”, May, 1998.
Relying on other professional or expert advice is common when preparing or approving operational plans. Few professionals singularly possess the vast scientific, legal and administrative knowledge required to produce operational plans in the current legislative regime. Also, the content of operational plans often explicitly relies on various other professional assessments required by the Forest Practices Code of British Columbia Act. The Operational Planning Regulation requires that operational plans indicate whether or not they are consistent with the results of these assessments.

Other professionals or specialists are also accountable for their advice (as regulated by their professional association, if applicable) but the signing professional forester remains accountable for the content of the operational plan, including external advice incorporated into the plan.

**At the very least, professional foresters should be aware that when they are preparing plans or prescriptions that commit to specific ‘end results’, they must also provide specific directions on how to achieve these results.**

These directions may not be required under legislation for submission and approval of the plan, but would be required of its members by the Association of British Columbia Professional Foresters as a matter of proper practice.

Experience under the *Forest Practices Code of British Columbia Act* to date shows that many agency plan reviewers and statutory decision makers and their staff have been overruling the professional opinions of plan proponents because they are uncertain of the level of risk assumed by themselves and by the government if they approve the plan. It is a consistent theme of the current legislation that licensees bear the majority of the risk. This is deemed to be one of the trade-offs for the privilege of harvesting crown timber. Risk for the government then arises if the district manager approves a plan that is patently unreasonable, or relies on advice that is patently unreasonable.

When a reviewing staff member has doubts about an element in a plan simply because they would do it differently, he or she can not use that as a reason to recommend against the plan. The reviewer must have no doubt that the element of concern is not scientifically/technically sound or that it will not meet end results before they should recommend rejection. Review staff who do recommend rejection must provide a rationale under signature and seal in enough detail to satisfy the statutory decision maker that the element of concern meets its test for rejection and to provide sufficient information to the prescribing forester.
to make necessary changes. The decision to recommend rejection and the rationale must be of sufficiently high quality as to withstand potential peer review or scrutiny by the Association of British Columbia Professional Foresters disciplinary process should a complaint be made.

This does not mean that a statutory decision maker is bound to accept a plan just because it has been prepared by a professional. Neither does it mean that a district manager can accept a plan on blind faith, merely because it was sealed by a professional. What it does mean, however, is that professionally prepared plans should not be rejected simply because of a difference of professional opinion between the plan proponent and the statutory decision maker or their staff.

Applying Theory to Practice

Up to this point, this handbook has dealt with basic principles of risk assessment and risk management, statutory interpretation, and administrative law. The remainder of the handbook demonstrates the application of theory to practice in the form of operational plan approvals and compliance and enforcement activities.
Chapter Summary

- Each time a statutory decision maker exercises their discretionary authority, they leave themselves open to one of three types of risk:
  ⇒ the risk of a legal challenge;
  ⇒ personal risk; and
  ⇒ professional risk.

- The risk of legal challenge is the risk of a civil servant being challenged on substantive, jurisdictional, or procedural issues.

- Personal risk is the risk of the civil servant being accused of intentional, including reckless, wrongdoing. This risk exists when a civil servant is not acting in "good faith".

- Professional risk is the risk that a licensed professional will be called upon to justify their conduct and standard of practice to a disciplinary committee of their professional licensing organization.
Operational Planning under the Forest Practices Code:
Managing the Interface between Forestry and the Rule of Law

"The policy of being too cautious is the greatest risk of all."
Jawaharlal Nehru

Introduction

From the perspective of assessing and managing risk within a statutory forest management regime, the preparation and approval of operational plans presents some of the greatest challenges. In keeping with the principle that higher risks lead to greater potential for gains and for losses, it is also then at the approval stage that the largest net gains or losses to society may occur. It is the balancing of planned benefits against potential losses that is the crux of the operational planning process.

A proper understanding of the interface of risk assessment and risk management and the plan approval process is essential to ensure that society obtains the maximum balanced benefits from its forest resources.
Operational Plans

Section 1 of the *Forest Practices Code of British Columbia Act* defines “operational plan” as meaning a forest development plan, logging plan, access management plan, range use plan, silviculture prescription, and stand management prescription. Most of the discussion in this chapter will be in reference to the forest development plan, but the basic principles apply to approval of all the operational plans.

Basic Fundamentals

Optimal Level of Risk

As discussed in chapters two and three, environmental, social, and economic risks arise when society collectively decides to utilize the forests. These risks are inherent in the very nature of the business. Through the enactment of forestry legislation, the legislature attempts to define the optimal level of risk: one that optimizes the net benefits to society, both economic and non-economic. The forestry legislation recognizes that risk exists, and it doesn’t attempt to eliminate risk or even necessarily to minimize it. However, although the legislation seeks to guide activities toward the optimal level of risk, it often illustrates the acceptable level of risk.

Acceptable Risk

As discussed, the legislation attempts to achieve the optimal level of risk. Where it falls short, the legislation defines the acceptable level of risk. An acceptable level of risk exists where the benefits of a decision slightly outweigh the likelihood and magnitude of the loss which may be incurred. It is during the evaluation of the operational plan, that statutory decision makers must determine whether the plan poses an acceptable or unacceptable risk as defined by the legislation.

Unacceptable Risk

Although the legislation often determines the optimal or acceptable level of risk, it often expressly determines the unacceptable risks. These are either directly stated, or indirectly in the form of an explicit statement of the acceptable risk. Unacceptable risks are usually those that can not be remediated, or where extremely high values are at stake given the expected benefits. For example, operations in and near fish streams and domestic water intakes are strictly controlled. Statutory decision makers must be aware of those areas where their discretionary power is most limited.

Accountability

The approval of an operational plan requires a considerable amount of technical and legal analysis. And while aspects of the plan approval process may be facilitated by staff and technical, professional and legal advisors, the final decision rests with the statutory decision maker or the lawfully authorized delegate. By choosing to accept the information and advice of others, the decision maker is, in effect, taking ownership of that information. The decision maker, as the legislature’s delegate, is accountable to the legislature for ensuring that its intentions are given effect. An approach to striking this balance of duties between ownership and accountability for the decision and the advice and
support provided by staff is outlined in the appendix #5 “An approach to operational plan approval”.

**Jurisdiction**

As illustrated by the decision of the B.C Court of Appeal in the ‘spotted owl’ case referred to earlier, statutory decision makers only have authority to decide on, and are only accountable for, those matters that are within their jurisdiction. In operational plan approvals, decision makers should only be addressing those matters which they are required to by the legislation. They may consider non-jurisdictional concerns and refer to them in their decision rationale, but they can not base their decision on those non-jurisdictional or irrelevant considerations and they can not decide on matters that are extra-jurisdictional. However, this does not preclude them as public servants from informing those with jurisdiction of the issues/concerns for their information or decision.

**Judgment**

Statutory decision makers are accountable for their decisions. However, they are not expected to ensure that no environmental, economic or social losses occur, but only to ensure that they occur within the acceptable limits of risk set out in the legislation. One consistent theme of the Forest Practices Code of British Columbia Act regime is that as long as statutory decision makers fulfill their obligations with due diligence and in good faith, the licensee ultimately bears the risk for losses that occur as a result of its planning or practices activities.

To demonstrate due diligence, decision makers must show that they anticipated and accounted for foreseeable risks to the extent required by their enabling legislation. That ‘extent’ isn’t always clearly defined in the legislation, and that is where statutory interpretation principles apply. The standard of due diligence to be met by the statutory decision maker is an objectively ‘reasonable’ standard. What is ‘reasonable’ in each case will depend on the proper interpretation of the legislative provisions in the context of all the circumstances of the case.

**Uncertainty**

Consideration of each of the risks will be complicated by uncertainty. However, uncertainty doesn’t have to paralyze the decision making process. For example, it may happen that although there is a large degree of uncertainty associated with an issue such as whether a stream is a class 2 or 3, its ability to impact the result may be quite limited. The area that may require a different riparian reserve zone width may have slope stability concerns and thereby be reserved from harvest anyway. Conversely, some small areas of uncertainty can have drastic impacts on the end result and thereby require a detailed statement of assumptions, careful analysis, and subsequent management.

Furthermore, often uncertainty may be reduced by gathering additional
data. In deciding whether a proposed forest development plan will have too large an impact on aboriginal trapping rights, for example, uncertainty may be reduced by means of an analysis of the amount of land base in the trapping area which has been affected by development and accessing the expertise of a biologist.

The Plan Approval Process

The remainder of this chapter outlines the five stages of the plan approval process:
- **Pre-planning** - Making information ‘known’;
- **Plan preparation** - Assessments; definition of ‘area under the plan’;
- **Public review and comment and agency referral**;
- **Evaluation and analysis of the plan**; and
- **Determination and rationale**.

At each step in the approval process it is necessary to assess the environmental, social and economic risks that the plan presents. To do so, the process outlined in the chapter on risk assessment can be used. It may not be necessary to conduct a formal risk assessment where each step is documented, but considering each step of the procedure and subsequently documenting the thought process in the rationale will improve the defensibility of the approval or disapproval. Furthermore, considering each of the three risk types individually provides the decision maker with a more thorough understanding of the risks the plan presents and provides additional information for determining the adequate management and conservation of forest resources.

1 - Pre-planning

Work starts prior to plan preparation

Under the *Forest Practices Code of British Columbia Act* regime, the statutory decision maker’s work on plan approval begins even before the plan is prepared and submitted by the proponent. This is in part because of the concept of ‘known’ information as defined in the Operational Planning Regulation (“OPR”).

‘Known’ information

‘Known’ means, when used to describe a feature, objective or other thing referred to in this regulation as ‘known’, a feature, objective or other thing that is:
(a) contained in a higher level plan; or
(b) otherwise made available by the district manager or designated environment official at least four months before the operational plan is submitted for approval.

In other words, if the district manager and the designated environment official have any particular features, objectives or other things that are referred to in the OPR as ‘known’, and which they wish to have addressed in the plan, they will have to ensure they have a process in place to advise the licensees at least four months prior to submission of the operational plan.
2 - Plan Preparation

Assessments

Section 17 of the *Forest Practices Code of British Columbia Act* makes it clear that the plan proponent is required to carry out only those assessments which are ‘required by the regulations’.

There are a number of mandatory assessments required by the OPR. There are also some discretionary assessments that a district manager can require, such as a forest health assessment under OPR sec. 13, or an archaeological impact assessment under OPR sec. 37(1)(e). The OPR sets out the requirements for the time at which the various assessments must be done, but section 26(2) of the OPR and section 41(2) of the *Forest Practices Code British Columbia Act* give the district manager the discretion to advance the timing. Efficiency and procedural fairness require that the decision maker’s requirements with respect to assessments be reasonable and be communicated to the plan proponent well in advance of plan preparation.

Area Under The Plan

The phrase ‘area under the plan’ is crucial to assessing a forest development plan as it sets the parameters for the information to be contained in the plan. In the Brooks Bay/Klaskish decision (Appeal No. 96/04(b), June 11, 1998) the Forest Appeals Commission (the “Commission”) determined the meaning of the phrase by looking at its use in section 13 (now section 9) of the OPR. Section 13 states:

1. A person must ensure that a forest development plan addresses an area *sufficient in size to include all areas affected by the timber harvesting and road construction or modification operations proposed under the plan*. [emphasis added]

2. If the district manager determines that the area under the plan does not meet the requirements of subsection (1), the district manager may, in a notice given to the person, specify the area that the plan must address.

The Commission decided that the plan and the area under the plan are the same thing. The area, after it is initially identified or defined by the licensee, does not change. The area must be large enough to include all the areas affected by the proposed timber harvesting and road construction or modification activities, and the resources in the entire area must be identified in accordance with the legislation. It is not adequate merely to address the cutblocks themselves and the areas immediately adjacent to the cutblocks.

The Commission noted, however, that the individual content requirements set out in the Operational Planning Regulation do not always apply to the entire ‘area under the plan’. The licensee and the district manager must look to the specific legislative requirements to see whether the information is required for the entire area under the
plan, for an area under the plan, or just for the cutblocks or roads themselves.

Based on this reasoning, the ‘area under the plan’ should be clearly identified on the plan map, and the district manager and the plan proponent should reach some degree of understanding as to what area will be “sufficient”.

3 - Agency Referrals and Public Review and Comment

Referrals

Section 7 of the OPR authorizes the district manager to provide written notice to plan proponents requiring them to refer the plan to those agencies or persons specified in the notice. A copy all comments received during the referral period must be submitted to the district manager by the plan proponent along with a summary of all revisions made to the proposed plan or amendment as a result of the comments. The extent to which the district manager is required to consider or address these comments is discussed below under the heading “Use of comments from agency referrals and public review”.

Public Review and Comment

Forest development plans and range use plans are the only two operational plans for which public notice and the opportunity for public review and comment are legislatively required. The OPR, however, gives the district manager the discretion to require public notice for logging plans (sec. 36), silviculture prescriptions (sec. 47), and stand management prescriptions (sec. 51).

Use of comments from agency referrals and public review

Any relevant information provided by Forest Service or Ministry of Environment, Lands and Parks staff, or through the public review and comment process, must be considered. However, there is a difference between:

- considering information regarding forest resources that are not mandatory content requirements; and
- requiring protective measures for the resources that are not mandatory content requirements.

The challenge for district managers is to achieve this difficult balance by not ignoring relevant information on the one hand, and not imposing additional content requirements – over and above what the legislation requires – on the other.

In achieving this balance, it is important to recognize the limitations of the review and comment provisions of the Forest Practices Code of British Columbia Act and the OPR, the power to require additional information under Section 41(2) of the Forest Practices Code of British Columbia Act, and the power to impose conditions under Section 41(5) of the Forest Practices Code of British Columbia Act. It is reasonable to assume that their scope falls short of empowering district managers to
ignore procedures established elsewhere in the legislation (e.g. the procedures under Part 2 for establishing higher level plans, the procedures in the OPR for designating “identified wildlife”, etc.).

The challenge of achieving this difficult balance is a quintessential example of the Forest Practices Code of British Columbia Act reliance on the judgment of district managers in interpreting and applying its provisions. The legislation provides little guidance on how the requisite balance is to be achieved.

Clearly, all relevant information must be considered. It will be up to district managers to determine what weight to give to information provided for their consideration which goes beyond the content requirements expressly set out in the Forest Practices Code of British Columbia Act and the OPR.

What about those situations where there has been no comments received from the public or referral agencies? In those cases it may be appropriate for the decision maker to rely on the professional accountability of the forester submitting the plan. Alternatively, if decision makers have some concerns about the quality or completeness of a plan, they may make their own inquiries. In the Brooks Bay/Klaskish case, the district manager conducted his own research into marbled murrelet after the issue was raised in a general way by the Sierra Club. In that case, the Commission held that he was correct in concluding that information was not required in the FDP.

The fact that no comment has been received from an outside agency is not reason enough on its own to either delay further processing of the plan approval or to expand the mandatory content requirement of the FDP.

4 - Evaluation and analysis of the plan

Delegating work associated with the gathering of information for the statutory decision maker is a necessary part of the plan evaluation and approval process, as it is unreasonable to expect that a statutory decision maker has the time or is an expert in every area in which he or she needs to render decisions. Therefore, decision makers rely on the findings and reports by their staff and the other interested parties to provide them with as much pertinent information on the issue as possible. Experts should be utilized where it is reasonable to do so. The experience of the experts should be commensurate with the gravity or magnitude of the task they are given. These experts must be able to state any assumptions upon which they base their report and be willing to stake their reputation on their recommendations.

“In presenting issues and recommendations...it is

In presenting issues and recommendations to the decision maker it is
inappropriate for staff to filter out information as a result of the anticipation of what the statutory decision maker will allow or approve."

"The statutory decision maker must however, ensure that the decision to rely on staff and to incorporate professional recommendations is made in a diligent manner."  

It is important for staff to remember that they do not make the final decision and must provide advice in a manner that allows the statutory decision maker to make a fully informed final decision.

"The statutory decision maker must however, ensure that the decision to rely on staff and to incorporate professional recommendations is made in a diligent manner to protect against challenges of the plan approval.

The development of district manager or designated environment official policies for certain issues may allow for minor issues to be resolved by the respective decision maker’s staff, but the use of staff discretion in this regard, without communication with the statutory decision maker should be avoided on any potentially contentious or pervasive issues.

**The use of statutory decision maker’s policies and procedures may prove helpful to staff in the collection of relevant information but where discretion is exercised by staff, it should be communicated to the statutory decision maker who makes the ultimate determination of its suitability.**

District managers and designated environment officials should ensure there are no policies, guidelines, templates, or other forest management documents in use in their offices which attempt to impose content requirements over and above those requirements specifically referenced in the Forest Practices Code of British Columbia Act or the OPR.

In addition to the issues and recommendations communicated to the statutory decision maker from the staff, other information sources that may influence the final determination include public comment, interagency comments, legal advice and ancillary legislation. The solicitation and coordination of this information may be done directly by the statutory decision maker or by the staff. Again, if staff assist in this function, they must be sure to provide all the information to the statutory decision maker and avoid filtering information based on assumptions about what the statutory decision maker will decide.

Additional information that may be considered by the statutory decision maker includes policies and guidebooks although these are not binding.
except in the limited circumstances detailed in chapter seven. The B.C. Supreme Court in the Metecheah case adopted the reasoning in Jones & de Villars:

“[E]ven if the external policy is relevant, the rule against fettering requires the [decision maker] to exercise his own discretion in deciding whether and how to accept the policy. In particular, the [decision maker] cannot simply treat the external policy as a given, and may be required to permit cross-examination and refutation of that policy.”

To re-emphasize, although a statutory decision maker may delegate work in information gathering, reviewing and assessing operational plans, the ultimate decision whether or not to approve the plan rests solely with the statutory decision maker.

Having made a decision the statutory decision maker must be able to justify and explain the decision and each step of the decision making process. This requires an understanding of the processes that lead up to the plan approval including the information reviewed and communication with the licensees and third parties. If a decision is challenged, it is not usually the work of the staff that is challenged but rather the decision itself and how it was formulated.

Specific Legislative Requirements

The specific legislative provisions dealing with operational plan approvals are discussed in detail in the Forest Practices Code Administrative Bulletin No. 5, “Guide to approving forest operational plans after June 15, 1998”, which is attached as Appendix 2.

5 - Determination and Rationale

The approval process to this stage has produced a decision by the statutory decision maker. The articulation of this decision is not in the form of a simple approval (or disapproval), but an accounting of the relevant facts and considerations that the decision maker used to reach the decision.

“A comprehensive written rationale is essential to successfully defend against the legal challenge of a decision. The decision maker’s assessment of the gravity and magnitude of the plan approval will be the primary factor in deciding how extensive the written rationale has to be. For example, in the Metecheah case, the district manager was accused of basing his cutting permit approval on a number of irrelevant considerations. Because he had anticipated the legal challenge and had articulated the factors upon which he had based his decision, the court was able to determine that the district manager had not given any weight to irrelevant considerations, and that the decision had not been predominantly based on irrelevant factors.
The risk of legal challenge will of course be based on such factors as the nature of the decision and its potential negative implications, the real and perceived environmental, economic, and social risks, and the number and nature of the parties whose interests may be affected.
Chapter Summary

- It is the balancing of planned benefits against potential losses, both monetary and non-monetary, that is the crux of the operational planning process.

- The plan approval process consists of the following five stages:
  - Pre-planning - Making information ‘known’;
  - Plan preparation - Assessments; definition of ‘area under the plan’;
  - Public review and comment and agency referral;
  - Evaluation and analysis of the plan; and
  - Determination and rationale.

- Although statutory decision makers may delegate work, the ultimate decision whether or not to approve the plan rests solely with them.
Compliance

“In this chapter:
• Introduction
• Risk assessment
• Risk management through compliance
• Developing assessment plans
• Assessing compliance

Introduction

Once the necessary plans and prescriptions have been approved and the appropriate permits issued, implementation of the activities can begin. The role of the Forest Service then becomes one of assessing compliance with legislation, the approved plans, the licence and permits and to take appropriate enforcement action when necessary.

In the process of approving plans, some of the forest management risks are managed, however environmental, economic and social risks still exist. These risks are managed during the plan implementation by the use of inspections.

Inspections manage risks in the following ways:
• they promote compliance;
• they find non-compliance; and
• inspections facilitate on going communication to prevent non-compliance from occurring.

Inspections are the primary tool for assessing compliance but it is not always possible to inspect all activities. It is necessary to allocate limited inspection resources in an efficient manner that is based on a comprehensive assessment of risks.

The process for assessing risk outlined in chapter three can be used to
assess risks for the purpose of allocating inspection resources. However, this process is applied somewhat differently in a compliance context.

To assess forest management risks after the required operational plans have been approved, it is important to understand the obstacles that may impede an accurate assessment and what information sources are available to conduct the assessment.

Approved plans represent those forest management risks that are determined to be an acceptable level of risk as defined by the legislation and in the application of the statutory decision maker’s discretion. However, there are several uncertainties:

1. There exists the possibility that the information in the plans is not entirely accurate and that additional forest management risks do exist;
2. There exists the chance that the approval was flawed and insupportable. Values that may be impacted by any mistakes in the planning process, generally are protected by default legislated standards; and
3. The assumption that the approved plan represents at least an acceptable level of risk is predicated on the belief that the plan will be implemented exactly as intended, however there certainly exists the possibility that this is not true.

Inspections ensure that approved plans are appropriate, implemented as intended and that results based legislated requirements are met.

The assessment of risk for the purposes of inspection planning is similar to the risk assessment for operational plan approval. The differences originate in two areas.

First, because inspections are a tool by which compliance is assessed and not a legislated obligation such as plan approval, the weighting of information that is simply considered during the plan approval may be much greater when assessing risk for prioritizing inspections. For example, where a statutory decision maker has some discomfort with the operator that will be carrying out the proposed activities she or he can not refuse to approve the plan on that basis alone. However, when conducting the risk assessment for prioritizing inspections the consideration of the operator’s past and current performance may result in a high risk rating.

