

File: INO5019 Beaufort Block T141
May 10, 2006

REGISTERED MAIL

John Philips, RPF CEA(SFM)
Manager, Forestry Programs
TimberWest Forest Corp.
#3-4890 Rutherford Road
Nanaimo, BC V9T 4Z4

Dear John Philips:

Re: Notice of determination regarding alleged contraventions

Authority

It has been alleged that TimberWest Corp (TimberWest) as owner of Lots 1350, 1011 and 1032 within Managed Forest #7, contravened sections 14 (2) (c) and 15 (b) of the Private Managed Forest Land Council Regulation. The alleged contraventions are in respect of each of four stream crossings along the main road within Block T141.

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 sections 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.

Opportunity to be heard

On March 29, 2006 the Council provided TimberWest with the investigation report¹ and a supplementary technical report². On April 25, 2006 TimberWest provided the Council with a written submission in respect of the allegations³.

¹ The investigation report, dated February 28, 2006, was prepared by Stuart Macpherson, RPF, Executive Director of the Council and was entitled "Investigation: Road Construction Practices on Block T141 Managed Forest #7 Beaufort Range Port Alberni".

² The technical report, dated March 2006, was prepared by Shawn Hamilton, RPBio, of Shawn Hamilton and Associates and was entitled "Block T141 Assessment – TimberWest".

³ The submission, dated April 25, 2006, was prepared by John Philips, RPF CEA(SFM) Manager, Forestry Programs and was entitled "RE: Investigation: Road Construction Practices on Block T141 Managed Forest #7 Beaufort Range Port Alberni dated February 28, 2006 (the "Investigation")."

TimberWest, represented by John Philips and Alan Chatterton, was given an oral hearing in respect of the allegations on April 26, 2006 at 980 Blanshard St., Victoria. Stuart Macpherson was present to respond to enquiries respecting the investigation report; Shawn Hamilton was present to respond to enquiries respecting the technical report. Members of the public were in attendance but were not parties to the proceedings.

This determination is based on information and evidence provided to the Council in the investigation report, the technical report, the written submission of TimberWest and by the parties at the oral hearing.

Council staff evidence:

In part the Council staff evidence indicated:

1. Block T141 is owned by TimberWest and is private managed forest land. The area is not within a water supply area as defined in section 1 of the Private Managed Forest Land Council Regulation.
2. All of the allegations concern roads within Block T141. The roads in Block T141 were constructed and used by TimberWest after August 3, 2004.
3. TimberWest prepared an operating plan for Block T141 dated February 1, 2005 (operating plan).
4. Block T141 is 56.4 ha in size and is located on a south facing slope in the Beaufort Range northwest of Port Alberni.
5. Block T141 contains nine identified streams, with two being numbered in the operating plan as Stream 4 and Stream 6. Streams 4 and 6 flow out of Block T141 in a south westerly direction, across the regional Log Train Trail, through property owned by Mr. Wayne Crowley and then enter into a fish stream locally called Woodward Creek.
6. The road within Block T141 contains two switchbacks and crosses Stream 4 on three occasions and Stream 6 on two occasions.
7. Each of the culverts within Block T141 has been assigned an identifier in the operating plan. The culverts that are the subject of the allegations are: C-1, C-18 and C-11 on Stream 4 and C-27 on Stream 6.
8. TimberWest began harvesting within Block T141 during the winter of 2005/06. On January 5, 2006, Wayne Crowley contacted Stuart Macpherson expressing concern about TimberWest's logging practices in Block T141.
9. On January 4 and 5, 2006 a significant rain on snow event occurred in the Beaufort Range area which increased flow within the streams in Block T141. During the event, approximately 140 to 150 m³ of material was carried down Streams 4 and 6.
10. There was evidence of other natural occurring slides in the Beaufort Range area that were triggered by the same particular confluence of conditions which impacted the area in and around Block T141. The peak flows in Streams 4 and 6 were not significantly affected by harvesting activities in Block T141.
11. The total volume of material transported down Stream 4 on January 4 and 5, 2006 is estimated to be approximately 75 m³. Of this volume, approximately 5 to 10 m³ came from an old Cat trail located in Block T141 that was neither constructed nor used by TimberWest. Approximately 1 to 2 m³ came from material eroded from stream

crossings. Only a small portion of the transported material in Stream 4 was deposited on either Mr. Crowley's property or into Woodward Creek. Approximately 40 m³ was deposited on the upslope side of culvert C-11 which had become blocked. This volume was removed by TimberWest on the morning of January 5, 2006. Most of the remaining volume being carried in Stream 4 was deposited on the upstream side of the Log Train Trail.

