

DETERMINATION

1. Authority

The Executive Director of the Council has alleged that Columbia National Investments Ltd. (CNI) as owner of District Lots 2462, 2463, 3373 and 3374 within Managed Forest #360, contravened section 19 of the Private Managed Forest Land Council Regulation B.C. Reg 336/2004 by failing to retain sufficient trees along a section of a small stream in the East Wilson Creek area during harvesting operations carried out in May 2007. Although the Private Managed Forest Land Council Regulation B.C. Reg 336/2004 (the regulation) was repealed and replaced on September 1, 2007 by the Private Managed Forest Land Council Regulation 2007, the allegation is in respect of the regulatory requirements in effect on the date that the alleged contravention occurred.

The Private Managed Forest Land Council (the Council), after giving a person who is alleged to have contravened a provision of the *Private Managed Forest Land Act* (the Act) or the regulations an opportunity to be heard, is authorized under section 26 and 27 of the Act to determine whether the person contravened the provision. If the Council determines that a contravention has occurred, the Council may levy an administrative penalty and may issue a remediation order.

2. Opportunity to be heard

On September 4, 2007 the Council provided CNI with the investigation report¹ and a supplementary technical report². On October 24, 2007 CNI provided the Council with a written submission in respect of the allegation³. CNI was also given an opportunity to respond to the written statement of Mr. Hans Penner, an affected member of the East Wilson Creek area.

This determination is based on information and evidence provided to the Council in the investigation report, the technical report, the written submission of CNI. The Council has also carefully considered the written statement of Mr. Penner.

¹ The investigation report, dated July 23, 2007, was prepared by Stuart Macpherson, RPF, Executive Director of the Council and was entitled "Investigation Report: Stream Protection Dakota Ridge Block".

² The technical report, dated July 2007, was prepared by Shawn Hamilton, RPBio, of Shawn Hamilton and Associates and was entitled "Block Assessment of MF 360 East Wilson Creek – Columbia National Investment Ltd".

³ The submission, dated October 24, 2007, was prepared by Bruce Mason, Chief Operations Officer for CNI and was entitled "Regarding: Investigation IN0702".

3. Relevant Evidence

3.1 Executive Director's evidence:

The investigation report contains evidence to the effect that:

1. *Attributes of the property*
 - The Dakota Ridge (DR) cutblock is owned by CNI and is private managed forest land.
2. *Attributes of the relevant stream*
 - The relevant portion of the East Wilson Creek catchment area and is not within a water supply area as defined in section 1 of the Private Managed Forest Land Council Regulation.
 - The stream has a gradient of less than 20% and CNI did not carry out any assessments to establish the absence of fish. As a result, the stream is a "fish stream" for the purposes of the regulation.
 - The stream had an average stream width of 1.8 m.
 - There were sufficient trees adjacent to the stream before harvesting to meet the streamside retention requirements of section 19 of the regulation.
3. *Attributes of the timber harvesting activity*
 - CNI prepared an operating plan for the DR cutblock (operating plan).
 - The harvesting occurred in May 2007.
 - CNI's harvesting within the DR cutblock generally conformed with the requirements of the regulation.
 - At each of 12 locations, CNI retained streamside trees in amounts that met or exceeded the requirements of the regulation.
 - At one location, Site 6, only 8 trees were retained within a 100 m portion of streamside area rather than the minimum of 10 required by section 19 of the regulation.
4. *Attributes of the incident*
 - At Site 6, there was no evidence of stream bank instability
 - At Site 6 and downstream of that site, there was no evidence of any significant impacts to water quality or fish habitat.

3.2 CNI's evidence:

CNI does not dispute any of the evidence presented in the investigation report and the technical report as the evidence relates to describing the events which occurred in the DR cutblock. However, CNI does not admit that the events, as described, constitute a contravention of the regulation as has been alleged.

4. Issues:

1. Did CNI contravene section 19 of the regulation in respect of the tree retention within portions of the DR cutblock?
2. If a contravention did occur, should an administrative penalty be levied?
3. If a contravention did occur, should a remediation order be given?

Issue #1: *Did CNI contravene section 19 of the regulation in respect of the tree retention within portions of the DR cutblock?*

Section 19 of the regulation states:

Retention of trees adjacent to small streams

19 (1) If an owner carries out timber harvesting activities in a cutblock adjacent to a stream whose stream channel is more than 1.5 m but less than 3.0 m wide, the owner must, on each side of every 100 m of the stream that is adjacent to the cutblock, retain at least 10 trees that

(a) are within 10 m of the edge of the stream channel,

(b) are 20 cm or more in diameter, and

(c) maintain

(i) the same proportion of coniferous to deciduous trees as in the pre-harvest stand, and

(ii) the same range of sizes, for both coniferous and deciduous trees, as in the pre-harvest stand, if the gradient of the stream is 8% or less.

(2) Despite subsection (1), if fewer than 10 trees meet the criteria set out in that subsection, the owner is required to retain only those trees within that area that meet the criteria in that subsection.

(3) If the stream referred to in subsection (1) has a stream gradient of more than 8%, the owner must not harvest a tree selected to be retained under subsection (1) or (2) unless the owner selects and retains in its place another tree that is 20 cm or greater in diameter.

