In the matter of the alleged contravention by Denis Francoeur Backhoeing Ltd of section 31 of the Private Managed Forest Land Council Regulation 2007 BC Reg 182/2007

DETERMINATION

1.0 Authority

The Executive Director of the Council has alleged that Denis Francoeur Backhoeing Ltd, owner of Managed Forest #281 near Port Alberni, contravened section 31 of the Private Managed Forest Land Council Regulation 2007 B.C. Reg 182/2007 (the Council Regulation) by not restocking a disturbed area within 5 years of the completion of timber harvesting activity in 2002.

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.

2.0 Opportunity to be heard

On February 17th, 2010 the Council provided the Owner with the investigation report,[1] the inspection summary report[2] and a stocking survey report[3]. On May 19th, 2010 the Council received a written submission from Denis Francoeur, owner representative, in respect of the allegation[4]. Finally, on May 26th, 2010, the Council provided Denis Francoeur with an oral opportunity to be heard in respect of the allegations. The hearing was attended by the Executive Director and Mr. Francoeur, as well as by Dianne Francoeur and Rod Bealing of the Private Forest Landowners Association in support of the Owner. The hearing remained open until June 9th, 2010 to enable further documentation respecting the stocking survey to be provided to the Owner[5] and commented on by the Owner[6].

1 The investigation report, dated February 8, 2010, was prepared by Stuart Macpherson, RPF, Executive Director of the Council and was entitled "Investigation Report: MF 281 Port Alberni - Restocking of Area Logged in 2002".

2 The inspection summary, dated August 12th , 2009, was prepared by Nancy Pezel, RPF, of Islands West Forestry".

3 The stocking survey, dated December 9, 2009, was prepared by Nancy Pezel, RPF and entitled "Stocking Survey on area of Managed Forest 281 Harvested in 2002".

4 The submission, dated May 13, 2010, was prepared by Denis Francoeur.

5 The stocking survey cards and summary card on which the Stocking Survey report was based.

6 The owner's response was contained in a June 7th, 2010 e-mail to the Executive Director.

This determination is based on information and evidence provided to the Council in the investigation report, the inspection summary report, the stocking survey report, including the stocking information on which the stocking report was based and the written submissions of the owner's representative. The Council has also carefully considered the oral evidence provided by the owner and the Executive Director at the hearing.

3.0 Issues to be Determined

There are three primary issues to be determined:

1. Did the owner contravene section 31 of the Council Regulation as alleged?
2. If a contravention did occur, what, if any, administrative penalty should be levied?
3. If a contravention did occur, what, if any, remediation order should be given?

4.0 Did the owner contravene section 31 of the regulation as alleged?

In determining whether or not there has been a contravention the Council must consider

1. if each of the elements of the alleged contravention of section 31 of the Council Regulation have been established on the balance of probabilities, and
2. if the person who is the subject of the allegation establishes on the balance of probabilities that one of the defences available under section 29 of the Act is applicable in the circumstances.

4.1 Was the area restocked as required?

It has been alleged that Denis Francoeur Backhoeing Ltd, as owner, has contravened section 31 (3) (a) of the Council Regulation by failing to sufficiently restock the disturbed area within the required period.

4.1.1 Applicable Legislation

The requirement to reforest disturbed areas is set out in section 31 of the Council Regulation. Section 31 states:

Reforestation of areas where timber harvested or destroyed

31 (1) In this section:

"completion of timber harvesting" means the date that timber harvesting within a cutblock is concluded and is determined by

(a) the date the area is declared as a cutblock in an annual declaration, or

(b) if an area is not included in a declaration, a date that does not exceed two consecutive operating seasons from the commencement of harvesting in the cutblock;

"crop tree" means a tree that

(a) is of a commercial species that is consistent with the species of trees specified in the management commitment for use in reforestation, and

(b) is unencumbered by pathogens;

"disturbed area" means all or part of private managed forest land where

(a) timber harvesting has been completed within a cutblock, or

(b) timber was destroyed

but does not include an area occupied by roads referred to in section 13 or logging trails referred to in section 14 (1);

