



MANAGED
FOREST
COUNCIL

Compliance Determinations Procedure Manual

November 2016

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DISCLAIMER

The legislation referred to in this Manual is subject to amendment from time to time and to judicial interpretation. The Manual may not reflect recent amendments to the legislation and should not be relied upon as an accurate statement of the existing law. It is a guide to the Council's practices and procedures only. An official version of the legislation may be obtained from Crown Publications.

ACKNOWLEDGEMENT

Substantial portions of the material in this Manual were based on material contained in the Forest Appeals Commission's Procedure Manual (April 2005). The Council would like to thank the Commission for allowing the Council to use the Commission's Procedure Manual.

1.0 INTRODUCTION

The Private Managed Forest Land Council was established under section 4 of the *Private Managed Forest Land Act* (the “Act”). As of September 19, 2014, the Private Managed Forest Land Council is known as the Managed Forest Council (Council).

The Council is an independent tribunal with statutory authority to establish regulations in respect of forest management requirements on private managed forest land. In addition, the Council has statutory authority to make administrative and quasi-judicial decisions with respect to a variety of matters regulated by the Act and the regulations made under the Act. These statutory decisions extend from evaluating submissions of management commitments and amendments to adjudicating whether a person has contravened a requirement of the Act and regulations.

This Manual applies to the Council’s powers in respect of ensuring compliance with the requirements of the Act and the regulations. The Council’s powers and their limitations are set out in the Act.¹ While the Act establishes the framework, it is not comprehensive. This Manual contains information about the legislated procedures that the Council is required to follow and the policies the Council has adopted to fill in the procedural gaps left by the legislation.

This Manual is intended to ensure that the compliance decision making process and any review of those decisions are open and understandable to the public. The Council will generally follow the policies and procedures contained in this Manual. Where any matter arises that is not dealt with in this document, the Council will do whatever is necessary to enable it to act fairly and effectively. In addition, the Council may dispense with any part or all of a particular procedure where it determines that it is appropriate to do so in the circumstances.

The Council will make every effort to ensure that the compliance decision making process and any review decision making process are carried out in a timely fashion and that Council decisions are made expeditiously.

¹ The formal requirements of the Council’s compliance decision making process are set out in Division 2 of Part 4 of the Act. The formal requirements for appeals are set out in section 33 of the Act.

2.0 THE COUNCIL

Members

The Council is made up of five members.² The minister appoints 2 members and the owners of private managed forest land (the “owners”) elect 2 members. These minister-appointed members and owner-elected members then select a fifth member who is the Chair. The Chair is appointed for a 3 year term; other members of the Council are appointed for a 2 year term. All of the members may be reappointed for additional terms.

The Council members bring with them a wide range of backgrounds and perspectives.

Organizing panels

Under section 8 of the Act, the Council may refer a matter that is before Council to a panel established by Council. Normally, panels are composed of 1 or 3 members.

If a panel of the Council is to make a determination or to hear a review, the panel chair is determined as follows:

- (a) if the chair of the Council is on the panel, he or she is the panel chair;
- (b) if the chair of the Council is not on the panel but a vice-chair of the Council is, the vice-chair is the panel chair;
- (c) if neither the chair nor a vice-chair of the Council is on the panel, the Council must designate one of the panel members to be the panel chair.

If members of the Council make a compliance decision as a panel, the panel has all the powers and duties given to the Council. Further, the decision of the panel is, for all purposes, a decision of the Council.

Annual report

The Council is required to publish an annual report and submit it to the minister responsible for the administration of the Act.³ The annual report must include information respecting the Council's compliance decisions. A copy of the annual report may be obtained from the Council's office.

Council office

Any questions regarding a compliance decision or a practice or procedure of the Council should be directed to the Council at:

305 – 1627 Fort Street, Victoria, BC V8R 1H8
PH: 250-386-5737 Email: office@MFCouncil.ca

² See section 6 of the Act.

³ See section 10 of the Act.

3.0 FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

The compliance and review decision making processes are public in nature. Information provided by one party must also be provided to all other parties to the process. Further, the hearings are open to the public.

If a member of the public requests information regarding a compliance decision or a review decision, that information may be disclosed. The Council is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act.

Unless the information falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act* it will be disclosed. Owners and other parties to compliance decisions and review decisions should be aware that information supplied to the Council will be subject to public scrutiny and review.

4.0 THE TYPES OF COMPLIANCE DECISIONS

The Act and regulations place many requirements on the owners of private managed forest land. The Act also establishes several mechanisms that may be used to ensure compliance with the owner's requirements. The main mechanisms are consent agreements, stop work orders, administrative contravention determinations and offences.

4.1 Consent Agreement

The Council and the owner may agree that the owner or the owner's employee, contractor or agent may have contravened a provision of the legislation.⁴ In those circumstances, the Council and the owner have an opportunity to enter into a consent agreement. These agreements may provide for remedial measures to be carried out and potentially for a penalty of up to \$5 000 to be imposed.

Consent agreements are not determinations. The Council has not applied the contravention determination making process in respect of a specific fact pattern. Consent agreements do not result in a formal record of contravention.

Consent agreements represent the final administrative disposition of a particular matter. Once entered into, the owner cannot challenge the remedial measures or the penalty specified in the consent agreement. Conversely, the Council may not make a formal determination or impose an additional penalty. The only exception is where the owner fails to comply with the agreement.

4.2 Stop Work Orders

The Council and persons authorized by the Council are empowered to issue a stop work order if they consider that the owner or the owner's employee, contractor or agent may have contravened a provision of the legislation.⁵ No formal finding of a contravention is required

⁴ See section 25 of the Act.

⁵ See section 30 of the Act.

before a stop work order may be issued. This enables the Council or authorized person to act quickly to address a situation that may otherwise result in damage to the environment.

While the issuance of a stop work order is not subject to all of the procedures in this manual, the person who receives the stop work order may request that it be reviewed.⁶ This Manual applies to any review of a stop work order.

4.3 Administrative Contravention Determinations

The Council is empowered to determine whether or not a contravention has occurred. In those circumstances where a contravention did occur, the Council is empowered to impose a number of different forms of administrative remedy, including administrative penalties of up to \$25 000.00⁷ and remediation orders.⁸ The Council will apply this Manual when determining whether or not a contravention occurred and what, if any, the appropriate remedy should be.

4.4 Offences

The Act specifies that the contravention of particular provisions of the Act and regulations constitutes an offence.⁹ Offences are matters of guilt or innocence and must go before the Courts to be determined. The Ministry of Attorney General has sole jurisdiction in respect of commencing a proceeding for an offence under the legislation. As the Council has no role in prosecutions, the procedures set out in this Manual have no application that type of proceeding.

The decision to commence begin a prosecution in respect of a particular incident may impact the decisions of the Council. If there is to be a prosecution, then any Council proceeding in respect of an administrative penalty for the same incident is stayed.¹⁰ The Act does not specifically provide that a remediation order is to be stayed. However, the Council will consider staying it, unless doing so will result in environmental damage.

5.0 THE COMPLIANCE HEARING PROCEDURE

This section of the Manual applies to the Council's compliance decision making process. Accordingly, it applies to making determinations in respect of administrative penalties and remediation orders.

