

**In the matter of the alleged contravention by Erie Creek Forest Reserve Ltd. of Section 21 of
the Private Managed Forest Land Council Regulation 2007 BC Reg 182/2007**

DETERMINATION

Introduction

1. The Private Managed Forest Land Council (the Council) is an independent tribunal established under the *Private Managed Forest Land Act* (the Act). The Council has oversight responsibilities aimed largely at ensuring that owners of private managed forest land comply with the Act and any regulations made under it. Erie Creek Forest Reserve (the Owner) is the registered owner of Managed Forest 248 (MF 248). The Council's Executive Director has alleged in an April 30, 2013 letter to the Owner that the Owner contravened section 21 of the *Private Managed Forest Land Council Regulation* (the Regulation) by failing to maintain the Second Relief Road (aka Erie Creek Road) in accordance with that section. It is further alleged that this failure resulted in two slides from the Road, one of which caused material adverse effect on fish habitat in Craigtown Creek, which is a tributary of Erie Creek, a Class A fish stream.
2. Consistent with sections 26 and 27 of the Act, the Council provided the Owner with an opportunity to be heard before making a determination about whether the Owner had contravened section 21 of the Regulation. The Council proceeded by way of a written hearing on August 29, 2013.

Evidence

3. The evidence before the Council consisted of the Executive Director's Investigation Report (the Investigation Report),¹ a report prepared by PR Blanchard & Associates Limited (the Blanchard Report),² a report prepared by Shawn Hamilton and Associates (the Hamilton Report),³ and a copy of a permit issued to the Owner by the Ministry of Transportation and Infrastructure (MoTI) on July 3, 2012, authorizing it to undertake road maintenance activities subject to terms and conditions specified in the permit. The Council also considered the submissions provided (by Rainer Muentner) on behalf of the Owner.
4. The Owner did not dispute the factual findings as set out in the Investigation Report, the Blanchard Report and the Hamilton Report. Rather the Owner maintained that the Council did not have jurisdiction over the segment of the road where the slides occurred because it is a public road which is owned by the MoTI, and for which that ministry is responsible.

¹ Executive Director's Investigation Report: MF 248 – Slide into Craigtown Creek from the Second Relief Road, Investigation #IN1204, March 31, 2013, prepared by Stuart Macpherson, RPF.

² PR Blanchard and Associates was retained by the Executive Director to review and prepare a report on the users of the road and the maintenance responsibility, the level of maintenance and the probable cause of the slide event. The December 2012 report is entitled "Craigtown Creek Slide Investigation #1203".

³ Shawn Hamilton RP Bio and Associates was retained by the Executive Director to review onsite and assess any impacts of the slides on the fish habitat of Craigtown Creek. The December 2012 report is entitled "Craigtown Creek Slide Inspection #IN-1204 – Erie Creek Forest Resources".

Issues

5. The Council must determine whether the Owner contravened section 21 of the Regulation and, if so: (1) what, if any, administrative penalty should be levied; and (2) what, if any, remediation order should be made.

Did the Owner contravene section 21 of the Regulation?

6. Section 21 of the Regulation provides as follows:

21(1) An owner who constructs or uses a road for a purpose related to timber harvesting must maintain the road in accordance with this section until the road is deactivated.

(2) Despite subsection (1), if an owner uses for timber harvesting purposes a portion of a road that was constructed under another enactment, the owner must maintain that portion of the road in accordance with this section for the period that the owner

(a) uses the road for timber harvesting purposes, and

(b) is the primary user of that portion of the road.

(3) For the purposes of this section, an owner must maintain

(a) the structural integrity of the road prism and clearing width, and

(b) the proper functioning of the drainage systems of the road to the extent necessary to avoid causing a material adverse effect on fish habitat or on water that is diverted by a licensed waterworks intake.