"restock" means to establish a stand of trees that contains at least

(a) 400 crop trees per hectare reasonably well distributed across the disturbed area if the stand is on the Coast, and

(b) 600 crop trees per hectare reasonably well distributed across the disturbed area if the stand is in the Interior;

"successfully regenerated stand" means a stand of trees

(a) that contains at least

(i) 400 crop trees per hectare reasonably well distributed across the disturbed area if the stand is on the Coast, and

(ii) 600 crop trees per hectare reasonably well distributed across the disturbed area if the stand is in the Interior, and

(b) where the crop trees exceed the height of competing vegetation within 1 m of the crop tree by

(i) 50% if the area is on the Coast, and

(ii) 25% if the area is in the Interior.

(2) This section does not apply to an owner of a disturbed area if

(a) the area where the timber was harvested or destroyed is a contiguous area that is under 1 ha in size, or

(b) the trees remaining on the area meet the definition of a successfully regenerated stand.

(3) If all or part of private managed forest land becomes a disturbed area after the area becomes an owner's land, the owner must reforest the disturbed area by

(a) restocking the disturbed area within 5 years of the completion of timber harvesting activity on the cutblock, or the date the timber was destroyed, as applicable, and

(b) establishing a successfully regenerated stand on the disturbed area within 15 years of the completion of timber harvesting activity on the cutblock, or the date the timber was destroyed, as applicable.

(4) Subject to subsection (5), if all or part of private managed forest land became a disturbed area before the area became an owner's land, the owner must reforest the disturbed area by

(a) restocking the area within 10 years of the area becoming the owner's managed forest land, and

(b) establishing a successfully regenerated stand on the area within 20 years of the area becoming the owner's managed forest land.

(5) If, in relation to a disturbed area, the council determines that

(a) the present owner is a corporation,

(b) the previous owner is a corporation and was the owner of the area when the area became a disturbed area, and

(c) the present owner is

(i) a subsidiary of the previous owner, or

(ii) has control of the previous owner,

the council may order that the present owner reforest the disturbed area in accordance with subsection (3).

(6) Nothing in this section requires an owner to reforest a disturbed area if the timber on the area was

(a) destroyed and the disturbed area is not sufficiently productive to support a successfully regenerated stand, or

(b) harvested or destroyed and the disturbed area becomes occupied by buildings or other structures or installations.

4.1.2 Elements of the contravention

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

(a) The disturbed area is private managed forest land;

(b) That Denis Francoeur Backhoeing Ltd is owner of Managed Forest #281;

(c) That the area was disturbed at least 5 years before the allegation was made;

(d) That the post harvest stocking is less than 400 crop trees per hectare reasonably well distributed across the disturbed area;

(e) That the circumstances described in section 31 (2) of the Council Regulation are not applicable.

4.1.3 Is the disturbed area private managed forest land?

Evidence

To be private managed forest land, the disturbed area must be subject to a management commitment and be classed as managed forest land under the *Assessment Act*.

The Executive Director provided Council with evidence that

- the area on which the alleged contravention occurred was within Block 1447 Alberni Land District,
- Block 1447 Alberni District is listed on the BC Assessment roll as property class 7 – managed forest land,
- Block 1447 Alberni District is listed in the Council database as managed forest 281, and
- The area is subject to a management commitment.

The Owner agreed with the Executive Director's submission that the disturbed area was private managed forest land.

Analysis

The Council is satisfied that sufficient evidence has been presented in support of the finding that the disturbed area is "private managed forest land" as that term is defined in section 1 of the Act.

4.1.4 Is Denis Francoeur Backhoeing Ltd owner of the disturbed area?

Evidence

The Executive Director provided Council with evidence that the Denis Francoeur Backhoeing Ltd had purchased Block 1447 Alberni District in 2000. Further evidence was submitted that in July 2002 the land conformed with the requirements of the former *Forest Land Reserve Act* and would continue to be managed forest 281 and be classified as managed forest land under the *Assessment Act*. Mr. Francoeur agreed with the Executive Director's submission that he had carried out the timber harvesting on the disturbed area in 2002 and had continued to own the property to the present day.