Second, since the risk assessment occurs just before or during the implementation of the plan, the adjustment for risk factors is generally a more important and more accurate step in determining the risk rating.
Risk Assessment Process

The risk assessment process as described in chapter three is applicable for assessing risk to prioritize inspections. However, there are some differences from the general process that warrant a specific discussion of each of the six steps below.

Step 1: Identification of Detrimental Events and Values

If during the plan approval process, the risk assessment was documented, the identification of potential detrimental events should simply involve confirming the detrimental events that were considered during the plan approval and amending the list of detrimental events to reflect any events that may have been missed or that may not have been relevant at the time. Where the events were not documented during the plan approval process, it is anticipated that the identification of potential detrimental events would involve communications between the compliance staff and the planning staff.

Similarly, this communication is essential in identifying the environmental, social and economic values that may be at risk, if they were not documented during the plan approval process.

Another source of information that may be used by the compliance staff to identify values at risk may be public comment that was received after the plan had been approved or comments on a previously approved category ‘A’ block. These latter comments cannot be used to refuse to approve a plan except in limited circumstances, but the comments may be important for assessing risk to prioritize inspections.

Step 2: Determination of Likelihood

The determination of likelihood for assessing risk to prioritize inspections should start with examining the likelihood’s that were determined and documented during the plan approval. It is necessary to ensure that the likelihood’s from the plan approval process represent the most accurate determination particularly where a significant length of time has passed since the approval of the plan. In addition, because of the ongoing communication between the licensee and the ministry during the plan approval process, it is necessary to ensure the likelihood’s reflect the approved plan and not a previous iteration of the plan.

Where the likelihood’s as taken from the plan approval are not ‘accurate’, it is necessary to determine the individual likelihood’s based on all the relevant information.

It is also necessary to consider the likelihood of ‘uncertainties’ occurring. For example, it may be useful to consider the likelihood that the plan is flawed or the likelihood that the plan will not be carried out as described when determining the likelihood of the individual.
detrimental events occurring.

The Forest Practices Code of British Columbia Act allows for a certain amount of impact on environmental, social and economic values. Although it is assumed that the approval of operational plans filters out the situations where these impacts would extend beyond that allowed in the legislation, it is still necessary to determine the magnitude of the consequences to these values if a detrimental event occurs.

The magnitude is dependent on two primary factors, **impact** and **time**. Determining each of these should involve considering the determination of the magnitude of consequence during the plan approval and consideration of specific field knowledge. Often the compliance staff have an advantage over the plan approval staff because of their ongoing experience in the field conducting inspections of activities that are, at times, not in compliance. These staff then, often can provide the most accurate assessment of the magnitude of consequence.

Those magnitudes which represent impacts that are not easily rehabilitated over any period of time, regardless of the likelihood of a detrimental event occurring should be a priority for inspection.

“When determining the likelihood and magnitude of consequence in the assessment of risk, it is necessary to note that both are determined as absolute values and not relative values.”

The determination of the initial risk rating is the same as that outlined in chapter three.

Many factors affect the risk at this stage. Timing, performance and market risk factors affect both the initial risk rating and the subsequent changes to that risk rating during the inspection process.

The assessment of risk for the purposes of developing of an inspection plan may use additional information that was not used in the approving of the plans. For example, the risk assessment may use information from ERA or perhaps, some of the comments that could not be directly addressed in the plan, may be considered relevant for determining inspection priorities. For example the season of operations may not have been important enough to create a ‘no go’ decision or an approval with conditions, but it may be a risk factor, that must be taken into account when prioritizing inspections.
One of the ways that licensees can manage their own uncertainties, is to have internal safeguards which go an extra distance to ensure that detrimental events do not occur. Where the ministry is assessing risk and is aware of a licensee’s extraordinary internal safeguards, the likelihood of certain detrimental events may be determined to be lower than for those licensees without the extra safeguards.

Step 6: Final Risk Rating

Although a ‘final’ risk rating can be calculated based on the discussion in chapter three, risk assessment for prioritizing inspections occurs both prior to any inspections being conducted and following each inspection. The assessment of risk following each inspection is simply a confirmation or revision of the risk rating based on the new information.

It is particularly important when assessing risk for the purpose of developing an inspection plan to consider the influence that the risk factors have on the risks, as there is a key linkage to the determining the timing of inspections.

With the limited resources available to districts to conduct inspections, an additional risk factor may be, the inability to carry out inspections; that is, if it is common knowledge that a district is not conducting inspections of low risk silviculture activities, the risks may actually increase on those activities because they may be done less diligently by some licensees.

Risk management occurs in two distinct ways:

- first, in developing an inspection plan that places priority on the highest risk activities as well as allowing for a specific number of inspections on lower risk activities to provide a sufficient disincentive to contravening; and
- second, in carrying out each individual inspection. Depending on the type and timing of inspection, the risks can be managed more or less effectively.

Given that government resources are limited and at times may fall short of the ideal, they must at least be used in a systematic, defensible manner. The most defensible manner in which to allocate inspection resources is to base the allocation on risk to environmental, economic and social values as defined by the operational plan and the default legislated standards (results based).

Risks are managed during the inspection process in three ways:

1. Inspections promote compliance. Knowing that operations may be inspected, licensees have additional incentive to manage risk appropriately and achieve the desired end result.
2. Inspections find non-compliance. Often non-compliance, if left
unchecked will create larger losses than if found and remediated promptly.

3. Inspections provide the only opportunity to communicate during the implementation phase. This communication about expectations or interpretations prevents non-compliance from ever occurring. It is always more desirable to avert non-compliance than simply wait to take enforcement measures after a contravention has occurred.

**Inspection types, methods and extent**

It is an oversimplification to state that inspections on their own are the risk management tool. Although this is true to some degree; to inspect or not is the primary tool. However, the approach and diligence of each inspection forms a secondary tool that is no less important to managing the risk.

The three components of the diligence of inspections are when it is inspected or otherwise referred to as the type, the method of the inspection and the extent of inspection.

The **inspection types** include:
- initial;
- progress;
- follow-up; and
- final.

The inspection types refer to the timing of the inspection. Initial inspections generally occur at the commencement of the activity and form a key role in the communication function of inspections. Progress and follow-up inspections occur during the activity as an ongoing assessment of compliance. The final inspections occur at or after the completion of an activity and are generally the last assessment of compliance of the activity.

The **methods** of inspection include:
- aerial ocular;
- ground ocular;
- ground reconnaissance; and
- detailed survey.

Different methods of inspection focus on an increasing level of detail. Accordingly, as the risks increase, the detail assessed increases as does the cost of the assessment.

The **extent** of an inspection refers to whether the inspection is of the entire activity or whether it is focused only on a specific concern (riskiest component of the activity). Some inspections are general in nature and assess the compliance with all applicable plan and legislated
requirements, while other are focused on one aspect or phase of the activity.

In varying combinations of the type, method and extent of inspections, a district can allocate inspection resources in a cost efficient manner that matches the timing and degree of scrutiny required for any given activity.

**Developing Inspection Plans**

Inspection planning is not only an art, but it is a fluid dynamic process for allocating limited inspection resources to the activities to be inspected in a cost effective, defensible and systematic manner.

A district inspection plan should incorporate the inspections planned for all activities within the district. As discussed, the number of inspections is but one component of this plan. Equally important from both a risk management and a resource allocation point of view is the degree of scrutiny and timing of each inspection. It is not acceptable to plan inspections in isolation, neither within individual program areas, nor by individual inspectors. To do so, does not create a situation where all of the activities in a district are inspected based on risk. Different inspection plans for harvesting vs. silviculture may focus too many inspections on the silviculture activities compared to the potentially more damaging harvest activities.

An equally important consideration in inspection planning is the experience, knowledge, training and skills of the inspectors. Generally, the more experienced inspectors should be inspecting the most complex, high risk sites.

When creating and updating inspection plans it is preferable to have the inspectors intimately involved in the development of the plan because of their knowledge about their own abilities and about the time and resources required to conduct the inspections.

Inspection planning is an ongoing process and the initial inspection plan must be continually revisited to reflect revised risk ratings and availability of resources.

**Assessing Compliance**

As stated in the introduction, compliance is assessed against the operational plans and any default legislated standards. The default standards apply regardless of the plans in place and generally ensure that irreversible environmental damage does not occur. It is far more preferable to mitigate irreversible damage, than attempt to remediate it.

In order to assess compliance with the operational plan, the inspector should be fully aware of the legislation that governed the planning
requirements, any assessments that were considered during the plan approval process, and should have a direct link with the plan approval staff to ensure good communication of information. This not only serves to fully ‘paint’ the picture for determining compliance, but form a feedback loop to those involved in the planning process to assist in future plan approvals.

Where discrepancies or vague requirements are uncovered at the inspection stage, they should be brought up to the plan proponent for possible amendment or clarification and to the plan approval staff for information.

Statutory decision makers must exercise their authority according to their enabling legislation. At the compliance stage, this responsibility continues, but under a slightly different framework. First, the legislation is somewhat confined to the default standards. Second, the interpretation is often done by the compliance staff and not the statutory decision maker.

Similar to the plan approval process however, legislation is not always clear. This emphasizes the importance of the fact that compliance staff have an excellent understanding in the principles of statutory interpretation. This is not to say that they cannot seek assistance from the statutory decision maker or legal counsel, but that they must be comfortable in their interpretation of the requirements when finding non-compliance, or in judging an area or activity as being in compliance. It should be noted however, that this is not a formal determination of non-compliance. That determination is ultimately reserved for the statutory decision maker.

Statutory Interpretation

Just as it is important for statutory decision makers to determine what the legislation says for the purpose of making decisions, it is also important for compliance staff to determine what the legislation says in order to assess compliance with it. The basic rules of statutory interpretation as discussed in chapter six should assist statutory decision makers and their compliance staff to operate effectively within a statutory forest management regime.
# Chapter Summary

- Inspections assess and promote compliance.

- Inspections reduce the risk associated with forest practices by finding impending, or noncompliance before it creates larger undesirable results.

- Inspection provide additional incentive for licensees to manage risk appropriately to achieve the desired end result.

- The inspection **types** include:
  - initial;
  - progress;
  - final; and
  - follow-up.

- The **methods** of inspection include:
  - aerial ocular;
  - ground ocular;
  - ground reconnaissance; and
  - detailed survey.
Enforcement

“Government is not reason, it is not eloquence, it is force; like fire, a troublesome servant and a fearful master
Never for a moment should it be left to irresponsible action.”
George Washington

Introduction

Enforcement is the last chance in the statutory forest management process to ensure that the legislative requirements are met in practice. At the same time, enforcement presents great challenges to a statutory forest management regime. All enforcement actions are ultimately founded in statute and inappropriate enforcement can, in extreme cases, put that statutory foundation at risk.

Clear observation of the rule of law is of paramount importance in the enforcement context. Enforcement provisions usually have a direct negative impact on persons against whom they are applied. As such, they are a frequent source of legal challenge. Accordingly, the implementation of enforcement actions requires good judgment and sound decision making ability. Sound enforcement decisions usually involve the assessment and management of risks.
The Three Key Forest Management Risks

**Environmental risk** arises in that the enforcement actions should provide an adequate deterrent message to reduce the risk of future environmental damage. In some circumstances, prompt enforcement action in the form of stopwork orders or remediation orders may immediately limit environmental damage.

**Economic risk** is important because the legislation contemplates that the Crown should be compensated for losses resulting from contraventions, and licensees are meant to substantially bear this risk. On the other hand, licensees can suffer needless economic harm if enforcement actions are taken improperly or inappropriately.

**Social risk** is reflected in the fact that, as noted above, enforcement actions are the last step in the forest management process. They are the last chance to ensure that the management of forest resources and values, as contemplated by the legislation, is reflected in results in the field.

In assessing these risks, the same six step assessment process outlined in chapter three should be applied.

Risk of Legal Challenge

Enforcement actions bring the power of the state to bear against the person who is alleged to have broken the law. The courts jealously guard the liberty of the individual, and thus require the enforcement official to meet the ‘correctness’ test; the official must be the statutory authority to take the enforcement action.

Another aspect to the risk of legal challenge is the chance that the statutory authority itself may be struck down. The extent of some of the enforcement powers under the forest management legislation may be subject to challenge - for example, section 107 of the *Forest Practices Code of British Columbia Act* provides for powers of entry and inspection without warrants. Similar powers have been upheld by the courts in other contexts. However, if statutory enforcement powers are exercised in a manner that the courts determine exceeds the limits of constitutionality, and if the courts decide that that excessive use of power accurately reflects the intention of the legislation, the courts will not hesitate to strike the legislative power down and rule it invalid. Accordingly, it is important to exercise enforcement powers only to the extent that the circumstances, the risks, and the law warrant.

“the risk of legal challenge increases in situations where the potential loss or damage is high”

Because enforcement actions can have such negative consequences for the person against whom they are applied, and generally involve grievous issues, they have a high probability of being subjected to legal challenge. An assessment of the gravity and magnitude of the issue is an important part of the enforcement decision making process because it
is a factor in determining how much time and resources should go into an investigation. Risk is a function of the likelihood of loss or damage and the potential magnitude of the loss or damage, and so the risk of legal challenge increases in situations where the potential loss or damage is high.

For example, if the case involves serious environmental damage (high potential for loss) so that the accused person faces significant penalties and social stigma (high likelihood of challenge), or if the nature of the social value that was impacted makes it especially important to establish a precedent, the investigator will want to be exceptionally thorough in gathering evidence to prove the relevant facts. On the other hand, if the consequences flowing from the contravention are relatively minor (low potential for loss), or if the licensee is cooperative to the point of agreeing to a statement of facts (low likelihood of challenge), the investigator probably won’t have to expend the same amount of effort in gathering and documenting evidence. That stated, there is always a minimum acceptable standard which applies to any enforcement action, regardless of the nature or simplicity of the issue.

### Personal Risk

The legislation doesn’t always provide the authority to deal with a particular situation to the extent that a forest official or officer may think it should. Sometimes it seems tempting to ‘stretch’ the meaning of a statutory provision to make it fit the situation. This is always improper, but it is especially egregious in the enforcement context. The authority to bring the government’s enforcement powers to bear against a person (including a corporation) is a responsibility that must be exercised in accordance with the law. Forest officials or officers who purport to act with authority which they know, or should know they do not have, are not acting in good faith and may lose the benefit of the statutory protections against personal liability.

Problems to be especially avoided in the enforcement context include searching without lawful authority, seizing property without lawful authority, and false arrest. Inappropriate use of stopwork orders also can have a very serious impact.

### Professional Risk

Licensed professionals must practice their profession to the standards set by their licensing body. Furthermore, members of a profession are expected to meet certain standards even outside the practice of their profession.

For example, most enforcement activities do not constitute the “practice of professional forestry” as defined in the *Foresters Act*. However, a forest official or officer who is also a professional forester may be liable to face sanctions from the Association of British Columbia Professional
Foresters for his or her conduct resulting from enforcement activities that don’t fall within the definition of professional forestry. A professional forester who has been determined to have acted in bad faith in conducting enforcement activities may be subject to discipline by the Association of British Columbia Professional Foresters for “infamous conduct” or for “conduct unbecoming a member”.

Which Enforcement Option?

The aspect of enforcement in which risk assessment and management are most relevant is in the choice of enforcement options. This includes such choices as:

- whether to take formal, informal or no enforcement action;
- whether to proceed by way of prosecution, administrative remedy, or both; and
- if by prosecution, whether to prosecute by way of Violation Ticket or Information.

The available enforcement options and criteria for their application are discussed extensively in the Basic Law Course produced by Compliance & Enforcement Branch and in various Ministry policies. That material will not be reproduced here, but should be referred to when considering different enforcement alternatives.

Fundamental to each such decision is the need to:

- determine which options are authorized by the relevant legislation; and
- weigh the assessed risks associated with each option against the anticipated losses and benefits (including non-monetary losses and benefits).

In weighing the losses and benefits, it is necessary to look not just at the impact on the Crown or society at large, it is also relevant to consider the effects on the licensee. That is, consider whether the licensee has benefited from the alleged contravention, and also consider whether the enforcement action being contemplated, such as a remediation order, may impose costs on the licensee that are out of all proportion to the damage done.

No action or informal action

The decision as to whether to take enforcement action starts with an accurate assessment of compliance. As detailed previously in chapter 11, this assessment is founded on statutory interpretation principles. That is, what does the law require, have those requirements been met, and if not, what enforcement actions are available in law? For example, you cannot instruct someone to do something that is not a legal requirement.

*The decision to take no

The decision to take no action or informal action should usually be
action or informal action should usually be reserved for those situations where no or very limited environmental damage has occurred..."

reserved for those situations where no or very limited environmental damage has occurred, the Crown has suffered no monetary loss, and the assessed risks were not high.

Assume, for example, that a road design across some unstable terrain above a fish stream calls for a section of end-hauling. During the construction of the road the weather has been dry and no slope stability problems have been apparent, so when the operator develops some mechanical difficulties with his gravel truck he decides to take a chance on sidecasting rather than end-hauling. He installs a few extra culverts and is successful in completing the road with no slides occurring. There has been no environmental damage and the Crown has not suffered a monetary loss. However, the unacceptable level of risk to the fish stream as determined in the approved operational plan is a factor which mitigates against taking no action or informal action. The likelihood of damage could have been very low, but the potential magnitude of the consequence could have been unacceptably high. Even if there had been no fish stream, and the risk from a slide was low, the need to send a deterrent message to prevent this or other operators from ignoring approved operational plans probably warrants formal action. (Note that if the risk of damage actually was low, it may not have been appropriate to require end-hauling to begin with. However, that is a judgment that was made at the time of approval and shouldn’t be second guessed at the enforcement stage.)

In most cases, administrative remedies will address the key forest management risks as well as or better than a prosecution. They are designed primarily to ensure that the Crown is compensated for unacceptable losses and to encourage compliance with the Forest Practices Code of British Columbia Act. Administrative remedies such as stopwork orders or remediation orders have an immediate effect, and the magnitude of monetary penalties available can act as a significant deterrent. Prosecutions require a higher standard of proof (beyond a reasonable doubt rather than balance of probabilities) and therefore more time and resources to reach a successful conclusion.

There are, however, circumstances where the public interest may require the additional process involved in a prosecution.

Prosecution should be seriously considered when:
• other methods of enforcement have in the past proven ineffective, or there is substantial reason to believe that other enforcement methods will not be effective;
• the person responsible is a repeat offender;
• the action of the person is willful or significantly negligent and resulted in damage to the environment or loss to the Crown; or
• there is substantial potential risk to the environment or the lives or
safety of innocent persons or property.

**Defences**

**Due Diligence**

Another factor in the decision whether or not to prosecute is the availability of due diligence as a defence. Forest Appeals Commission decisions have consistently held that due diligence is not a defence to administrative remedies under British Columbia’s forestry legislation - it is only a factor to be considered in mitigation of the penalty. When the performance evaluation and penalty regime of Bill 47 is eventually implemented, due diligence will still only be a defence against the disciplinary penalty portion rather than against the compensatory penalty portion.

On the other hand, due diligence is a full defence to a strict liability regulatory offence or to a true criminal offence. Accordingly, if the facts indicate that there is a strong argument to be made for a due diligence defence, the district’s enforcement resources will probably be better spent pursuing an administrative remedy rather than a violation ticket prosecution.

**Officially Induced Error**

"the defence of ‘officially induced error’ is available with respect to both regulatory offences and administrative remedies"

Administrative remedies are a relatively new enforcement tool, with a limited number of court decisions analyzing their scope and application. The Forest Appeals Commission has determined that the defence of ‘officially induced error’ is available with respect to both regulatory offences and administrative remedies. The defence arises when a person alleged to have contravened a legislative provision did so in reliance on erroneous advice received from a responsible government official. To be successful, the person must show that:

- he or she recognized prior to committing the act that it may raise legal issues, and that he or she made reasonable efforts to ascertain what the law was;
- he or she sought advice from a government official involved in the administration of that particular law;
- the advice was apparently reasonable, but was in fact incorrect;
- he or she actually relied on the advice;
- the reliance was reasonable in the circumstances and was in good faith; and
- he or she took reasonable care to give accurate information to the official whose advice he or she sought.

There may be other defences available against administrative remedies as well, but it is likely that the number and scope of such defences will be more limited than they are for prosecutions. The availability of various defences and the likelihood of conviction are relevant matters to consider when deciding on whether to pursue administrative remedies, prosecution, or both.
Violation ticket or Information

A violation ticket is a form of prosecution and requires the same level of proof as a prosecution initiated by an Information. If it is disputed, it often requires just as much administrative effort with respect to preparation of a Report to Crown Counsel as does a prosecution initiated by Information, but the penalty is usually significantly lower. If achieving a conviction through a violation ticket in a particular situation is going to consume substantially the same amount of time and resources as a full blown prosecution by Information, but the potential for deterrence is less, then the prosecution should be initiated by Information. Accordingly, if prosecution is a preferred enforcement option, a violation ticket should only be used if:

- the contravention is expressly designated as a ticketable offence in the Violation Ticket Administration and Fines Regulation;
- the evidence is relatively simple and straightforward, and supports a reasonable likelihood of conviction;
- the public interest requires legal proceedings but not a public hearing;
- the set fine is adequate for the magnitude and nature of the offence; and
- there is little or no potential or actual damage to the environment.
Chapter Summary

- The implementation of enforcement actions requires good judgment and sound decision making ability.

- Enforcement actions have immediate and potentially long term negative consequences for the person against whom they are applied.

- The aspect of enforcement in which risk assessment and management are most relevant is in the choice of enforcement options.