7. The uncontradicted evidence before the Council can be summarized as follows:

- MF 248 consists of four parcels of land in the West Kootenays which has been classified as private managed forest land since 1995.
- Erie Creek Forest Reserve Ltd. is the owner of the land described as MF 248.
- The Second Relief Road is the only access road to MF 248. It enters MF 248 at the 11 km point.
- Beyond the 9 km point, the Owner was the sole user of the Second Relief Road in 2011.
- In its 2011 Annual Declaration, the Owner reported that logging took place in MF 248 that year.
- The Owner's use of the Second Relief Road is seasonal. It is used during the summer and early fall for hauling timber. The Second Relief Road is not usable during the winter.
- The Owner maintains the road during the summer period when it is in use.
- The Owner did not carry out any seasonal deactivation of the road in 2011 prior to the winter snowfall.
- The Second Relief Road was not constructed by the Owner.
- The Second Relief Road is a public road. All maintenance work performed on the Second Relief Road by the Owner has been permitted and inspected by the MoTI. The permit produced by the Owner is a Permit to Construct, Use and Maintain Works within the Right-of-Way of a Provincial Public Highway and it is between the MoTI and the Owner.
- On May 17, 2012, the Owner reported two slides within MF 248 at the 11.6 km point on the Second Relief Road which had occurred during the spring of 2012 at a time when the Road was not trafficable. The slides occurred on a section of the Second Relief Road that had been rebuilt by the Owner in 2011 after a previous slide in the spring of that year.
- The Second Relief Road runs adjacent to Craigtown Creek, which is a tributary to Erie Creek.

- Erie Creek is a fish stream and it provides fish habitat for resident rainbow and Eastern Brook trout.
- The probable cause of the slides was the inability of the road drainage structures to handle and accommodate the peak run offs experienced in the spring of 2012. The lack of a functioning drainage system resulted in the destabilization of the road prism. A contributing factor was the unprecedented rain-on-snow event in the spring of 2012.
- One of the slides (described as Slide C in the Hamilton Report and Slide 4 in the Investigation Report) deposited material into a side channel of Craigtown Creek permanently filling in a 53 meter section of the channel. This channel provides high water refuge habitat for fish. Slide C resulted in a permanent loss of fish habitat.

8. In support of its position that the Second Relief Road is a public road owned by the MoTI, the Owner points to a Supreme Court Order dated April 14, 1980 which declares: “that that certain roadway in the County of Kootenay, Province of British Columbia, near Salmo, lying to the east of Erie Creek from the junction of Erie Creek and Highway 3, which said roadway proceeds in a northerly direction more or less and is popularly known as the “Erie Creek” or “Second Relief” Road is a public highway pursuant to section 6 of the Highway Act, R.S.B.C., chapter 122 and amendments, by virtue of the expenditure of public funds thereon”. In a letter dated July 7, 2000 (copied to the Owner), the District Highways Manager for the then Ministry of Transportation and Highways describes a meeting between Ministry representatives and Rainer Muentner and Doug Lockwood which took place to discuss ownership and maintenance of the Second Relief Road. At this meeting, Mr. Muentner and Mr. Lockwood referred to the Supreme Court Order and maintained that the Ministry must upgrade, or participate in the upgrading of the Road. The District Highways Manager advised as follows:

MoTH has checked with Arrow Forest District ... and has confirmed that this is not their road although they have periodically contributed funds to it for upgrading. Our records indicate that we currently maintain the first 1.4 km at a winter classification “6-D” level (maintained to the same specifications as all other regularly maintained winter roads). Therefore, based on the 1980 Supreme Court judgement, we will take responsibility of the remainder of the Second Relief Road (past the maintained 1.4 km) to the terminal point as established by the court judgment. In doing so, this remainder will be classified as a “8-F” in which the road is not maintained in the winter and not maintained by MoTH except to keep the road passable to four wheel drive vehicles. Any road upgrade and expenses incurred beyond this will be the responsibility of the user. If you wish to have the remainder of this road reviewed for classification please inform this office by letter with reasons why you wish to have it reviewed.

9. Returning to section 21 of the Regulation, the reference in that section to the “owner” is a reference to the owner of the land described as private managed forest land, not the owner of a road used for a purpose related to timber harvesting purposes. Section 21(2) specifically contemplates that the owner of private managed forest land who uses a portion of a road “constructed under another enactment” for timber harvesting purposes must maintain that road for the period the owner uses the road for those purposes if the owner is the primary user of that portion of the road. It is the Council’s view that the fact that the road may be legally described as a public road owned by the MoTI does not alter the owner’s maintenance responsibilities under this section. The MoTI has been clear that any road grade expenses incurred beyond those for which the MoTI has committed, such as to ensure compliance with an owner’s responsibilities under the Act and Regulation, are the responsibility of the owner.