Analysis

The Council is satisfied that sufficient evidence has been presented in support of the finding that Denis Francoeur Backhoeing Ltd is the owner of the disturbed area and has been the owner at all times material to this determination.

4.1.5 Has the period for restocking the disturbed area expired?

Evidence

The Executive Director provided Council with evidence that portions of Block 1447 Alberni District were harvested by the Owner in each of 2000 to 2004. The Owner agrees that he harvested the areas within Block 1447 Alberni District.

The allegation relates to the portions of Block 1447 Alberni District that were harvested in 2002 to 2004. The Executive Director submitted evidence that the portions of the area that were harvested in 2000 and 2001 were harvested before there was a management commitment in place in respect of Block 1447 Alberni District. Evidence was provided that indicated the portion of the area that was harvested in 2002 and contained within the Owner's annual declaration that was submitted to the Council on April 15th, 2003.

The Owner provided evidence as to the timber volumes that were harvested from Block 1447 Alberni District in the calendar years of 2002, 2003 and 2004 respectively.

Analysis

The Owner purchased Block 1447 Alberni District on November 6, 2000. The Owner subsequently submitted a management commitment to the Land Reserve Commission[7] on March 28th, 2001. The evidence is that the Land Reserve Commission accepted the management commitment on July 23, 2001.

Areas harvested within Block 1447 Alberni District would be disturbed areas within the meaning of section 31 of the Council regulation. Specifically those disturbed areas harvested after July 23, 2001 would be areas to be restocked within 5 years of the completion of timber harvesting activity on the cutblock. The annual declaration dated April 15th, 2003 identifies a portion of Block 1447 Alberni District as being harvested in 2002. There is no evidence to suggest that the volumes identified in the harvest returns for 2002 to 2004 did not originate from the area identified as being harvested in 2002.

The Council is satisfied that the portions of Block 1447 Alberni District that are identified on the map attached to the Investigation Report and indicated in the yellow highlight as being harvested in 2002 is an area to which section 31 (3) of the Council Regulation applies.[8] The Council is also satisfied that the completion of timber harvesting date in respect of the area harvested in 2002 is April 15th, 2003 as this was the date the area was identified in the Owner's annual declaration. Therefore, the date by which the area identified in the Investigation Report was required to meet the restocking requirements was April 15th, 2008.

---

7 The Land Reserve Commission (and then subsequently the Agricultural Land Commission) administered private land that was managed forest land under section 24 of the *Assessment Act* until the repeal of the *Forest Land Reserve Act* on August 3rd, 2004.

8 The Council makes no finding with respect to the potential applicability of section 31 (3) of the Council Regulation to those portions of Block 1447 Alberni District as being that were harvested in 2000 and 2001 as these were not specifically identified in the Investigation report as being the subject of the allegation.

4.1.6 Were there sufficient crop trees present on the disturbed area at the restocking date?

Evidence

The Stocking Survey specified that the disturbed area within the relevant portion of Block 1447 Alberni District that was required to be reforested was 17.3 ha after deducting areas occupied by timbered reserves, roads, landings and non-productive rock outcrops. The Stocking Report divided the disturbed area into two treatment units: Treatment Unit #1 was 13.5 ha and contained 347 crop trees per hectare; Treatment Unit #2 was 3.8 ha and contained 560 crop trees per hectare.[9]

The management commitment dated March 28th, 2001 specified the commercial species for MF 281 to be as follows:

> PART 8 Commercial Species
>
> We incorporate a wide variety of species into our planting and reforestation programme. These species include but are not exclusively …. (e.g. Douglas Fir, Western Red Cedar)

The Owner amended the management commitment on September 8, 2009 to provide:

> We incorporate a wide variety of species into our planting and reforestation programme. These species include but are not exclusively …. Douglas Fir, Western Red Cedar, (Hemlock, Red Alder, Big Leafed Maple, Lodgepole Pine)

The Stocking Survey recognizes all of the species specifically identified in the amendment to the management commitment as well as Grand Fir as commercial species. It also provides that some of the species are not acceptable as a crop tree on particular sites. The Stocking Survey states on page 2:

> "On drier salal and/or ocean spray dominated sites Hw, Dr and Mb were not considered acceptable. During the survey it was observed that Grand fir (Bg) is also ecologically suitable in some portions of the property (moister and richer), so it was also tallied when found in suitable microsites."

The Stocking Survey used a minimum inter-tree distance of 2.0 m for crop trees to be reasonably well distributed.

The Owner submitted that the Stocking Survey may have understated the number of crop trees within Treatment Unit #1. The reasons for the potential understatement were

- That the Stocking Report may not have fully considered all of the commercial species that could potentially be considered as crop trees, and
- That the Stocking Report may not have adequately allowed for clumpiness of distribution of potential crop trees.

The Council provided the Owner with a reproduction of the original survey plot cards and summary plot card used as the basis for the Stocking Report and provided the Owner with an opportunity to respond. To that end the Owner commented by e-mail to the Executive Director, in part:

> *"Hi Stewart – after hearing your message and reviewing the plot cards I feel they are quite self explanatory as per my interpretation of the PFLA Handbook…"*

[9] See map on page 10 of the Stocking Report.

Analysis

The language contained in both the original management commitment and the amendment is written in inclusive rather than exhaustive language. As such, the language does not specifically exclude any species from being a potentially commercial species for the purposes of identifying crop trees.

The Council accepts that the microsite location of a particular tree will influence whether or not the tree is a potential crop tree. The relative proximity of trees to each other will also determine whether or not one or both of the trees may be counted as crop trees.

The Council has not established a formal policy as to

- the microsites where each species of tree will be considered acceptable as a potential crop tree, and
- the minimum distance that must exist between trees for each to be considered to be a crop tree.

Therefore, the Council has examined the evidence of the particular stocking within both Treatment Unit #1 and #2 on the particular merits of the site. In the particular circumstances applicable to the allegation, the Council accepts that

- due to the inclusive language of the management commitment,
    - Western Hemlock, Red Alder and Big Leaf Maple should be considered a commercial species for the purposes of meeting the restocking requirements even though these species were not specifically identified in the management commitment until after the date for restocking the areas had expired, and
    - Grand fir should be considered as a potential commercial species even though not specifically identified in the management commitment
- Grand fir will be considered a potential crop tree if located on moister and richer micro-sites
- Western Hemlock, Red Alder and Big Leaf Maple will not be considered a potential crop tree if located on drier salal and/or ocean spray dominated micro-sites
- except in exceptional circumstances, trees of a potential commercial species must be located a minimum of 2.0 m apart.

Applying the above principles, the Council accepts the evidence contained in the Stocking Survey that

- The disturbed area in Treatment Unit #1 (13.5 ha) contains 347 crop trees per hectare, and
- The disturbed area in Treatment Unit #2 (3.8 ha) contains 560 crop trees per hectare.

The Council also accepts that the date by which the disturbed area was required to be restocked was April 15th, 2008.

4.1.7 Are the circumstances in section 31 (2) of the Council Regulation applicable?

Evidence

The Stocking Survey has, when calculating the disturbed area, specifically netted out the portions of the cutblock within Treatment Unit #1 and #2 that contain timber reserves.

Analysis

The Council is satisfied that section 31 (2) of the Council Regulation has no application for the areas that have been identified as being within the disturbed area in Treatment Unit #1 and #2.

4.1.8 Findings re: *Was the area restocked as required?*

The Council finds that

- the 13.5 ha in Treatment Unit #1 does not meet the stocking requirements of section 31 (3) of the Council Regulation, and
- the 3.8 ha in Treatment Unit #2 meets the stocking requirements of section 31 (3) of the Council Regulation.