- Fundamental to each enforcement decision is the need to:
  ⇒ determine which enforcement options are available under the legislation; and
  ⇒ weigh the assessed risks associated with each option against the anticipated losses and benefits (including non-monetary losses and benefits).
### Appendix 1 - Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Bad faith</td>
<td>Intentionally or recklessly abusing one’s legislated authority.</td>
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<tr>
<td>Civil law</td>
<td>A system founded on written laws or statutes.</td>
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<tr>
<td>Common law</td>
<td>The body of unwritten laws upon which our legal system was founded.</td>
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<tr>
<td>Context</td>
<td>For the purposes of statutory interpretation:</td>
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<td></td>
<td>• the immediate context of the subsection (that is, the adjacent words); and</td>
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<td></td>
<td>• the general context of the Act. You also have to consider the “purpose” or “object” of the Act.</td>
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<tr>
<td>Detrimental events</td>
<td>Events that may cause loss or damage to environmental, social or economic values.</td>
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<tr>
<td>Discretionary decisions</td>
<td>Decisions that allow the decision maker to choose whether to make a decision or not.</td>
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<tr>
<td>Economic risk</td>
<td>The chance of monetary loss as a result of actions taken or decisions made.</td>
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<td>Encumbrance</td>
<td>Any legally recognized interest in land, and if aboriginal title is an interest in land, then it, too, can be an encumbrance.</td>
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<tr>
<td>Environmental risk</td>
<td>The chance of loss or damage to physical and ecological factors as a result of actions taken or decisions made.</td>
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<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
<td>Fettering</td>
<td>Imposing improper constraints on the designated decision maker, that in their eyes, constrains the ability to render an independent decision.</td>
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<td>Guidebooks</td>
<td>Reference material to consider, except in the limited circumstances.</td>
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<tr>
<td>Information</td>
<td>The initiation of a prosecution for an offence.</td>
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<tr>
<td>Jurisdiction</td>
<td>The legal authority to act. In the case of a statutory decision, the power to make the decision must be established by the legislation.</td>
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<tr>
<td>Mandatory decisions</td>
<td>Those decisions that must be made once particular criteria are met. Judgment is exercised to determine if the criteria are met.</td>
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<td>Perceived risk</td>
<td>The perception of risk based on an individual’s or society’s impressions, experience or intuition.</td>
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<tr>
<td>Performance factor</td>
<td>The operational history and economic capacity of the company or operator proposing to undertake a particular forest activity.</td>
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<tr>
<td>Personal risk</td>
<td>The risk of the civil servant being accused of intentional or reckless wrongdoing. This risk exists when a civil servant is not acting in ‘good faith’.</td>
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<tr>
<td>Policies</td>
<td>The general principles that guide government administration in the management of public affairs and normally do not have the force of law.</td>
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<tr>
<td>Procedural fairness</td>
<td>Procedural fairness has two elements:</td>
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<tr>
<td></td>
<td>• the decision maker must be unbiased; and</td>
</tr>
<tr>
<td></td>
<td>• any person directly affected by the decision must be given an opportunity to be heard by the decision maker before the decision is made.</td>
</tr>
<tr>
<td>Professional risk</td>
<td>The risk that a licensed professional will be called upon to justify their conduct and standard of practice to their professional licensing organization.</td>
</tr>
<tr>
<td>Real risk</td>
<td>The risk determined through expert analysis and based primarily on scientific evidence and grounded in scientific principles.</td>
</tr>
<tr>
<td>Relevant information</td>
<td>The facts and reliable opinions that are pertinent or logically related to the matter at hand.</td>
</tr>
<tr>
<td>Risk</td>
<td>The potential for loss or damage resulting from a particular action or decision.</td>
</tr>
<tr>
<td>Risk assessment</td>
<td>The estimation of the likelihood of loss or damage and the magnitude of...</td>
</tr>
</tbody>
</table>
the consequence should the loss or damage occur.

**Risk management**  
The "art" of weighing the assessed risks (i.e., the likelihood of a potential loss to an environmental, social or economic value) against the expected benefits that may be gained from that action or decision to achieve an appropriate balance.

**Rule of Law**  
The rule requiring statutory decision-makers to abide by the language and purposes of the legislation upon which their decision-making authority is founded.

**Sensitivity Analysis**  
An approach to managing uncertainty where the effect that uncertain variables have on the overall result is determined.

**Social risk**  
The chance of loss or damage to cultural, aesthetic and social circumstances or factors as a result of actions taken or decisions made.

**Statute law**  
The legislature’s attempt to regulate an activity in a manner consistent with the public interest.

This guide is provided for the information of Forest Service staff, primarily district managers. While every effort has been made to ensure accuracy, the guide is only intended to provide an overview of the administrative requirements pertaining to operational plan approvals. It should not be interpreted as ministry policy, or legal advice, and it should not be used in place of the Forest Practices Code of British Columbia Act (Act), the Forest Act, their associated regulations or in place of advice of your solicitor.

Introduction

The Forest Practices Code of British Columbia Act (the FPC) identifies five operational plans:

1. Forest Development Plans (FDPs)
2. Logging Plans (LPs)
3. Silviculture Prescriptions (SPs)
4. Stand Management Prescriptions (SMPs) and
5. Range Use Plans (RUPs).

This bulletin provides information to evaluate FDPs and SPs with some mention of LPs, SMPs and RUPs. It provides details on approval of operational plans after June 15, 1998 that reflect
recent revisions to the FPC and the following four regulations which were deposited April 2, 1998 (see Section 14 - Transition):

1. Operational Planning Regulation
2. Timber Harvesting Practices Regulation
3. Forest Road Regulation

This administrative bulletin replaces the Guide to Approving Forest Operational Plans after June 15, 1997, which is dated August 15, 1997.

1.0 Information Needs

Communication of Information
Evaluation of operational plans to meet legislated requirements is a complicated process requiring continual communication between the Statutory Decision Maker (SDM) and the plan proponent. While the guidance contained in this administrative bulletin will assist SDMs in making their determinations, it is critical that there be well-established communication with the plan proponent throughout all stages of the approval and implementation process.

SDMs may wish to communicate to all parties including the proponent, government agencies, the public and interest groups, throughout the review process that they are open to varying and contrary points of view. These views are expected and welcomed during the review process for consideration in plan approval. However, SDMs have the responsibility for making the final decision on operational plan approval.

It is essential that the proponent of the plan has all relevant information necessary to develop an operational plan. If the proponent believes they are lacking information, they should follow up as needed. Some planning requirements are contingent on government providing information to the proponent within a certain timeline or on the district manager (DM) requesting that certain assessments be completed prior to plan submission.

What is "Known" Information?
A feature, objective or other thing becomes "known" information, for the purposes of the Operational Planning Regulation (OPR), when it is made available only by the DM or designated environment official (DEO) at least four months before an operational plan is submitted for approval, or if it is identified in a higher level plan (HLP) that is in effect at the time of submission. Other staff do not have the authority to make information known. As a cautionary note, this definition only applies to items referred to in the OPR as being "known". "Known" has similar but not identical definitions in the Timber Harvesting Practices and Forest Road Regulations.

Observation
All available information is not necessarily "known" information. Known information is limited to a feature, objective or other thing referred to in the OPR. For example, guidebooks are not known information. It is important that if the
DM or DEO make something known, they communicate that information to each other and the plan proponent, in a way that respects the authority of the SDM(s). This means that in joint approval areas the DM and DEO should jointly sign off known information or otherwise agree on a procedure for effectively communicating known information to the proponent. In non-joint approval areas where there is a sole SDM it is recommended that all information be provided to the proponent via the SDM to ensure good communication between all parties.

**Example:** Using "Known" for Wildlife Habitat Areas

Wildlife Habitat Areas (WHAs) and General Wildlife Measures (GWMs) are defined in the OPR. They are made "known", as it is defined in the OPR, when they are made available by the DM or DEO at least four months before an operational plan is submitted for approval. Once this is done, WHAs must be included in future SPs and FDPs submitted for approval four months after the date the WHAs were made known.

The Timber Harvesting Practices Regulation (THPR) requires operations in known WHAs to be carried out in accordance with GWMs that are written for the specific WHA. "Known" in the THPR means included for a proposed category A cutblock in an FDP or in an SP. This is the authority requiring the holders of SPs or FDPs containing WHAs to conduct their operations (practices) in accordance with the applicable GWMs.

**Note:** Information made known after the 4 month period could be incorporated into the FDP voluntarily and may have some influence on the DM's determination of "adequately manage and conserve" under FPC41. There is no requirement or ability to amend an FDP where the SP incorporates more "known" information. The SP can still be consistent with an FDP without being identical to it.

**What is "Best Information Available"?**

Plan proponents are required, when preparing a plan, to use the most comprehensive and accurate information available to them. Where there is uncertainty about what information is in fact the most comprehensive and accurate, it is up to the SDM to determine. For example, two reports on the same topic may be available and they may contain different and conflicting recommendations. The SDM must then decide which information from the two reports the proponent is to use (he or she should also be prepared to provide a rationale on the decision).

**Observation**

The SDM may wish to provide an annually updated information package available to the proponent for consideration in preparing the new plan. While there is no obligation to "remind" proponents of information requirements already made available, it does improve communication and information can be tracked in one document. The SDM should really only have to communicate new information needs as the proponent should know and be responsible for what has been communicated previously.
Summary of Information Needs
The following is a list of information the SDM may wish to provide to the proponent in order to prepare an operational plan regarding their specific interpretations and needs.

1. Information required to meet FPC41(1) of the FPC.
2. The area to be included in the plan.
3. The SDM's expected timelines of the approval process - what is required by when.
4. The assessments required before submission of the FDP, SP and CP application.
5. Known information.
6. A listing of the most comprehensive and accurate information available.
7. The effect of any HLP on the plan.
8. The relevant guidebooks and how they affect the plan.
9. Any additional requirements in accordance with FPC41(2).
10. An explanation as to what would constitute an amendment approved under FPC41 versus FPC42 or 43 and how the amendments will be processed.
11. How "consistency" between plans will be applied based on the new definition in the OPR.
12. A list of tenure related requirements, if any.
13. A strategy, if one is in place, for addressing review and comments, including those stemming from referrals required by the SDM.
14. The term of the FDP.
15. The recommended format for operational plans (template).

2.0 Plan Preparation

Based on communication with the SDM(s) during the information phase, the proponent should be able to proceed with some comfort regarding the scope and requirements for review of the plan as it proceeds through the approval process. For plans prepared by the district, the DM should provide details of the expectations regarding the plans to assist staff in the preparation of operational plans. It is not possible to specify a provincial or regional timeline that would apply to all operational plans, but districts can and should determine critical timelines based on individual FDP replacement dates while recognizing operational logistics in the district.

Plan for Operational Flexibility
Operational planning should reflect the need for operational flexibility in achieving regulated forest practices. This flexibility is important to provide for operational realities while not reducing enforceability of practice standards. Where plans are too restrictive, amendments to several plans may be required to reflect changes at the time of harvesting that could have been provided for in the original plan submission.

Use of Operational Plan Templates
Templates are standardized operational plan formats for submitting both text and map information and can consist of information on paper (word documents and maps), a combination of digital and paper, or be fully digital with links between the text and map files. Currently, there are FDP and SP templates available for use by licensees and the Small Business Forest Enterprise Program (SBFEP). While the use of templates is voluntary, they are recommended by
the Ministry because the standard format used for presenting information should reduce plan approval time. As the templates are "code ready", i.e., they comply with the most recent requirements of the acts and regulations, they are useful to industry as a means of ensuring all mandatory operational plan information requirements have been met. They may also reduce preparation time as industry will not have to submit FDPs to more than one standard.

In the future, fully digital submissions will allow for the use of Graphic Information Systems (GIS) and viewer business applications and will allow for the consolidation of multiple FDPs on a landscape level to facilitate landscape unit and biodiversity planning and reporting.

**Assessments**

Important Regulation change: Effective June 15, 1998 (see Section 14 - Transition) assessments will no longer be part of an operational plan. Instead certain assessments will be required to be completed by the proponent before submission of the operational plan for approval. In addition, the timing of when certain assessments are required has changed. For example, if required, an archaeological impact assessment must now be completed prior to the submission of an SP rather than the FDP.

*Note:* While assessments are not submitted with the FDP and SP, OPR26 authorizes the DM or DEO to request that a copy of the assessments be provided with the FDP or CP application (these are the assessments required under OPR13 to 17). Under OPR27, if an assessment required under OPR13 to 17 is completed, the proponent of the plan must provide an opportunity for the review of the assessment, on the request of the person conducting the review. OPR37 allows the DM (only the DM) to request assessments that must be prepared prior to SP approval. The DM can also request any of this information under FPC41(2) if it passes the test for reasonableness - see Section 4.0 of this bulletin - FPC41(2) - Submission of additional information.

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### Assessments Required before Submission of FDP

<table>
<thead>
<tr>
<th>Where the assessment is required</th>
<th>Assessments required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Area under the FDP</td>
<td>Forest Health Assessment - OPR13 - if required by the DM</td>
</tr>
<tr>
<td>For watersheds listed in OPR14(1) that are within the area of the FDP</td>
<td>Watershed Assessment - OPR14</td>
</tr>
<tr>
<td>Areas referred to in FPC41(6) - joint approval areas within an FDP - that are in or adjacent to a proposed cutblock or could directly impact on or be impacted by a proposed road</td>
<td>Riparian Assessment - OPR15</td>
</tr>
</tbody>
</table>

### Assessments Required before CP Application

<table>
<thead>
<tr>
<th>Where the assessment is required</th>
<th>Assessments required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Areas referred to in FPC41(6) where there is a high or moderate likelihood</td>
<td>Terrain Stability Field Assessment - OPR16</td>
</tr>
</tbody>
</table>
of landslides, unstable or potentially unstable terrain, slope gradient >60 percent, or where a DM or DEO require it

Areas other than those referred to in FPC41(6) of the FPC where there is a high likelihood of landslides, unstable terrain, or a slope gradient >70 percent

Terrain Stability Field Assessment - OPR17

**Note 1**: Under OPR16 there are certain areas where, if the proposed operation is an emergency or expedited major salvage operation, a terrain stability field assessment may not be required before a CP is applied for.

**Note 2**: If a terrain stability field assessment is required under OPR16 or 17 the licensee may not apply for a CP unless the cutblock is a Category A cutblock in an approved FDP and the FDP contains a statement that it is consistent with the assessment's results and recommendations (in addition to other conditions - see OPR20(3)).

<table>
<thead>
<tr>
<th>Assessments Required before Submission of SP</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Where the assessment is required</strong></td>
</tr>
<tr>
<td>Cutblocks in known scenic areas</td>
</tr>
<tr>
<td>Cutblocks referred to in OPR16(3) but where the assessment was not required at the FDP stage because the operations proposed were emergency or expedited major salvage</td>
</tr>
<tr>
<td>Cutblocks other than those referred to in FPC41(6) where there is a moderate likelihood of landslides, potentially unstable, terrain, a slope gradient &gt;60 percent and less than or equal to 70 percent</td>
</tr>
<tr>
<td>Cutblocks identified by the DM as requiring a terrain stability field assessment</td>
</tr>
<tr>
<td>Cutblocks where indicators of potential slope instability in the cutblocks are identified in carrying out field work for the SP</td>
</tr>
<tr>
<td>Gullies in cutblocks on the coast if harvesting in the gullies is proposed</td>
</tr>
</tbody>
</table>
Cutblocks if required by the DM to determine the nature and extent of forest health factors | Pest Incidence Survey - 37(1)(d)
---|---
Within the area of the SP where the DM determines it is required to manage and conserve archaeological sites | Archaeological Impact Assessment - 37(1)(e)
In and adjacent to the area within the SP | Riparian Assessment - 37(1)(f)

**Note 1:** A visual impact assessment is not required if the operations are minor salvage or expedited major salvage, unless requested by the DM.

**Note 2:** For emergency operations, no assessments are required prior to submission of the SP unless the DM requests that a terrain stability field assessment is required.

**Note 3:** SPs must be consistent with the results or recommendations of any assessments required under OPR37.

**Note 4:** Refer to OPR37(2) for exceptions to the requirement for a terrain stability field assessment.

### Assessments Required Prior to Road Construction, Modification or Deactivation

<table>
<thead>
<tr>
<th>Area where the assessment is required</th>
<th>Assessment required</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Areas where there is a moderate or high likelihood of landslides based on terrain stability hazard maps</td>
<td>Terrain stability field assessment - FRR4(5)</td>
</tr>
<tr>
<td>2. Unstable or potentially unstable terrain, based on reconnaissance terrain stability maps, if no terrain stability hazard mapping has been done</td>
<td></td>
</tr>
<tr>
<td>3. Slope gradients greater than 60 percent, if no terrain stability hazard mapping or reconnaissance terrain stability mapping has been carried out</td>
<td></td>
</tr>
<tr>
<td>4. There are indicators of slope instability</td>
<td></td>
</tr>
<tr>
<td>5. Has been identified by the DM as requiring a terrain stability field</td>
<td></td>
</tr>
<tr>
<td>assessment</td>
<td>Riparian assessment - FRR4(6)(a)</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Streams, wetlands and lakes that may be affected by the proposed road or road work</td>
<td></td>
</tr>
<tr>
<td>Community watersheds</td>
<td>Fish stream identification - FRR4(6)(b)</td>
</tr>
<tr>
<td>Community watersheds (Note: This assessment is not required if soil erosion potential mapping carried out under section 12 of the OPR (terrain mapping in community watersheds) indicates that the area does not have a high or very high soil erosion potential.)</td>
<td>Soil erosion field assessment - FRR5</td>
</tr>
<tr>
<td>Known scenic areas with established Visual Quality Objectives (VQOs)</td>
<td>Visual impact assessment - FRR4(7)</td>
</tr>
<tr>
<td>Areas for which the DM is satisfied that the assessment is necessary to adequately manage and conserve potential archaeological sites in the area affected by the road or road work</td>
<td>Archaeological impact assessment - FRR4(8)</td>
</tr>
</tbody>
</table>

**Note 1:** FRR3 requires a person who submits a road layout and design to forward any assessments related to the road layout and design to resource agencies upon request if the DM has identified them as a referral agency. The DM may also request copies of the assessments under FPC41(2).

**Note 2:** The only assessment required for deactivation purposes is the terrain stability field assessment.

**Additional assessments at the discretion of the DM**

In the above tables some of the assessments are required at the discretion of the SDM and require some advance notification to the plan proponent. Discretionary assessments include: archaeological impact assessments; certain terrain stability field assessments; certain watershed assessments and forest health assessments. Notification for these types of assessments is required at an earlier stage, as discussed under Section 2 - Plan Preparation.

Assessments in general require sufficient notice to complete field work and may necessitate hiring consultants. It is recommended that sufficient notice be provided prior to review to ensure an assessment request can be satisfied. By providing this information to proponents before they prepare the plan, the requirement for amendments to the FDP can be reduced.

There is now a greater reliance on professional accountability given that assessments are no longer part of the plan and therefore not submitted for approval. Assessments are required as
noted above. The responsibilities vary with the type of assessment - OPR 13 to 17 and FRR4 and 5 should be reviewed.

3.0 Notice, Review and Comment

Of the five operational plans identified, only FDPs and RUPs require notice, review and comment. OPR36, 47 and 51 provide DM discretion to require referral for LPs, SPs and SMPs respectively.

Notice
Before an FDP is submitted for approval, or in the case of the SBFEP, before the DM puts an FDP into effect, the proponent must publish a notice in a newspaper, in a form acceptable to the DM, stating the FDP is available for review and comment (OPR25).

Review
The review stage is the main opportunity for the public to provide comments on how the forest resources will be managed. A key part of the SDM's determination is balancing fairness between the public's right to review and comment versus the proponent's right to timely harvest approvals. With respect to resource agencies, the review stage of the plan approval process has both legislated timelines and policy timelines under a memorandum of understanding (MOU). By gathering detailed information during the "information needs" portion of the planning stage, the review should focus on:

1. Has the SDM's guidance been captured in the plan?
2. Were the stakeholders notified and information solicited?
3. Were the public's comments captured?
   - Was it clear what the public's role was and how they should have responded?

For example, there is no public opportunity to comment on approved category A cutblocks. The review should focus on the proposed category A cutblocks and roads. The approved blocks are included to allow viewers a complete view of planned development.

The legislated period for review for an FDP approval or amendment is 60 days from the date of first publication. For an FDP that is solely proposing an expedited major salvage operation or amendments to an FDP that are solely proposing an expedited major salvage operation, the review period is for at least ten days. Minor changes to an FDP under FPC43 do not require notice or review (refer to Section 10.0 - Amendments for further information). Under OPR27, there is no requirement to provide for a review if harvesting is an emergency operation as defined under FPC42 and there is not enough time for a review of at least ten days. If a review is not required, a notice must be published by the person preparing the amendment allowing five clear days prior to implementing operations (OPR27(7)).

Note: The review period includes the time to review and comment on a plan. There is no "comment period". Comments from the review must be submitted during the 60 or ten days (plus) allowed for the review period.
**Observation**

Plans submitted for review may be retained on file in the event that the approved plan, which should be kept, is challenged or complaints are brought forward. This does create an administrative volume of paper and it is recommended that the SDM recognize this and make a decision based on the history and specifics of the plan.

**Referral**

DMs have discretion to require referral of any operational plan to resource agencies that do not have statutory authority to approve, other government agencies or to any person that may be materially affected by the proposed operational plan or amendment (OPR7). This must be communicated via a formal notice. The provision for referral requires the consideration by the plan proponent of comments received during the referral period. A copy of all comments received during the referral period must be submitted with the proposed plan or amendment along with a summary of all revisions made to the proposed plan or amendment as a result of the comments.