5.1 Providing an Opportunity to be Heard

The Act requires that before the Council levies a penalty or issues a remediation order, the Council must provide the person who would be subject to the penalty or order with an opportunity to be heard.¹¹ The Council will extend the offer of an opportunity to be heard in writing. The notice will include the following:

⁶ See section 32 of the Act.
⁷ See section 26 of the Act.
⁸ See section 27 of the Act.
⁹ See section 35 of the Act.
¹⁰ See section 28 (2) of the Act.
¹¹ See section 26 (1) and 27 (1) of the Act.

- the allegation that has been made against the person;
- a statement that the person may notify the Council within the specified period of the person's opportunity to be heard;
- the type of hearing that is being offered;
- that the Council may make a determination in respect of the allegation if the person chooses not to take advantage of the opportunity to be heard.

If the person chooses to take advantage of the opportunity to be heard, the Council will conduct a hearing in respect of the allegation. If the person does not choose to take advantage of the opportunity to be heard, the Council may make the determination after one month has elapsed from the date on which the person was notified of the opportunity to be heard.

Type of hearing

A compliance decision making process may be conducted by way of written submissions, an oral hearing or a combination of both. The Council will determine the appropriate type of hearing before giving the owner a notice of hearing.

The Council will normally conduct an oral hearing although it may order that a hearing proceed by way of written submissions in certain cases. Where the Council is considering a hearing by written submissions, the Council may request input from the parties.

If a party wants to request that a hearing be conducted by oral hearing, written submissions, or a combination of both, the request should be communicated to the Council within a reasonable time of receiving the notice of hearing and should provide reasons in support of the type of hearing procedure proposed.

Joining hearings

Where the Council considers that two or more hearings are related to each other, or that all of the parties are the same, it will consider joining the hearings together.

The Council will notify all parties if it decides to join the hearings. Objections may be made to the Council, in writing.

Timeline for holding a hearing

There is currently no prescribed period under the Act or regulations for the Council to hold a hearing following the issuance of a notice of hearing.

5.2 General Provisions Respecting Hearings

The role of a Case Manager

The Council has the option of appointing a Council member as a case manager in respect of specific cases. If a case manager is appointed, the person who is the subject of the allegation will be notified in the notice of hearing.

The role of the case manager is to provide administrative support to the compliance determination making process. The case manager will answer any enquiries from the party who is the subject of an allegation and will provide a similar function for the Executive Director.

A case manager may participate on a panel that will make the decision in respect of the case. However, if the case manager is of the opinion that he or she may have prejudged the case in any way, the case manager may not participate on the panel.

Parties to a proceeding

There will always be at least two parties to a compliance determination proceeding: the Executive Director who is making the allegation and the person against whom the allegation is being made. In some cases, there may be additional parties known as “third parties”. If the allegation is being made against an owner’s employee, contractor or agent (rather than against the owner), the owner can, by application to the Council, be added as a Third Party to the proceeding.

A person who believes that they should be given party status to a proceeding should make the request to Council as soon as possible after the notice of hearing is given. Requests made too close to a hearing date will usually be denied unless special circumstances are shown to exist.

A person seeking to be added as a party must make a written request to the Council. The written request should contain the following:

- (a) the name, address, telephone and fax number, if any, of the person submitting the request;
- (b) if the person submitting the request intends to be represented by a lawyer or agent, the name, telephone number and fax number of the lawyer or agent;
- (c) a detailed description of how the person is affected by the subject matter of the proceeding **and** explain why the person should be included in the proceeding;
- (d) the signature of the person submitting the request.

Before adding a party, the Council will provide the other parties to the proceeding with an opportunity to make representations. In deciding whether to add a person as a party, the Council will consider whether the person is directly affected, has relevant evidence to provide to the Council, and any other factors that are relevant in the circumstances.

The complainant's role at a proceeding

In many cases, the process that led to the formal commencement of the determination making proceeding was initiated by a person making a complaint. The opportunity to submit complaints to the Council is provided by Council policy and not by the Act. As such, the complainant does not have any rights under the Act. While a complainant is not a party in the formal proceeding, the Council wants to ensure that the complainant is kept informed of the proceedings and is given an opportunity to make a statement.

If a proceeding was initiated by a complaint, the complainant will be provided with a Notice of Hearing and will be kept informed as to whether the hearing is to be oral or by way of written submissions.

If the hearing is to be an oral hearing, the following will apply:

- the complainant will be given the opportunity to make an oral statement to the Council before any evidence has been presented by the parties.
- the complainant may also provide a written statement to the Council.
- the oral and written statements must be limited to matters associated with the specific complaint.
- the Council and the parties to the proceedings may ask questions of the complainant or to otherwise respond to the complainant's statement.
- the complainant does not have a right to call witnesses or to cross-examine witnesses called by the parties.

If the hearing is to be by way of written submissions, the complainant may submit a written statement to the Council and must provide copies of the written statement to the parties to the proceedings. The parties to the proceedings may respond to the complainant's statement when making their written submissions.

The Council will provide the complainant with a copy of the Council's determination and any attachments referred to in it as soon as practicable after the determination has been made.

Correspondence (Communicating) with the Council

To ensure that the compliance decision making process is kept open and fair to the participants, any correspondence to the Council in relation to the process must be sent to the Council and be copied to all other parties.

Council members will not contact a party, accept personal telephone calls from a party or attend private meetings with a party on any matter related to a compliance decision making process, unless that member puts all other parties on notice and gives them an opportunity to participate. The exception to this general rule is where a Council member is providing administrative support while carrying out his or her role as a case manager.

5.3 Written Hearing Procedure

Scheduling written submissions

In some cases, the Council will decide that an oral hearing is not required and will order that the hearing be conducted in writing. In a written hearing, all evidence and argument are provided in writing. Reasons for ordering a written hearing may include the expense of an oral hearing, the issues raise a question of law only, or credibility is not a significant issue.

If the Council determines that a hearing can fairly be heard by way of written submissions, it will provide the parties with a submission schedule. In making the schedule, the Council will ensure that each party is given an opportunity to review the written submissions from the other party and is given an opportunity to respond. The submissions will normally be scheduled to proceed in the following order:

- (1) the complainant's statement, if any;
- (2) the Executive Director's submissions;
- (3) the defendant's submissions;
- (4) the Third Party's submissions (if any);
- (5) the Executive Director's submissions in reply;
- (6) closing comments (no new evidence is to be included).

In certain cases, the Council will ask that closing comments be included with the party's submissions in order to expedite the proceeding.

Each party must deliver its submissions by the dates specified. The written hearing is over once the deadlines have expired for making submissions.

Although not specifically set out in this section, many of the procedures and provisions described in section 5.4 under "Oral Hearing Procedure" are also applicable to written hearings.

If an owner wishes to request that the hearing be conducted by way of written submissions, the owner should make its request to the Council as soon as possible in the process and provide reasons in support of this type of hearing procedure being adopted.

Extension of time to make submissions

If a party is not able to deliver its submissions by the date specified by the Council, the party can request an extension of time to file its written submissions. The request should be made in writing before the specified deadline and should include

- (a) the reasons for extension,
- (b) the length of the extension, and

- (c) whether the other party to the appeal consents to the extension.