4.2 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.

The Owner did not specifically state that he intended to establish any of the defences available under section 29 of the Act. However, the Owner's written submission and oral testimony contains some evidence that would contribute to the establishment of a defence of due diligence. Accordingly, the potential applicability of the due diligence is discussed below.

4.2.1 The test for Due Diligence

The Council has, in several earlier determinations, applied the test for due diligence that was set out by the Forest Appeals Commission in *Weyerhaeuser Company Limited v. Government of British Columbia, Forest Appeals Commission, Decision No. 2004-FOR-005(b), January 17, 2006* at p. 24, 25:

> Hence, the test for due diligence has two branches, as described in *R. v. MacMillan Bloedel Ltd.* Accordingly, the Panel must ask itself:
>
> (1) whether the event was reasonably foreseeable; and
>
> (2) if so, did Weyerhaeuser take all reasonable care to establish a defence of due diligence

In the recent (December 14, 2009) decision of the Supreme Court of British Columbia in the matter of *Pope & Talbot v. British Columbia*, Madam Justice Fisher considered a decision of the Forest Appeals Commission. One of the issues considered was what is the appropriate test for establishing due diligence. Madam Justice Fisher when discussing the *Weyerhaeuser* case, stated in paragraphs 59 to 63:

> [59] The first error is that the majority incorrectly defined the first branch of the defence of due diligence as reasonable foreseeability rather than mistake of fact. It then conflated its interpretation of the two branches of the due diligence test into s. 72 (a) of the *Forest and Range Practices Act*. Purporting to apply *MacMillan Bloedel*, it set out the test for due diligence under section s. 72 (a) as:
>
> (1) whether the event was reasonably foreseeable; and
>
> (2) if so, did *Weyerhaeuser* take all reasonable care to establish a defence of due diligence. [Emphasis added].
>
> [60] The panel found that Weyerhaeuser had
>
> ... made out a due diligence defence under section 72(a) of the *Act,* under the first branch of the test set out in the case law. [Emphasis added]
>
> [61] This requires reasonable foreseeability of the event as a condition precedent to a consideration of reasonable care. In my view, this in an incorrect interpretation of *MacMillan Bloedel*.
>
> [62] The majority of the Court of Appeal in *MacMillan Bloedel* set out the two branches of the due diligence defence as (1) where an accused's conduct is "innocent" as a result of a mistake of fact; and (2) if there is no mistake of fact, where an accused has taken all reasonable steps to avoid the particular event. The first branch of this defence is found in s. 72(b), the second branch in s. 72(a), and each is provided as an alternative. I will repeat these sections here for clarity:
>
> … no person may be found to have contravened a provision of the Acts if the person establishes that the
>
> (a) person exercised due diligence to prevent the contravention, [or]
>
> (b) person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision …
>
> [63] Neither *Sault Ste. Marie* nor *MacMillan Bloedel* require reasonable foreseeability of the circumstances giving rise to the contravention before reasonable care is considered within the second branch of the defence. Moreover, s. 72(a) contains no such requirement. In *MacMillian Bloedel*, Smith J.A. simply described the first branch (mistake of fact) as applying "where the accused can establish that he did not know and could not reasonably have known of the existence of the hazard".

The Court in *Pope and Talbot* went on to discuss the issue of what constituted the "particular event" for which a person must be duly diligent. Madam Justice Fisher stated in paragraphs 68 to 75:

> [68] The second error with the interpretation of the due diligence defence in *Weyerhaeuser* is the majority's apparent conclusion that due diligence was established under s. 72(a) where the company could not reasonably foresee the *circumstances that gave rise to the contravention*. Although the majority stated that it must first determine whether "the contravention" was reasonably foreseeable, it proceeded to characterize this as the contractor's act of ignoring a specific direction and the faller's confusion about his location in the block, rather than the contravention itself.