12. The total volume of material transported down Stream 6 on January 4 and 5, 2006 is estimated to be approximately 75 m³. Approximately 1 to 2 m³ came from material eroded from stream crossings. Most of the material carried down Stream 6 was deposited on the natural alluvial fan and the flats on Mr. Crowley's property.
13. During the rain on snow event each of culverts C-1, C-18 and C-11 became either partially or completely blocked with material being carried down Stream 4. Similarly, culvert C-27 on Stream 6 became at least partially blocked.
14. TimberWest was on site on the morning of January 5, 2006 and cleaned the upstream culverts to enable them to carry the stream flow. TimberWest also removed significant volumes of material from the upstream side of culvert C-11. The failure of the culvert to carry this material and its prompt removal by TimberWest combined to prevent any of this material from being transported downstream to Mr. Crowley's property or on into Woodward Creek.
15. The installation of the culverts C-1, C-11, C-18 and C-27 failed to protect the erodable material on the downstream end. The culvert pipe needed to be longer to extend beyond the erodable fill or that material had to be suitably protected. Because neither of these precautions were taken, approximately 2 to 4 m³ of material from the stream crossing structures eroded into Stream 4 and Stream 6 during the rain on snow event of January 4 and 5, 2006. Unless remedial measures were carried out, erosion would continue at the downstream outlet of these culverts.
16. At C-11 the diameter of the culvert that was installed (600 mm) was smaller than the diameter that was specified in the applicable plan (800 mm). That culvert has since been replaced with a 1000 mm culvert.

TimberWest evidence:

TimberWest does not dispute any of the evidence presented in the investigation report and the technical report as the evidence relates to describing the events which occurred in Block T141. However, TimberWest does not admit that the events, as described, constitute a contravention of the regulation as has been alleged.

Issues:

1. Did TimberWest contravene section 14 (2) (c) of the Private Managed Forest Land Council Regulation in respect of the culverts at C-1, C-11, C-18 and C-27?
2. Did TimberWest contravene section 15 (b) of the Private Managed Forest Land Council Regulation in respect of the culverts at C-1, C-11, C-18 and C-27?
3. Should an administrative penalty be levied?
4. Should a remediation order be given?

1. Did TimberWest contravene section 14 (2) (c) of the regulation?

Section 14 (2) (c) of the Private Managed Forest Land Council Regulation provides:

- (2) An owner who constructs, deactivates or rehabilitates a road, landing, excavated or bladed trail or similar access structure must ensure that the construction, deactivation or rehabilitation is carried out so as to meet all of the following requirements:
 - (c) excavated soil does not enter directly into streams.

Analysis

TimberWest authorized the construction of the road through Block T141. This road construction necessarily involved the installation of culverts C-1, C-11 and C-18 in respect of Stream 4 and culvert C-27 in respect of Stream 6. TimberWest was required to ensure that the installation of the culverts did not result in excavated soil entering directly into Stream 4 or Stream 6.

Photographs of each of the outlets of culverts C-1, C-11, C-18 and C-27 are contained on page 23 of the investigation report. From the photographs it is apparent that excavated material was placed around each of the culvert outlets during installation. It is also readily apparent that in each case some of that excavated material has eroded. For culverts C-1, C-11 and C-18, the excavated material that eroded did so directly into Stream 4. Similarly, the excavated soil associated with the installation of culvert C-27 that has eroded entered directly into Stream 6.

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.