If the other party does not consent to the extension, it may be provided with an opportunity to make submissions with respect to the extension.

In deciding whether to grant an extension, the Council will consider the adequacy of the reasons given for the extension, the prejudice to the other party, and any environmental or other impacts that may result from an extension.

If an extension of time is granted to one party, the submission schedule for the other party will be similarly extended. The Council will inform all parties of the revised schedule, in writing.

Failure to file submissions

If the Executive Director fails to deliver a written submission by the date specified, the Council may dismiss the matter that was the subject of the notice of hearing.

If the owner fails to deliver the written submission by the specified date, the Council may make a decision without hearing from the owner.

Content of written submissions

Where a hearing is conducted in writing, the parties will be required to present their entire case in writing. This means that all evidence (which includes all means of proof including correspondence, maps, charts, graphs, affidavits, studies, reports etc.), legal authorities and argument that the party wants the Council to consider must be included in the submissions (for further information see section 6.0, "Evidence").

Where there is more than one evidentiary document or legal authority provided with the submission, the documents and authorities should be numbered consecutively and the number should be referenced, where applicable, in the written text.

Public access

In written hearings, the resulting decision will be posted on the Council's website (see section 2.0 under "Council Office"). *The Freedom of Information and Privacy Act* applies to any evidence and written submissions arising from the hearing. Documents will be made available to the public in accordance with the requirements of that Act.

5.4 Oral Hearing Procedure

5.4.1 Pre-hearing

Scheduling an oral hearing

The Council will determine which members of the Council will participate in the compliance hearing¹², and the Council will set the date, time and location of the hearing as expeditiously as possible in the circumstances.

The Council will normally consult with the parties as to their availability on specific dates. A reasonable attempt will be made to accommodate the parties scheduling needs. However, the primary responsibility of the Council is to accomplish its statutory mandate by giving owners a hearing promptly.

An oral hearing may be held anywhere in the Province. The Council will decide where the hearing will take place on a case-by-case basis.

The Council will, where possible, attempt to accommodate expedited hearing requests. Requests for an expedited hearing should be made in writing and include the reasons for the urgency.

The Council will consider the expedited hearing request having regard to the other parties' right to proper notice, and the rights of other people who may be awaiting hearings.

The Council will post on its website the particulars of an upcoming oral hearing, including

- the parties,
- the subject matter,
- the date and time of the hearing, and
- the location of the hearing.

Exchange of documents

Parties are requested to disclose all relevant documents to the Council and the other parties in advance of the hearing so that all parties will be prepared. Documents include correspondence, reports, articles, maps, photographs, charts and any other materials (e.g., legislation and policies) that may be referred to or relied upon at the hearing.

Where there is more than one document provided, the documents should be numbered.

The schedule for exchanging documents does not preclude the parties from the voluntary exchange of documents. If information or documents are needed before the date set by the

¹² See section 8 (2) of the Act.

Council for the exchange of documents, the parties should arrange for copies of the documents to be provided or schedule a time to view the documents.

A party may request that the Council require the production of documents by another party.

Pre-hearing conferences

The Council may, on its own initiative or at the request of any of the parties, schedule a pre-hearing conference before the date of the hearing. The Council will normally schedule a pre-hearing conference in complex cases. A pre-hearing conference may be conducted by telephone or in person, depending upon the circumstances. Attendance will generally be limited to one member of the Council and a representative from each party. The Council member who oversees the pre-hearing conference may or may not be a member of the panel that conducts the compliance hearing.

Pre-hearing conferences provide the parties with an opportunity to clarify the hearing process, narrow the issues to be dealt with at the hearing, discuss any preliminary concerns and are intended to facilitate a just, expeditious and inexpensive disposition of the matter.

Some matters that may be discussed at a pre-hearing conference include

- defining and simplifying the issues to be determined at the hearing,
- identification of witnesses,
- arranging for the exchange of documents and expert reports,
- admission of facts relevant to the hearing and consented to by the parties,
- admission of any evidence relevant to the hearing and consented to by the parties,
- determination of the day to day conduct of the hearing,
- determination of a date for further pre-hearing conferences before the hearing, and
- resolution of the matter.

A request for a pre-hearing conference should be made in writing and include a list of the items the party wants addressed at the conference. The request should be made no later than 30 days before the hearing.

Pre-hearing conferences are of limited value unless all parties come to the pre-hearing conference fully prepared for a useful discussion of all issues involved, both procedural and substantive, and are authorized to negotiate and make decisions with respect to the issues. The Council has no authority to compel parties to attend a pre-hearing conference, nor to compel participation if the party is in attendance. To be effective, the parties must be willing to attend and be open to discussion on the issues raised during the conference.

These provisions do not preclude voluntary meetings between the parties.

Notification of expert evidence

An expert witness is a person who, through experience, training or education, is qualified to give an opinion on certain aspects of the subject matter of the compliance hearing. To be an expert, the person must have knowledge that goes beyond common knowledge.

Any party that intends to present expert evidence at a hearing must provide the Council, and the other parties, with reasonable notice that an expert is to be called. The notice should include

- (a) a brief statement of the expert's qualifications and areas of expertise,
- (b) the opinion to be given at the hearing, and
- (c) the facts on which the opinion is based.

If a party intends to produce a written statement or report prepared by an expert at the compliance hearing, a copy of the statement or report should be provided to the Council and the other parties within a reasonable time before the statement or report is given in evidence. Unless there are compelling reasons for later admission, expert reports should be distributed 30 days before the compliance hearing date.

Failure to provide reasonable notice of expert evidence, or expert reports, may result in an adjournment of the hearing or exclusion of the evidence.

Attendance of witnesses

Arranging for the attendance of witnesses and production of documents and other evidence at a hearing must be performed by the parties. The Council does not have the power to summon and enforce the attendance of a witness at a hearing.

Site visits

Before or during a hearing the Council may, on its own initiative or at the request of a party, schedule a site visit. If a party wishes to schedule a site visit, the request should be made as early as possible as additional time may be required to accommodate the visit in the hearing schedule.

Postponement of the hearing

The Council will only grant a postponement of a hearing where the parties consent to the postponement, or where the party requesting a postponement can show that special circumstances exist which justify postponing the hearing to a later date.

To obtain a postponement, a party should make a request to the Council, in writing, providing the Council with:

- (a) the reasons for a postponement,
- (b) the length of postponement (what is the next date available), and

- (c) whether the other parties to the compliance hearing consent to the postponement.

In deciding whether to grant a postponement, the Council will consider the adequacy of the reasons for the postponement, the position of the other parties on the application, the prejudice to the other parties, and any environmental impacts that may result from a postponement of the hearing.

5.4.2 The Hearing

Swearing-in

Witnesses and parties to the compliance hearing will not be asked to give their evidence under oath or affirmation.

Record of the hearing

Generally, there is no official reporter who records Council hearings. The Council will notify the parties if there is to be an official recorder.

Role of the panel chair

The member of a panel who has been designated the chair of that panel will be responsible for the general conduct of the compliance hearing.

Documents as evidence

If a party will be referring to a document that was not provided to the Council and the other parties before the hearing, sufficient copies of the document must be brought to the hearing for the Council and the other parties.

