

RECONSIDERATION

1. On 3 November 2007 TimberWest Forest Corp (TimberWest) requested that the Council, under section 32 of the *Private Managed Forest Land Act* (the “Act”), reconsider its determination of 27 September 2007 (the “original determination”) in respect of timber harvesting that occurred adjacent to Beech Creek near Comox.¹ In the original determination, the Council found that TimberWest, as owner, had failed to retain sufficient streamside trees as required by section 18 of the Private Managed Forest Land Council Regulation (the “regulation”) when TimberWest’s contractor removed all of the streamside trees along an almost 200m portion of one side of Beech Creek. The Council had levied an administrative penalty of \$35 000 and imposed a remediation order.

2. TimberWest provided the Council with written submissions in support of its request (the “written submissions”).² The grounds for the reconsideration set out in the written submissions included that TimberWest exercised due diligence to prevent a contravention from occurring.

3. The defence of due diligence has two parts:
 - (1) Was the particular event was reasonably foreseeable given the particular circumstances applicable at the time? and
 - (2) If the event was reasonably foreseeable, did the person take all reasonable steps to ensure that the contravention did not occur?

4. The Council has carefully reviewed TimberWest’s written submissions to determine if TimberWest has established that it exercised all due diligence in respect of the events which occurred within Block CW500 adjacent to Beech Creek.

¹ Appendix 1.

² Appendix 2.

5. The written submissions include evidence to the effect that
- (a) pre-harvest evaluations of the risks associated with harvesting adjacent to Beech Creek were undertaken which determined, amongst other things, that the potential impact on water quality was low as was the potential harm to fish habitat,
 - (b) the pre-harvest evaluations influenced the cutblock layout and associated logging plan,
 - (c) the logging plan provided for most of the area within the cutblock to be harvested by helicopter with the trees to be harvested as either pre-marked single tree selection or within small ribboned out clearcut areas,
 - (d) a small clearcut area was identified adjacent to Beech Creek with an approximately 30 m buffer area of timber to be reserved between the bank of the creek and the clearcut area,
 - (e) the contractor who was retained to carry out the timber harvesting within the cutblock was experienced with TimberWest's operating procedures and with operating in that area,
 - (f) TimberWest met with the contractor to go over the logging plan for the cutblock before harvesting commenced,
 - (g) during the pre-work meeting the contractor did not express any concern with respect to any of the constraints identified within the logging plan, including the identified area within which harvesting was to be constrained adjacent to Beech Creek, and
 - (h) during the actual harvesting with the cutblock, the contractor harvested the buffer area between the identified clearcut area and Beech creek.
6. The effect of the removal of all of the trees within an approximately 200 m length of the buffer area identified on the logging plan was that there insufficient trees to conform with the requirements for streamside tree retention set out in section 18 of the regulation.

7. The Council, in reviewing the circumstances which lead up to the removal of the trees from within the identified buffer area, is satisfied that the removal of the buffer area was not reasonably foreseeable. The circumstances included that:

- The contractor was experienced with
 - preserving timber within riparian areas
 - the area within which the cutblock was located
 - working with TimberWest, including TimberWest's policies that the contractor could not unilaterally move a marked harvesting boundary;
- The boundary of the clearcut area was marked on both the logging plan map and physically within the cutblock;
- The contractor was provided with a logging plan map and TimberWest staff met with the contractor to review the logging plan for the area;
- The contractor did not express to TimberWest staff any concerns with respect to the location of the clearcut area boundary.

8. If the Council is incorrect and the event was reasonable foreseeable in the particular circumstances, the Council is satisfied that TimberWest took all reasonable measures to prevent the event from occurring. These measures included:

- Assessing the pre-harvest risks associated with the harvest area, including in respect of terrain stability, potential impacts on water quality and fish habitat;
- Designing a harvest scheme that was consistent with the pre-harvest risk assessment, including providing
 - for no roads to be constructed,
 - generally single tree selection, and
 - a 30 m buffer area between the clearcut area and Beech Creek;
- Marking the boundaries of the clearcut area within the cutblock and on the logging plan map;
- Retaining an experienced harvesting contractor;
- Ensuring that the contractor was familiar with the logging plan map and TimberWest's policies and procedures;
- Ensuring that the contractor was provided an opportunity to ask questions regarding the proposed harvesting within the cutblock before the commencement of harvesting within the area.

9. Under section 29 of the Act, a person must not be found to have contravened a provision of the regulation if the person establishes that the person exercised all due diligence to prevent the contravention. The Council is satisfied that TimberWest has exercised all due diligence with respect to the events which occurred within Block CW500. Accordingly, TimberWest must not be found by the Council under section 26 of the Act to have contravened section 18 of the regulation as previously concluded in the original determination.

10. For the reasons set out above, the Council rescinds the original determination.



Trevor Swan, Chair

March 13, 2008