

FOREST PRACTICES BOARD POLICY

Board interpretation of the meaning of “must ensure” in section 79(6) of the FPPR

Background

Several sections of the *Forest and Range Practices Act* and regulations use the term “must ensure.” This policy applies to the meaning of must ensure in section 79(6) of the *Forest Planning and Practices Regulation* (FPPR), regarding road maintenance.

Road maintenance

79(6) A person required to maintain a road **must ensure** (emphasis added) all of the following:

- (a) the structural integrity of the road prism and clearing width are protected;
- (b) the drainage systems of the road are functional;
- (c) the road can be used safely by industrial users.

Also relevant to the question is section 81 of the FPPR.

Wilderness roads

81 . . . if a . . . road . . . is not being used by industrial users,

- (a) section 79(6)(a) and (b) apply to that road only to the extent necessary to ensure there is no material adverse effect on a forest resource, and
- (b) section 79(6)(c) does not apply to that road.

The Issue

In carrying out compliance audits, the Board has come across situations where a licensee has not taken any action to achieve compliance with section 79(6). They may be unaware of their road maintenance obligations and/or have taken no steps to assess the need for or carry out road maintenance. At the time of the audit, there has not been any significant consequence of the failure to maintain roads on the ground. Two conclusions are possible:

1. *The road maintenance sections say that licensees “must ensure” certain outcomes. To “ensure” means to “make certain.” In the audit, even though the structural integrity of the road is still protected, the drainage systems are still functional, and the road is still safe for industrial users, the auditee has not made certain of this; it just happens that nothing has gone wrong yet. The Board could report this as non-compliance.*
2. *The alternative would be to take the approach that the true intent of the legislation is that there could be no non-compliance until there actually was a problem with structural integrity of the road, a non-functioning drainage system, or an unsafe condition.*

When the FPPR says that a person “must ensure” can the person be non-compliant if they have been passive but not failed to achieve the prescribed result(s)? Alternatively, is the intent of the regulation to provide an accountability (due diligence) test only when a negative result has occurred?

Board Interpretation

The legislation would not include the term “must ensure” if it did not intend for there to be positive, deliberate action taken to achieve the results. For the Board, this means that it is reasonable for an auditor to describe the absence of positive, deliberate action as non-compliance, whether or not there has been a failure to achieve a required result.

Therefore, when auditing compliance with Section 79(6) of the FFPR the absence of any proactive management to ensure achievement of the required results may be considered non-compliant by the Board.

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Chair

August 20, 2012