Documents entered into evidence at the hearing will be marked as an exhibit to the hearing.

Procedure at the compliance hearing

Although the degree of formality of a compliance hearing may vary depending on the Council panel and the parties, the format is generally as follows:

1. The chair of the panel will begin the hearing by identifying the members of the Council conducting the compliance hearing.
2. The chair will state the statutory authority for the Council to conduct the compliance hearing and identify the allegation of non-compliance that is the subject of the hearing. The chair may also clarify with the parties the precise issues to be decided in the hearing.
3. The chair will invite those parties in attendance to introduce themselves for the record.

4. The chair will review the procedures that will apply at the hearing in connection with the presentation of evidence. The order for presenting the respective cases will also be addressed. The chair may make a statement regarding the scope of evidence that will be acceptable and other limitations as may be applicable.
5. The parties will be given an opportunity to confirm or clarify their understanding of the matter at hand and make any preliminary objections or requests.
6. The chair will ask the parties for their opening statements. The order of statements will be the Executive Director followed by the person who is the subject of the allegation and then by any third parties.
 - The opening statement of the Executive Director may include the grounds for the notice of hearing being given, the remedy (decision) sought, the names of witnesses (if any) to be called and the approximate time required to put its case before the Council.
 - The other parties' opening statements should include the remedy (decision) sought, the names of witnesses (if any) to be called and the approximate time required to put their cases before the Council.
7. The chair will invite the complainant to make an oral statement and to submit a written statement in respect of the events related to the complaint.
8. The chair will advise the Executive Director to proceed with the presentation of its evidence. The Executive Director's witnesses may be cross-examined by the defendant and any third party. Members of the Council may also ask the witnesses questions. Additional information given in response to questions asked by the Council is subject to re-examination by the parties to the hearing.
9. The chair will advise the defendant to proceed with the presentation of its evidence. The defendant's witnesses may be cross-examined by the Executive Director and any third party. Members of the Council may also ask the witnesses questions. Additional information given in response to questions asked by the Council is subject to re-examination by the parties to the hearing.
10. The chair will advise the third party (if present) to proceed with the presentation of its evidence. The third party's witnesses may be cross-examined by the other parties. Members of the Council may also ask the witnesses questions. Additional information given in response to questions asked by the Council is subject to re-examination by the other parties to the hearing.
11. The Executive Director may apply to the Council for the opportunity to call reply evidence. The application will only be granted if the defendant or third party called evidence that could not reasonably be anticipated by the Executive Director.
12. The chair will request the parties to present a closing statement (argument) at the conclusion of the presentation of all the evidence. The order of presentation is as follows:

- (1) Executive Director;
- (2) defendant;
- (3) third party (if any);
- (4) reply by Executive Director.

No new evidence will be accepted in the closing statement. In some circumstances the chair will allow the parties to make their closing submissions to the Council in writing.

13. The chair will advise parties that the hearing of evidence is concluded and the record is closed.

Adjournments

An adjournment is a discontinuation of a hearing that is in progress. The Council will make every effort to complete a hearing within the time scheduled. However, if a hearing is not concluded within the allotted time, a party is surprised by previously undisclosed evidence or another problem arises, the Council may exercise its discretion to adjourn the proceedings until a later date.

Where a party requests an adjournment, the Council will consider each of following:

- (a) the views of the other parties;
- (b) whether the purpose for which the adjournment is sought will contribute to the resolution of the matter;
- (c) whether the adjournment is required to provide a fair opportunity to be heard;
- (d) the degree to which the need for the adjournment arises out of the intentional actions or the neglect of the party seeking the adjournment;
- (e) any prejudice to a party resulting from the adjournment which cannot otherwise adequately be compensated for, balanced against the prejudice to the participant seeking the adjournment if the adjournment is not granted and which cannot be otherwise adequately compensated for;
- (f) any other factors which may be relevant.

Public access

All hearings are open to the public.

Media coverage

Radio, television, filming, videotaping or recording of Council proceedings may be permitted at the discretion of the Council, subject to any terms and conditions the Council may impose.

Permission to do any of the above should be sought before the commencement of the hearing.

6.0 EVIDENCE

General

In an oral hearing, each party will have the right to present evidence to support its case. Evidence is anything that has the potential of establishing or proving a fact including oral testimony, written records, demonstrations, physical objects, etc. It does not include argument or submissions made by a party for the purpose of persuading or convincing the Council to decide the case a particular way.

While most of the information under this heading relates primarily to oral hearings rather than to hearings conducted in writing, the principles involved in weighing evidence and applying the correct burden of proof are common to all types of hearings.

Admissibility and exclusion of evidence

The rules of evidence used in a hearing are less formal than those used in a court. In general, the Council can admit any oral or documentary evidence that is

- (a) relevant, and
- (b) not privileged or restricted by another statute.

Relevant evidence can be described as evidence (oral or written) that will shed some light on a disputed matter or tends to prove or disprove a fact in issue. The Council may admit hearsay and circumstantial evidence if it is considered relevant. The amount of weight the evidence will receive from the Council depends on the degree to which it is relevant to the issues in the compliance hearing and its reliability.

The Council may also exclude evidence. This will normally occur when the evidence is of minimal relevance, may prejudice the other parties, confuse the issues, or is a repetition of evidence already presented.

Before the Council excludes any evidence, the party will be offered an opportunity to explain why the evidence they are seeking to introduce is relevant or significant and should not be excluded. If evidence is limited or excluded, the Council will advise the parties of its reasons for doing so.

All evidence admitted during the hearing as relevant will be assessed by the Council to determine what weight, if any, should be given to it before making their decision.

Affidavit evidence

In special circumstances, the Council may allow a witness to provide affidavit evidence if the witness is unable to appear at the hearing to give oral testimony.

Expert evidence

An expert witness is a person who, through a combination of experience, training and education, is qualified to give an opinion on certain aspects of the subject matter of the hearing. To be an expert the person must have knowledge that goes beyond common knowledge.

Experts must be qualified by the Council before giving their opinion. Each party will have an opportunity to cross-examine a proposed expert and make submissions before the Council makes its determination on qualifications.

If a person is not found to be qualified to give opinion evidence on a particular subject matter, the Council may still receive the witness's evidence. The Council will determine what weight should be given to each witness's testimony. The qualifications and experience of the witness will be a factor in determining the weight to be given to that witness's testimony.

Witness panels

The Council may permit evidence to be given by a number of witnesses sitting as a panel. This will normally be allowed when the testimony of two or more witnesses is interconnected and the evidence will be more understandable if the witnesses are able to give their evidence in a chronological fashion. Cross-examination will not take place until all the witnesses on the panel have presented their evidence-in-chief.

The main restriction on this type of format is that the witnesses cannot discuss the answers to questions with the other witnesses on the panel. Each witness must give his or her evidence without consultation with the other panel witnesses.

Council's authority to obtain evidence

In some hearings the Council may find that it does not have the necessary expertise to properly consider the subject matter of the compliance hearing. In such cases, the Council may retain, call and hear its own expert witness. In deciding whether to call on an expert witness the Council will consider the complexity of the evidence being presented, the ability of the parties to present expert evidence on their own, the public interest and any other relevant factors.

