

DETERMINATION

1. Authority

The Executive Director of the Council has alleged that Island Timber Lands GP Ltd. (ITL), owner of Managed Forest #19, contravened section 21 of the Private Managed Forest Land Council Regulation 2007 B.C. Reg 182/2007 (the regulation) by failing to maintain the Welch Creek crossing of the Menzies mainline as required.

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 February 2, 2009 the Council provided ITL with the investigation report¹, a site visit report², a habitat assessment report³ and a road engineering report⁴. On April 20, 2009 W.A. Waugh, ITL representative, provided the Council with a written submission in respect of the allegation⁵. Finally, on April 22, 2009, the Council provided ITL, represented by W.A. Waugh and Brad Rodway, with an oral opportunity to be heard in respect of the allegations.

This determination is based on information and evidence provided to the Council in the investigation report, the site visit report, the habitat assessment report, the road engineering report and ITL's written submissions. The Council has also carefully considered the oral evidence at the hearing provided by ITL's representatives and the Executive Director.

¹ The investigation report, dated January 5, 2009, was prepared by Stuart Macpherson, RPF, Executive Director of the Council and was entitled "Investigation of Welch Creek crossing washout on Menzies Mainline".

² The site visit report, dated January 9, 2009, was prepared by Steve Lackey, RPF, of Sutil Forestry Consulting Ltd. and was entitled "Menzies Mainline Fillslope Failure at Welch Creek Crossing".

³ The habitat assessment report, dated September 2008, was prepared by Shawn Hamilton, RP Bio and Associates and entitled "A Fish Habitat Assessment of Welch Creek, Menzies Main Road".

⁴ The road engineering report, dated April 11, 2008, was prepared by Jamie Alguire, RPF, P.Eng. of Maritime Pacific Engineering Ltd. and entitled "IR #724, Field Investigation for Slope Fill Failure on Menzies Mainline, Welch Creek Stream Crossing, Island Timberlands MF 19"

⁵ The submission, dated April 20, 2009, was prepared by W.A. Waugh, RPF and entitled "re: Determination Hearing – MF 19 Welch Creek".

3. Issues to be Determined

There are three primary issues to be determined:

1. Did ITL contravene section 21 of the 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. Did the owner contravene section 21 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 21 (road maintenance) of the 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 Road Maintenance

It has been alleged that ITL contravened section 21 of the regulation. Section 21 states:

Road maintenance

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- (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 roadto the extent necessary to avoid causing a material adverse effect on fish habitat or on water that is diverted by a licensed waterworks intake.

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

- (a) The road is on private managed forest land owned by ITL;
- (b) ITL either constructed or used the Menzies Mainline for a purpose related to timber harvesting;
- (c) That the level of maintenance was not sufficient to avoid causing a material adverse effect on fish habitat or on water that is diverted by a licensed waterworks intake.

ITL as owner of relevant area

The Executive Director and ITL each submitted evidence that agreed that

- The Welch Creek crossing on the Menzies Mainline is located within MF 19, and
- ITL is the owner of MF#19

The Council finds that ITL is the owner of MF #19 within which the Menzies Mainline crossing of Welch Creek is located.

ITL as user of Menzies mainline

The Executive Director and ITL each submitted evidence that agreed that ITL did not construct the Menzies Mainline. The issue therefore turns on whether or not ITL used the Menzies Mainline after August 3rd, 2004 (the date the Act came into force) for a purpose related to timber harvesting.

The Executive Director submitted on page 4 of his Investigation Report:

“However, Island Timberlands does use the road to access its Managed Forest 19 for timber harvesting, and so it would appear that the road maintenance section of the regulation would continue to apply.”

ITL submitted that it has not used the Menzies Mainline for a purpose related to timber harvesting after August 3rd, 2004 and therefore section 21 of the regulation has no application. In support of this, ITL identified in its written and oral submissions that

- the portion of MF #19 in which the Menzies Mainline is located is a long narrow strip that parallels Highway 19
- the Menzies Mainline runs perpendicular to Highway #19, crosses MF #19 and provides access to Crown lands west of MF #19
- the length of the Menzies Mainline located within the portion of MF #19 west of Highway 19 is approximately 1.7 km
- ITL has a road maintenance agreement with Western Forest Products Ltd. (WFP) to maintain the portion of the Menzies Mainline that lies within MF #19
- WFP has an interest in the Menzies Mainline located within MF #19 in that
 - A WFP equipment maintenance shoppe is located within MF #19
 - WFP moves off-highway equipment to its operations in TFL 39
 - WFP hauls timber to Menzies Bay
- ITL has not used the portion of the Menzies Mainline that crosses Welch Creek to do any of the following:
 - Carry out timber harvesting in the areas adjacent to the mainline
 - Access timber in MF #19 for development
 - Store or maintain timber harvesting related equipment
 - Carry out post harvesting silviculture treatments

- ITL hauls timber from its Oyster River Block operations within MF #19 (located south of the Menzies Mainline) north along Highway #19 and not along the portion of the Menzies Mainline that crosses Welch Creek
- ITL hauls timber from its Sayward Block operations within MF #19 (located north of the Menzies Mainline) south along Highway #19 and not along the portion of the Menzies Mainline that crosses Welch Creek

It is apparent from the evidence that the portion of the Menzies Mainline within MF#19 that crosses Welch Creek has been used by WFP to facilitate timber harvesting activities. These timber harvesting activities are associated with TFL 39 and not any timber harvesting within MF #19. There is no evidence to suggest that ITL has, since August 3, 2004, used that portion of the Menzies Mainline for the purpose of timber harvesting or related activities.

The Council finds that ITL was not required to maintain the portion of the Menzies mainline that crossed Welch Creek during the period when the fill slope erosion event occurred.

Level of maintenance

Significant amounts of evidence were submitted by both the Executive Director and ITL with respect to the issues as to whether or not the level of maintenance carried out at the Welch Creek crossing was sufficient to comply with the requirements of section 21 of the regulation. Having previously found that ITL was not required to maintain the crossing, it is not necessary for the Council to make a finding with respect to the adequacy of the maintenance that was carried out.

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.

ITL made comprehensive submissions regarding the diligence it exercised in ensuring that the stream crossing at Welch Creek was properly designed, installed and maintained. As the Council has determined that ITL was not responsible for maintaining the Welch Creek crossing at the time when the events occurred which led to the allegation, it is not necessary for ITL to establish that they were duly diligent in their actions.

5. 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 has determined that ITL did not contravene section 21 of the regulation in respect of maintenance of the Welch Creek crossing. Accordingly, section 26 (2) of the Act has no application.

6. 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 Council has determined that ITL did not contravene section 21 of the regulation in respect of maintenance of the Welch Creek crossing. Accordingly, section 27 of the Act has no application.

7. Reconsideration and Appeal:

Under section 32 of the Act, ITL may request that the Council reconsider some or all of this determination. Under section 33 of the Act, ITL 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 Managed Forest Land Council Office, at (250) 386-5737.

Yours truly,



Trevor Swan, Chair
Private Managed Forest Land Council
June 15, 2009