(4) If the stream referred to in subsection (1) has a stream gradient of 8% or less, the owner must not harvest a tree selected to be retained under subsection (1) or (2) unless the tree falls by natural causes outside of the stream channel.

For there to have been a contravention, it must be established that:

- (a) CNI is the owner;
- (b) the harvesting occurred while the regulation was in effect;
- (c) the stream is one for which section 19 is applicable;
- (d) there were sufficient trees in the pre-harvest stand to meet the requirements of section 19 and that insufficient trees were retained.

It must also be considered whether or not CNI has established a defence available under section 29 of the Act.

Analysis

CNI acknowledges that they are the owner of the DR cutblock and that they authorized the timber harvesting adjacent to the tributary to East Wilson Creek in May 2007. The stream meets the requirements to be a small stream to which section 19 applies. Accordingly, CNI was required to ensure that any timber harvesting adjacent to the stream retained, on each side of every 100 m of the stream, a minimum of 10 trees that were located within 10 m of the edge of the stream channel and were of a minimum of 20 cm in diameter.

In many instances CNI retained streamside trees that exceeded the requirements of the regulations. In a single 100m portion, identified as Site 6 in the technical report, CNI retained only 8 trees which met the required size and distribution attributes. This represents only 80% of the retention required for that site under section 19 of the regulation.

Available defences

Under section 29 of the Act, the Council cannot find that a person has contravened a provision of the 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 facts 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.

CNI did not specifically state that it intended to establish a due diligence defence. However, CNI's written submission contains statements that would contribute to the establishment of such a defence. Of particular note are the following paragraphs contained within the "points of note" portion of the written submission:

- The tactic of harvesting so close to a stream was not suggested by CNI or any of its consultants, but a mistake, possibly on behalf of a machine operator who may have gotten too close to that particular stream.

- Prior to these allegations, CNI did instruct the supervisors on the site as well as the companies and contractors involved, to ensure that all men and employees working on this site be made aware on a continuing basis, of all the revised harvesting requirements and the logging plan so as to protect the habitats from harm. There has been and will continue to be daily on-site supervision to ensure that these practices are met. This has been and will continue to be CNI's policy.

The test for due diligence has two branches:

- (1) was the event reasonably foreseeable in the particular circumstances?
- (2) if so, did the person take all reasonable care to prevent the event from occurring?

Foreseeability

People are only expected to take preventative action in respect of harmful events which they can reasonably foresee. In the present case, the Council must assess whether or not, in the particular circumstances relating to this case, it is reasonably foreseeable that Probyn Log Ltd., the person authorized to carry out timber harvesting activities on behalf of CNI, would remove trees in a manner that did not conform to the requirements of section 19 of the regulation.

CNI had prepared an operating plan for the area and had classified the streams identified within the area. The block map, dated April 24, 2007, and provided to the Probyn Group, indicates that all of the streams had all been classified using the criteria of the *Forest and Range Practices Act* and not those of the *Private Managed Forest Land Act* and regulation. The particular stream in question was indicated on the map as being an S3 stream. Under the Forest Planning and Practices Regulation an S3 stream has an associated 20 m riparian reserve zone. Under section 19 of the Private Managed Forest Land Council Regulation, there is no riparian reserve zone but rather a specified tree retention requirement.

The Council finds that it was reasonably foreseeable in the circumstances that a person could become confused between the retention requirements associated with a particular stream due to differences in requirements under the *Forest and Range Practices Act* and those of the *Private Managed Forest Land Act* and regulation. The Council notes that CNI has taken steps to update all of the relevant maps to clarify the stream retention requirements in the area.

Reasonable care

If an event is reasonably foreseeable, then a duty arises to prevent the event from occurring. Being duly diligent does not mean that a person must eliminate all risk of anything going wrong. The person must, however, eliminate what in the normal course of business would objectively be seen as unacceptable risks. The test is an objective one and relies on what other people engaged in the same activity, looking at the same situation, would have prudently done. Generally this means that the greater the gravity of potential harm or the greater the likelihood of the potential harm, the higher the degree of care that would be expected.

The Council recognizes that CNI took some measures to prevent the event from occurring. These include preparing operating maps, hiring experienced contractors and

providing periodic on-site supervision. The Council is of the opinion that it would have been reasonable in the particular circumstances to ensure that the contractor had maps that conformed with the stream classification applicable to private managed forest land and that the contractor was made aware of the specific tree retention requirements and other constraints associated with operating adjacent to those streams. Therefore, CNI did not, in the particular circumstances, take all reasonable measures to prevent the event from occurring.

For these reasons, the Council finds that the defence of due diligence has not been established.

Finding

After considering all of the evidence, and after determining that no applicable defences have been established, the Council finds that CNI contravened section 19 of the regulation by retaining insufficient trees within a 100m portion of a stream located at Site 6 in the DR cutblock. The Council notes that in all other areas within the DR cutblock, CNI either met or exceeded the retention requirements under the regulation. Furthermore, the Council recognizes that CNI has taken steps to clarify its operational maps to remove the potential confusion associated with the stream classification systems and to clearly articulate the constraints associated with operating adjacent to those streams.