If the Council calls an expert to testify, the parties will be given notice of the expert in accordance with this Manual and will have an opportunity to cross-examine the expert.

Receipt of new evidence after the hearing is closed

Once the record is closed, no additional evidence will be accepted unless the Council decides that the evidence is material to the issues, there are good reasons for the failure to produce it in a timely fashion, and acceptance of such evidence is in accordance with the principles of natural justice and procedural fairness.

7.0 DETERMINING IF A CONTRAVENTION OCCURRED

7.1 Timing

The Council may make a determination whether or not a person has contravened a requirement of the Act or the regulations if the person has been given an opportunity to be heard. In addition, if a person elects not to take advantage of the Council's offer of an opportunity to be heard, the Council may make a determination after one month has elapsed from the date on which the person was given the offer.

7.2 Required Steps

In accordance with the Act, the Council may determine whether or not a person contravened a provision of the Act or the regulations. In making these determinations, the Council will follow the same general 4 step procedure:

- Step 1:* Confirm that the Council has jurisdiction to make the determination
- Step 2:* Confirm that the procedure followed in the specific case is consistent with the applicable law and that it is consistent with the rules of natural justice and administrative fairness
- Step 3:* Assess whether or not each element of the allegation has been established on the balance of probabilities
- Step 4:* Assess whether or not the defendant has established any alleged defence on the balance of probabilities

Jurisdiction

The Council may only make determinations if it has authority to do so. The Council's jurisdiction comes from the Act. The Council will ensure that the matter before it is within its statutory jurisdiction to decide.

Natural justice and the duty to be fair

Before making a contravention determination, the Council must be satisfied that the requirements of the rules of natural justice and the duty to be fair have been met. This means, at a minimum, that the person was aware of the case being made against them and that they were given an opportunity to respond. The procedures in this Manual are designed to ensure that these requirements are met.

The duty to be fair also means that a person has a right to expect that the decision making of the Council is not tainted by bias or the appearance of bias. The Council has established general rules respecting bias in its Governance Policy. Additional safeguards are established to ensure against bias with respect to compliance decisions.

If the Chair or a Council member becomes aware of any facts that would lead an informed person, viewing the matter reasonably and practically, to conclude that a member, whether consciously or unconsciously, would not decide a matter fairly, the member will be prohibited from participating in the compliance decision making process unless consent to continue is obtained from the defendant and third parties. In addition, a party may challenge a member on the basis of a real or a reasonable apprehension of bias.

To raise an allegation of bias or another ground for disqualification during a hearing, the party should make a motion to the panel. If it is determined that the allegation has been made promptly and has merit, the Council member will disqualify him/herself and withdraw from the panel unless consent to continue is obtained from each of the parties. If a party does not consent, the hearing may be adjourned until a new member is appointed to the panel by the chair.

Elements of the allegation

Each alleged incidence of non-compliance will contain several elements. For example, the matter must be in respect of private managed forest land, it must be in respect of the owner or the owner's employee, contractor or agent, and the facts on the ground must support the alleged act or omission. The general rule is that the burden or responsibility for proving a fact is on the person who asserts it. In respect of allegations made under the Act, this burden will rest with the Executive Director. The fact is to be proved on a balance of probabilities.

Applicability of available defences

The Act provides that a person may not be found to have contravened a provision of the Act or regulations if the person establishes that they exercised due diligence, were subject to a mistake of fact or were the subject of an officially induced error.¹³ The burden of proof is with the defendant to establish, on the balance of probabilities, that the defence existed in respect of the alleged contravention.

7.3 Who Will Be Held Accountable

Generally

Under the Act, an owner or a contractor, employee or agent of the owner may all be held liable for contravening a requirement of the Act or its regulations.¹⁴ Generally, the Council will hold the owner directly accountable. This is because the owner of the land is the person who made the management commitment and is generally in control of operations that are carried out on the land.

Special circumstances

In some circumstances the Council may consider that it would be inappropriate for the owner to be held accountable for a particular event occurring on the owner's land. For example, the

¹³ See section 29 of the Act.

¹⁴ See section 26 (1) and 27 (1) of the Act.

owner's contractor may have been reckless in their conduct and the owner may have established that they acted with due diligence.

In these circumstances, if the allegation had been made against the owner, the Council will find that the owner did not contravene the requirements of the Act and regulations. A separate allegation must be made against the contractor before a determination may be made against them. This is necessary to ensure that the contractor, as defendant, has an opportunity to know the case that they must meet and are given an opportunity to defend themselves.

Transfer of accountability

In the event that the Council makes a remediation order against a person other than the owner of the affected land, the owner may have the remediation order transferred to them.¹⁵ The owner may do this by notifying the Council in writing that it wants to have a particular remediation order transferred to them. Upon receipt of the notice from the owner, the Council will notify the person who had been the subject of the remediation order and that person, as of the date of the Council's notice, will no longer be responsible for the remediation order.

If the owner assumes responsibility for a remediation order, the owner may request that the Council review the order. Section 11.2 of this Manual applies to any application for review made by the owner in respect of the transferred remediation order.

8.0 ADMINISTRATIVE PENALTIES

8.1 Amount of Penalty

Factors

If the Council determines that a person has contravened a requirement of the Act or the regulations, the Council may impose an administrative penalty of up to \$25 000 in accordance with the Act.¹⁶ The Act specifies that the Council must consider the following factors in levying a penalty:

- (a) any previous contravention of a similar nature by the person if the contravention was the subject of
 - (i) a determination under this section in the previous 10 years, or
 - (ii) a consent agreement under section 25 in the previous 12 months;
- (b) the gravity and magnitude of the contravention;

¹⁵ See section 27 (6) of the Act.

¹⁶ See section 26 (1) and (2) of the Act.

- (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.¹⁷

Most of these factors are fairly self-explanatory. However, in respect of considering “previous contraventions of a similar nature”, the Council has adopted the following policy to provide interpretive guidance:

- the current and previous contraventions need not be the same but only similar
- the Council will evaluate the acts or omissions that gave rise to the previous and current contraventions and not the specific provisions that were contravened¹⁸
- when considering contraventions that occurred during the previous 10 years, the Council will generally give greater weight to contraventions that have occurred in the last 3 years.

No penalty

The Council has the discretion to not impose an administrative penalty if the Council considers that the contravention was trifling.¹⁹ The Council will generally consider a matter to be trifling if the contravention was very minor in nature and did not have a material adverse effect on the environment or another person.

In some circumstances the Council is prohibited from imposing a penalty even where it is determined that a contravention has occurred. For example, a penalty may not be levied if the time limit of 2 years from the date on which the facts first came to the knowledge of a council member (or a contractor, employee or agent of the council) has been exceeded.²⁰ Similarly, a penalty may not be levied if a proceeding in respect of an offence has been commenced.²¹

¹⁷ See section 26 (5) of the Act.

¹⁸ For example, the council considers that failing to retain trees adjacent to small streams and adjacent to large streams to be contraventions of a similar nature even though they relate to separate provisions of the Private Managed Forest Land Council Regulation.

¹⁹ See section 26 (2) (a) (ii) of the Act.

²⁰ See section 26 (4) of the Act.

²¹ See section 28 (1) of the Act.