[69] In my view, this is an incorrect interpretation of what is referred to in *Sault Ste. Marie* as the "particular event". *Sault Ste. Marie* makes it clear that the "particular event" is the contravention itself, not the circumstances that gave rise to it, as shown in these passages:

> In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with evidence of due diligence. (p. 1325)
>
> Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. (p. 1331) [Emphasis added.]

[70] In *MacMillan Bloedel*, the Court also described the "particular event" as the *actus reus* of the offence:

> [53] In this case, that event [the particular event giving rise to the charge] was the discharge of a deleterious substance into Crabapple Creek on May 16, 1997.

[71] In other words, the particular event in *Weyerhaeuser* was the unauthorized harvesting of trees, not the contractor's act of ignoring instructions or the faller's confusion.

[72] Whether conduct is "innocent" under the first branch of the common law defence, or whether all reasonable steps were taken under the second branch, must be considered in the context of the "particular event": *MacMillan Bloedel*, para. 48. The same focus applies in a foreseeability analysis: *MacMillan Bloedel*, para. 53. Accordingly, the proper inquiry under the second branch of the due diligence defence, as codified in s. 72(a), is whether the company took reasonable care to avoid the contravention (there the unauthorized cutting of the trees). Instead, the majority in *Weyerhaeuser* embarked on an inquiry as to the circumstances that led to the contravention, expressed as follows at p. 27:

> ... what led to the contravention in this case was a decision by one person to disregard clear instructions, and then the operator's confusion about where he was on the cut block and his failure to get out of his machine to confirm his location before he started cutting.

[73] This led the panel to consider whether these *circumstances* were reasonably foreseeable. The majority found that Weyerhaeuser's employee had no way of foreseeing that the contractor would ignore his specific direction and that the operator would misread the map. This was the wrong inquiry, because it should have determined whether the unauthorized harvesting was reasonably foreseeable. This conclusion pre-empted a proper analysis of reasonable care.

[74] Mr. Wells submitted that in this case, the Commission turned its mind to the wrong question and asked whether it was generally foreseeable that Mr. Kheller would have accidentally cut beyond the boundary of the guy-line access area rather than to the specific circumstances that led to the contravention.

[75] I agree with Mr. Wells to this extent. The focus of a foreseeability analysis is not whether unauthorized harvesting was "generally foreseeable", but rather on the "occurrence of the particular event giving rise to the charge" or the *actus reus* of the contravention in issue: see *MacMillan Bloedel* at paras. 44 and 53. However, as I have already explained, this does not mean that the focus of the inquiry is on the specific circumstances giving rise to the contravention. The focus must be on the contravention itself. In this regard, I note that there is no requirement for an accused to prove precisely how the "particular event" occurred: see *R. v. Emil K. Fishing*, 2008 BCCA 490 at para. 22 and *R. v. Petro-Canada* (2003), 171 C.C.C. (3d) 354 (Ont.C.A.) at paras. 19-20. However, as the court noted in *Petro-Canada*, in a case where the accused can do

this, "it may be able to narrow the range of preventative steps that it must show to establish that it took all reasonable care."

In consideration of the *Pope & Talbot* case, the Council will no longer apply the test for due diligence as stated in the *Weyerhaeuser* case. The common law defence of due diligence has two branches:

(1) where an accused's conduct is "innocent" as a result of a mistake of fact; and
(2) if there is no mistake of fact, where an accused has taken all reasonable steps to avoid the particular event.

The defence of mistake of fact is provided in section 29 (b) of the Act. The defence of due diligence as set out in section 29 (a) of the Act is therefore limited to the issue of whether or not the person has taken all reasonable steps to avoid the particular event. With respect to the issue of foreseeability of the particular event, the test that will be applied is whether the person took reasonable care to avoid the contravention.

In the context of this determination, there is no evidence to suggest that there is a potential application of the defence of mistake of fact. With respect to the potential application of due diligence under section 29 (a) of the Act, the test is whether the Owner took reasonable care to avoid the contravention of failing to reforest the area as required under section 31 of the Council Regulation.