A Memorandum of Understanding (MOU) between the Ministry of Forests, Ministry of Environment, Lands and Parks and the former Ministry of Energy and Mines and Petroleum Resources was developed to facilitate inter-ministry communication and co-ordination for the implementation of the FPC (Memorandum of Understanding Among the Three Principal Ministries Regarding Joint Administration of the Forest Practices Code). One of the key components of this document is the section on Referrals and Approvals - it should be consulted at this stage of the plan approval process, particularly in relation to time lines. This MOU also provides for development of regional agreements and district action plans that further define the commitments contained in the provincial document. The MOU, regional agreement and district action plan should all be consulted at the review stage to ensure direction in these documents is being followed.

*Note:* OPR7 is the authority to require plan referral. At the information requirements meeting with the licence holder, it is important to identify all parties to whom the operational plans should be referred.

**Comments**

The legislation obligates the plan proponent to provide copies of comments received during the review period to the SDM and to indicate how concerns were addressed in the FDP. Once the review is completed, all concerns should be identified and there should not be any surprises at the final submission stage. Resource agencies and the public forward their comments to the proponent. For the SBFEP FDPs, the comments go to the DM or the district contact as specified in the review notice.

If comments are provided to the SDM instead of the proponent, the comments must be forwarded to the proponent for consideration and inclusion into the plan. Where comments are received after the review period has ended and the plan has not been submitted for approval, the comments should still be forwarded to the proponent.
Late Comments
Any information coming to the SDM is relevant information that could have a potential impact on the approval. Late information is still knowledge that the SDM must consider when approving a plan; however, he or she has the discretion to determine if plan approval should be delayed or not, based on the new information. Comments received after approval of the plan must be referred to and retained by the proponent for consideration in future plan submissions or amendments.

If comments are received after the plan has been submitted for approval, but the plan has not yet been approved, the proponent can consider if it is a valid concern and decide how to incorporate it into the plan. The rights of the proponent may be affected if the DM considers a submission without advising the proponent or if the DM sends a submission and the plan back to the proponent. The proponent may well be in a position to challenge the DM on the grounds that the DM has exceeded the review provisions of the regulation. While the proponent can not be forced to deal with the submission of late comments in a legal sense, this action may result in the FDP not being approved. If the DM considers the comment important enough and feels it should not have to wait until the next FDP, discretion can be exercised by refusing to approve the FDP without more information. Otherwise, the DM could be challenged for ignoring relevant considerations under FPC41 if he or she fails to consider the submission. Alternatively, the DM can wait until the SP comes in - at that point the information can be considered in the SP approval. This may, however, result in a need to amend the FDP.

Note: Only comments relating to Category A cutblocks and roads must be considered if received during the review. Comments on Category I cutblocks and roads and previously approved cutblocks and roads are not required to be considered. It is also important that the public be informed as to the type and nature of comments being solicited. Despite the appropriateness of the comments, all must be submitted with the plan along with any revisions made to the proposed plan or amendment.

Observation 1
Incorrectly submitted comments or late submissions should be clearly documented, and the rationale (if prepared) should consider how the late or incorrectly submitted comments were incorporated into the approval.

Observation 2
It should be recognized that the advertised plan may vary from the approved plan. The plan does not have to go through review for every change. However, any change or revisions should be based on the comments received. Plans revised as a result of the review are generally not required to be re-advertised for further comment.

Categories of Cutblocks and Roads for FDP Review

Forest Development Plans
Beginning October 15, 1998 (please refer to Section 14 - Transition), FDPs submitted for approval will contain both general information relating to the entire FDP and information
relating specifically to proposed cutblocks and roads. In addition to FPC10 (FDP Content), the general information requirements for the FDP are listed in OPR18 (map and information requirements for all FDPs). These information requirements include the approximate location of proposed road construction and road modification operations, the location of cutblocks proposed as category A cutblocks and the location of cutblocks that have been approved in previous plans.

Category A Cutblocks
A cutblock proposed as a category A cutblock must include the information in OPR20(1). Once the plan in which the block is proposed has been approved, the block is a category A block and is provided limited protection from reconsideration - OPR21 (limited protection).

Category I Cutblocks and Roads
Beginning October 15, 1998, FDPs submitted for approval may also include category I blocks (OPR19) which are blocks that do not meet the requirements of a category A block and are for information purposes only. These blocks are not part of the FDP and therefore do not contribute to the proposed harvesting in the period of the plan. Roads may also be shown for information purposes only. The "I" category is meant to provide an opportunity to reviewers of the plans to identify any concerns they may have prior to the start of more detailed work on the cutblocks and roads.

Transition
The transition provision in OPR23 provides for certain cutblocks that were included in plans submitted for approval or given effect prior to October 15, 1998 to be deemed category A blocks. These cutblocks must either have a cutting permit issued, an SP approved or been exempted from the requirement to prepare an SP or have met certain requirements as listed in OPR23. If the cutblock does not meet either of these tests, the cutblock will need to be reconsidered as a proposed category A cutblock in the first submission of a forest development plan on or after October 15, 1998.

4.0 Approval of an Operational Plan

Approval of an operational plan is a mandatory determination if the operational plan meets the required tests in FPC41 (see section FPC41(1)). In making a mandatory determination, the same principles apply that were detailed in the training course titled, "Making Effective Determinations (E404)". This training material is of particular interest to persons with delegated authority under the delegation regulation. In addition, it is important that the SDM and support staff both clearly understand their respective roles in operational plan approval. The SDM and support staff should be familiar with the content of Compliance and Enforcement Branch's course, "Risk Management and the Art of Decision Making". SDMs in both agencies need to take this training so they clearly understand administrative law and exercise their discretionary decision making properly.

Text amendments to proposed FDPs can be accomplished by clearly identifying changes as amendments in the written text portion of the FDP. Changes in mapping can be made on a highlighted photocopy rather than preparing completely new maps. Photocopies should be of the
same scale as the map in terms of accurately reflecting the boundaries. If changes are made to the original map, both parties should sign it off and date it. The same applies for text changes.

Observation 1

Decisions surrounding forest management are very complex and seldom black and white and as such discretion is necessary in making the most appropriate decisions. The FPC has given this power to SDMs who in turn must put their minds to decisions and support them with good reasoning. Discretion recognizes individual judgment in making decisions. Discretion is important when applying the law as it allows for consideration of individual circumstances and factors. In exercising discretion properly it is critical that the principles of administrative law are followed. Compliance and Enforcement branch has prepared training courses and interpretation guidance for SDMs - this should be consulted for additional detail.

Observation 2

In granting approval of an operational plan ask yourself "have I fettered myself in this decision by unquestioningly following policy, procedures or the wishes of a resource agency or other person, or the proponent?" It is important that decision makers come to their own conclusions regarding information provided to them. Of course, this doesn't mean you cannot consider the advice of your staff. However, the decision cannot be based solely on recommendations of staff or government policy. You must believe that recommendations of staff or government policies are appropriate in this particular case. If you strongly believe they are not appropriate to this particular case, you must not follow them. Decision makers are accountable for their decisions and are expected to follow some sort of due process that results in a documented rationale of the decision.

For example, where there is conflicting information, the decision maker will be expected to bring his / her own judgment to bear to reach a decision and also include that reasoning in a rationale.

Term of an Operational Plan

The term of a plan is the length of time over which a plan remains in effect, while the period of the plan is the required length of time over which planning information has to be included in a proposed plan. The term of FDPs for major licences or for SBFEP is one to two years. For a TSL (not considered a major licence) which provides for CPs and woodlot licence FDPs, a term of up to five years may be specified. The term starts from the effective date of the plan identified in the approval letter. Before or after an FDP expires, the DM may, at the request of or with the consent of the plan proponent, extend the term of the plan for a length of time not exceeding one year. This is true regardless of the length of the original term (two year FDPs can be extended for a further year).

An SP has a term lasting until the free growing obligations are achieved, unless a new prescription is required under FPC37 / 38 (outdated prescription).
The period covered by an FDP is five years. There are exceptions to the period of the FDP under OPR3(3).

**Observation**

SDMs may wish to utilize approval of FDP terms to stagger replacement submissions so the approval workload is spread over the entire calendar year. This is recommended during this first year of replacement plans. Another method for reducing staff workloads is to approve plans for a two-year term. With woodlot licences, the SDMs may want to consider if shorter terms are more appropriate than the five-year time period available.

**Limited Protection**

Once an FDP in which a category A block is proposed has been approved, that block is protected from being reconsidered except in limited circumstances. If any of the circumstances listed in OPR21 occur, the cutblock may be reconsidered in a future plan approval. However, the reason for refusing to approve the plan must be limited to the circumstance which allowed reconsideration of the block. For example, if a wildlife habitat area is established over any area of the proposed plan and the chief forester and Deputy Minister of Environment, Lands and Parks have specified that the cutblock cannot be harvested as planned, the DM, or the DM and DEO, as the case may be, may refuse to approve the plan based on those grounds and not for any other reasons.

**FPC40 - Act Giving Effect to Operational Plans Prepared by a DM**

The administrative law principles that apply to an approval under FPC41 also apply when a DM gives effect to an operational plan under FPC40. The wording difference is required to address the dual role of the DM in being responsible for preparing the plan and giving it effect. FPC40 does not have a subsection (1)(b) identical to FPC41 because Section 4 of the Ministry of Forests Act already requires the DM to manage and conserve the forest resources.

**FPC 41 - Approvals of Plans by DM or DEO**

SDMs approve operational plans under this section for major licensees and woodlot licensees.

**Observation**

The SDM approves the plan based on his/her determination that the plan meets the FPC and regulations and adequately manages and conserves the forest resources. Once approved, it does not become the SDM's plan. It is the proponent's plan and remains the proponent's plan to the end. For FDPs, cutblocks or roads that will not form part of the final plan must be deleted or listed as a category I block or road by the proponent and not the SDM. Such amendments can be accomplished by simple administrative memos from the proponent to the DM to provide notification and documentation on file. They must, however, still be signed and sealed by an R.P.F. Please note that it is very important to be able to distinguish between the plan that was submitted for review and the plan that was submitted for approval.
FPC41(1) - When a DM Must Approve an Operational Plan
The DM must approve an operational plan or amendment submitted under this part, if the two requirements set out in FPC41(1)(a) and (b) are met. From an administrative law perspective, FPC41(1)(a) is a mandatory decision and FPC41(1)(b) is discretionary in the first part, then once satisfied becomes a mandatory decision. There is an important cross-reference to FPC41(3) that prohibits approval if the plan does not meet standards.

FPC41(1)(a) - Operational Plans Prepared and Submitted in Accordance with the FPC and Regulations
FPC41(1)(a) requires the SDM to determine if the operational plan was prepared and submitted in accordance with the FPC and regulations.

FPC41(1)(b) - Adequately Manage and Conserve
FPC41(1)(b) requires the SDM to determine if the plan will adequately manage and conserve the forest resources. In terms of adequately, it means just that and not optimally or maximally. With respect to conserve, this is meant to be sustainable wise use and not preservation. FPC41(1)(b) is an additional requirement over and above the requirement that the plan comply with the FPC and regulations and is meant to catch the gaps in FPC41(1)(a) and be a final look versus a carte blanche opportunity to ask for new information.

**Observation**
Examples of when a DM may refuse approval based on FPC41(1)(b) are:
- where a terrain stability field assessment was not required in accordance with the FPC and regulations (i.e. slopes less than 60 percent) but the SDM has concerns about instability, or
- as a result of a pest incidence survey, a licensee has determined that there is a forest health problem, and has proposed management strategies to reduce risks of timber loss. Although these strategies may meet the requirements of FPC41(1)(a), if the DM believes that the management measures are inadequate, the DM could not approve the plan under FPC41(1)(b).

Information that may be of assistance in determining adequate management and conservation includes comments from the review, guidebooks, policy and procedures. However, these inputs must be used in a manner that does not fetter the discretion of the decision maker. This statutory decision is that of the decision maker alone; the decision maker is not bound by any of the above information. For more information please refer Section 6.0, Guidebooks, on the next page.

FPC41(2) - Submission of Additional Information
If the DM is not satisfied that he or she has the necessary information to determine if the plan will adequately manage and conserve the forest resources, additional information may be requested to assist in the determination under this section. Examples of additional information may include higher resolution maps or more detailed related site information. The intent is information requested under this authority be reasonable and limited in its scope; however, the main test is "does the DM reasonably require the information?" If the answer is yes, he or she is not limited in what can be requested.
FPC41(3) - Approval Only if Plan Meets 41(1)
To fully understand this section, it is best to read FPC41(3) in the context of the two subsections which precede it. FPC41(1) provides that the DM must approve the operational plan and amendment if the two threshold tests in FPC41(1)(a) AND (b) are met. If the DM determines that either (a) or (b) are not met, FPC41(2) authorizes the DM to seek and obtain the additional information from the licensee that the DM requires in order to make the decision in FPC43(1). FPC41(3) then directs the DM to embark again on the analysis in FPC41(1) and to approve only if the additional information is such that the DM is now satisfied that the two threshold tests are met.

FPC41(4) - Right to Refuse Approval or Amendments to LP
This is a performance based harvesting provision that provides the SDM with authority to withhold approval of an LP or amendment if the applicant has not taken all measures necessary to prevent or minimize the effects of a previous contravention of the FPC or regulations. Section 81 of the Forest Act provides authority for refusing, or placing special conditions on, a cutting permit.

Note: In accordance with the new FPC21, the DM may require only the following persons to obtain DM approval of an LP prior to harvesting:
- the holder of a road permit (unless they hold a major licence, timber sale licence (TSL) or woodlot licence (WL)),
- the holder of a licence to cut,
- the holder of a CP under a master licence to cut.

Existing LPs continue until they expire.

FPC41(5) - Approval of FDP Subject to a Condition
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 be satisfied that the plan or amendment adequately manages and conserves 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 action is clearly identified or conveyed.

Note: This provision must not be used to get around the protection provisions of the new OPR.

Observation
An example of an approval with a condition would be: In response to a MELP referral which has identified a trapline in a proposed development area, a licensee has agreed to inform the affected trapper when harvesting activities will take place to allow him sufficient time to remove any equipment that is in place. To add clarity to this matter, the following condition was attached to the FDP approval: The FDP is approved with the condition that written notice is to be provided to Mr. Smith at least 30 days prior to harvesting commencing in the trapline area.
FPC41(6) - Joint Approval
This section requires the approval of the DEO in addition to the approval of the DM for that portion of the FDP that is contained within a community watershed or that meets prescribed requirements as detailed in the OPR. In addition, OPR2 provides that the requirement for joint approval may be established in a higher level plan or if the DM and DEO agree that joint approval is appropriate in the circumstances. The SDM, in making decisions on non-joint approval areas, should ensure that the results of his or her decisions don't affect the management of adjacent joint approval areas.

FPC41(6.1)
This section provides the authority for the DM to approve any part of an FDP, or any part of an amendment that does not require joint approval.

FPC41(7) - DEO Approval
This section requires the DEO to approve an FDP or amendment under FPC41(6) if it meets the requirements of FPC41(1) and the DEO is satisfied that it will adequately manage and conserve the forest resources.

Observation
Joint approval requires additional co-ordination with the proponent to identify guidance of the two SDMs and to ensure that required assessments are completed in time for making a determination. The letter of approval for portions of an FDP by a DEO may be included in a joint approval document or a separate document. In either case it is still a separate determination. In the event that a joint approval document is issued it is recommended that a separate rationale supporting the individual determinations be provided by each decision maker. The decision as to which type of letter is chosen often depends on the working relationship the SDMs have with one another and their supporting filing system.

FPC41(8) to (13)
These sections establish an administrative framework around the definition, designation, cancellation and amendment of operational plans in community watersheds.

Observation
Before the designation of a community watershed is established, varied or canceled, the regional manager must provide for review under FPC 41(12).

FPC42 - Approval in Emergency Cases
It is up to the DM to first determine that there is an emergency; this would be a joint decision with the DEO if it is an area referred to in FPC41(6). Once it has been determined that there is an emergency, the FDP may be approved without review, the SP and LP can be approved if they comply with the regulations and standards, and the timber should be harvested without delay because it is in danger of being damaged, significantly reduced in value, lost or destroyed. This damage should imminent such that not having a review period or less than full content FDP is
absolutely required and no other mechanisms, such as expedited major salvage, can address the need. Please note, some review provisions may still apply subject to the DM's determination.

**Observation**
The final decision on whether an emergency exits is up to the SDM(s), but the FPC appears to contemplate that an emergency exists when the timber is in danger of being damaged, significantly reduced in value, lost or destroyed and there is not sufficient time available for public review. This section should not be used to deal with wood supply issues resulting from inadequate or late submission of plans.

Important Regulation change: An important change in the OPR is the addition of provisions for "expedited major salvage operation." Refer to Section 12.0 - Salvage Operation.

**FPC43 - Minor Amendments**
Minor changes to operational plans are permitted under FPC43. The amendment must achieve all of the following conditions:

- meets the requirement of the FPC and regulations;
- adequately manages and conserves the forest resources;
- does not materially change the objectives or results of the plan.

If all three conditions are met, then the SDM or designate may approve the amendment without review. While the process for determining a minor amendment does not vary, the decision must be made based on the particular set of circumstances for the request.

**Observation 1**
As with the first two tests the DM alone must put his mind to the third test. Upon receiving an amendment request the DM will be directed to a particular section of the FDP for which the amendment is requested. For that section, the original objectives or results of the plan should be stated. Only then can the test be made to determine if the original objectives or results will be changed in a material way should the amendment be approved. Following are amendments that may materially change the objectives or results of the plan:

- adding a new road or cutblock to the FDP
- substantially affecting an environmental attribute that was not affected in the original plan
- substantially increasing the risk of negative environmental consequences

As with the previous third test, the rationale should identify how the test for "materially change" was determined.

**Observation 2**
When the SDM has delegated authority to a person under this section, then that person becomes the sole SDM and no one, including the original SDM, may fetter the decision of the designate. It is recommended that adequate training and support be provided to designated authorities. The DM may revoke the delegation
of a decision-making authority but may not vary or rescind a decision made by the designate.

Observation 3
Amendments should only be considered when changes will occur on the ground. For example, there would not be an amendment considered for improvements in information such as a higher standard of accuracy measurement in the cutblock area as a result of a re-calculation using a global positioning system (GPS) or correcting an error of "net area to be reforested." However, the Licensee should notify the district of the changes because of the need for records to be accurate for their use for compliance and enforcement purposes.

5.0 Higher Level Plans

FDPs must be consistent with higher level plans (HLPs) in effect four months before the date the FDP is submitted for approval, unless the HLP or this Act specify otherwise. SPs and LPs must only be consistent with the HLP when there is no FDP in place. Otherwise they must be consistent with the approved FDP. In addition there may be phase-in provisions included in the HLP which may temporarily exclude an area under the plan or an objective from coming into effect for a specified period to enable a smooth transition from the pre- to post-HLP requirements. In considering any HLP, the key item for the SDM is to determine what the plan means in terms of forest practices delivered on the ground. The HLP document should provide clearly defined objectives; however, there will almost always be areas where SDMs must interpret what the plan means.

Draft or interim plans or standards are not legally binding on SDMs and have no formal standing under the statute, but they may be important information that the SDM may want to consider for the purposes of FPC41(1)(b). SDMs may wish to develop district policy relating to the use of draft or interim plans or guidelines as some care must be taken given their non-legal status. Any district policy should be available to plan proponents with sufficient advance notice prior to plan preparation and the district should make it clear that the policy will not fetter statutory decision making. In other words, the decision maker will ignore the policy if the decision maker considers the policy inappropriate in a particular circumstance.

Observation
In approving an FDP where an HLP is in effect, DMs, and DEOs where applicable, will need to put their minds to the interpretation of the requirements of the HLP. The proponent of the plan should be made aware of the HLP requirements and the SDM's interpretation as early as possible in the process (see point 7 in the Summary of information needs list on page 3). The SDMs may rely on interpretative documents developed by other staff, but must put their minds to the various resources at their disposal and not let others dictate their decision through interpretative documents.

6.0 Guidebooks
Guidebooks should be treated as key reference material and not treated as if they have the force of law. They have and continue to be prepared by knowledgeable experts and they should assist SDMs in suggesting appropriate ways of addressing forest management issues affecting operational plans.

**Caution:** Cited guidebooks can prove to be problematic unless very careful thought and consideration has been given as to what the specific application of the citation means to forestry practices.

Guidebooks are never enforceable as stand alone guidebooks, even when they are mentioned in a general way in the legislation. However, following are three ways to potentially incorporate information from guidebooks into binding requirements of the FPC and regulations or the harvest authority:

1. **Higher Level Plans**
   HLP declaration may cite specific sections of guidebooks, thereby making them binding. SDMs will need to ensure they know of any linkage between the HLP and the sections of guidebooks incorporated by reference.

2. **Regulation**
   The regulations cite the following guidebooks. Portions of these guidebooks are binding on the proponent of the plan with respect to specific definitions:
   - Establishment to Free Growing
   - Hazard Assessment Keys for Evaluating Site Sensitivity to Soil Degrading Process
   - Mapping and Assessing Terrain Stability
   - Seed and Vegetation Material
   - Fish Stream Identification
   - Interior Watershed Assessment
   - Coastal Watershed Assessment

3. **Harvest Authority**
   Harvest authorities may also incorporate portions of guidebooks. It is important to realize that citing a guidebook within a regulation or harvesting authority does not make the entire guidebook legally binding but only the part that is cited. That part then becomes enforceable not as a guidebook, but as part of the regulation or harvest authority.

### 7.0 Policy

"Policies" are the general principles that guide government administration in the management of public affairs and normally do not have the force of law. Policy cannot restrict the SDM's discretion unless clearly provided for in the legislation.