TimberWest did not specifically state that it intended to establish a due diligence defence. However, TimberWest's written submission contains statements that would contribute to the establishment of such a defence. Of particular note are paragraphs 1 to 3 of the written submission which state:

- 1. TimberWest is committed to carrying out all of its operations, including its operations within Block T141, in compliance with all applicable environmental protection regulations. It has rigorous operating procedures, and inspection and monitoring systems, in place to ensure that this commitment is fulfilled. If TimberWest is found to have failed in complying with any regulation, it is committed to diligently remedy such non-compliance and, if necessary, to change its procedures and systems to ensure that it does not reoccur. TimberWest therefore takes the allegations in the Investigation very seriously.
- 2. The heavy run-off experienced throughout the west side of the Beaufort Range was the result of unusually high precipitation over several weeks, culminating in a storm or series of storms in early January, 2006, determined by weather records to be in the range of one in twenty-five to one in fifty year

event. TimberWest believes that any material water quality issues arising from the heavy run-off were the result of these extreme weather conditions, not TimberWest's forest management practices.

3. TimberWest acted in a duly diligent manner in dealing with issues that occurred within Block T141 during the storm period.

The test for due diligence has two branches:

- (1) was the event reasonably foreseeable?
- (2) if so, did the person take all reasonable care to prevent the event from occurring?

Foreseeability

In the present case, the Council must assess whether or not it was reasonably foreseeable that the excavated material around a stream culvert could be deposited directly into the stream. People are only expected to take preventative action in respect of harmful events which they can reasonably foresee. The precipitation and runoff conditions in Block T141 on January 4 and 5, 2006 conservatively may be estimated at being a one in twenty-five year event. There is no question that the event caused significant amounts of material to be transported down Streams 4 and 6 and through culverts C-1, C-11, C-18 and C-27 than would have been the case under normal weather conditions. However, the issue is not if the extreme weather event was reasonably foreseeable, but whether it was reasonably foreseeable that exposed excavated material around a culvert pipe carrying stream flow could be directly deposited into that stream. The Council finds that it was reasonably foreseeable in the circumstances.

Reasonable care

If a harmful event is reasonably foreseeable, then a duty arises to prevent the event from occurring. Being duly diligent does not mean that a person must eliminate all risk of anything going wrong. The person must, however, eliminate what in the normal course of business would objectively be seen as unacceptable risks. The test is an objective one and relies on what other people engaged in the same activity, looking at the same situation, would have prudently done. Generally this means that the greater the gravity of potential harm or the greater the likelihood of the potential harm, the higher the degree of care that would be expected.

There is a significant risk that an improperly installed culvert on a logging road on the west side of Vancouver Island will result in soil eroding into a stream. There is also a significant potential for that eroding soil to result in damage to the stream. A reasonable person would have taken reasonable care to ensure that the stream culvert was properly installed. This would likely mean that the installation should be consistent with the specifications set out in The Handbook of Best Management Practices for Private Forest Land in British Columbia⁴. TimberWest did not ensure that the culverts C-1, C-11, C-18 and C-27 were installed in a manner consistent with these best management practices. The Council finds that TimberWest did not take all reasonable care in the circumstances to prevent the excavated soil associated with these culverts from eroding directly into Stream 4 and Stream 6.

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

⁴ Published by the Private Forest Landowners Association, 2001.

Finding

After considering all of the evidence, and after determining that no applicable defences have been established, the Council finds that TimberWest contravened section 14 (2) (c) of the Private Managed Forest Land Council Regulation in respect of each of culverts C-1, C-11 and C-18 on Stream 4 and culvert C-27 on Stream 6.

2. *Did TimberWest contravene section 15 (b) of the regulation?*

Section 15 (b) of the Private Managed Forest Land Council Regulation provides:

- 15 An owner who, adjacent to a stream, carries out timber harvesting or related activities, silviculture activities or road construction or deactivation activities must ensure that those activities meet all of the following requirements:
 - (b) soil erosion into streams is minimized.

Analysis

TimberWest authorized the construction of the road within Block T141 which necessarily included road construction activities adjacent to Stream 4 and Stream 6. Accordingly, TimberWest was required to ensure that the soil erosion associated with the installation of the culverts C-1, C-11, C-18 and C-27 was minimized.