Issue #2: Should an administrative penalty be levied?

Under section 26 (2) of the Act, if the Council determines that a person has contravened a provision of the Act or the regulations, the Council may

- (a) levy an administrative penalty against the person in an amount that does not exceed \$25 000, or
- (b) refrain from levying an administrative penalty against the person if the person considers that the contravention is trifling.

The Council does not consider that the contravention of section 19 of the regulation is trifling. In making this assessment, the Council has considered both the nature of the deficiency itself and the circumstances which led to the event occurring.

Section 26 (5) requires that, before the Council levies an administrative penalty, the Council must consider all of the following:

- (a) any previous contraventions of a similar nature;
- (b) the gravity and magnitude of the contravention;
- (c) whether the contravention was repeated or continuous;
- (d) whether the contravention was deliberate;
- (e) any economic benefit derived by the person from the contravention;

- (f) the person's cooperation and efforts to remedy the contravention;
- (g) the person's efforts to prevent the contravention;
- (h) whether relevant forest management objectives specified in Division 1 of Part 3 of the Act are being achieved despite the contravention.

These factors will be evaluated together with no one factor being given greater or less weight than another.

(a) any previous contraventions of a similar nature

CNI does not have any previous contraventions of a similar nature.

(b) the gravity and magnitude of the contravention

There was a single incident of a 20% deficiency in tree retention within the cutblock. There was no evidence of significant detrimental impact on stream bank stability, water quality or fish habitat.

(c) whether the contravention was repeated or continuous

CNI met or exceeded tree retention requirements on all other areas within the DR cutblock. Therefore the contravention was not repeated.

(d) whether the contravention was deliberate

There is no evidence to suggest that CNI intended to contravene the regulation.

(e) any economic benefit derived by the person from the contravention

CNI would have initially derived a small economic benefit associated with the removal of the 2 trees that should have been retained. Any associated economic benefit has been more than offset by measures undertaken by CNI to assess the potential impact of the event as well as in modifying its operational mapping procedures.

(f) the person's cooperation and efforts to remedy the contravention

CNI was very cooperative with the Council in respect of the contravention. This included providing information in a timely fashion to Stuart Macpherson and Shawn Hamilton. CNI also voluntarily shutdown its operations in the affected area during the Council's investigation.

(g) the person's efforts to prevent the contravention

CNI made some efforts to prevent the contraventions from occurring. For example, CNI has prepared operational maps for the area and retained competent contractors and consultants. CNI also had a policy of having daily on-site supervision.

(h) whether relevant forest management objectives specified in Division 1 of Part 3 of the Act are being achieved despite the contravention

The retention of insufficient numbers of trees over a small area has had no detrimental impact on soil conservation, water quality of fish habitat. Accordingly, the achievement of government's forest management objectives will not be impacted by the contraventions.

Having considered each of the factors set out in section 26 (5) of the Act, the Council chooses not to levy an administrative penalty. This is due primarily to the fact that CNI had met or exceeded the retention requirements at 12 of 13 measured areas and was only deficient by 20% in the one identified area. In addition, there was no short or long term detrimental impact on the water quality or fish habitat in the area. Lastly, as CNI has taken steps to address the circumstances that may have caused the event to occur, there is no need to impose a deterrent penalty to encourage these improvements to be instituted.

Issue #3: Should a remediation order be given?

If the Council determines that a person has contravened a provision of the Act or regulations, the Council is empowered under section 27 of the Act to order the person to remedy the contravention by

- (a) carrying out a requirement of the Act or regulations that the person has failed to carry out, or
- (b) repairing or mitigating the damage to private managed forest land caused by the contravention.

On the area where there was inadequate retention of streamside trees, there was no evidence of stream bank instability or detrimental impacts to downstream water quality or fish habitat. Therefore, a remedial order is not required in the particular circumstances applicable to the area.

CNI has submitted that, to reduce the likelihood of similar incidences occurring in the future, it has done each of the following:

- Effected changes to its logging plan map to reflect a more conservative tree retention and stream classification program;
- Retained a qualified specialist to further review the streams and riparian areas on the area.

In July 2007 CNI representatives attended the Council sponsored workshop held in Nanaimo regarding pending changes to the private managed forest land regulatory requirements. These regulatory changes, which took effect on September 1, 2007 include a new stream classification system and increased streamside retention requirements.

The introduction of the new Private Managed Forest Land Council Regulation 2007 will require modification to operational maps and procedures for areas of future harvesting.

The Council seeks confirmation from CNI that it has made the necessary changes to its systems. As these measures concern future operations rather than remedial measures, this request is not a remediation order for the purposes of section 27 of the Act.

5. Reconsideration and Appeal:

Under section 32 of the Act, CNI may request that the Council reconsider some or all of this determination. Under section 33 of the Act, CNI may appeal this determination to the Forest Appeals Commission.

If you need clarification of any aspect of this determination, please contact the undersigned at the Private Manage Forest Land Council Office, at (250) 386-5737.

Yours truly,



Trevor Swan, Chair
March 8, 2008