

**In the matter of the alleged contravention by Wynn Properties Ltd. of ss. 15, 21, 22, and 26 of the Private Managed Forest Land Council Regulation (B.C. Reg. 71/2014, July 1, 2014)**

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**DETERMINATION**

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**Introduction**

1. The Private Managed Forest Land Council<sup>1</sup> (the “Council”) is an independent tribunal established under the *Private Managed Forest Land Act* (the Act). The Council has oversight responsibilities aimed largely at ensuring that owners of private managed forest land comply with the Act and any regulations made under it.
2. Wynn Properties Ltd. (the Owner) was the registered owner of the portion of Managed Forest 54 (MF 54) under investigation at the time the alleged contraventions occurred. Michael Combs is the chief executive officer of Wynn Properties Ltd. The property was sold to the Nature Conservancy of Canada (NCC) on December 20, 2018, who subsequently removed the property from the Managed Forest program effective March 2019.
3. Following an investigation, the Council’s Executive Director alleges that Wynn Properties Ltd. contravened ss. 15, 21, 22, and 26 of the *Private Managed Forest Land Council Regulation* (the “Regulation”), which are copied in Appendix A. Section 15 of the Regulation requires, among other things, that an owner carrying out a primary forest activity must not cause sediment or other material to be transported to, or deposited in, a stream if that sediment or material will have a material adverse effect on fish habitat. Section 21 requires that an owner who constructs or uses a road for a purpose related to timber harvesting must maintain the road until the road is deactivated to the extent necessary to avoid causing a material adverse effect on fish habitat. Section 22 requires an owner who no longer requires a road and who intends to cease maintaining it to deactivate the road. Section 26 requires an owner to notify the council within 24 hours of becoming aware that a landslide or debris flow has occurred on the owner’s land, if they know that the landslide or debris flow has deposited debris or sediment into a class A stream, class B stream, class C stream, class D stream or class E stream.
4. In a letter dated July 3, 2019 the Council provided the Owner with an opportunity to be heard before making a determination about whether the Owner contravened ss. 15, 21, 22, and 26 of the Regulation. Wynn Properties Ltd. provided a written response to Council on July 13, 2019. The Council conducted a written hearing on October 15, 2019.

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<sup>1</sup> The Private Managed Forest Land Council operates under an abbreviated title as the Managed Forest Council.

## Issues

5. Wynn Properties Ltd. provided an opinion that Council no longer has jurisdiction over this property given the property has subsequently been sold and is no longer private managed forest land subject to the Act and Regulation.

6. It is Council's opinion that an owner remains legally responsible for contraventions under the Act and Regulation when they owned private managed forest land even though the property was subsequently sold to a new owner. Accordingly, in this case the Council must determine:

- (a) whether there were contraventions of ss. 15, 21, 22, and 26 of the Regulation;
- (b) whether an administrative penalty should be levied and, if so, how much; and
- (c) whether to order remediation.

## Evidence

7. The evidence before Council consisted of: (a) the Investigation Report 1801 prepared by Phil O'Connor, Executive Director of the Council; (b) the 2018 Managed Forest Inspection Report for MF 54 prepared by Stuart Parker; (c) a landslide and fish habitat assessment report prepared by VAST Resource Solutions; and (d) Wynn Properties Ltd. response to the opportunity to be heard under the Act.

8. Wynn Properties Ltd. was the owner of MF 54 at the time the landslide into the unnamed tributary of Next Creek occurred. Wynn Properties Ltd. sold the property to the NCC in December 2018, then NCC subsequently withdrew the property from the Managed Forest Program in March 2019.

9. A Council inspection conducted by Stuart Parker found an unreported landslide that entered a Class C stream during inspection of MF 54 on Aug. 13, 2018. This information was sent to Council's Executive Director on Aug. 18, 2018 which triggered the landslide and fish habitat assessment conducted by VAST Resource Solutions.

10. The assessment conducted by VAST Resource Solutions found that a landslide (Landslide E) originating from a road constructed within Block 130 on MF 54 deposited debris and sediment into an unnamed tributary of Next Creek. Six other landslides from that same road (A, B, C, D, F, and G) did not deposit material into the watercourse. The slides occurred within an existing cutblock harvested in 2014 on or above the road which was constructed more than 30 years ago.

