

**In the matter of the request by Erie Creek Forest Reserve Ltd. under s. 32 of the Private Managed Forest Land Act for reconsideration of a Determination made by the Private Managed Forest Land Council, dated November 5, 2013 in respect of s. 21 of the Private Managed Forest Land Council Regulation BC Reg 182/2007**

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**RECONSIDERATION**

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1. By letter dated November 29, 2013, Rainer Muentner and Erie Creek Forest Reserve Ltd. applied to the Private Managed Forest Land Council (the "Council") for reconsideration of the Council's Determination IN 1204-1 dated November 5, 2013, MF248 under section 32 of the *Private Managed Forest Land Act* (the "Act"). Erie Creek Forest Reserve Ltd. (the "Owner") is the registered owner of Managed Forest 248 (MF 248). The letter was sent by Mr. Kenneth R. Watson of the law firm of Spilker Watson McNally, acting on behalf of the Owner.
2. In Determination IN 1204-1 (the "Determination"), the Council found that the Owner had contravened section 21 of the Private Managed Forest Land Council Regulation 2007, BC Reg. 182/2007 (the "Regulation"), and levied an administrative penalty of \$7,500 and imposed a remediation order. The basis for the reconsideration appears to be based on the idea that the Council may not have had before it a copy of a 2011 permit from the Ministry of Transportation and Infrastructure ("MoTI") which authorized the Owner to perform maintenance work on the Second Relief Road. The Owner's submissions in this respect are as follows:

As owner of MF248 and user of the Second Relief Road, the Owner complied with all obligations placed upon him and exercised all due diligence to prevent a future slide. The Executive Director's report in this matter noted that the rain-on-snow event in the spring of 2012 was "unprecedented". The Owner therefore cannot be found to have contravened the Act; the Act does not impose absolute liability on owners of private managed forest land.

3. Section 32 of the Act allows the Council to rescind or vary orders, decisions or determinations in certain circumstances. Section 32 provides:
  - 32(1) On the request of an owner or contractor, employee or agent of the owner, or on its own initiative, the council may rescind an order, a decision or a determination made by the council or an authorized person under this Act if the council determines that there were insufficient grounds for making the order, decision or determination.
  - (2) On the request of an owner or a contractor, employee or agent of an owner, or on its own initiative, the council may vary an order, a decision or a determination made by the council or authorized person under this Act
    - (a) on new information being provided to the council, and

(b) with the consent of the person who was the subject of the order, decision or determination.

(3) Despite subsections (1) and (2), the council may not rescind or vary an order, a decision or a determination that is the subject of an appeal under section 33 after the conclusion of the appeal.

(4) If the council rescinds or varies an order, a decision or a determination under this section and the order, decision or determination is the subject of an appeal under section 33 that is not yet concluded, the council must notify the commission.

4. The 2011 permit was before the Council when it made its Determination and it is referenced in that decision. For purposes of section 32 of the Act, it therefore cannot be considered “new information”. The Council has considered whether, in light of the further submissions of the Owner, there were insufficient grounds for making the Determination given that the Owner had complied with all of the 2011 permit conditions.
5. The Owner argues that it exercised all due diligence to prevent a future slide because it complied with all obligations placed upon it by the MoTI permit. The Council’s view is that the Owner’s obligations under the 2011 permit issued by the MoTI are not connected to the Owner’s statutory obligations under the Act and the Regulations. The 2011 permit enabled the Owner to carry out road repair and maintenance in accordance with its terms and was required because the Owner is a user, not an owner, of the Second Relief Road.
6. The Act imposes separate obligations on *an owner* of a managed forest, one of which is to maintain “the structural integrity of the road prism and clearing width” and “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” (Regulation, section 21(3)). The Owner is not relieved of these obligations by virtue only of having complied with the terms of a MoTI permit which authorized it to carry out surface maintenance and road repairs during the period June 1, 2011 and September 1, 2011.
7. The evidence before the Council included evidence that: (1) the Owner did not carry out any seasonal deactivation of the road in 2011 prior to the winter snowfall; (2) 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; (3) the lack of a functioning drainage system resulted in the destabilization of the road prism; and (4) the rain-on-snow event in the spring of 2012 was a *contributing factor* (emphasis added).
8. There was also evidence before the Council that, while precipitation amounts were clearly extreme at the time of the slide event, an examination of the climate records at the nearby Castlegar Airport station indicate precipitation was within the realm of what has occurred in the past, as well as evidence supporting a history of slides in the area. The Council’s view is that seasonal deactivation would normally constitute a reasonable “due diligence” procedure, especially given the history of precipitation amounts and slides in the area of the Second Relief

Road. Put differently, the Council's view is that a reasonable person would have undertaken seasonal deactivation to prevent slides in all of the circumstances as described in the evidence.

9. In these circumstances, the Council sees no basis upon which it should rescind or vary its Determination.

10. Under section 33 of the Act, the Owner may appeal this Reconsideration to the Forest Appeals Commission.



Rod L. Davis, Chair  
Private Managed Forest Land Council

[DATE]

May 13, 2014