**FPC Act or Regulations**
The FPC provides for two kinds of policies to be binding on DMs. The first policy is one that DMs must follow in exercising their statutory obligations. This authority is provided to the chief forester under FPC1(1), FPC4(1&4) and FPC5(1&4). This policy is in the _Higher Level Plans:_
Policy and Procedures document dated June 15, 1996, as amended by the chief forester on December 1, 1996. Directions of the chief forester contained in this policy must be followed by the DMs pursuant to their responsibilities under Part 2 of the FPC - Strategic Planning, Objectives and Standards.

A second policy is provided for under FPC122; this is a policy that must be considered by the DM in exercising his or her authority. At the present time there is no policy approved under FPC122.

Forest Act
Section 105(1) of the Forest Act provides authority for the appraisal policy set by the minister that SDMs must follow.

SDM Policy
Where an SDM must repeatedly make complex decisions weighing a range of facts, the SDM may create his or her own policy to communicate guidance or limitations that would apply to approvals of operational plans. A DM's policy is a very useful tool to communicate the DM's expectations for plan approvals where interpretations and application of standards are clear. However, a DM's policy must allow for consideration of new information that may not have been available when the DM approved the policy.

If a policy is developed and used by the SDM, it must be made available to other parties to which the standard would apply. Extreme caution is required in drafting any DM policy. The following reminders may be helpful:

- An SDM is not bound to policy that is not provided for in legislation. At best, it may be a tool for the decision maker to use in exercising his or her discretion in addition to other types of information available for their use.
- Policy drafted by SDMs that does not provide adequate consideration of the particular facts in an individual plan approval would not be viewed by the courts as fair policy and the SDM may be found to have abrogated their statutory authority.
- Policy must be made public if it is to be considered as a factor in the approval process.
- It is important to remember that the law treats policy and procedures very differently. While a policy can not bind the ability of the SDM to exercise discretion, a procedure is binding upon the SDM with respect to the steps required prior to the SDM making the decision (e.g. before an FDP can be submitted for approval procedures may state it must be made available to certain persons).

Note: Courts do not recognize policy not provided for by legislation; in fact, they are often seen as fettering. For example, the CF's letter on biodiversity is very important information and is information an SDM considers but they do not have to follow it.

8.0 Linkage to Approvals Under the Forest Act

Under FPC18 and 19, a major licensee may only apply for a CP, or in the case of the DM, may invite application or enter into a TSL, if the approved FDP identifies the cutblocks to be
harvested and the location of existing and the approximate location of proposed roads. The FDP does not have to be in effect for the life of the CP, only at the time of issuance. The area applied for under the CP must be the same as the area shown on the FDP. The actual issuance of the CP is controlled by the licence document - the FPC has no influence. The licence document contains a clause requiring the approval of applicable operational plans before harvest can occur. It is important to note that even if all approved operational plans are in place, actual harvesting cannot occur until the CP is issued.

**Observation**
While a CP or RP can remain in effect even if the FDP expires, it may be worthwhile to extend the FDP in order to provide authority for amendments such as salvage operations that may be required.

The licence documents for tree farm licences and forest licences are replaced every five years; therefore some are pre-code while others are post-code. Depending on whether a pre-code or post-code document is in effect, the licensee is granted a different CP.

For example, for pre-code licences, there is a "codified" CP. In approving operational plans the authorities granted by the tenure documents need to be recognized. Licensees may have obligations under the Forest Act that could be confused with operational plan approvals under the FPC. An example is a licence that limits harvesting to a problem forest type. The information provided with the FDP may indicate the harvesting will meet the FPC. However, the data accompanying a CP application (e.g., cruise data) may provide new details that indicate the area is not of the type provided for in the licence agreement - this would prevent issuance of a CP under the licence agreement.

**Observation**
The FPC does not obligate the DM to approve a CP, even if the planning requirements have been achieved. The licence provision will govern issuance of a CP, for example a CP can not be issued if it interferes with an aboriginal right. Section 81 of the Forest Act provides authority for the DM to refuse issuance of a cutting permit or attach special conditions (See Performance Based Harvesting Regulation). It is recommended that multi-block CPs proceed through the categories with the same status.

It is recommended that the FDP clearly identify CPs already in effect. Including a schedule was previously required by the licence document, but is now covered under FPC10(1)(b)(i)(B) and OPR18(1)(r).

Approval of a block for harvesting or a road for construction outside the term of the plan does not give approval for issuance of a harvesting authority. A licensee submitting an application for a harvesting authority where approval for road construction or harvesting is not contained within the term of the plan should seek an amendment to the FDP under FPC41 or 43.
Note: The Forest Act permits the delegation of issuance of CPs to a forest officer authorized by the DM, which would make the forest officer the SDM.

Observation
The SDM may wish to separate a Forest Act issue from plan approvals under the FPC by placing conditional approvals in the operational plan. An example of this would be the STI agreements DMs have with the various licensees. It is recommended that plan proponents be informed of the links between the term of the plan, issuance of harvesting authorities and the DM’s expectations regarding submission of operational plans and CP applications.

Approval of Cutblocks Where Terrain Stability Assessments Required
On or after October 15, 1998, a cutting permit application may not be submitted for cutblocks in an FDP for the following areas:

1. Areas with a high likelihood of landslides, unstable terrain or with slope gradients greater than 70%,
2. Joint approval areas where there is a moderate likelihood of landslides, potentially unstable terrain, a slope gradient greater than 60%, or
3. An area within a joint approval area identified by the DM or DEO as requiring a terrain stability field assessment, unless, the following requirements have been met:
   • The cutblock is approved as a category A block in an FDP, and
   • A terrain stability field assessment for the cutblock has been completed. Exemptions to this requirement are provided for in OPR16. (i.e., emergency approvals under FPC42, or for operations that are expedited major salvage operations), and
   • The FDP contains a statement that it is consistent with the assessment results and recommendations, that it does not conflict with THR 8(3) and 8(4) and that it either, meets the requirements of section 7(2) and (3) and 8(4) of the Timber Harvesting Practices Regulation if the block is within a community watershed or the requirements of section 8(2) and (3) if the block is outside of a community watershed. If the FDP does not meet those requirements the statement must indicate the reason why the requirements have not been met and the reason the person believes the forest development plan should be approved in spite of the failure to meet the requirements. This statement may be submitted with the FDP in which the cutblock is approved as a category A block or in a subsequent FDP submission or amendment.

Observation
The DM may want to consider requesting terrain stability assessments where an environmental risk has been identified during review of the FDP or if the proposed harvesting activity is uncommon in the operating area.

9.0 Exemptions

Exemptions from the need to prepare operational plans are contained in FPC28-32. The DM may only exempt a person from the requirement to prepare an operational plan if the DM determines that the plan is not necessary to adequately manage and conserve the forest resources (FPC33).
The DM cannot initiate an exemption except for plans he or she has prepared. Exemptions must be at the request of the licence holder. The DM should not approve blanket exemptions and must make a determination for each exemption request on its own merits. It is possible to "batch" the exemptions together for administrative ease such as one covering letter and have the individual exemptions attached.

Conditions - OPR40 allows the DM to attach conditions to his exemption for the requirement to prepare a silviculture prescription. The DM does not have this ability for FDPs and LPs.

Exemptions for an SP may be provided for individual areas up to one hectare in size or 500m³ (FPC30).

**Observation**

An exemption decision is a determination under the Code and as such, the rationale should be documented in writing and supported with reasons for the purpose of defending the determination if it is challenged. The DM may also find it useful to express to the proponents what he or she considers important in assessing whether the exemption adequately manages and conserves the forest resources.

### 10.0 Amendments

Operational plans are amended for six reasons under the FPC:

1. Voluntary amendments requested by the licensee (FPC34).
2. Where a person knows that operations specified in the plan will not succeed (FPC35).
3. If the requirements of an SP can not be met (FPC36)
4. Outdated SP for industry (FPC37)
5. Outdated SP for government (FPC38) and,
6. FDP extensions requested after a regulation change changes the content requirements of the FDP and before the extension is granted

Any changes made to an approved operational plan must be made via an amendment proposed by the proponent. If the proponent considers that the change to the plan does not materially change the objectives or results of the plan, the amendment is not advertised for review and comment but submitted directly to the SDM(s) for approval under FPC43 as a minor amendment.

If there is a material change to the objectives or results of the plan, the amendment is advertised, is made available for review for a 60 day period and then submitted to the SDM(s) for approval under FPC41. If the change is to an FDP for expedited major salvage operations only, the review is for at least 10 days versus the full 60.

If the proposed change to an operational plan is an emergency as defined under FPC42, it may be approved under the conditions described in that section.
It is the responsibility of the SDM, as the approver of the amendment, to approve the amendment as proposed or re-classify it as minor, non-minor or an emergency. If a minor amendment has been applied for and the SDM feels it does not meet the criteria defined in FPC43, the SDM will refuse to approve it under that section.

**Example:** In the event an area outside of a cutblock is to be harvested, there must be an amendment to the approved operational plans to reflect the new cutblock boundaries before harvesting can commence - this may be a material change and if so, the amendment will require a 60 day review period prior to submission for SDM(s) approval. If the area of the cutblock is to be reduced in size but is still contained within the approved area, this is probably not a material change and no review is required prior to submission to SDM(s) for approval as a minor amendment.

*Note 1:* The proponent must determine if a change to a plan is a material change but the SDM must also put his or her mind to this as part of the amendment approval process.

*Note 2:* The SDM should ensure that the amended operational plan remains consistent with any higher level plans and other operational plans and assessments that were in place before the amendment was approved. Please note that the definition of consistency in the OPR ("not in material conflict") does not mean, "identical to".

While there are situations where amendments are unavoidable, minimizing the number of amendments processed pays off in administrative efficiency. See Section 2.0 of this bulletin, Plan for Operational Flexibility.

*Observation*

Amendments under FPC34 to 38 cannot be required, they must be proposed by the proponent of the plan. However, failure to propose amendments when amendments are required by the FPC is a contravention of the FPC.

**Legislative Amendment:** Effective July 30, 1997, for all operational plans (FDP, LP, SP, SMP & RUP) operators are only prohibited from carrying out any operation on the areas of proposed amendment until the amendment is approved. Previously, operators were prohibited from working on the entire area until the amendment was approved.

**11.0 Extensions**

Under FPC18 and 19, the DM may extend the term of an FDP for a period not exceeding one year, either before or after the FDP expires. If the FDP does not comply with the current requirements of FPC41(1), then the holder who prepared the plan must amend the plan to the extent necessary in accordance with FPC18(8) and 19(5). Joint approval would be required if any amendments to the plan affecting a joint approval area were necessary, however, joint approval would not be required for the extension itself.
If the DM prepares the plan, only the regional manager has the authority to extend it. Regional managers will require documentation on the original plan approval rationale (if utilized) as well as details on the specific request for extension.

**Observation**

*In determining if an FDP extension should be approved, the SDM should determine whether or not new higher level plan requirements or new legislated requirements, such as the new definition for “known information”, have taken effect since the date of the FDP originally approved. While the onus is on the proponent to propose the required amendment, the approval lies with the SDM.*

### 12.0 Salvage Operations

**Minor Salvage**

Under the definition, the allowable volume to be harvested has increased to 2000 m³ per opening. This volume does not include any harvest from right-of-ways associated with the minor salvage operation.

**Note:** It is recommended that a single timber mark be used for timber to be harvested from the minor salvage area and associated right-of-way, however, it is important to maintain a separate accounting of any wood harvested from the right-of-way as it does not contribute to the 2000 m³ maximum allowed for in the minor salvage operation.

OPR18(1) lists the information requirements of an FDP. OPR18(2) indicates that a person does not have to meet the FDP information requirements if the operation is for minor salvage. So if the minor salvage is within the FDP area the content requirements are likely addressed. However there is no minimum standard, therefore, the DM must issue a notice up front with the requirements of the FDP, otherwise there is a risk that the FDP for minor salvage will not have any content requirements.

A person may not carry out minor salvage in the following areas unless an SP has been approved or if the SP is exempted, the DM has specified in writing the terms and conditions of the minor salvage operation (THPR28):

a) riparian management zones;
b) known forest ecosystem networks;
c) wildlife tree patches;
d) known old growth management areas;
e) known ungulate winter ranges.

**Observation**

*The DM in granting FDP or SP exemptions should consider the potential lack of content issue and express content needs in the terms and conditions. In addition, the terms and conditions should identify to the persons carrying out the
harvesting the locations of the 5 items listed above because they are very site specific and would have been shown in an operational plan.

Special Forest Products
Special forest products are defined in the Forest Act as, "... poles, posts, pilings, shakes, shingle bolts, Christmas trees and other similar forest products designated by regulation as special forest products." The FPC allows the DM to exempt persons harvesting only special forest products from the requirement to prepare LPs and SPs.

The OPR specifies that the harvesting of special forest products is considered a "minor salvage operation" with the exception that there is no 2,000 m³ upper limit.

Expedited Major Salvage Operation
This is defined as harvesting salvage materials or carrying out sanitation treatments where the volume to be harvested is greater than 2000 m³ per opening and the operations must be expedited to prevent the spread of insects or to harvest timber that is deteriorating in quality and value. This volume does not include any harvest from right-of-ways associated with the salvage operation. This level of harvesting requires an FDP or an amendment to an existing FDP.

Generally, all the requirements of an FDP are required of an amendment to an FDP for expedited major salvage. One exception is the review period. Proposed expedited major salvage requires a notice in a newspaper and a review period of at least 10 days (instead of 60).

13.0 Woodlot Program

Amendments to the FPC provide the regulation making authority to create a simplified Woodlot Licence Forest Management Regulation (yet to be finalized) that is tailored to the needs of woodlot licences. When this regulation is brought into force, the OPR, SPR, THPR and FRR will not apply to woodlot licences. The last section of the new OPR states that the rules of the old OPR continue to apply to woodlot licences. There will be no changes to operational planning requirements for woodlot licences until the Woodlot Licence Forest Management Regulation comes into force.

The current Forest Act requirement to produce a management plan (MP) and a CP will be maintained, however it is anticipated that the MP will focus on AAC related matters.

14.0 Transition

The operational planning regulation, the forest road regulation, the timber harvesting practices regulation and the silviculture practices which were deposited April 2, 1998 will become effective June 15, 1998. For SPs, the four month rule in FPC12(b)(ii) does not apply which means that any SP submitted for approval on or after June 15, 1998 must meet the new requirements in the OPR. The four month rule in FPC10(1)(d)(ii) which relates to forest development plans, does apply. This means that FDPs submitted on or after June 15, 1998 but before October 15, 1998 must meet the requirements in the OPR that was in effect prior to June
15, 1998. On or after October 15, 1998, FDPs submitted for approval must meet the requirements in the new OPR.

On or after June 15, 1998 logging plans will not be required by statute, except for those cutblocks where a silviculture prescription was put into effect or approved before June 15, 1998, or where an exemption from the requirement for a silviculture prescription was given before June 15, 1998. In those cases, if a logging plan was required prior to June 15, 1998, it continues to be required and is to be prepared in accordance with the Operational Planning Regulation that was in effect before June 15, 1998.

Note: The transition provision does not capture those silviculture prescriptions submitted for approval before June 15, 1998 but not approved before June 15, 1998. Therefore a logging plan is not required after June 15, 1998 on those blocks where a silviculture prescription was submitted for approval but not approved before June 15, 1998. It is recommended the district send a letter advising plan proponents on how the transition for no longer requiring logging plans will be handled.

On or after October 15, 1998, cutblocks that were approved under the previous OPR requirements for FDPs are deemed to be approved category A cutblocks if the cutblocks have an approved SP, an SP that has been submitted and meets the requirements of OPR18(1)(t) to (x) or have an approved CP.

15.0 Contacts

For any questions regarding this administrative bulletin, please contact your regional tenures officer or one of the following:

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Forest Appeal Commission’s Decision Regarding the Approval of MacMillan Bloedel’s FDP for Brooks Bay/Klaskish

Introduction

On June 11, 1998 the Forest Appeals Commission (the “Commission”) released its reasons for decision in Appeal No. 96/04(b), which was an appeal from a determination by the District Manager in Port McNeill, dated May 31, 1996, approving a five year Forest Development Plan (“FDP”) submitted by MacMillan Bloedel Limited (“MB”). The appeal was initiated under section 131 of the Forest Practices Code of British Columbia Act (the "FPC Act") by the Forest Practices Board (the "Board"), which sought an order rescinding the approval of the FDP. There were several stated grounds for appeal, but the primary concerns were the alleged deficiency in the content of the FDP, and the alleged failure of MB to fulfill the public review and comment requirements. The Sierra Club of British Columbia (Sierra Club) joined the appeal as an intervenor.

The end result was that the appeal was dismissed and the Commission did not rescind the approval of the FDP.
Decisions of the Commission do not set a precedent and are not binding on district managers or other statutory decision-makers. However, in this case, the Commission’s application of some basic principles of statutory interpretation is particularly compelling, and consideration of the decision may therefore be of assistance to district managers and other statutory decision makers under the FPC Act.

In this case, the Commission dealt with the following issues:

1. What is meant by "substantial compliance"?
2. What are the content requirements for a FDP?
3. How is the test of "adequately manage and conserve" to be applied?
4. What is adequate review and comment?

1. What is Meant by "Substantial Compliance"?

Now that the transition period is over, there is likely to be less interest in the first issue. However, the Commission’s approach to interpreting "substantial compliance" may still be useful as an example of the application of basic principles of statutory interpretation. The Commission took as its starting point the dictionary definition of "substantial":

"The common meaning of "substantial" as found in Webster's New Collegiate Dictionary is "important or essential or being largely, but not wholly what is specified."

The Commission held that the interpretation of "substantial compliance" which most closely reflected this definition was that set out by the District Manager for the Queen Charlotte Island Forest District in a letter dated February 1, 1996 to all major licensees in the district:

"Simply put, the term ‘substantial compliance’ means that the objective is to be in full compliance wherever possible. However, the degree of flexibility allowed by this interpretation needs further clarification. Substantial compliance means ‘in compliance with the requirements of the Code Act and regulations, except for minor omissions or defects that will not effect the intent of the legislation.’ Unimportant omissions or defects in FDP submissions may be tolerated if the essential requirements of the Code are met. The expectation is that variation from the requirements of the Code will be minimal and that in such cases [the] final decision on the matter will be based on individual circumstances and the context of the Code as a whole..."

2. What are the Content Requirements for a FDP?

The Commission observed that the FPC Act does not define a FDP. However, as the highest level of operational plan, it is implicit that a FDP should contain sufficient information about the "area under the plan" from which lower level planning regarding cutblocks can be developed. It should be a plan for developing the forest, and not just a collection of individual roads and cutblocks.
All parties to the appeal agreed that the purposes of a FDP are threefold:

1. to specify measures that will be carried out to protect forest resources;
2. to provide the public and resource agencies with a right to review and comment; and
3. to guide in the preparation and approval of lower level plans (e.g. SPs, LPs, cutting permits, and road permits).

However, the parties disagreed as to the breadth or scope of the FDP’s content requirements. There were three main areas of disagreement:

a) the meaning of the phrase "area under the plan";
b) the requirements of Section 10(b)(ii) – "matters required by regulation"; and
c) the requirements of Section 10(c)(ii) of the FPC Act – "measures that will be carried out to protect forest resources".

a) the meaning of the phrase "area under the plan"
As the Commission notes in its decision, the phrase "area under the plan" is crucial to assessing a FDP as it sets the parameters for the information required to be contained in the plan. To determine the meaning of this phrase, the Commission looked at its use in section 13 [now section 9] of the Operational Planning Regulation (OPR). Section 13 states:

13. 1) A person must ensure that a forest development plan addresses an area sufficient in size to include all areas affected by the timber harvesting and road construction or modification operations proposed under the plan. [emphasis added]
2) If the district manager determines that the area under a proposed forest development plan does not meet the requirements of subsection (1), the district manager may, in a notice given to the person, specify the area that the plan must address.

MB and the government argued that the phrase "area under the plan" should be interpreted as a fluid concept providing for different geographic areas depending on the specific provision of the FPC Act or the OPR at issue, and the actual or potential impact of each proposed forest management activity on the particular resource feature or value being considered.

The Commission disagreed.
The Commission noted, however, that the individual content requirements set out in the OPR do not always apply to the entire "area under the plan". The licensee and the district manager must look to the specific legislative requirements to see whether information is required for the entire "area under the plan", for "an area" under the plan, or just for the cutblocks or roads themselves.

b) Section 10(b)(ii) of the FPC Act - "matters required by regulation"
The Board and Sierra Club argued that the FDP failed to meet the requirements of Sections 10(b)(ii) [now Section 10(1)(b)(ii)] of the FPC Act in that the FDP did not include "for the area under the plan", "matters required by regulation". The specific issues raised by the Board were:

i. stream identification and classification;
ii. wildlife;
iii. cultural heritage resources;
iv. operability information;
v. unstable terrain;
vi. watershed information; and
vii. other resources.

The Commission proceeded to assess each issue against the content requirements set out in the OPR in effect at that time.

i. **Stream Identification and Classification**
The Board argued that the FDP was deficient in that it only included stream classifications for the cutblocks identified in the FDP, and did not show classifications for the rest of the "area under the plan", including in particular the areas downstream from the cutblocks. The Commission looked at the content requirements relating to stream classification set out in section 15(6) of the OPR, which references assessments required to be carried out under Section 28. Section 28 [at that time] provided that

"... a person proposing to carry out timber harvesting or road construction or modification operations in an area under a forest development plan must … determine the riparian class for each stream, wetland and lake in the area. [emphasis added]"

The Commission concurred with the government’s interpretation that the word "an area" in Section 28 "narrows the scope of the classification from the entire area under the plan to the areas in and around proposed timber harvesting and road construction or modification".