11. The exact date of the landslides is unknown; however, the mutual understanding is these landslides occurred during the spring of 2018.

12. No harvesting has occurred in the vicinity of Block 130 since 2014.

13. Road maintenance has not been completed for several seasons and seasonal deactivation has not been completed on this section of road. The 2018 Council inspection report states that no road maintenance nor deactivation was conducted in 2017 or 2018. The VAST report outlines several observations relating to significant landslide risk in the area, road stability and drainage failures, and lack

of road maintenance and deactivation, stating “road maintenance has not been completed for several seasons”, and “culvert inlets are completely or partially blocked”, and presence of “infilled ditches from raveled and failed cut slope material”.

14. Although Wynndel Box and Lumber Company Ltd. (previous owner of MF 54) had an “Environmental Instruction” document outlining road maintenance and deactivation standards, Michael Combs states that MF 54 “did not have a formal written plan” for road maintenance and deactivation operations even though road maintenance and deactivation is clearly directed in the Managed Forest Council’s Field Practices Guide which has been provided to all private managed forest land owners and is available on Council’s website. The Owner claims that BC Forest Service road closures in 2016 prevented access to monitor road conditions or conduct road maintenance activities, however this does not excuse the fact the road should have been deactivated post-2014 harvesting.

15. The VAST Resource Solutions report provides unambiguous evidence of a material adverse effect on fish habitat in the unnamed tributary of Next Creek resulting from Slide E. They concluded “The impact of landslide activities in the upper reaches of a fish-bearing tributary of Next Creek has resulted in a material adverse effect on the stream ecosystem. The largest impacts are localized to the immediate channel over the distance of the slide path, however, overall impacts extend to downstream reaches as a consequence of sediment transport processes. The slide aftermath has certain implications on water quality, fish habitat, and ecosystem processes that may alter overall aquatic productivity at a watershed scale.”

16. Council was never notified by the Owner of these slides having taken place, and first became aware of this from Stuart Parker’s inspection on August 13, 2018. An NCC employee (Adrian Leslie) noted the slides on June 25, 2018 and was able to photograph the slides on July 5, 2018. Michael Combs discussed the slides on July 18, 2018 with Tom Swann from NCC. This establishes when Wynn Properties was first made aware of the slides. The Owner claims they could not access the site to inspect the reports of the slide when it became known in July because access was restricted due to active wildfires in the area, however Council’s inspector was able to conduct an inspection in August. Wynn Properties knew slides had occurred in the area well before the MFC inspection and did not report it as required, nor is there any evidence of diligent follow-up by the Owner to the information the Owner obtained from NCC.

## **Analysis**

### **a) Whether there was a contravention of ss. 15, 21, 22, and 26 of the Regulation:**

17. Based on the evidence presented, the Council makes the following findings:
- The Owner did not contravene s. 15 of the Regulation due to the fact that no forest management activities have taken place in the vicinity since 2014.
  - The Owner did not contravene s. 21 of the Regulation as the road had not been actively used for several years for a purpose related to timber harvesting, rather given the circumstances the road should have been deactivated in accordance with s. 22 of the Regulation.
  - The Owner contravened s. 22 of the Regulation by failing to either maintain or deactivate the road as required under s. 22 of the Regulation resulting in Landslide E into the unnamed tributary of Next Creek which had a material adverse effect on fish habitat.
  - The Owner contravened s. 26 of the Regulation which requires Council be notified within 24 hours of becoming aware that a landslide or debris flow has occurred on the owner's land.

18. Section 29 of the Act sets out the following defenses which are available to a person where a contravention has been established:

29 For the purposes of a determination of the council under sections 26 and 27, a person must not be found to have contravened a provision of this 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 fact 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.

19. The Owner did not provide any evidence of due diligence that would establish this defense. There is no evidence of owner diligence with respect to ongoing road maintenance or deactivation. Given the fisheries values in the unnamed tributary of Next Creek, the Owner should have immediately conducted a field inspection to follow up on the notification of the slides he received from NCC in July 2018 and the Owner was required to notify Council within 24 hours of then becoming aware of a slide into a fish creek.

