

In the matter of the request by Wynn Properties Ltd. under s. 32 of the Private Managed Forest Land Act for reconsideration of a Determination made by the Private Managed Forest Land Council, dated November 12, 2019 in respect of ss. 22 and 26 of the Private Managed Forest Land Council Regulation (B.C. Reg. 71/2014, July 1, 2014)

RECONSIDERATION DECISION

Introduction

1. By email dated December 3, 2019, Michael Combs and Wynn Properties Ltd. applied to the Private Managed Forest Land Council (the "Council") for reconsideration under sections 32(1) and 32(2)(a) of the *Private Managed Forest Land Act* (the "Act") of Council's determination dated November 12, 2019 (the "November Determination").
2. Wynn Properties Ltd. (the "Owner") was the registered owner of Managed Forest 54 (MF 54) at the time of the alleged contraventions. As described in the July 3, 2019 opportunity to be heard, the Owner was alleged to have contravened ss. 15, 21, 22 and 26 of the Regulation as a result of landslides that occurred on the property. The alleged contraventions occurred in spring 2018 but were not discovered until August 2018. In December of that year the Owner sold the property to the Nature Conservancy of Canada (the "NCC"). The NCC withdrew the property from managed forest land classification in March 2019. In its November Determination, Council found that the Owner had contravened ss. 21 and 26 of the *Private Managed Forest Land Council Regulation*, B.C. Reg. 71/2014, (the "Regulation"), and levied an administrative penalty of \$16,000.
3. Council has considered the supplemental investigation report of the Executive Director and the reconsideration submissions of the Owner. Council has carefully considered the submissions when making its reconsideration determination.

The November Determination

4. In its November Determination, Council made the following findings:
 - a. The Owner did not contravene s. 21 of the Regulation which requires that a road be maintained until it is deactivated. Council found that, since the road had not been actively used for several years for a purpose related to timber harvesting, the road should have been deactivated in accordance with s. 22 of the Regulation.
 - b. The Owner contravened s. 22 of the Regulation by failing to deactivate a road as required resulting in a landslide into the unnamed tributary of Next Creek which had a material adverse effect on fish habitat.
 - c. The Owner contravened s. 26 of the Regulation which requires that Council be notified within 24 hours of the Owner becoming aware that a landslide or debris flow has occurred on the

owner's land, if the 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.

5. Council levied a total administrative penalty of \$16,000 comprised as follows: \$14,000 for contravening s. 22; and \$2,000 for contravening s. 26. Council also concluded it lacked the authority to issue a remediation order to a former owner upon sale of the property to a new owner.

Position on Reconsideration

6. The Owner has presented four arguments as the basis for his request for reconsideration:
 - a. The Owner submits they were not obligated to deactivate the road as there was an intent to use the road for silviculture and future harvesting, and that the road is a mainline access road for the adjacent NCC property and for cabin owners on Kootenay Lake.
 - b. The Owner agrees they had an obligation to maintain the road post-harvesting in 2014 and 2015, but submits it could not be maintained due to the closing of the Blazed Creek forest service road. The Owner submits the Blazed Creek Road was closed because of an active forest fire, that there was no other access, and that there was no safe access to maintain the road during the subject period.
 - c. The Owner submits that, while having been informed by the NCC that “something had happened” on their property, they did not have specific knowledge of the scope and magnitude of the matter, and that it is not justifiable or reasonable to be obliged to conduct an inspection within three weeks of having been notified of the matter. They further argue there was no safe and lawful access due to the Blazed Creek forest road closure as a result of an active forest fire.
 - d. The Owner argues the \$16,000 penalty assessed in the November Determination is unreasonable in comparison to the Forest Appeals Commission Decision No. 2014-PMF-001(a) and the factors outlined in s. 26(5) of the Act.
7. Upon receiving the Owner’s reconsideration request, Council asked its Executive Director to provide further information addressing some of the issues raised by the Owner. In particular, Council requested clarification of timelines of road closures and forest fire events, and alternate access routes available. This information was submitted to Council as the INV 1801 Reconsideration Addendum (Updated) on April 21, 2020, and the Owner was provided an opportunity to be heard on this new information on April 27, 2020.
8. The Owner submitted a reply to the opportunity to be heard on May 20, 2020 by email outlining their contention that:
 - a. Access to Blazed Creek would have been illegal and unsafe because the road was closed by the Ministry of Forests, Lands and Natural Resources Operations (FLNRO);
 - b. Access to MF 54 using the northern Porcupine Road was not possible because the Owner did not have a road use agreement with private land owners on that road; and

- c. Access to MF 54 to investigate reported slides was not possible because the road was closed and was unsafe to use because of a wildfire in the area.