Photographs of each of the outlets of culverts C-1, C-11, C-18 and C-27 are contained on page 23 of the investigation report. From the photographs it is apparent that some of the excavated material that was placed around each of culverts C-1, C-11 and C-18 eroded into Stream 4. Similarly, some of the excavated material associated with the installation of culvert C-27 eroded into Stream 6.

The issue to be determined is whether or not the amount of soil that eroded into Streams 4 and 6 was minimized. This is not an absolute test; it is not expected that no soil will erode as a result of carrying out road construction activities. The test to be applied is whether the amount of soil erosion was the minimum amount practicable in the circumstances.

Approximately 2 to 4 m³ of material associated with culverts C-1, C-11, C-18 and C-27 eroded into Streams 4 and 6. Before the event occurred TimberWest had not taken sufficient measures to ensure that the culvert pipe was of sufficient length or that the exposed material was protected. These types of measures were reasonable and not extraordinary. If the measures had been employed, there would have been a reduced amount of soil eroding from the stream crossings into Streams 4 and 6.

Available defences

The analysis of the potential applicability of a due diligence defence to a contravention of section 15 (b) of the regulation is similar to that discussed in the context of section 14 (2) (c).

The Council finds that it was reasonably foreseeable in the circumstances that leaving exposed mineral soil around a stream culvert would not minimize the amount of soil erosion into the stream. A reasonable person would have taken reasonable care to ensure that the

amount of soil erosion was minimized. This would likely mean that the installation should be consistent with the specifications set out in The Handbook of Best Management Practices for Private Forest Land in British Columbia. TimberWest did not ensure that the culverts C-1, C-11, C-18 and C-27 were installed in a manner consistent with these best management practices. The Council finds that TimberWest did not take all reasonable care in the circumstances to ensure that the amount of soil erosion into the streams was minimized.

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

Finding

After considering all of the evidence, and after determining that no applicable defences have been established, the Council finds that TimberWest contravened section 15 (b) of the Private Managed Forest Land Council Regulation in respect of each of culverts C-1, C-11 and C-18 on Stream 4 and culvert C-27 on Stream 6.

3. *Should an administrative penalty be levied?*

Under section 26 (2) of the Act, if the Council determines that a person has contravened a provision of the Act or the regulations, the Council may

- (a) levy an administrative penalty against the person in an amount that does not exceed \$25 000, or
- (b) refrain from levying an administrative penalty against the person if the person considers that the contravention is trifling.

The Council does not consider that the contravention of sections 14 (2) (c) and 15 (b) of the Private Managed Forest Land Council Regulation in respect of each of culverts C-1, C-11, C-18 and C-27 is trifling.

Section 26 (5) requires that, before the Council levies an administrative penalty, the Council must consider all of the following:

- (a) any previous contraventions of a similar nature;
- (b) the gravity and magnitude of the contravention;
- (c) whether the contravention was repeated or continuous;
- (d) whether the contravention was deliberate;
- (e) any economic benefit derived by the person from the contravention;
- (f) the person's cooperation and efforts to remedy the contravention;
- (g) the person's efforts to prevent the contravention;
- (h) whether relevant forest management objectives specified in Division 1 of Part 3 of the Act are being achieved despite the contravention.

The Council has determined that there were contraventions associated with four stream crossings. In determining the amount of any administrative penalty that may be appropriate, the Council will assess each stream crossing as a separate event and will combine the contraventions associated with each event. The factors below will be evaluated together with no one factor being given greater or less weight than another.

(a) any previous contraventions of a similar nature

TimberWest does not have any previous contraventions of a similar nature.

(b) the gravity and magnitude of the contravention

The gravity of the contravention goes to the significance of the impact of the contravention. The total volume of soil that eroded from C-1, C-11, C-18 and C-27 into Streams 4 and 6 as a result of the contraventions is estimated at between 2 and 4 m³. This volume would not have any grave consequences on soil productivity, water quality or fish habitat.

The magnitude of the contravention goes to the overall scope of the contravention. In this instance, there were contraventions associated with four stream crossings. The magnitude of each contravention was low; taken together, the magnitude is significant.

(c) whether the contravention was repeated or continuous

TimberWest built four inadequate stream crossings within Block T141. Therefore the contravention was repeated.