4.2.2 Evidence re Due Diligence

Evidence submitted by the Owner that is relevant to the establishment of due diligence is as follows:

1. Management Commitment

The management commitment contained some information relevant to planning and implementing a regime to ensure conformance with the reforestation requirements of the Council Regulation

PART 3 Long Term Forest Management Objectives

- To manage this property under sound business and forest management principles and meet the requirements of applicable laws.

PART 4 Strategies to Achieve Forest Management Objectives

- Reforestation will be conducted with respect to overall forest management objectives and values and may from time to time include planting, natural regeneration, vegetative propagation, direct seeding and coppicing.

PART 9 Declaration

I hereby commit to:

(c) reforest the areas as required under the Act and regulations in accordance with the strategies outlined in Part 4 of this Commitment.

2. Actions since harvesting

The owner carried out some site preparation to improve the likelihood of establishment of natural regeneration.

The owner retained some mature residuals which may contribute a seed source for natural regeneration.

The Owner implemented a reforestation strategy that did not include planting. The Stocking Survey, on page 4, noted:

> "Where brush competition is high, unless the crop trees were able to establish and grow quickly, the brush has completely shaded the crop trees from light (a common occurrence in dense bracken patches) or severely damaged the trees by smothering them. Dense brush also limits the exposed areas in which seed can land and grow."

There is no evidence that the Owner carried out any form of survey or assessment to evaluate whether or not the implementation of a natural regeneration strategy had been successful. There is no evidence that a brushing program has been implemented. The Owner did not make any comment in any of his annual declarations in respect of the relative success of reforestation efforts within Block 1447 Alberni District for those areas which had exceeded the date by which restocking was to have been achieved.

The Owner, after the investigation was initiated, did initiate a fill planting program.

4.2.3 Analysis of Due Diligence

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 Owner harvested the 13.5 ha of Treatment Unit #1 in 2002. Some site preparation was carried out at the time of harvesting. There is no evidence that the Owner considered the likelihood of success of a regeneration strategy for the area that did not include planting. In addition, there is no evidence that the Owner monitored the progress of the chosen regeneration strategy at any time before the area was inspected by the Council in 2009.

The establishment of only 347 crop trees per ha by the restocking date is significantly (13%) less than the minimum of 400 crop trees per ha required by section 31 (3) (a) of the Council Regulation.

The Council is of the opinion that it would have been reasonable in the particular circumstances to reduce the risk of there being unsatisfactory natural regeneration across the cutblock by

- Assessing the likely success of a natural regeneration reforestation strategy at the time of harvesting,

- Monitoring the success of any natural regeneration regime, including overall stocking, distribution of stocking and competition from brush on richer sites,
- Implementing
    - aggressive vegetative management, and
    - a fill planting regime as required.

4.2.4 Findings re: *Have any of the available defences been established?*

The Owner did not adopt any of the reasonable strategies. Accordingly, the Council finds that the Owner did not, in the particular circumstances, take all reasonable measures to prevent the event (failure to reforest) from occurring.

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

4.3 Findings re: *Did the owner contravene section 31 of the Council Regulation as alleged?*

After considering all of the evidence, and after determining that no applicable defences have been established, the Council finds that the Owner has contravened section 31 of the Council Regulation by failing to establish, by the specified date, sufficient numbers and distribution of crop trees within a 13.5 ha portion of the disturbed area identified as Treatment Unit #1. In particular, only 347 crop trees per ha were established within the 5 year period as measured from the completion of timber harvesting in 2003.

The Council notes that a 3.8 ha portion of the cutblock within Treatment Unit #2 fully conformed with the restocking requirements under the Council Regulation.

5.0 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 31 of the Council 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) of the Act 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

The Owner does not have any previous contraventions of a similar nature.

(b) the gravity and magnitude of the contravention

The gravity of the contravention goes to the significance of the impact of the contravention. The magnitude of the contravention goes to the overall scope of the contravention.

The 13.5 ha portion of the disturbed area that is in Treatment Unit #1 (78% of the total disturbed area) contained only 87% of the minimum stocking required by the regulation. The Council finds that the deficiency in the number and distribution of crop trees within portions of the cutblock was significant.