Evidence and analysis

9. The evidence before Council includes the two investigation reports prepared by the Executive Director and the additional evidence submitted by the Owner. From these materials, Council finds the following:
 - a. Five landslides occurred on a road located on MF 54, one of which caused a material adverse impact on fish habitat during the spring of 2018 (Slide E).
 - b. The Owner had not been maintaining nor had they deactivated the road following harvesting operations which occurred in 2014 and 2015.
 - c. The Owner was informed that landslides had occurred on MF 54 by the NCC on July 18, 2018.
 - d. Council was first informed of the landslide by its inspector as a result of a field inspection of MF 54 conducted on August 13, 2018.
 - e. A wildfire in the Blazed Creek area was ignited on July 28, 2018 and was considered extinguished on October 24, 2018, but there were no area restrictions or closures by FLNRO in effect due to the fire.
 - f. Roads accessing MF 54 exist from the south via the Blazed Creek – Jersey Creek road network, or from the north via the Porcupine Road.
 - g. The Blazed Creek – Jersey Creek road access was closed by FLNRO on November 14, 2016 due to a road failure at 1.0 km on the forest service road.
 - h. On behalf of the Owner, W.H. Excavating accessed the MF 54 landslides with heavy machinery to conduct maintenance on the road via the Blazed Creek – Jersey Creek route in October 2018.
10. Council observes that the Owner has not disputed that: (1) the landslide occurred from a road located on MF 54 which had a material adverse effect on fish habitat; (2) the road was neither deactivated nor was it being maintained; (3) the slide was not reported to Council upon the Owner being informed of it by the NCC; and (4) there were no steps taken to investigate the impacts of the landslides or debris flows reported by the NCC any time prior to the ignition of the Blazed Creek forest fire on July 28, or anytime before the August 13, 2018 inspection.
11. The three issues to be addressed in this reconsideration are:
 - a. Was the Owner obligated to maintain or deactivate the road as required under ss. 21 and 22 of the Regulation?
 - b. Did the Owner contravene s. 26 of the Regulation by failing to report that Slide E had deposited debris or sediment into a stream?
 - c. Are the penalties assessed appropriate?

(a) Was the Owner obligated to maintain or deactivate the road as required under ss. 21 and 22 of the Regulation?

12. The Owner agrees that they had an obligation to maintain the road in question as they assert that they had no intention of deactivating the road because of plans for future use for silviculture work and timber harvesting. However, the Owner argues that the road could not be maintained because there was no legal or safe access to MF 54.
13. The Regulation requires an owner to either maintain a road used for timber harvesting in accordance with s. 21 or deactivate the road in accordance with s. 22. The evidence before Council establishes that the road failures which resulted in the landslide impacting fish habitat was due to a lack of road maintenance. There is no evidence that the Owner conducted maintenance activities on the road following harvesting operations in 2014 and 2015. Diligent road maintenance would include seasonal deactivation, maintaining proper functioning of drainage structures, and maintaining the road prism, as well as ongoing monitoring which should have discovered the landslides well before they were reported to the Owner by the NCC. The existence of a wildfire in the area during the period of July 28 to October 24, 2018 is irrelevant to the Owner's obligation to maintain or deactivate the road. Given the Owner's demonstrated lack of commitment to maintain the road either before or after the southern access to MF 54 was closed by FLNRO in November 2016, it should have been deactivated in accordance with s. 22. The Owner should have made reasonable efforts to gain safe and legal access to carry out this responsibility. Council rejects the Owner's claim that the road could not be maintained because there was no legal and safe access to MF 54. On the evidence, Council has concluded that the Owner contravened s. 22 of the Regulation.

(b) Did the Owner contravene s. 26 of the Regulation by failing to report that Slide E had deposited debris or sediment into a stream?