(d) whether the contravention was deliberate

TimberWest deliberately constructed the crossings at C-1, C-11, C-18 and C-27. However, there is no evidence to suggest that, in constructing the stream crossings, TimberWest deliberately intended to contravene the regulation.

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

TimberWest would likely have derived an economic benefit from the initial installation of each of C-1, C-11, C-18 and C-27. This benefit would be the cost differential between the actual installation costs and those which would have been experienced if the culverts had been properly installed. The amount of this cost differential is not known.

TimberWest has voluntarily reconstructed each of the stream crossings at C-1, C-11, C-18 and C-27. The associated costs would have removed any initial economic benefit.

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

TimberWest was very cooperative with the Council in respect of the contraventions. This began with the initial self-reporting of the events and continued with the providing of information in a timely fashion to Stuart Macpherson and Shawn Hamilton.

TimberWest has taken steps to remedy the problems of soil eroding at each of C-1, C-11, C-18 and C-27. In addition, TimberWest's prompt response on the morning of January 5, 2006 in removing the blockages to each of the culverts minimized the potential for additional soil erosion.

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

TimberWest made some efforts to prevent the contraventions from occurring. For example, TimberWest has submitted that it has operating procedures as well as inspection and monitoring systems in place. These efforts to prevent the contravention were not sufficient.

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

A significant volume of material (approximately 150 m³) was transported by Streams 4 and 6 as a result of the high levels of flow experienced on January 4 and 5, 2006. The source of the material was mostly from channel scour within and above Block T141. The evidence suggests that the amount and the extent of the channel scour was not significantly influenced by timber harvesting within Block T141. The downstream transport of all of the material will not significantly reduce the productivity of the soil, has not had a detrimental effect on fish habitat and the increase in water turbidity level was of short duration.

The volume of transported material contributed by the four stream crossings is approximately 2 to 4 m³. This means that less than 3% of the total material that was transported was associated with the contraventions. The achievement of government's forest management objectives will not be impacted by the contraventions.

Having considered each of the factors set out in section 26 (5) of the Act, the Council levies an administrative penalty of \$7 500.00 for each of the four stream crossings. Therefore, the total administrative penalty levied on TimberWest for the four contraventions of section 14 (2) (c) and the four contraventions of section 15 (b) of the Private Managed Forest Land Council Regulation is \$30 000.00. This amount must be paid to the Minister of Finance by June 30, 2006.

4. Should a remediation order be given?

If the Council determines that a person has contravened a provision of the Act or regulations, the Council is empowered under section 27 of the Act to order the person to remedy the contravention by

- (a) carrying out a requirement of the Act or regulations that the person has failed to carry out, or
- (b) repairing or mitigating the damage to private managed forest land caused by the contravention.

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

TimberWest has submitted that it has done each of the following:

- repaired each of the culverts at C-1, C-11, C-18 and C-27 within Block T141;
- carried out all of the work recommended by Shawn Hamilton in the technical report;
- reforested all of the harvested area within Block T141;
- seeded those areas of exposed soil that might benefit from being seeded;

- upgraded its environmental protection systems to protect environmental values from extreme weather events in the future.

Some felled and bucked timber remains to be harvested within Block T141. The road network will be required to facilitate this harvesting activity.

The Council requires adequate assurance that the road network within Block T141 remains stable and in good repair. To provide adequate assurance the Council orders that TimberWest do the following:

1. As soon as practicable submit to Council a report prepared by a qualified registered professional confirming that all necessary measures have been taken to minimize the potential for future soil erosion associated with the road network within Block T141;
2. Until the road network within Block T141 is deactivated, monitor the drainage structures during periods of high stream flow to ensure that they are working adequately;
3. Notify the Council as soon as practicable after completing road deactivation activities within Block T141.

Reconsideration and Appeal:

Under section 32 of the Act, TimberWest may request that the Council reconsider some or all of this determination, including the administrative penalty and remediation order.

Under section 33 of the Act, TimberWest 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 Manage Forest Land Council Office, at (250) 386-5737.

Yours truly,



Trevor Swan, Chair
Private Managed Forest Land Council