(c) whether the contravention was repeated or continuous

The Owner met or exceeded the reforestation requirements on the disturbed areas within Treatment Unit #2 that were harvested concurrently with Treatment Unit #1. There were no areas outside of the cutblock on which the Owner had carried out timber harvesting activity in 2002. Accordingly, the contravention was not repeated.

(d) whether the contravention was deliberate

There is evidence that the Owner intended to implement a reforestation regime that, in the circumstances applicable to the area, had a significant risk of not meeting the requirements of section 31 of the Council Regulation. However, there is no evidence to suggest that the Owner in any way intended to contravene the regulation.

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

The Owner would have initially derived an economic benefit by not planting the 13.5 ha portion of the disturbed area that did not meet the requirements of section 31. However, it is very likely that subsequent fill planting and brushing costs on the area will be greater now than if the area had been promptly planted. As a result any initial economic benefit will be removed.

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

The Owner has been very cooperative with the Council in respect of the contravention.

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

The Owner made some efforts to prevent the contravention from occurring. For example, the Owner carried out some site preparation within the cutblock. In addition, the retention of some timber reserves within the cutblock may have increased the potential for ingress within the cutblock. The Owner did not, however, adjust the reforestation strategy employed in the years following timber harvesting within the cutblock.

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

The failure to meet the reforestation requirements for all of the disturbed area within the cutblock 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 contravention.

Having considered each of the factors set out in section 26 (5) of the Act, the Council chooses to levy an administrative penalty in the amount of $1000.00.

6.0 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.

The power of the Council under paragraph (b) is limited to damage to private managed forest land and does not extend to other lands that may have been affected by the contravention.

The Executive Director noted in his Investigation Report that unless steps are taken

- it is likely that any future recruitment of germinants will be minimal, and
- there is a significant risk that the requirements to establish a successfully regenerated stand on the cutblock will not be met.

The Executive Director asked the Council to consider the restocking and fill-planting recommendations in the stocking survey report. In the Spring of 2010, the Owner undertook to plant portions of Treatment Unit #1 and #2 (although stocking met the minimum requirements). The planting that was carried out was consistent with the

recommendations contained in the Stocking Survey. The Owner has indicated that he is committed to fill planting the balance of the area within Treatment Unit #1.

The Stocking Survey provides a detailed regime for improving the stocking within each of the two treatment units. While the stocking within Treatment Unit #2 currently meets the requirements for the restocking date, the Stocking Survey notes that brush competition and root disease present on the site increases the risk of the stocking dropping below the minimum requirements by the date when a successfully regenerated stand is required to be established.

While the Stocking Survey provides useful information and recommendations for ensuring that the cutblock will be reforested, the Council does not adopt it as a remediation order. The reasons for this are twofold:

1. The Council has no jurisdiction to make a remediation order in respect of the 3.8 ha portion of the cutblock (Treatment Unit #2) that is not in contravention of the requirements of the regulation;
2. The Council declines to order the Owner to plant specific numbers and stock types of seedlings.

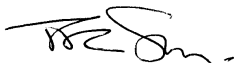
It is within the discretion of the Owner to choose to carry out the recommendations of the Stocking Survey. However, it is important to understand that the recommendations in the Stocking Survey Report do not form part of the Council's remediation order.

The Council makes the following remediation orders in respect of the 13.5 ha of the disturbed area (Treatment Unit #1) that is currently insufficiently restocked:

1. The Owner take appropriate steps to ensure that the area is sufficiently restocked with a minimum of 400 crop trees/ha as soon as practicable and no later than by May 31, 2011. (The Owner may establish a larger number of crop trees at his discretion.)
2. The Owner must provide to the Council, by May 31, 2011, a stocking survey detailing the stocking present on the area.

7.0 Reconsideration and Appeal:

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



Trevor Swan, Chair
Private Managed Forest Land Council

June 28, 2010