14. The Owner argues they had no obligation to report the landslides as required by s. 26 of the Regulation because they did not have specific information as to their extent and effect, and that they did not have legal or safe access to MF 54.
15. Section 26 of the Regulation requires an owner, its contractor, or agent to notify Council within 24 hours of "becoming aware" that a landslide or debris flow has occurred on the owner's land, if the owner, or the owner's contractor, employee, or agent, "knows" that the landslide or debris flow has deposited debris or sediment into one of the classes of streams. Council agrees that there must be evidence that an owner, its contractor, or agent "knows" that the landslide or debris flow has deposited debris or sediment into one of the classes of streams to establish a contravention of s. 26. However, an owner cannot escape responsibility for a contravention by being wilfully blind. An owner who becomes aware of the need for investigation upon receiving information of a landslide or debris flow but who declines to make the necessary inquiries because he or she does not want to know the truth and face the consequences can be found to be wilfully blind. If that were not the

case, an owner could decline to make necessary inquiries to avoid triggering the notification requirement of s. 26 of the Regulation. Such an interpretation would not give effect to the objectives of the Act. .

16. The question for Council, then, is whether the evidence on reconsideration establishes the Owner knew or was wilfully blind to the fact that the landslide or debris flow has deposited debris or sediment into one of the classes of streams.
17. The evidence shows that the landslides on MF 54 were first discovered by an NCC employee on June 25, 2018 and that the NCC advised the Owner that landslides or washouts had occurred on the property on July 18, 2018. At that point, the Owner had become aware that a landslide or debris flow had occurred on the Owner's land.
18. Council accepts the Owner may not have acquired subjective knowledge that Slide E had deposited debris or sediment into a stream until August 13, 2018. However, Council finds that the Owner did not demonstrate reasonable diligence in investigating and reporting the landslides after they came to its attention on July 18, 2018. The Owner relies heavily on the existence of the Blazed Creek forest fire, but this is not an adequate response in view of the sequence of events. Council's inspector was able to access the property on August 13, 2018, and he has maintained that the access on that date was safe. Even if the wildfire presented a safety risk after July 28, 2018, the timing of the fire was ten days after the Owner was informed of the landslides by the NCC. The requirement for notification within 24 hours underscores that time is of the essence in determining whether adverse impacts have occurred to fish habitat. It is imperative that owners initiate a prompt investigation by whatever means operationally possible when they learn of a landslide event on their property to determine the potential for environmental impacts or risk to public safety.
19. Even so, Council finds no evidence that the Owner's failure to promptly investigate upon becoming aware of the landslide was done wilfully, and therefore on reconsideration finds the Owner has not contravened s. 26 of the Regulation.

(c) Are the penalties assessed appropriate?

20. The owner argues that the penalties assessed by Council are excessive given the penalty assessed to Erie Creek Forest Reserve Ltd. by the Forest Appeals Commission in Decision No. 2014-PMF-001(a), as well as the factors outlined in s. 26(5) of the Act. In assessing its penalty, Council took into account that the Owner had no previous contraventions of the Act or Regulation, the contraventions were not deliberate, there was no direct economic benefit resulting from the contraventions, and the Owner had cooperated fully with Council through its investigation. However, the failure to maintain or deactivate the road in question is not a trifling matter given the potential impact on fish habitat. In this case, the resulting landslide and debris flow in fact had a material adverse effect on fish habitat on a watershed scale.

21. The penalty levied by Council is consistent with prior penalty determinations made recently by Council for similar contraventions (eg. IN 1707 – MF 502) and is consistent with the Forest Practices Board recommendations on penalty determinations for similar contraventions under the *Forest and Range Practices Act* on Crown land (eg. Forest Practices Board, Special Investigations Report #41, October 2014).
22. In Council's view, the penalty assessed for contravening s. 22 of the Regulation reflects the gravity of the impact on fish habitat and the owner's failure to undertake road maintenance and deactivation activities.

Conclusion

23. As a result of its findings, Council upholds its November Determination that s. 22 of the Regulation was contravened but has determined that s. 26 was not contravened.
24. Council thereby upholds the \$14,000 administrative penalty assessed in the November Determination for contravening s. 22 and rescinds the \$2,000 penalty for contravening s. 26.
25. Under section 33 of the Act, the Owner may appeal this Reconsideration Decision to the Forest Appeals Commission.



Rod Davis, Chair
Managed Forest Council

September 15, 2020