No penalty may be levied unless the person has been found to have committed a contravention. Accordingly, no penalty may be levied if the allegation was not proven or if the person established a defence to the allegation.

8.2 Notice of Determination

Timeliness of decision

Where an oral hearing has been conducted, the Council will not normally make its decision at the end of the hearing. The Council will make every effort to have a decision to the parties within 3 months of the completion of the oral hearing. If an oral decision is rendered at the conclusion of an oral hearing, the Council will provide full written reasons within a reasonable time following the hearing.

When a hearing has been conducted by written submissions, a final decision will be given in writing, with reasons, within a reasonable time after the last submissions were delivered to the Council. As with oral hearings, the Council will make every effort to have a decision to the parties within 3 months of the completion of the hearing.

Copies of the decision will be given to the parties and the complainant. A copy of a decision will be faxed to a party or complainant upon request.

Copies of Council decisions are available upon request from the Council office. Decisions are also located on the Internet (see section 2.0 under "Council Office").

Content of the notice

The Act requires that the Council must give notice of determination to a person who is the subject of a determination under section 26 of the Act. If the determination is not in respect of the owner of the affected private managed forest land, the Council must also ensure that a copy of the notice is given to the owner. Each notice of determination must set out:

- (a) the nature of the contravention,
- (b) the amount of the penalty,
- (c) the date by which the penalty must be paid,
- (d) the person's right to request that the council reconsider the penalty, and
- (e) the person's right to appeal the penalty to the Forest Appeals Commission.

In addition to the requirements of the Act, the Council will generally include in the notice a rationale for its determination in respect of the alleged contravention and a rationale in respect of the amount of penalty, if any, that has been levied.

9.0 REMEDIATION ORDERS

9.1 Remedial Measures

Factors

If the Council determines that a person has contravened a requirement of the Act or the regulations, the Council may issue a remediation order.²² The remediation order may require the person to carry out an unfulfilled requirement, or repair or mitigate damage that resulted from the contravention.

The Council is aware that carrying out remedial measures can be very expensive and that the overall cost can be significantly impacted by the timeframe within which the measures must be carried out. Conversely, the Council will not accept ongoing damage if that damage can be prevented or mitigated. The Council will, at a minimum, specify measures and timelines that will address any material adverse impact on the environment.

No measures

In some circumstances the Council is prohibited from issuing a remediation order. For example, a remediation order may not be given if the time limit of 2 years from the date on which the facts first came to the knowledge of a council member (or a contractor, employee or agent of the council), has been exceeded.²³ Although not specifically prohibited, the Council generally will not issue a remediation order if a proceeding in respect of an offence has been commenced unless the Council determines that the order is necessary to prevent a material adverse effect on the environment or another person's property.

9.2 Remediation Orders

Timeliness of decision

Where an oral hearing has been conducted, the Council will not normally make its decision at the end of the hearing. The Council will make every effort to have a decision to the parties within 3 months of the completion of the oral hearing. If an oral decision is rendered at the conclusion of an oral hearing, the Council will provide full written reasons within a reasonable time following the hearing.

When a hearing has been conducted by written submissions, a final decision will be given in writing, with reasons, within a reasonable time after the last submissions were delivered to the Council. As with oral hearings, the Council will make every effort to have a decision to the parties within 3 months of the completion of the hearing.

²² See section 27 of the Act.

²³ See section 27 (3) of the Act.

Copies of the decision will be given to the parties. A copy of a decision will be faxed to a party upon request.

Copies of Council decisions are available upon request from the Council office. Decisions are also located on the Internet (see section 2.0 under “Council Office”).

Content of the order

The Act requires that the Council must give to a person who is the subject of a determination under section 27 of the Act a copy of the remediation order. If the determination is not in respect of the owner of the affected private managed forest land, then the Council must also ensure that a copy of the order is given to the owner. Each remediation order must set out

- (a) the nature of the contravention,
- (b) the nature of the work to be done to remedy the contravention,
- (c) the date by which the work must be completed,
- (d) the person's right to request that the council reconsider the order, and
- (e) the person's right to appeal the order to the Forest Appeals Commission.

In addition to the requirements of the Act, the Council will generally include in the notice a rationale for its determination in respect of the alleged contravention and a rationale in respect of the nature of the work and the date by which the work must be completed.

10.0 ENFORCEMENT OF DECISIONS

The Council does not have the power to enforce its decisions directly. However, decisions of the Council may be filed in the court registry and has the same effect of an order of the court for the recovery of debt.²⁴ The Council may also notify the assessor that an owner has failed to comply with a requirement of the Act or regulations.²⁵ This notification may result in the loss of managed forest land status and the exposure to exit fees. In addition, the failure to comply with a decision may constitute another potential contravention. For example, it is a contravention for a person to not comply with a remediation order.²⁶

The person who is the subject of a Council compliance decision may request that the decision be reviewed.²⁷ The section 11 of this Manual will discuss these administrative reviews. In addition, a person who is subject to a compliance decision may appeal the decision to the Forest Appeals Commission provided that the appeal conforms to the requirements of the Act and regulations.²⁸ For a complete discussion of appeals from Council decisions, please see the Forest Appeals Commission Procedure Manual.

²⁴ See section 26 (9) of the Act.

²⁵ See section 31 of the Act.

²⁶ See section 27 (2) of the Act.

²⁷ See section 32 of the Act.

²⁸ See section 33 (1) of the Act.

11.0 REVIEWING COMPLIANCE DECISIONS

The Council has jurisdiction to review a compliance decision made by the Council or a stop work order issued by a person authorized by the Council. These reviews can be initiated by the Council or on the request of the person who is the subject of the original decision. The Council has no jurisdiction to review a decision if it is already subject to an appeal that has concluded.²⁹

11.1 Council Initiating a Review

Where there may have been insufficient grounds

If the Council becomes aware that there is credible evidence that there may have been insufficient grounds for making the original decision, the Council will initiate a review of that decision. If it is clear on the face of the evidence that there were insufficient grounds for making the decision, the Council will rescind the decision and simply notify the person who had been subject to the decision. Where the Council requires further information, the Council will notify the parties to the original decision.

The Council's notice will be in writing and will specify the type of information that the person is requested to provide and the period within which it must be provided. If upon reviewing the requested information the Council is satisfied that there were insufficient grounds for making the decision, the Council will rescind the decision and simply notify the person who had been subject to the decision.

Where new evidence has been provided to the council

In some cases, after an initial determination has been made, the Council may become aware of some evidence that is relevant to the proceedings that may have resulted in a different decision. The Council is authorized to vary determinations in these circumstances provided the person who is the subject of the determination consents.³⁰ In this manner, the amount of a penalty may be changed or the requirements of a remediation order or the time frame within which to fulfil it may be modified.

In every case where the Council becomes aware of new evidence, the Council will notify the parties to the original decision. The Council's notice will be in writing and will provide each party with an opportunity to respond to the new evidence and to each other's submissions. After considering the submissions, the Council will determine if the original decision should be varied. A variance will not become effective unless the person who was subject to the original decision consents to the variance.

²⁹ See section 32 (3) of the Act.

³⁰ See section 32 (2) (b) of the Act.