Sierra Club’s challenge was to the method used to classify fish streams. Sierra Club argued that the default provision found in the definition of "fish stream" in section 1 of the OPR should have applied. However, the Commission noted that the default provision only applies if there has not been a "fish inventory acceptable to the district manager".
The Commission noted that "fish inventory" is not defined. Although Sierra Club argued that MB should have carried out minnow trapping or electro-shocking, the district manager testified that the information provided in the FDP was acceptable to him. The Commission was also satisfied that, while some of the information was based on an old classification system and minnow trapping and electro-shocking were not done, the information provided by MB met or substantially met the requirements of the OPR.

ii. **Wildlife**

The Board and the Sierra Club argued that the FDP was deficient since it contained no information on marbled murrelet, roosevelt elk, or trumpeter swans, all of which were species found in the area under the plan.

The Commission held that the only requirements for wildlife encompassed under Section 10(b)(ii) were those spelled out in the OPR, namely the "known" locations of "wildlife habitat areas" (OPR sec. 15(2)(f)) and objectives for the management of "identified wildlife" (OPR sec. 15(7)(c)). The Commission noted that the terms "known", "wildlife habitat area" and "identified wildlife" are all defined terms.

"Known" is defined as meaning "contained in a higher level plan, or … otherwise made available by the government at least 4 months before the operational plan is submitted".

"Wildlife habitat area" is defined as meaning "a mapped area of land that the Deputy Minister of Environment, Lands and Parks, or a person authorized by that deputy minister, and the chief forester, have determined is necessary to meet the habitat requirements of one or more species of identified wildlife."

"Identified wildlife" is defined as meaning "... those species at risk that the Deputy Minister of Environment, Lands and Parks or a person authorized by that deputy minister and the chief forester, agree will be managed through a higher level plan, wildlife habitat area or general wildlife measure."

Evidence was given at the hearing that neither the roosevelt elk nor the trumpeter swans have been designated as "identified wildlife". Although the marbled murrelet had been placed in draft documents indicating that they will be designated as "identified wildlife", it too had not yet been designated. Indeed, at the time the FDP was approved, no wildlife had yet been designated as "identified wildlife".

Based on this evidence, the Commission held that the OPR content requirements for wildlife did not apply to the FDP, and that there were no other specific statutory requirements for the species in question.

The Commission flagged the fact that the District Manager for the Port McNeill
District did obtain additional information regarding the marbled murrelet as a result of concerns raised by the Sierra Club in April, 1996, prior to the approval of the FDP. However, the district manager did not require MB to include this additional information in the FDP, and the Commission agreed with his assessment that "there was no requirement to do so."

iii. **Cultural Heritage Resources**
The Board and Sierra Club both argued that the FDP was seriously deficient in making no reference to cultural heritage resources. The Commission looked at Section 15(2)(a) of the OPR, which provided that a FDP must identify and describe for the area under the plan the "known" locations of cultural heritage resources. The Commission held that since there were no such "known" resources in the area, the FDP was not deficient in that regard.

Furthermore, while the Commission noted that it would have been convenient for the FDP to have stated that no cultural heritage resources had been made "known", there was no legislative requirement for MB to expressly identify the provisions of the OPR which did not apply to the FDP.

The Commission also held that the district manager did not err in failing to exercise the discretion granted to him under the OPR to require MB to perform an archaeological impact assessment.

iv. **Operability Information**
Section 15(3)(d) of the OPR required a FDP to describe for the area under the plan "the location of all forest areas identified as operable for timber harvesting". The FDP contained little or no operability information for the area outside the proposed cutblocks.

The Commission held that while the FDP did not contain all the information required by section 15(3)(d), the lack of information in the circumstances was relatively minor, and the plan "substantially met" the legislative requirements.

v. **Unstable Terrain**
Section 15(3)(b) of the OPR required a FDP to describe "for the area under the plan... the location and nature of areas with unstable or potentially unstable terrain". "Unstable or potentially unstable terrain" was defined in section 1(1) of the OPR as "an area where there is a moderate to high likelihood of landslides". The FDP did not have information on terrain stability outside of the proposed cutblocks. However, as neither the Board nor Sierra Club presented any evidence of "unstable or potentially unstable terrain" outside the cutblocks, the Commission had no evidence to support a finding that the FDP did not comply with section 15(3)(b).

The other sections dealing with terrain stability were sections 15(6)(f) and 30(1) of the OPR. Section 30(1) only required a person proposing to carry out
harvesting operations "in an area" to conduct a terrain stability assessment to the satisfaction of the district manager. That had been done with respect to the proposed cutblocks. Section 15(6)(f) required that the results of any such terrain stability assessment be included in the FDP. That had also been done. Thus, the Commission found that those two requirements had been met.

vi. Watershed Information

The Sierra Club contended that the FDP did not contain watershed level information which the Ministry of Environment, Lands and Parks (MELP) had wanted. The Commission looked at the requirements of Section 32(1) of the OPR, which provided that a watershed assessment must be performed by

"... person proposing to carry out timber harvesting or road construction or modification operations under a FDP in the following areas . . . .

  a) a community watershed;
  b) a watershed that has significant downstream fisheries or watershed sensitivity as determined by the district manager and a designated environment official; or
  c) a watershed for which the district manager determines that an assessment is necessary.

The district manager had concluded that Section 32(1)(a) and (b) did not apply. As for Section 32(1)(c), the district manager had concluded that a watershed assessment was not required because:

  a) it was not one of the watersheds identified as a priority in the joint consultation process with MELP officials; and
  b) consultation with a hydrologist and ministry staff indicated that, in the circumstances, a watershed assessment of an un-logged watershed with a FDP proposing harvesting in less than 1% of the watershed area would have no value.

At the hearing, a MELP representative testified that while MELP would have liked a watershed level plan or a watershed study completed prior to the harvesting of timber in the area, he agreed that undertaking a comprehensive watershed management plan wasn’t required under the FPC Act in the circumstances. The Commission held that no watershed assessment was required in the FDP.

vii. Other Resources

The Board argued that the FDP should have specifically mentioned all of the other resources or values listed in section 15(2) of the OPR, including for example wilderness areas, sensitive areas, resource features, forest ecosystem networks, and scenic areas. The Commission held that section 15(2) only required MB to identify and describe the "known" locations of the various items. If none existed, the legislation did not require MB to go the further step and say so.
Summary
In summary, the Commission held that Section 10(b)(ii) only requires information about certain forest resources to be included in a FDP, namely those forest resources which are set out in the OPR, and only in those circumstances and to the extent that such information is expressly stated to be required.

c. Section 10(c)(ii) - "measures that will be carried out to protect forest resources"
The Board also argued that the FDP did not meet the requirements of Section 10(c)(ii) (now Section 10(1)(c)(ii)) of the FPC Act, which requires a FDP to specify "measures that will be carried out to protect forest resources". In particular, the Board stressed that no measures at all were specified in the FDP to protect forest resources outside the cutblocks.

"Forest resources" is defined in section 1(1) of the FPC Act as "resources and values associated with forests and range including, without limitation, timber, water, wildlife, fisheries, recreation, botanical forest products, forage and biological diversity."

The Board took the position that "forest resources" in the context of section 10(c)(ii) was something more than those resources identified and described in accordance with the provisions in the OPR. In its submissions, the Board said that since the FDP did not mention all the resources listed in the definition of "forest resources", it was impossible to know whether any of those resources were to be found in the area, or whether any measures were required to protect them. The Sierra Club took the same view. It argued that the district manager should turn his mind beyond whether the minimal requirements listed in the OPR have been met and look at whether the forest values in the area are managed and protected. In other words, both the Board and the Sierra Club argued that even if a particular resource (e.g. marbled murrelet) were not covered by the content requirements of the OPR, measures to protect that resource were still required under section 10(c)(ii).

The Commission disagreed. They held:

"[T]he OPR provides a detailed account of the specific resources or values that are to be identified and described in a plan. There is no express requirement for the licensee to go beyond those specified resources and values when preparing its plan. In fact, section 17 of the Code sets out a guide for the preparation of a plan and only identifies those things required by regulation as matters to be included in the plan...."

"The Commission finds that the forest resources which are to be covered in the plan are those set out in the various sections of the OPR. Once the resources have been identified, described or assessed in accordance with the OPR, section 10(c)(ii) requires the licensee (sic) to show how those resources will be protected - i.e., specify the "measures" that will be employed to protect them...." [emphasis in original]"
In other words, the Commission held that Section 10(c)(ii) does not require a
licensee to include information on a forest resource in a FDP, or to locate, map or
otherwise identify the forest resource in a FDP, if there is no express requirement
to do so in the OPR.

Section 10(c)(ii) cannot be used as a vehicle to impose mandatory content
requirements over and above the requirements set out in the OPR. Neither can it
be used to require a licensee to treat a forest resource that is not a mandatory
content requirement as if it were a mandatory content requirement, or to afford it
the same type or level of protection required in the OPR for a forest resource that
is a mandatory content requirement.

In this case, the Commission concluded that if the OPR required forest resources to be identified
for areas outside the cutblocks, and if the FDP failed to identify those forest resources, as
required, and consequently failed to specify measures to protect those resources, then the FDP
would be deficient. However, without specific evidence to that effect, the Commission had no
basis for finding that the FDP was in fact deficient.

3. How is the Test of "Adequately Manage and Conserve" to be Applied?

Under section 41(1) of the FPC Act, a district manager must approve a FDP if:

a) the plan was prepared and submitted in accordance with the requirements of the FPC Act,
regulations, and standards; 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.

With respect to the first test, the Commission was satisfied that MB’s FDP was prepared in
accordance with the requirements of the FPC Act and the OPR for the reasons set out above.

With respect to the second test, the Board and the Sierra Club argued that the district manager
could not reasonably have been satisfied with the FDP as there was not sufficient information in
the FDP on areas beyond the proposed cutblocks.

The Commission concluded that:

"Whether the plan ‘adequately manages and conserves the forest resources’ will
largely depend on what resources have been identified and described in the plan
and the adequacy of the measures specified to protect them with a view to
achieving ‘sustainable use’.”

Earlier in the decision, the Commission put its conclusion another way:

"The Commission finds that the forest resources which are to be covered in the
plan are those set out in the various sections of the OPR. Once the resources have
been identified, described or assessed in accordance with the OPR, section
10(c)(ii) requires the licencee (sic) to show how those resources will be protected - i.e., specify the "measures" that will be employed to protect them. It is only after both steps are taken that the District Manager is then in a position to determine whether the plan will ‘adequately manage and conserve the forest resources of the area to which it applies’ in accordance with section 41(1) of the Code." [emphasis in original]

As with Section 10(c)(ii), the Commission held that Section 41(1)(b) cannot be used to impose additional mandatory content requirements over and above those set out in the OPR. Section 41(1)(b) is a test for evaluating the contents of a FDP; it is not a vehicle for adding to those contents. Similarly, Section 41(1)(b) cannot be used to require a licensee to treat a forest resource that is not a mandatory content requirement as if it were a mandatory content requirement, or to afford it the same type or level of protection required in the OPR for a forest resource that is a mandatory content requirement.

As noted above, neither the Board nor Sierra Club provided evidence of any deficiency in meeting the content requirements set out in the FPC Act and the OPR. Based on what was included in the plan, the Commission held that the district manager "could have been reasonably satisfied that the plan adequately managed and conserved the forest resources identified in the plan".

4. What is Adequate Public Review and Comment?

The Board and the Sierra Club argued that the public review and comment requirements of section 39(1) of the FPC Act and sections 2 through 7 of the OPR were not met, on the grounds that:

a) the information in the FDP was not organized and presented in a way that could be understood by the public; and

b) the public was not given the opportunity to review and comment on all of the contents of the plan.

With respect to the first ground, lack of organization, the Commission held that there are no format requirements under the legislation, and that the guidance in the relevant guidebooks had not been available at the time the FDP was prepared. The poor organization and presentation of the FDP did not contravene the review and comment provisions.

On the second ground, sufficiency of the draft FDP, the Board and the Sierra Club took the position that the public has the right to review and comment on the final plan, not a draft plan.

In this case, the FDP had been amended prior to approval in response to public review and comment, and some additional amendments were made that were not related to public comments.
The Commission held that the OPR clearly contemplates that some changes will be made to the draft FDP submitted for public comment before it is submitted for approval.

The Commission also held that the amendments, which consisted primarily of adjustments to cutblock boundaries and reclassification of some streams, were so minor as to fall within the scope of section 43 of the FPC Act and did not require additional public review and comment.

The Board made other arguments with respect to public review and comment, which the Commission concluded were actually aimed at the adequacy of the contents of the plan, which the Commission had already addressed earlier in its decision. The review and comment provisions do not provide an alternative avenue to challenge the adequacy of plan content.

**Commentary**

While the decision of the Commission is not binding, its analysis of the requirements applying to the preparation, submission and approval of FDPs is worthy of consideration. District managers may wish to pay particular attention to their findings respecting mandatory content requirements and the application of Section 10(1)(c)(ii) and the test of "adequately manage and conserve" in Section 41(1)(b) of the FPC Act. The Commission held:

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

The Commission also flagged the district manager’s authority to require additional information under Section 41(2) and to impose conditions under Section 41(5). While the Commission did not expand on the scope of these sections, it is reasonable to assume that neither of these sections can be used to expand the mandatory content requirements for a FDP.

There is also the review and comment process to consider. In this case, relatively little information was provided through the review and comment process (with the exception of the information collected by the district manager himself as a result of concerns about marbled murrelet raised by Sierra Club). Still, nothing in the Commission’s decision suggests that if such information is forthcoming it is not to be considered.

Clearly, all relevant information provided by Forest Service or MELP staff, or through the public review and comment process, must be considered.

However, there is a difference between:

a) considering information regarding a forest resource that is not a mandatory content requirement; and
b) requiring a licensee to include that forest resource in a FDP as if it were a mandatory content requirement, or to afford it the same type or level of protection required in the OPR for forest resources that are mandatory content requirements.

The challenge for district managers will be to achieve a difficult balance by not ignoring relevant information on the one hand, and not imposing additional content requirements – over and above what the OPR requires – on the other.

In particular, it will be up to district managers to determine what weight to give to information provided for their consideration which goes beyond the mandatory content requirements set out in the OPR.

In this case, the district manager did consider the additional information he collected on marbled murrelet, but he did not require MB to include this information in the FDP. The Commission held that he was correct in concluding this information was not required in the FDP.

Also, district managers must be careful not to use the review and comment process, Sections 10(1)(c)(ii) or 41(1)(b) — or Sections 41(2) or 41(5) — to circumvent any of the processes established elsewhere in the legislation to deal with certain types of resources or issues (e.g. the procedures under Part 2 for establishing higher level plans, the procedures in the OPR for designating "identified wildlife", etc.).

Compliance and Enforcement Branch, in conjunction with other branches within both the Ministry of Forests and the Ministry of Environments, Lands and Parks will be consulting with the Ministry of Attorney General to determine whether further advice on this issue can be provided to district managers and other statutory decision makers under the FPC Act.

In the interim, it is recommended that district managers apply their judgment – in accordance with the principles set out above -- on a case specific basis, having regard to the circumstances.

"Area Under the Plan"

It is also worth noting the Commission’s comments with respect to the "area under the plan". Although many provisions of the OPR have been changed recently, this concept continues to be relevant to FDP preparation and approval.

It is recommended that district managers follow the Commission’s lead in treating the plan and the "area under the plan" as the same thing.

Those resources identified as mandatory content requirements for the entire "area under the plan" must be identified in accordance with the legislation. It is not adequate merely to address the cutblocks themselves and the areas immediately adjacent to the cutblocks.
However, as the Commission also noted, the individual content requirements set out in the OPR do not always apply to the entire "area under the plan". The specific legislative requirements should be carefully examined to see whether information is required for the entire "area under the plan", for "an area" under the plan, or just for the cutblocks or roads themselves.

Also, it would be wise to ensure the boundaries of the "area under the plan" are clearly delineated on the maps submitted with the operational plan.

Finally, in their closing comments, the Commission noted that it is not acceptable that a complete copy of the approved FDP was not available in the district office for public viewing. The Port McNeill District has addressed this concern.

If other districts have not already done so, it is strongly recommended that they also ensure one copy of any approved FDP is kept in the district office for public viewing.

Also, the Commission was clearly frustrated by the inability of MB or the government to recreate the FDP that was approved. The necessity of being prepared for potential challenges to the approval of an operational plan is another reason to ensure there is a complete copy of the approved plan in the district office.

In closing, it should be kept in mind that the Commission’s decision was based on a particular set of facts. District managers should consider reading the entire decision in order to appreciate the context in which the findings of the Commission were made.

Where necessary, district managers should not hesitate to seek further advice from the Ministry of Attorney General. Alternatively, you may contact one of the Compliance and Enforcement Practices Foresters or Statutory Decision Advisors in Compliance and Enforcement Branch and, if legal advice is required, they can liaise with the Ministry of Attorney General on your behalf.

**Contact**

For any questions regarding this bulletin, please contact the following:

Dan Graham, Compliance and Enforcement Practices Forester, at Dan.Graham@gems7.gov.bc.ca
## Appendix 4  
### Appropriate Use of Policies and Procedures

There are two categories of policies & procedures:

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<td>To establish <em>rules</em> for how the ministry conducts its business</td>
<td>To communicate a statutory decision-maker’s <em>approach</em> to making a statutory decision</td>
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| Focus of Policy | To establish the *goals* ministry staff must meet and the *principles* they must adhere to in carrying out the ministry’s business | To communicate the *guiding principles* a statutory decision-maker uses to *structure* his or her *thought processes* in making a statutory decision without fettering those thought processes (i.e. the principles cannot be rigid or binding “rules”) |

| Focus of Procedures | To establish the *processes* ministry staff must follow in carrying out the ministry’s business in accordance with the goals and principles established in policy | To communicate the *processes* the statutory decision-maker follows prior to making a statutory decision and in subsequently communicating the decision once it is made |

| Appropriate Response from Ministry Staff | *Comply strictly* with all such ministry policies and procedures unless they are clearly inappropriate (e.g. contrary to law) as such policies and procedures | *Understand* the statutory decision-maker’s *guiding principles* in order to provide appropriate advice and |

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<th>Risk Management &amp; the Principles of Statutory Decision Making</th>
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<td>procedures are usually <strong>binding</strong> on ministry staff</td>
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<td>support to the decision-maker</td>
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<td><strong>Identify circumstances</strong> which may lead the statutory</td>
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<td>decision-maker to <strong>depart from the guiding principles</strong></td>
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<td>and advise the decision-maker accordingly</td>
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<td><strong>Comply strictly</strong> with the decision-maker’s <strong>processes</strong></td>
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<td>leading up to and subsequently communicating a</td>
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<td>statutory decision</td>
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<td><strong>Relevance to Licensees &amp; Other Clients</strong></td>
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<td>business; otherwise none</td>
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<td>Advises them of the “<strong>case to meet</strong>” in order to persuade</td>
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<tr>
<td>the decision-maker to depart from his or her guiding</td>
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<tr>
<td>principles</td>
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<tr>
<td>Entitles them to order their own affairs in <strong>reliance</strong> on</td>
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<tr>
<td>the statutory decision-maker’s established <strong>processes</strong></td>
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<td>with the <strong>legitimate expectation</strong> that those <strong>processes</strong></td>
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<tr>
<td>will not change without adequate prior notice</td>
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<tr>
<td><strong>Authority to use Policies &amp; Procedures to Direct Licensees &amp; Other Clients</strong></td>
</tr>
<tr>
<td><strong>None</strong></td>
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<td>There are only two ways to direct licensees and other clients:</td>
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<tr>
<td>1) under authority conferred in a contract</td>
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<tr>
<td>2) under authority conferred in legislation</td>
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<tr>
<td><strong>Authority to use Policies &amp; Procedures to Direct Statutory Decisions</strong></td>
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<tr>
<td><strong>None</strong></td>
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<tr>
<td>Statutory decision-makers are delegated representatives of</td>
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<tr>
<td>the Legislature and their statutory decision-making</td>
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<tr>
<td>authority falls outside the scope of such policies and</td>
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<tr>
<td>procedures</td>
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<tr>
<td><strong>Only if specifically provided in legislation:</strong> otherwise, none</td>
</tr>
<tr>
<td>Only legislation can <strong>direct</strong> a statutory decision-maker or confer authority upon someone else to direct the statutory decision-maker</td>
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</table>
Examples of the Scope for Policy Versus Advice in The Operational Planning Process

There is scope for statutory decision-making policy wherever the legislation provides for a statutory decision.

There is scope of advice wherever statutory decision-makers, their staff, licensees or others require impartial, expert information. The goal is only to explain; never to direct or otherwise attempt to control the planning process.

### Collection of data and information and the carrying out of assessments

<table>
<thead>
<tr>
<th>Scope for Policy</th>
<th>Scope for Advice (Guidebooks, Bulletins, Advisory Letters, Templates, Etc.)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>What can be done:</strong></td>
<td>Provide expert advice on:</td>
</tr>
<tr>
<td>Where the legislation specifically confers a discretion to decide whether or not certain data or information is to be collected or certain assessments are to be carried out, policy can be used to communicate the guiding principles a statutory decision-maker will use in making this decision.</td>
<td>1) the legislated requirements (applying appropriate statutory interpretation principles);</td>
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<td></td>
<td>2) other relevant legal principles;</td>
</tr>
<tr>
<td></td>
<td>3) scientific, technical or other information relevant to the process.</td>
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<tr>
<td></td>
<td>This advice must be accurate and impartial!</td>
</tr>
<tr>
<td><strong>What cannot be done:</strong></td>
<td>Advice cannot be used to impose data or information collection requirements or assessment requirements over and above those set out in the legislation, or to alter any criteria set out in the legislation.</td>
</tr>
<tr>
<td>Policy cannot be used to impose data or information collection requirements or assessment requirements over and above those set out in the legislation, or to alter any criteria set out in the legislation.</td>
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### Preparation and content of operational plan

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<tbody>
<tr>
<td><strong>What can be done:</strong></td>
<td>Provide expert advice on:</td>
</tr>
<tr>
<td>Where the legislation specifically confers a discretion on a statutory decision-maker to decide on an issue relating to plan content (e.g. variation upwards or downwards from the default standards for cutblock size), policy can be used to communicate the guiding principles which the statutory decision-maker will use in making this decision.</td>
<td>1) the legislated requirements (applying appropriate statutory interpretation principles);</td>
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<td></td>
<td>2) other relevant legal principles;</td>
</tr>
<tr>
<td></td>
<td>3) scientific, technical or other information relevant to the process.</td>
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<td></td>
<td>This advice must be accurate and impartial!</td>
</tr>
<tr>
<td><strong>What cannot be done:</strong></td>
<td>Advice cannot be used to circumvent the</td>
</tr>
<tr>
<td>Policy cannot be used to circumvent the</td>
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</table>

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requirements of the legislation by adding or substituting content requirements, altering criteria set out in the legislation, or creating alternative management regimes (e.g. by creating an alternative to the legislated process for designating and managing species that would otherwise qualify as “identified wildlife”).