10. The evidence establishes that in 2011 the Owner was the primary user of a portion of the Second Relief Road, which is a road that “was constructed under another enactment”, and that such use was for timber harvesting purposes. The evidence also establishes, on a balance of probabilities that, the failure of the Owner to maintain the structural integrity of the road prism and clearing width and to ensure the proper functioning of the drainage systems of that portion of the Road resulted in Slide C during the 2012 spring run-off. Slide C in turn resulted in the permanent damage to fish habitat on Craigtown Creek, a tributary of Erie Creek, which is a Class A fish stream. Such permanent damage constitutes a “material adverse effect on fish habitat” for section 21(3) purposes. The Council therefore finds that the Owner has contravened section 21 of the Regulation.

11. Section 29 of the Act sets out the defences which are available to the owner of private managed forest land where a contravention has been established. Section 29 provides:

29 For the purposes of a determination of the council under sections 26 and 27, a person must not be found to have contravened a provision of this Act or the regulations if the person establishes that:

- (a) the person exercised all due diligence to prevent the contravention,
- (b) the person reasonably and honestly believed in the existence of fact that if true would establish that the person did not contravene the provision, or
- (c) the person’s actions relevant to the provision were the result of officially induced error.

12. There was no evidence before the Council to suggest that the Owner exercised all due diligence to prevent the contravention, that the Owner was mistaken in fact, or that the contravention was a result of officially induced error.

Should an administrative penalty be levied?

13. Having found that the Owner contravened the Act, the Council must next consider whether or not to levy an administrative penalty under section 26(2) of the Act. Section 26(2) provides that the Council may either levy an administrative penalty in an amount not exceeding \$25,000 or refrain from levying such a penalty if satisfied the contravention is trifling. When making its assessment, the Council is directed by section 26(5) to consider the following factors:

- Any previous contraventions of a similar nature
- The gravity and magnitude of the contravention
- Whether the contravention was repeated or continuous
- Whether the contravention was deliberate
- Any economic benefit derived by the person from the contravention
- The person’s efforts to remedy the contravention
- The person’s efforts to prevent to contravention
- Whether relevant forest management objectives specified in Division 1 of Part 3 of the Act are being achieved despite the contravention.

14. In this case, the Owner self-reported the slides and fully cooperated with the Executive Director in his investigation. The Owner has not had previous contraventions and took steps to reconstruct the

Road in 2013. There is no evidence that the Owner derived any economic benefit as a result of the contravention. On the other hand, given the damage to the fish habitat on Craigtown Creek the Council does not consider the contravention to be trifling. Additionally, while the contravention was not deliberate, the Road is located in an area of steep topography and is adjacent to fish habitat, and there has been a history of slides on the road prior to 2012. Taking all of these factors into account the Council has decided to levy an administrative penalty in the amount of \$7,500.

Should the Council make a Remediation Order?

15. The Council has authority, under section 27 of the Act, to remedy a contravention of the Act by requiring an owner to either carry out a requirement of the Act or Regulation which the owner failed to carry out or repair or mitigate the damage to private managed forest land caused by the contravention. Pursuant to this section, the Council requires the Owner to do the following as soon as practicable in 2014:

1. Re-vegetate all slide tracks and slide deposition areas with appropriate native vegetation to minimize surface soil erosion.
2. Engage a qualified registered professional to prepare a plan to upgrade the Second Relief Road sections (9.0-11.20 km) within MF 248 to improve road drainage and road prism stability.
3. Carry out the works necessary to fully implement the road upgrade plan.
4. Engage a qualified registered professional to prepare risk-based standard operating procedures (SOPs) for road maintenance which include seasonal road deactivation procedures to guide all future road maintenance.
5. Implement the road maintenance and seasonal deactivation SOPs for roads within MF 248.
6. Prepare a report which summarizes the work done and the results achieved and submit it to Council as soon as practicable after completing these activities.

Reconsideration and Appeal

16. Under section 32 of the Act, the Owner may request the Council to reconsider some or all of this Determination. Under section 33 of the Act, the Owner may appeal this Determination to the Forest Appeals Commission.

Original signed

Rod L. Davis, Chair
Private Managed Forest Land Council

November 5, 2013