11.2 Requesting a Review

How to request a review

The process for requesting a review begins with the filing of a request for review with the Council office (see section 2.0 under “Council Office”). The request for review must be signed by, or on behalf of, the appellant and contain all of the following:

1. the name and address of the appellant;
2. the name of the person, if any, making the request for an appeal on behalf of the appellant;
3. the address for giving a document to, or serving a document on, the appellant;
4. the grounds for review (a detailed explanation of the appellant’s objections to the determination – describe errors in the decision);
5. a statement describing the relief requested (what you want the Council to order at the end of the review).

A recommended form of request for review is attached to this Manual as Form 1.

Incomplete (deficient) requests for review

If the request for review does not contain the required information, it is considered deficient. When the Council receives a deficient request for review, it will invite the appellant to submit further material to remedy the deficiencies within a specified period. The Council will not take any action on the review until the deficiencies have been addressed.

If the deficiencies identified by the Council are not corrected by the specified date, the Council may consider the request for a review to be abandoned.

Review fee

There is no fee required for filing a request for review with the Council.

Time limit for filing a request for review

There is no time limit for requesting a review. However, it is the policy of the Council that, except in exceptional circumstances, the request for review should be made within 3 weeks of the initial decision.

If the appellant is in need of an extension, the appellant must make a request to the Council. The request should be made in writing and include the reasons for the delay in filing the request for review and any other reasons which the requester believes support the granting of an extension of time. A request for an extension should accompany the request for review.

The Council may provide potential parties to the review with an opportunity to respond to the requester's submissions before the Council makes its decision.

In deciding whether to grant an extension, the Council will consider whether fairness requires an extension. The Council will take into account the length of the delay, the adequacy of the reasons for the delay, the prejudice to those affected by the delay and any environmental impacts that may result from an extension. Other factors not identified could be relevant depending on the circumstances of the particular case.

Rejection of a request for review

The Council may reject a request for review if

- (a) it is determined that the requester does not have standing, or
- (b) the Council does not have jurisdiction over the subject matter or the remedy sought.

While the Council generally has jurisdiction to hear a review, this is not always the case. The Council has no authority to entertain a request for review in respect of a matter that has already been considered by the Commission.³¹ In addition, the Council is not required to consider a request from a person if the request is in respect of the calculation of an annual administration fee or an exit fee.³²

Before a request for review is rejected, the Council will inform the appellant of this in writing, with reasons, and give the appellant an opportunity to make submissions and any potential parties with an opportunity to respond.

11.3 Procedure Following Receipt of a Request for Review

Notification of the review

The Council will promptly acknowledge receipt of any **complete** request for review. The Council will send copies of the request for review to each of the other parties to the decision that is the subject of the review. For example, if the initial decision was given to a contractor of the owner and the owner made the request for review, the Council would provide the contractor with a copy of the request for review.

If the Council had not posted the original decision on the website before the receipt of the completed request for review, the Council will post the original determination with a prominent notation that the decision is under review.

If the original decision had already been posted on the website when the completed request for review was received, then the Council will place a prominent notation that the decision is under review.

³¹ See section 32 (3) of the Act.

³² See section 3 Private Managed Forest Land Council Matters Regulation.

If the review is to be by oral hearing, the Council will post on the website the particulars of an upcoming oral review hearing, including

- the parties,
- the subject matter,
- the date and time of the hearing, and
- the location of the hearing.

The results of the review will also be posted on the website.

Parties to the review

The parties to the review will vary depending on the nature of the decision that is the subject of the request for review. If the decision was a stop work order, the parties will usually be the owner (as appellant) and the Executive Director (as respondent). However, if an owner's agent or contractor was party to the original decision, then that person would also be included (as a Third Party) in any review in respect of the decision.

If the review is in respect of an original decision made by the Council, then the appellants and Third Parties are as described above. However, the Executive Director is not the Respondent. This is because it is the decision of the Council and not of the Executive Director that is the subject of the review. The Executive Director will likely be called as a witness but is not a party to the proceedings.

Adding parties to the review

A person who believes that they should be given party status to a review should make the request to Council as soon as possible after the request for review is filed. Requests made too close to a hearing date will usually be denied unless special circumstances are shown to exist.

A person seeking to be added as a party must make a written request to the Council. The written request should contain

- (a) the name, address, telephone and fax number, if any, of the person submitting the request,
- (b) if the person submitting the request intends to be represented by a lawyer or agent, the name, telephone number and fax number of the lawyer or agent,
- (c) a detailed description of how the person is affected by the subject matter of the review **and** explain why the person should be included in the review, and
- (d) the signature of the person submitting the request.

Before adding a party, the Council will provide the other parties to the review with an opportunity to make representations. In deciding whether to add a person as a party, the Council will

consider whether the person is directly affected, has relevant evidence to provide to the Council, and any other factors that are relevant in the circumstances.

Stays pending hearing

Generally, the Council will stay the original determination during the period that the determination is under review. In some cases, the matter before the Council may be a request for a review of a stop work order issued by the Council or a person authorized by the Council. The Council does not have the authority to grant a stay pending the requested hearing.

Type of hearing

A review may be conducted by way of written submissions, an oral hearing or a combination of both. The Council will determine the appropriate type of hearing before giving the owner a notice of hearing.

The Council will normally conduct an oral hearing although it may order that a hearing proceed by way of written submissions in certain cases. Where the Council is considering a hearing by written submissions, the Council may request input from the parties.

If a party wants to request that a hearing be conducted by oral hearing, written submissions, or a combination of both, the request should be communicated to the Council within a reasonable time of requesting the review and should provide reasons in support of the type of hearing proposed.

Timeline for holding a review

There is no prescribed period under the Act or regulations for the Council to hold a review. The Council will make every reasonable effort to conduct the review as soon as is practicable in the particular circumstances of the case.

The complainant's role at the review

In many cases, the process which led to the formal commencement of the determination making proceeding was initiated by a person making a complaint. While a complainant is not a party in the formal proceeding, the Council wants to ensure that the complainant is kept informed of the proceedings and is given an opportunity to make a statement.

If a proceeding was initiated by a complaint, the complainant will be provided with a Notice of Review and will be kept informed as to whether the hearing is to be oral or by way of written submissions.

If the hearing is to be an oral hearing, the following will apply:

- the complainant will be given the opportunity to make an oral statement to the council before any evidence has been presented by the parties.
- the complainant may also provide a written statement to the council.

- the oral and written statements must be limited to matters associated with the specific complaint.
- the Council and the parties to the proceedings may ask questions of the complainant or to otherwise respond to the complainant's statement.
- the complainant does not have a right to call witnesses or to cross-examine witnesses called by the parties.

If the hearing is to be by way of written submissions, the complainant may submit a written statement to the Council and must provide copies of the written statement to the parties to the proceedings. The parties to the proceedings may respond to the complainant's statement when making their written submissions.

The Council will provide the complainant with a copy of the Council's review decision and any attachments referred to in it as soon as practicable after the review decision has been made.

11.4 Written Hearing Procedure

The material contained in section 5.3 "Written Hearing Procedure" is applicable to review hearings.

11.5 Oral Hearing Procedure

The material contained in section 5.4 "Oral Hearing Procedure" is applicable to review hearings.

11.6 Evidence

General

The discussion of Evidence in section 6.0 of this Manual is applicable to issues respecting evidence during reviews.