**b) Whether an administrative penalty should be levied and, if so, how much:**

20. Having found that the Owner contravened the Regulation, the Council must consider whether or not to levy an administrative penalty under section 26(2) of the Act.

21. Section 26(2) provides that the Council may either levy an administrative penalty in an amount not exceeding \$25,000 or refrain from levying such a penalty if satisfied the contravention is trifling. When making its assessment, the Council is directed by section 26(5) to consider the following factors:

- Any previous contraventions of a similar nature
- The gravity and magnitude of the contravention
- Whether the contravention was repeated or continuous
- Whether the contravention was deliberate
- Any economic benefit derived by the person from the contravention
- The person's efforts to remedy the contravention
- The person's efforts to prevent the contravention
- Whether relevant forest management objectives specified in Division 1 of Part 3 of the Act are being achieved despite the contravention.

22. The owner of MF 54 has no previous contraventions of the Act or Regulation, nor was the contravention deliberate. There was no direct economic benefit resulting from the contravention, and the Owner has cooperated fully with Council through its investigation. However, the failure to maintain or deactivate roads given the potential impact on fish habitat and failure to provide a landslide notification are not trifling matters. In this case, the resulting landslide and debris had a material adverse effect on fish habitat.

23. Council has decided to levy a total administrative penalty of \$16,000 comprised as follows:

- \$14,000 for contravening s. 22
- \$2,000 for contravening s. 26

**c) Whether to order remediation:**

24. In addition, the Council is authorized under s. 27 of the Act to remedy a contravention by requiring an owner, or a contractor, employee or agent of the owner, to either carry out a requirement of the Act or Regulation which the owner failed to carry out or repair or mitigate the damage to private managed forest land caused by the contravention. However, there is no recourse for Council to order remediation in this case where the property is no longer owned by Wynn Properties Ltd. nor is any longer private managed forest land subject to the Act. Council does note the Owner's agreement and commitment to work with the Nature Conservancy of Canada to effect remediation.

**Reconsideration and Appeal**

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

A handwritten signature in black ink that reads "Rod Davis". The signature is written in a cursive style with a clear, legible font.

Rod Davis, Chair  
Managed Forest Council

November 12, 2019

## **Appendix A – Sections 15, 21, 22 and 26 of the *Private Managed Forest Land Council Regulation***

### **Sediment transport or deposition**

**15** An owner or a contractor, employee or agent of the owner carrying out a primary forest activity must not cause sediment or other material to be transported to, or deposited in, a stream if that sediment or material will have a material adverse effect on

- (a) fish habitat, or
- (b) water that is diverted by a licensed waterworks intake.

### **Road maintenance**

**21** (1) An owner or a contractor, employee or agent of the owner who constructs or uses a road for a purpose related to timber harvesting must maintain the road in accordance with this section until the road is deactivated.

(2) Despite subsection (1), if an owner or a contractor, employee or agent of the owner uses for timber harvesting purposes a portion of a road that was constructed under another enactment, the owner or a contractor, employee or agent of the owner must maintain that portion of the road in accordance with this section for the period that the owner or a contractor, employee or agent of the owner

- (a) uses the road for timber harvesting purposes, and
- (b) is the primary user of that portion of the road.

(3) For the purposes of this section, an owner or a contractor, employee or agent of the owner must maintain

- (a) the structural integrity of the road prism and clearing width, and
- (b) the proper functioning of the drainage systems of the road

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

### **Road deactivation**

**22** An owner or a contractor, employee or agent of the owner who no longer requires a road and who intends to cease maintaining it must

- (a) remove round-pipe stream culverts, and
- (b) remove any other culverts or bridges and stabilize the road prism, if doing so will reduce the likelihood of a material adverse effect in relation to fish habitat or water diverted by a licensed waterworks intake.

### **Notification of landslides and debris flows**

**26** An owner or a contractor, employee or agent of an owner must notify the council within 24 hours of becoming aware that a landslide or debris flow has occurred on the owner's land, if the owner or a contractor, employee or agent of an owner knows that the landslide or debris flow has deposited debris or sediment into a class A stream, class B stream, class C stream, class D stream or class E stream.