Dealing with Public Review and Comment

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<tr>
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</thead>
<tbody>
<tr>
<td><strong>What can be done:</strong></td>
<td><strong>What can be done:</strong></td>
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</table>
| Where the legislation specifically confers a discretion to decide on an issue relating to the public review and comment process (e.g. the extension of time for review and comment or the referral of an operational plan), policy can be used to communicate the guiding principles which the statutory decision-maker will use in making this decision. | Provide expert advice on:  
1) the legislated requirements (applying appropriate statutory interpretation principles);  
2) other relevant legal principles;  
3) scientific, technical or other information relevant to the process.  
This advice must be accurate and impartial! |
| **What cannot be done:** | **What cannot be done:** |
| Policy cannot be used to tell a licensee how to deal with comments received through the review and comment process, or to transform the review and comment or referral processes into a vehicle for delegating all or part of the decision to approve or not approve a plan (e.g. by making approval of a plan contingent on favourable comments from or “approval” by another organization or agency. | Advice cannot be used to tell a licensee or a statutory decision-maker how to deal with comments received through the review and comment process, or to transform the review and comment or referral processes into a vehicle for delegating all or part of the decision to approve or not approve a plan (e.g. by making approval of a plan contingent on favourable comments from or “approval” by another organization or agency. |

Approving an operational plan

<table>
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<tr>
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<tr>
<td><strong>What can be done:</strong></td>
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</table>
| The approval of operational plans is not a discretionary decision; it is a mandatory decision based on two tests laid out in section 41(1)(a) and (b). However, both tests require the exercise of judgment, which provides some scope for policy. For example, where a forest development plan is for an area covered by a duly established higher level plan, a statutory decision-maker can use policy to communicate the guiding principles he or she will use in determining under section 41(1)(a) whether the plan is consistent (i.e. does not materially conflict) with the higher level plan. | Provide expert advice on:  
1) the legislated requirements (applying appropriate statutory interpretation principles);  
2) other relevant legal principles;  
3) scientific, technical or other information relevant to the process.  
This advice must be accurate and impartial! |
Similarly, a statutory decision-maker can use policy to communicate the guiding principles he or she will use in applying the test of “adequately manage and conserve” under section 41(1)(b).

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<tr>
<th><strong>What cannot be done:</strong></th>
<th><strong>What cannot be done:</strong></th>
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<tbody>
<tr>
<td>Policy cannot be used to transform the approval process into a vehicle for directing earlier stages in the plan approval process (e.g. by adding to the plan content requirements).</td>
<td>Advice cannot be used as a vehicle to direct a statutory decision-maker on how to apply his or her judgment, or into a vehicle for directing any stage in the plan approval process (e.g. by adding to the plan content requirements).</td>
</tr>
</tbody>
</table>
Appendix 5 – An Approach to Operational Plan Approval

An Approach to Operational Planning

The approval of an operational plan as defined in the *Forest Practices Code of British Columbia Act* by a statutory decision maker (or legally delegated representative), requires a considerable amount of technical analysis, teamwork, professional and sometimes legal advice. The overall coordination of this process must be done by the statutory decision maker, while many of the component parts may be accomplished by advisors, analysts and support staff.

Although several components of the operational plan approval process are not accomplished by the statutory decision maker, the end approval must be based on all of the pertinent facts, and their interrelations as examined, determined and articulated by the statutory decision maker.

A typical process for operational plan approval should be fair and well understood by both the licensee and district staff. That said, it is only one of many ways to ensure that the principles of administrative law and legislative interpretation are applied according to the real risks borne by the licensee, licensee staff, the statutory decision maker and district staff and the professionals involved.

The operational plan approval process assumes that the plan will permit inherently risky activities. These plans and the related legislation are put into effect with the premise that ‘unacceptable’ risks will not be incurred in the implementation of the plan. The plan preparation and approval process is in place (among other reasons) to ensure that the resultant risks of the planned activities are ‘acceptable’ as defined by the legislation and professional judgment. The resultant risks are to be taken in the context of their uncertainty. For example, risks that approach the ‘unacceptable’ threshold that can’t be quantified with an appropriate degree of certainty, need further analysis before a defensible determination can be made.
The roles and responsibilities of all individuals and agencies in the operational plan approval process are defined by risk. Not only with respect to their role in the filtering of ‘unacceptable’ risk and uncertainty from the approved plan but in mitigating their personal risk associated with the participation in this process. Risks are not just related to the management of the forest and the associated practices, but may be civil, professional or legal in nature.

The following operational plan approval process is provided as a guide only and is by no means meant to be the perfect approach and is largely an oversimplification of the true process. Each statutory decision maker and district has its unique issues, licensees and staff. This process serves to illustrate some key milestones in the operational plan approval process in a typical case and the interactions of staff, the statutory decision maker and outside influences throughout the process. Plan approvals that are more or less complex than the average will require a more or less diligent application of the principles associated with this process.

1. **The Statutory Decision Maker is a Coach**

   The statutory decision maker ‘owns’ the process. He or she is accountable for the end result and as such may control the process and dictate the rules or framework that will guide the plan approval. It is advisable that all of the participants in the process understand the rules for engagement, their responsibilities and any limits that the legislation creates on them or the process. This can be done through policies, standard operating procedures or through informal communication. However, everyone must be mindful of the fact the policies/procedures are to guide the process and not limit the final outcome. The final outcome is limited by the statutory decision maker’s legislated discretion and the applicable legislation. The degree of ‘hands on’ interaction from the statutory decision maker will vary with the experience of the staff, the management style of the statutory decision maker and the complexity of the plan to be approved.

2. **Analysts are Advisors**

   The complexity and volume of operational plans requiring approval preclude the statutory decision maker from analyzing every plan in it’s entirety before approval. Technical, professional and support staff are required to analyze all sections of the plan, identify potential issues and develop recommendations for the statutory decision maker. Issues management and resulting recommendations are put forward given the risks associated with different courses of action. Inappropriate use of statutory decision maker discretion by the advisor level is undesirable. This ‘second guessing’ of what the statutory decision maker will actually allow or approve is inappropriate. Established, well understood district manager policy for certain issues may enable minor issues to be resolved at the advisor level. However, the use of ‘discretion’ in this regard, without personal contact with the statutory decision maker should be avoided on any potentially contentious or pervasive issues. Where ‘discretion’ is employed by an advisor, it should be articulated to the statutory decision maker prior to the overall plan approval.
3. The Statutory Decision Maker Determines

Based on the recommendations put forth by advisors, the statutory decision maker must actively manage the sensitivity analysis and resulting decision. The decision may be clear and straightforward or complex/incomplete thereby requiring more technical analysis/information and associated recommendations. Regardless, this step in the process must be actively managed or completed by the statutory decision maker. The resulting decision(s) will lead to the eventual approval. These decisions form the crux of the rationale and related assumptions that lead to the determination made (or not made). This step can not be made by staff or advisors. It is the statutory decision maker’s alone. At this stage, more information may be required than can be generated in step 2.

Once the statutory decision maker has fully elicited the issues and recommendations of the staff, outside influences may play a role in the final determination. Public pressures, interagency comments, legal advice, superseding legislation etc. may, at this stage, influence the final decision. The solicitation and coordination of this input may be done directly by the statutory decision maker or by the staff. If staff assist in this function, it is with the same relationship as in step 2. That is, the use of the statutory decision maker’s policies may guide their work, but limit it. Also, the use of discretion by staff should be put forward in the context of qualified recommendations. And like step 3, it is the statutory decision maker who must determine the intended course of action based on the advisors’ input.

4. Rational rationale

The process to this stage has produced a conclusion, as determined by the statutory decision maker. The articulation of this conclusion, is not in the form of a mere approval, but an accounting of the relevant facts, assumptions and decisions that formed that approval. The rationale may be written by the statutory decision maker or the support staff. However, the rationale must be consistent to the facts, ideas and assumptions that the statutory decision maker used to form the determination. Clearly articulated determinations ensure all parties involved in the specific operational plan approval process, be they licensee or staff, understand the parameters and assumptions employed. Advisors whose preferred recommendations were not chosen can use these determination rationales as a tool to hone their skills and understanding for contributing to the process in the future.

5. The Statutory Decision Maker owns the Decision
The statutory decision maker owns his or her decision and is accountable for it. A statutory decision maker may delegate work in information gathering, reviewing and assessing but he or she makes the decision. In doing so, the product of this work becomes his or her own. The statutory decision maker must be able to stand behind the decision and must have sufficient understanding of the content and process of the information review to defend its outcome. Should the decision be appealed, it is not usually the work of subordinates that is challenged but the decision of the statutory decision maker and how it was formed. Statutory decision makers must have confidence in and an understanding of the work that was done for them to face challenges to their decisions in a positive and professional manner.
Exercise #1

For the section you have been assigned, identify the acceptable or unacceptable level of risk, explain the balance between environmental, economic and social values and identify if there is discretion involved in determining the acceptable or unacceptable level of risk (follow the instructions on the worksheet in the back). Note- some of the sections may not involve all three values.

Below is an example of how this exercise may be done.

Example:

*THPR s. 11(3)* - A person carrying out helicopter, balloon or another type of aerial harvesting must not use as a log drop area, a) the littoral zone of a marine or freshwater system, b) water that is less than 10m deep, or c) a marine-sensitive zone.

This prohibition explicitly identifies an unacceptable risk - that is - it is an unacceptable risk to the environment to use as a log drop area any of the places listed in a, b or c. Because this subsection does not provide for a variance, either through a plan approval or a written authorization, it defines clearly the line between acceptable and unacceptable risk without the use of discretion. From the identification of unacceptable risk it can be assumed that an acceptable risk to the environment exists if for example, water that is greater than 10m deep is used as a log drop area. It does not mean that there is no risk in water greater than 10m deep, just that it is acceptable.

The economic trade-off is that, there may be more cost expended in finding a log drop area that is does not contravene the prohibition.

1) Section 19 from the Timber Harvesting Practices Regulation

Landing and roadside debris accumulations

19  (1) A person carrying out a harvesting operation must

(a) deposit debris that accumulates from the construction and use of landings in the area of the landing or in other areas that are approved by the district manager, and

(b) dispose of combustible landing and roadside debris, unless the district manager authorizes the person in writing to not dispose of it, and the district manager may attach conditions to the authorization.

(2) Subject to subsection (3), if the person burns the debris referred to in subsection (1) (b) they must burn it in the first burning season after harvesting is completed or, if it is insect-infested, before the insects emerge.
(3) If the district manager determines that burning cannot take place as required under subsection (2) because the debris is too wet to burn or environmental conditions prevent burning, the district manager may authorize, in writing, a different period of time for completion of the disposal of the debris.

(4) If the method for disposing of debris accumulations resulting from roadside harvesting operations requires piling of the debris, the person carrying out the piling operation must not operate ground-based equipment on the area adjacent to the road during periods when the soil strength is not sufficient to prevent the wheels or tracks of the equipment, used to carry out the piling, from creating concentrated soil disturbance if it is apparent that continuing the piling operations will result in the total amount of soil disturbance within this area being greater than the amount specified in section 18.

For reference section 18 is provided

A person carrying out roadside harvesting operations, including decking, processing, loading and any associated debris disposal or piling operations, must not cause soil disturbance to more than 25% of the area that is both within the net area to be reforested and used to carry out those activities.

2) Section 6 from the Silviculture Practices Regulation

Restricted operation of machinery

6. (1) A person who carries out a silviculture treatment must not permit tracks or wheels of ground based machinery within 5 m of a stream bank except in the following cases:
   (a) for carrying out fire fighting activities;
   (b) in response to natural disasters;
   (c) at stream crossings authorized by the district manager,
   (d) if operations will be conducted in a manner that protects stream banks and minimizes damage to understory vegetation.

(2) The district manager may exempt a person from the requirements of subsection (1) if
   (a) the machinery is operated
      (i) to construct or maintain a range development,
      (ii) to construct or maintain a work or to carry out an activity within or adjacent to streams for the purpose of controlling soil erosion, protecting stream banks or managing fisheries or wildlife, or
      (iii) for an activity similar to one described in subparagraphs (i) and (ii), or
   (b) in the opinion of the district manager,
(i) no other practicable option exists for carrying out the silviculture treatment, or
(ii) operating the machinery more than 5 m from the stream bank will increase the risk of sediment delivery.

(3) A person who carries out a silviculture treatment must not fuel or service machinery in a riparian management area of a stream or wetland or within 30 m of a lakeshore.

(4) Subsection (3) does not apply on an approved landing or road, or to machinery that is any of the following:
   (a) hand held;
   (b) required for fire fighting;
   (c) broken down and requires fuelling or servicing to be moved;
   (d) authorized in a silviculture prescription or stand management prescription to be fuelled or serviced in the area;
   (e) authorized by the district manager to be fuelled or serviced in the area.

3) Section 11 from the Forest Road Regulation

Road site preparation

11  (1) A person required to construct or modify a road in compliance with section 62 (1) of the Act must do all of the following when clearing the clearing width:
   (a) fell all standing trees within the clearing width and fell any danger trees that have the potential to reach the proposed road surface;
   (b) in areas where felled trees could reach streams or lakes
      (i) directionally fell trees away from the stream or lake, unless that is the only practicable way the timber can be felled, and
      (ii) use felling and yarding methods that prevent the stream bank from destabilizing;
   (c) remove from within the road prism width
      (i) stumps, roots, embedded logs, topsoil, and
      (ii) soils that are not capable of supporting the road and applied vehicle loads.

(2) Despite subsection (1) (c), the person may leave or place stumps, roots and embedded logs in the road prism, if
   (a) the stumps, roots and embedded logs are outside the road subgrade width on the downhill side,
   (b) the area is not assessed as having a moderate or high likelihood of landslides, as determined by a terrain stability field assessment under section 4, and
   (c) the person has prepared a statement in accordance with section 8 (6).
(3) Despite subsection (2) (a), a person may leave or place stumps, roots and embedded logs in the road prism within the road subgrade width, if
(a) the requirements of subsection (2) (b) and (c) are met,
(b) the road will be
   (i) permanently deactivated within 5 years after construction, or
   (ii) permanently deactivated more than 5 years, but not more than 10 years, after construction, if the person has reasonable grounds to believe, on the basis of assessments carried out more than 5 years after construction and at times the person considers appropriate, that the road is not likely to be at risk due to decomposition of the stumps, roots and embedded logs until the next assessment, and
(c) any deactivation prescription and deactivation works will incorporate measures to remove stumps, roots and embedded logs that may reasonably be expected to fail and de-stabilize the road fill.

(4) Despite subsection (1) (c), a person may use stumps and logs as retaining structures under or against the fill, if
(a) they are used for the purposes of measures prepared under section 8 (3) to provide slope stability, and
(b) the road will be permanently deactivated in accordance with subsection (3) (b) and (c).

(5) Subsection (1) (c), (2) and (4) do not apply to overlanding or snow roads.

(6) A person who constructs or modifies a road in compliance with section 62 (1) of the Act must dispose of slash and debris by one or more of the following methods:
   (a) scattering;
   (b) piling and burning;
   (c) burying;
   (d) endhauling.

(7) A person must not deposit slash and debris or erodible soil into a lake, wetland, stream, fisheries-sensitive zone or marine-sensitive zone, if the deposit is capable of
   (a) damaging fish habitat, or
   (b) causing water quality to fail to meet its known water quality objectives

(8) A person must not deposit slash and debris in a manner that would increase the likelihood of slope failure.
4) **Section 15 from the Forest Fire Suppression and Prevention Regulation**

**Cable Logging**

15 A person carrying out an industrial activity that is a cable logging system must
(a) lay out all running lines in straight line;
(b) remove branches, brush and shrubs to a width of 75 cm on each side of the running line for a distance of 4 m in either direction from each corner block; and
(c) in addition to any other requirement of this regulation, provide a hand-tank pump containing at least 18 litres of water and keep it immediately adjacent to each corner block that is in use.

5) **Section 11 of the Operational Planning Regulation**

**Maximum cutblock size**

11 (1) The maximum size of a cutblock must not exceed
(a) 40 ha for the following areas:
   (i) Vancouver forest region;
   (ii) Nelson forest region;
   (iii) Kamloops forest region, and
(b) 60 ha for the following areas:
   (i) Cariboo forest region;
   (ii) Prince Rupert forest region;
   (iii) Prince George forest region.

(2) The maximum size for a cutblock specified under subsection (1) does not apply to a cutblock located within an area covered by a higher level plan if
(a) the higher level plan specifies that cutblocks may be larger, or
(b) the higher level plan specifies conditions that must be met in order for larger cutblock sizes to be approved and, the district manager, or for areas referred to in section 41(6) of the Act the district manager and the designated environment official, are satisfied that the conditions are met.

(3) Despite subsection (1), the district manager, or for areas referred to in section 41(6) of the Act the district manager and designated environment official, may
(a) refuse to approve a forest development plan that includes a cutblock that meets the requirements of that subsection if the district manager, or the district manager and the designated environment official, as the case may be, are of the opinion that a cutblock smaller than that specified in subsection (1) is required
   (i) for hydrological reasons,
   (ii) to manage wildlife values,
   (iii) to manage recreation or scenic values, or
   (iv) for other similar reasons, or
(b) approve a forest development plan that includes a cutblock that is larger than that specified in subsection (1)
   
   (i) if
   
      (A) harvesting is being carried out to recover timber that was damaged by fire, insects, wind or other similar events and wherever possible, the cutblock incorporates structural characteristics of natural disturbance, or
      (B) the silvicultural system proposed for the area
   
   (i) is other than clearcut or seed tree, and
   
   (ii) retains 40% or more of the pre-harvest basal area, or

   (ii) if the district manager, or the district manager and the designated environment official, as the case may be, are of the opinion that the larger cutblock is designed to be consistent with the structural characteristics and the temporal and spatial distribution of natural openings.
Work Area

Does the section or subsection identify an acceptable or unacceptable risk?

Describe the acceptable or unacceptable risk

Does the section provide for any discretion in determining the acceptable or unacceptable risk? If so, how?

Identify the values (environmental, economic, social) that are managed by the section or subsection. Be as specific as possible.
Exercise # 2

The instructor will assign you one of the following statutory decisions. Choose one of the values that has been identified as requiring a risk assessment prior to making the decision and follow the instructions on the worksheet in the back.

1) THPR Felling adjacent to streams, wetlands, lakes, etc.

   10 (1) A person carrying out harvesting must not fell the timber onto a stream... unless...
   (2) If there is no silviculture prescription for the area and the district manager does not require the person to prepare a logging plan for the area, the district manager may waive the requirements of subsection (1) and may place other conditions on the person with respect to felling timber near streams, lakes, wetlands, fisheries- sensitive zones or marine-sensitive zones to minimize damage to those areas.

Values:
1) Fish habitat  2) Water quality  3) Harvesting cost

Assumptions:
The area is a small (0.8ha) area of beetle killed timber. 5 - 10 trees require falling across the stream. Stream is an S4 fish stream. A known community water supply intake is downstream (approx. 200m). The water intake is used by a small group of cabin owners in the summer months only. The proposed falling is likely to occur in October. To fall away from the stream is possible although it would be costly to the licensee and is slightly more dangerous to the fallers.

2) THPR - Requirements when constructing a landing

   15 A person constructing a landing must
   (a) construct it at least 30 m from a fish stream or a stream in a community watershed, unless
   (i) there is no other practicable location for the landing,
   (ii) constructing the landing closer to the stream will not create a high risk of sediment delivery to the stream, and
   (iii) the district manager approves constructing the landing less than 30 m distance from the stream, and
   (b) incorporate drainage systems to minimize runoff flowing onto the landing and erosion of the landing fill and material.

Values:
1) Fish Habitat  2) Worker Safety  3) Soil Productivity

Assumptions
Stream is an S3 and it is not in a community watershed. It has been determined that there is no
other practicable location for the landing and that there is a moderate risk of sediment delivery to the stream if the landing is constructed within 30m of the stream. There is a natural bench upon which the landing can be constructed within the 30m zone. If there is no landing, an extensive amount of skidding within the block would be required.

3) **FRR - Selecting road location**

    4 (3) A road in a community watershed must not
    
    (a) be located within a 100 m radius upslope of a known community water supply intake, unless the district manager and designated environment official agree that the road may be located closer to the intake,

**Values:**
1) Cost to licensee  2) Water quality  3) Wildlife Habitat

**Assumptions:**
A 225m portion of the proposed road is to be constructed within 100m radius upslope of the intake. The area upon which the road is proposed has a gradual slope but in a fine textured soil type. It is anticipated that there will be high public use of the completed road. Road construction is proposed for the spring. The water intake is one of two that supplies water to a community of 5000. The area around the water supply intake is known to be frequented by grizzlies. To construct the road entirely outside of the 100m radius would involve an additional 500m of road on much steeper terrain.