New evidence

In cases involving reviews of previous decisions, the Council may allow evidence to be presented in a hearing that was not before the previous decision-makers. This is subject to the considerations mentioned above under "Admissibility and exclusion of evidence."

12.0 REVIEW DECISIONS

In accordance with the Act, after reviewing an order, decision or determination of the Council or person authorized by the Council, the Council may rescind or vary the order, decision or determination. In making these determinations, the Council will follow the same general 5 step procedure:

Step 1: Confirm that the Council has jurisdiction to make the determination

- Step 2:* Confirm that the procedure followed in the specific case is consistent with the applicable law and that it is consistent with the rules of natural justice and administrative fairness
- Step 3:* Assess whether or not there were sufficient grounds for making the order, decision or determination
- Step 4:* Assess whether or not there is any new information provided that would make it in the public interest to vary the original order, decision or determination
- Step 5:* Determine if the person who was the subject of the original order, decision or determination consents to varying that order, decision or determination.

Jurisdiction

The Council may only review a determination if it has authority to do so. The Council's jurisdiction comes from the Act. The Council will ensure that the matter before it is within its statutory jurisdiction to decide.

Natural justice and the duty to be fair

Before making a review decision, the Council must be satisfied that the requirements of the rules of natural justice and the duty to be fair have been met. This means, at a minimum, that the person was aware of the proceedings and that they were given an opportunity to respond. The procedures in this manual are designed to ensure that these requirements are met.

The duty to be fair also means that a person has a right to expect that the decision making of the Council is not tainted by bias or the appearance of bias. The Council has established general rules respecting bias in its Governance Policy. While Council members will be informed of the issues before them as they made the original order, decision or determination, they will not prejudice the matter under review.

Where the Chair or a Council member becomes aware of any facts that would lead an informed person, viewing the matter reasonably and practically, to conclude that a member, whether consciously or unconsciously, would not decide a matter fairly, the member will be prohibited from participating in the review decision making process unless consent to continue is obtained from the person who is the subject of the process. In addition, the person who is the subject of a review decision making process may challenge a member on the basis of a real or a reasonable apprehension of bias.

To raise an allegation of bias or another ground for disqualification during a hearing, the owner should make a motion to the panel. If it is determined that the allegation has been made promptly and has merit, the Council member will disqualify him/herself and withdraw from the panel hearing the matter unless consent to continue is obtained from the person who is the subject of the process. If the person does not consent, the hearing may be adjourned until a new member is appointed to the panel by the chair.

Sufficient grounds

The Council may rescind an order, decision or determination if the Council determines that there were insufficient grounds for making the order, decision or determination. The Council will generally consider that there were insufficient grounds if

- the Council or authorized person did not have jurisdiction to make the order, decision or determination that is the subject of the review,
- the rules of natural justice and the duty to be fair were not met in respect of the original order, decision or determination,
- an element of the allegation had not been proven on the balance of probabilities, or
- an available defence was established on the balance of probabilities.

Public interest

At the conclusion of the review hearing process, the Council may still be of the opinion that the person did contravene a particular provision of the Act or regulations. However, as a result of new information being provided to the Council, the Council may conclude that it would be in the public interest to modify the original order, decision or determination. Examples of where this may occur are, because the new information provided to the Council, the Council determines that it is in the public interest to modify

- the weighting of the factors in respect of an administrative penalty,
- the area to which a stop work order should apply, or
- the timing for carrying out particular work under a remediation order.

Consent required

A decision of the Council to vary a previous order, decision or determination does not become effective unless the person who was subject to the previous order, decision or determination consents. This ensures that the modifications do not have any unintended consequences.

Appeals from Council decisions

A person who is subject to an original decision or a review decision may appeal the decision to the Forest Appeals Commission provided that the appeal conforms to the requirements of the Act and regulations. For a complete discussion of appeals from Council decisions, please see the Forest Appeals Commission Procedure Manual.

If the Council had not posted the decision that is subject to the appeal on the website before the commencement of the appeal, the Council will post the Council's decision being challenged with a prominent notation that the decision is under appeal to the Forest Appeals Commission.

If the original decision had already been posted on the website when the appeal was commenced, then the Council will place a prominent notation that the decision is under appeal to the Forest Appeals Commission.

The results of the appeal will also be posted on the website.

13.0 ADDITIONAL PROVISIONS

Representatives/Legal counsel

Parties are permitted to have a spokesperson or representative speak on their behalf. The spokesperson or representative does not have to be a lawyer. The Council will make every effort to keep the process open and accessible to unrepresented parties.

A complainant is permitted to have a spokesperson or representative speak on their behalf.

Constitutional question

If a party intends to raise a question about the constitutional validity or applicability of a statute, regulation, bylaw or common law rule, or claim a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms*, that party must deliver written notice to the Council at least 14 days before raising the constitutional question.

A party raising a constitutional question must also comply with the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, by delivering a notice of constitutional question to the other participants in the hearing process and the Attorneys General of Canada and British Columbia.

Role of precedent (Previous decisions of the Council)

Although the Council may be bound by the decisions of certain courts, it is not required to follow (is not bound by) its past decisions or the decisions of the Forest Appeals Commission. While earlier decisions of the Council or the Commission may indicate how the Council will view particular types of cases, as a matter of law, it must decide each case on its own merits.

Costs

The Council does not have the authority to order a party to pay another party any of the actual costs in respect of a compliance or review proceeding.

Audio-visual requirements

If a party wants to use an overhead projector, flip chart, VCR, etc., at a hearing, that party should confirm the availability of such items with the venue scheduled for the hearing and make arrangements accordingly.

Visually impaired, hearing impaired or disabled participants

If a party or a witness is visually or hearing impaired, or has any other disability (e.g., reading or writing) and services are required to assist the participant, that party must arrange for such services at the hearing.

Other languages

If a party or a witness would prefer to give evidence in another language and to have the evidence of others interpreted into that other language, that party must arrange for such services at the hearing.

Failure to attend proceedings

Where notice of a preliminary meeting, pre-hearing conference, hearing by written submissions or an oral hearing has been properly given and a party fails to attend or does not provide its submissions, the Council may proceed in that party's absence, or without its submissions.

Withdrawing or abandoning a proceeding

An appellant may withdraw his or her request for review by so informing the Council in writing.

Legal counsel to the Council

The Council may appoint and direct its legal counsel to advise the Council on matters of law and procedure and on such other matters as the Council requests.

**Form 1
Request for Review**

TO: Managed Forest Council
305 – 1627 Fort Street
Victoria, BC V8R 1H8

NAME OF APPELLANT(S):

[include full name, address, telephone number and facsimile number, if available]

APPELLANT'S REPRESENTATIVE (if any):

[include full name, address, telephone number and facsimile number, if available]

ADDRESS FOR SERVICE OF APPELLANT(S):

[specify address for delivery of all correspondence and documents related to the review]

DETERMINATION SUBJECT TO REVIEW:

[include determination date, number and subject matter]

 GROUNDS FOR REVIEW:

[please state why the appellant objects to the determination, in detail; attach additional pages as necessary]

...

RELIEF SOUGHT:

[what you want the Council to order at the end of the review]

Signature

Date