4) **FRR - Content of road layout and design**

    6 (3) The district manager may exempt a person from the requirement to carry out a road location survey on being satisfied that
    
    (a) the length of the road affected will be short, and
    (b) there will be little or no impact on forest resources.

**Values:**
1) Cost of survey  2) Soil Productivity  3) Range values

**Assumptions:**
The proposed road is a 40m in block road to be built on an approximately 45% side slope. There is some range use in the area and there is the potential for some salt licks being located in the area. In addition there is a high percentage of proposed permanent access within the block.
Work Sheet

Identify the section you have been assigned ________________

Identify which of the three values (listed under the section) you have selected _______________

Note: Please refer to the assumptions associated with your assigned section to help you through the exercise. If you need to make some additional assumptions space has been provided in each part to do so.

1) Identify some Potential Detrimental Events (see pg. 3-3 of handbook) that may affect the selected value:

Assumptions

2) Identify things you might consider in determining the likelihood of the potential detrimental events occurring (see pg. 3-4 of handbook):

Identify any uncertainties associated with determining the likelihood

Assumptions
3) Assuming that two of the detrimental events you identified in 1) do occur, identify things would you consider in determining the **Magnitude of Consequence** (see pg. 3-5 of handbook) to the value: (remember magnitude is effected by both the impact and the time over which the impact exists).

Identify any uncertainties associated with determining the magnitude

Assumptions

4) Identify any **Risk Factors** (performance, market, timing) that may influence an assessment of risk to the identified value (see pg. 3-7 of handbook).

Assumptions
Exercise #3

An SP was submitted for approval. Based on the initial review by district staff, four key issues were identified that may affect the DM’s decision to approve or not approve. Staff put forward the issues below, with some risk assessment information. It is now up to you (your group), acting as the decision maker to risk manage. How would you consider the information presented in your determination, or if not in the determination, in negotiations for an acceptable solution. Follow instructions on worksheet in the back.

Issue #1:
The area is not in a known scenic area. However, it is in an area that is visible to an increasing number of recreational users, and it is anticipated that in the future it may be designated as a scenic area.
The current cutblock configuration and proposed level of retention would fall short of meeting acceptable visual quality criteria in a scenic area. However, the prescription acknowledges the increasing visual sensitivity of the area.
During the public review of the forest development plan, there were some public concerns over the potential loss to visual quality in this area.
There is a high likelihood that public comment will be negative regarding the logging of this cutblock as outlined in the SP. (It should be noted that the FDP was approved with no change in cutblock configuration as a result of the public comment at that time.)

Issue #2:
The licensee proposing this cutblock is relatively new to this district, and to forestry in general. Licensee planning staff, corporate philosophies and logging contractor are all relative ‘unknowns’. Other than the work by some high-quality consultants from the area, the district staff feel that there may be an increased chance that the plan information may be lacking in some areas, and that the plan as proposed, has less of a chance of being implemented as planned.
There is no tangible reason for this feeling, but it is shared by all staff that have interacted with this licensee over the last year. The greatest chance for non-compliance or damage is in not being able to carry out the silviculture system proposed. It is generally thought that an organized, experienced licensee will be able to harvest as proposed, but a less than diligent approach to such a new and difficult system will yield unacceptable soil disturbance and basal scarring.

Issue #3:
Assume the stand will be clearcut. The proposed tree species (singular) for reforestation is ecologically suited to the site. However, the stand to be harvested is a mixed species stand. Given that there is no history of natural ingress or acceptable germinants/residuals of any other desired species on this site series, there is a concern that the multi-species stand will be replaced with a single species stand.
The planned species for reforestation has probably been chosen for it’s reliable survival and fast growth. The silviculture specialist in the district feels that lack of species diversity may increase the chance of forest health problems and will negatively affect future species diversity.
Note: s. 41 of the OPR states that unless otherwise set out in a higher level plan, a person must select a mix of ecologically suited species for reforestation of a mix of species was present on the area before the timber was harvested.

Issue #4:
An alternate silviculture system is being proposed. It appears that stand level biodiversity concerns will be addressed at the expense of increased potential for windthrow. There is a moderate likelihood that the retained stems in the cutblock will experience a high degree of windthrow (empirical estimates are not available).

The stems to be retained are not in a riparian reserve zone. Any windthrow will be difficult, if not impossible to salvage due to the soil and slope constraints and the economics of such an undertaking.

Retaining the stems in the block will affect the economics of the logging operation since approximately 20% of the timber value of the cutblock is being left behind. Additionally, logging costs will be higher for such a harvesting operation. Although there isn’t very much information about how much additional cost will be incurred, it is estimated as 15%.

It should be noted that if blowdown is experienced, the benefit to biodiversity and visual quality is diminished somewhat. On the positive side, there is very little information about this type of harvesting in this stand type, and the information would be used to guide future innovative logging practices in this area.

Risk factors that will affect this issue are market related; there is a risk that in poor market conditions, the chance for non-compliance with the planned approach will be elevated.
Work Area

State whether the information provided under each issue:

- will affect the approval decision,
- will be considered as relevant information, but do little to affect the outcome, or
- is not relevant information.

Give reasons for the degree of consideration you gave the information.
ASSESSING AND MANAGING RISK A CASE STUDY

Situation:

I was faced with having to make a decision between two possible access routes to a cutblock. The route from the North, was considerably longer and through much more difficult terrain (steep and unstable) than the Southern route. The Southern route, albeit shorter and through easier terrain than the Northern route, cut through a corner of a Caribou High zone raising the potential for negatively impacting a small and somewhat isolated Caribou herd. Here are the “facts”:

Points of View:

A. Opposition to the southern route:
   1. The cutblock should never have been approved as it fell within the Caribou High Zone and was missed during previous FDP reviews and approvals (the SP and CP had been subsequently approved and issued).
   2. There is anecdotal evidence that the Caribou herd heavily uses the area.
   3. The southern route could potentially increase preying by wolves on the local, small and isolated Caribou herd. Data showed there was little or no interaction between this herd and other herds in the George Mountain and Bowron Valley areas.
   4. The southern route could potentially increase harassment of the Caribou by snowmobile users. For the same reasons as in (2), heavy snowmobile use could result in extirpation of the herd as had been evidenced in other areas of BC. This risk is a higher risk to the herd than the predatory risk.
   5. The northern route could potentially cause environmental problems but the integrity of the Caribou herd took precedence, therefore, there was not support for the southern route.
   6. Erosion of public trust. The LRMP table stated there would be no commercial harvest in the Caribou High Zones until proven management strategies are developed.
   7. Further erosion of public trust. As the route is different from the approved FDP and poses a threat to blue-listed species, it should be considered a major amendment and re-advertized for public review and comment.
   8. Concern that this will set precedence.

B. Support for the southern route (licensee):
   1. The Northern route would pose a long-term risk to the environment because stabilizing a road in such difficult and unstable terrain would be expensive and likely ineffective.
   2. There is less road to construct with the Southern route and because of favourable grades will be a more economical proposition.
3. The Southern route can be more effectively put to bed (permanently deactivated) than the Northern route.
4. There is little evidence that there is actual use of the area by the Caribou herd.
5. The Southern route was not accessing or traversing a significant portion of the Caribou High Zone thus would not significantly increase risk to the herd.
6. The licensee was willing to impose speed restrictions on their logging trucks to minimize potential collisions with animals “channelled” onto the road because of deep snows.
7. The licensee has had operations in similar situations with no experience of animal mortality because of collisions with vehicles.

C. MOF staff stated:
   1. They could see both sides of the argument.
   2. They were very concerned with the Northern route because of the steep and potentially unstable terrain and the potential for negative impacts into nearby fish streams.
   3. They have a concern with landslide potential with the Northern road.

This was a very difficult decision to make as it involved the three general risk groups in forest management i.e. Environmental, Economic and Social. As I said to the parties involved, they may not like my decision, but they could never fault me for my process. So here, is how I arrived at my decision.

Risk Assessment Process:

1) What are the potential detrimental events and the potential values that may be impacted?
   Environmental Risk:
   Northern route:
   • Potential for landslides and sedimentation into fish streams (thus degrading fish habitat and fish populations) potentially for a significant period of time because of difficulties with stabilizing or permanently deactivating a road through the steep and potentially unstable terrain in the area.
   • Potentially provides access for wolves to the Caribou High Zone which could increase predatory pressure on the local Caribou herd which could lead to, in the worst case, extirpation of the Caribou herd. Deactivation may not decrease this pressure as pulling of the bridge would not create an impassable barrier to wolves.
   • Potentially provides access for snowmobile users to the Caribou High Zone. Because of a bridge in this access system, permanent deactivation would likely decrease snowmobile access. Heavy harassment by aggressive snowmobile users could lead to, in the worst case, extirpation of the Caribou herd.
Southern route

- Virtually no potential for landslides and/or sedimentation events.
- Potentially provides access for wolves through part of, and to, the Caribou High Zone which could increase predatory pressure on the local Caribou herd which could lead to, in the worst case, extirpation of the Caribou herd. Deactivation may not decrease this pressure as snow pack onto the R/W will likely continue to provide access to wolves.
- Potentially provides access for snowmobile users, through part of, and to, the Caribou High Zone which could lead to, in the worst case, extirpation of the Caribou herd. Permanent deactivation would likely not decrease this pressure as snow pack onto the R/W will likely continue to provide access to snowmobiles.

Economic Risk:

Northern Route

- Significantly costly route to the licensee because of more R/W to construct, traversing potentially unstable terrain and the construction of a bridge.
- Lower stumpage revenue to the Crown.
- Likely higher than average maintenance costs because of steep terrain and potentially unstable terrain.
- Potential on-going stabilization costs of the deactivated R/W because of the steep terrain and potentially unstable terrain.

Southern Route

- No potential detrimental event or impact identified with this route with respect to Economic Risk.

Social Risk:

Northern Route

- Access to Caribou High Zone may violate public trust as developed from LRMP table.

Southern Route

- Access through part of, and to, Caribou High Zone may violate public trust as developed from LRMP table.

2) What is the likelihood that the detrimental events will occur?

Environmental Risk:

Northern Route

- Potential for landslides and sedimentation into fish streams (thus degrading fish habitat and fish populations) potentially for a significant period of time because of difficulties with stabilizing or
permanently deactivating a road through the steep and potentially unstable terrain in the area. Although I am not aware of any Terrain Stability Field Assessments (TSFA’s) with this route (thus making this clearly a REAL risk), I accept the advice of MOF and licensee staff with the high risk/likelihood of this event. Although I am not aware of the TSFA I concluded this risk was a mix of REAL and PERCEIVED.

- Potentially provides access for wolves to the Caribou High Zone which could increase predatory pressure on the local Caribou herd which could lead to, in the worst case, extirpation of the Caribou herd. Deactivation may not decrease this pressure, as pulling of the bridge would not create an impassable barrier to wolves. I concluded this to be a PERCEIVED risk with a low likelihood of occurrence because there was no scientific evidence submitted of similar situations showing a correlation between access and increased preying (although intuitively one would suspect there would be some correlation). I also considered that this Caribou High Zone is already roaded in other parts and there was no evidence of increased preying by wolves on this Caribou herd.

- Potentially provides access for snowmobile users to the Caribou High Zone. Because of a bridge in this access system, permanent deactivation would likely decrease snowmobile access. Heavy harassment by aggressive snowmobile users could lead to, in the worst case, extirpation of the Caribou herd. I concluded this to be a PERCEIVED risk with a low likelihood of occurrence because there was no evidence of increased harassment of the herd by snowmobile users given the existing access in the other parts of this Caribou High Zone. Further, MOF recreation specialists submitted this was likely a low likelihood of occurrence because the access led only to the cutblock; not to any attractive open areas such as Alpine areas. I further considered that if there is evidence of harassment by snowmobile users I would consider mitigating this risk through using Section 105 of the Forest Practices Code of British Columbia Act.

Southern route

- Virtually no potential for landslides and/or sedimentation events. I concluded this to be a mix of REAL and PERCEIVED risk with a low likelihood that there would be landslides and/or sedimentation events.

- Potentially provides access for wolves through part of and to, the Caribou High Zone which could increase predatory pressure on the local Caribou herd which could lead to, in the worst case, extirpation of the Caribou herd. Deactivation may not decrease this pressure as snow pack onto the RAY will likely continue to provide access to wolves. I concluded this to be a PERCEIVED risk with a low to medium likelihood of occurrence (I upped the likelihood of
Appendix 5
An Approach to Operational Plan Approval

occurrence because this route traverses a portion of the Zone as well as providing access to the Zone) because there was no scientific evidence submitted of similar situations showing a correlation between access and increased preying (although intuitively one would suspect there would be some correlation). I also considered that this Caribou High Zone is already roaded in other parts and there was no evidence of increased preying by wolves on this Caribou herd.

- Potentially provides access for snowmobile users, through part of and to, the Caribou High Zone which could lead to, in the worst case, extirpation of the Caribou herd. Permanent deactivation would likely not decrease this pressure as snow pack onto the R/W will likely continue to provide access to snowmobiles. I concluded this to be a PERCEIVED risk with a low likelihood of occurrence because there was no evidence of increased harassment of the herd by snowmobile users given the existing access in the other parts of this Caribou High Zone. Further, MOF recreation specialists submitted this was likely a low likelihood of occurrence because the access led only to the cutblock; not to any attractive open areas such as Alpine areas. In light of the above, I did not raise the likelihood of occurrence even though deactivation of the R/W would not decrease the potential for access. I further considered that if there is evidence of harassment by snowmobile users I would consider mitigating this risk through using Section 105 of the Forest Practices Code of BC Act.

Economic Risk:

Northern Route

- Significantly costly route to the licensee because of more RAY to construct, traversing potentially unstable terrain and the construction of a bridge. I concluded this to be a REAL risk with high likelihood of occurrence.
- Lower stumpage revenue to the Crown. I concluded this to be a REAL risk with a low likelihood of occurrence.
- Likely higher than average maintenance costs to the licensee because of steep terrain and potentially unstable terrain. I concluded this to be a REAL risk with a high likelihood of occurrence.
- Potential on-going stabilization costs of the deactivated R/W because of the steep terrain and potentially unstable terrain. I concluded this to be a REAL risk with a high likelihood of occurrence.

Southern Route

- No potential detrimental event or impact identified with this route with respect to Economic Risk. I concluded this to be a REAL risk
with a high likelihood of occurrence i.e. this is the more economical route over the Northern route.

Social Risk:

**Northern Route**
- *Access to Caribou High Zone may violate public trust as developed from LRMP table.* I concluded this to be a PERCEIVED risk with a low likelihood of occurrence. Although LRMP curtailed harvesting operations until proven management strategies were developed there was no explicit curtailment of access to or through these zones (likely in recognition of other resource activities such as mining). I also noted there was no public comment regarding the Northern route to the block with respect to concerns around providing access to the Caribou High Zone.

**Southern Route**
- *Access through part of and to, Caribou High Zone may violate public trust as developed from LRMP table.* I concluded this to be a PERCEIVED risk with a low likelihood of occurrence. Although LRMP curtailed harvesting operations until proven management strategies were developed there was no explicit curtailment of access to or through these zones (likely in recognition of other resource activities such as mining). I also noted there was no public comment regarding the Northern route to the block with respect to concerns around providing access to the Caribou High Zone. In light of this evidence I concluded this did not constitute a major amendment to the FDP.

3) **What is the magnitude of consequence to each of the values/risks if a detrimental event occurs?**

Environmental Risk:

**Northern Route**
- *Potential for landslides and sedimentation into fish streams (thus degrading fish habitat and fish populations) potentially for a significant period of time because of difficulties with stabilizing or permanently deactivating a road through the steep and potentially unstable terrain in the area.* I concluded this to have a significant consequence because of the fish steams potentially affected by this event and in light of the fact that management of aquatic systems were one of the primary underpinnings of the Code when it was conceived.
- *Potentially provides access for wolves to the Caribou High Zone which could increase predatory pressure on the local Caribou herd which could lead to, in the worst case, extirpation of the Caribou herd. Deactivation may not decrease this pressure as pulling of the*
bridge would not create an impassable barrier to wolves. I concluded this to have a significant consequence if this event occurred because this is a blue listed species.

- Potentially provides access for snowmobile users to the Caribou High Zone. Because of a bridge in this access system, permanent deactivation would likely decrease snowmobile access. Heavy harassment by aggressive snowmobile users could lead to, in the worst case, extirpation of the Caribou herd. I concluded this to have a significant consequence if this event occurred because this is a blue listed species.

**Southern route**

- Virtually no potential for landslides and/or sedimentation events. I concluded this to have a significant consequence if this event occurred because of the decreased impact to fish bearing streams.

- Potentially provides access for wolves through part of and to, the Caribou High Zone which could increase predatory pressure on the local Caribou herd which could lead to, in the worst case, extirpation of the Caribou herd. Deactivation may not decrease this pressure as snow pack onto the R/W will likely continue to provide access to wolves. I concluded this to have a significant consequence if this event occurred because this is a blue listed species.

- Potentially provides access for snowmobile users, through part of and to, the Caribou High Zone which could lead to, in the worst case, extirpation of the Caribou herd. Permanent deactivation would likely not decrease this pressure as snow pack onto the R/W will likely continue to provide access to snowmobiles. I concluded this to have a significant consequence if this event occurred because this is a blue listed species.

**Economic Risk:**

**Northern Route**

- Significantly costly route to the licensee because of more R/W to construct, traversing potentially unstable terrain and the construction of a bridge. I concluded this have a significant consequence if this event occurred because of the Government’s direction for us to find as many cost saving measures as possible without significantly increasing risk to environmental standards.

- Lower stumpage revenue to the Crown. I concluded this to have a low consequence to the Crown as the waterbed effect will balance this specific issue.

- Likely higher than average maintenance costs to the licensee because of steep terrain and potentially unstable terrain. I concluded this have a significant consequence if this event occurred because of the Government’s direction for us to find as many cost saving
measures as possible without significantly increasing risk to environmental standards.

- **Potential on-going stabilization costs of the deactivated R/W because of the steep terrain and potentially unstable terrain.** I concluded this have a significant consequence if this event occurred because of the Government’s direction for us to find as many cost saving measures as possible without significantly increasing risk to environmental standards.

**Southern Route**

- **No potential detrimental event or impact identified with this route with respect to Economic Risk.** I concluded this have a significant consequence if this event occurred because of the Government’s direction for us to find as many cost saving measures as possible without significantly increasing risk to environmental standards i.e. this is the more economical route over the Northern route.

**Social Risk:**

**Northern Route**

- **Access to Caribou High Zone may violate public trust as developed from LRMP table.** I concluded this to have a low consequence because access was not restricted by the table.

**Southern Route**

- **Access through part of and to, Caribou High Zone may violate public trust as developed from LRMP table.** I concluded this to have a low consequence because access was not restricted by the table.

4) **What is my initial Risk Rating?**

The Northern route, based on careful consideration of the evidence before me, poses the greatest risk in this situation (the Northern route poses a High risk while the Southern route poses a Low to Medium risk when all risk elements are considered). When I consider the values at risk and the mitigation strategies I am willing to entertain (immediate permanent deactivation after planting is completed, reduced road speeds and use of Section 105 of the FPCBC Act) I am comfortable that the most acceptable risk here is to approve the Southern route. The following explains how I got to this decision.

With respect to Environmental Risk, the Northern route clearly poses the greatest risk to the Environment because of the high likelihood of landslides or sedimentation into fish bearing streams and the probability that the road will be a source of continuing environmental problems into the future. The Southern route certainly increases risk to the herd from preying and snowmobile use but, based on the evidence, the likelihood of the herd being extirpated is remote at best.
While preying appears to be the greatest pressure on the herd if the Southern route is approved, some believe it is more likely that aggressive snowmobile users will be the primary pressure. Again, in my analysis I did not find the evidence compelling that either route would increase snowmobile pressure because the routes do not go to any place that normally attract snowmobile users and there is no evidence of harassment of the herd given the extensive existing roads in the zone. However, to mitigate this risk, I am prepared to consider using Section 105 of the *FPCBC Act* if snowmobile harassment becomes an issue sometime in the future.

With respect to the Economic risk, it is clear that the most likely and significant economic impact will be felt by the licensee if it must construct the Northern route. With respect to the Social risk, in my opinion, there is no difference between the two routes on this element based on the evidence I had. Although the LRMP table constrained harvesting, it did not constrain access. The public review and comment phase of the FDP did not generate any comments or concerns with access to the zone.

In light of the above, I concluded that the most acceptable solution, albeit not optimal but represents, in my opinion, the best balance of impacts, is to approve the Southern route.

5) **Do I adjust my initial Risk Rating?**

Reflecting on my analysis I wove this section’s considerations into the general body of my analysis. For example, while many of opposing evidence was based on Perceived Risk as opposed to Real Risk, I was sufficiently concerned with the consequence of extirpation of the herd if snowmobile users became an issue to commit to using section 105 of the *FPCBC Act* to restrict their use of the area (recognizing the problems and limitations because of limited resources associated with monitoring and enforcing such an order). Further, to address the concerns that this set a precedence for future access into these zones, I made it clear in my determination that this decision in no way was to be interpreted as precedence and would not be considered as such by myself. This decision was reflective solely of the circumstances of this case.

6) **What is my final Risk Rating?**

I confirm that my final risk rating is the same as my initial risk rating and conclude that the Southern route is the most appropriate option in this case with the following risk management requirements:

- Immediate permanent deactivation of the road upon completion of planting
- Reduced road speeds to minimize the potential for fatal vehicle/animal collisions.
- Enact section 105 of *FPCBC Act* if snowmobile use becomes problematic to the Caribou herd.