Notice of Determination, Case DQU-27870

West Fraser Mills Ltd.

This is my determination with respect to Case DQU-27870. Forest Service (FS) staff provided evidence that West Fraser Mills Ltd. (WF) contravened section 21(1) of the *Forest and Range Practices Act* (FRPA). The case stems from alleged failure of harvesting near Bowron Lake to meet a legally established visual quality objective (VQO).

The relevant excerpt from FRPA is shown below:

Forest and Range Practices Act

Compliance with plans

21 (1) The holder of a forest stewardship plan or a woodlot licence plan must ensure that the intended results specified in the plan are achieved and the strategies described in the plan are carried out.

An opportunity to be heard (OTBH) with respect to this case was conducted on January 12, 2010, attended by Woods Manager Peter Andrews, Forestry Supervisor for Planning Larry Gardner, Planning Coordinator Rob Ballinger from WF, and by Landscape Forester Peter Rennie and Compliance and Enforcement Officer Susan Pelletier on behalf of the FS .

Authority

The Minister of Forests and Range has delegated to me under section 120.1 of FRPA, the authority to make determinations with respect to contraventions and administrative penalties under section 71 of FRPA.

Issues

The issues relevant to this case are as follows:

- Has there been a contravention of section 21(1) of FRPA?
- If there has been a contravention, do any of the defences of due diligence, mistake of fact, or officially induced error apply?
- If there has been a contravention and the defences do not apply, what amount of penalty is appropriate?

After considering the evidence presented to me, and for the reasons presented below, it is my determination that:

WF did contravene section 21(1) of FRPA. The harvesting that relates to this contravention was within Tree Farm Licence (TFL) 52. The forest stewardship plan (FSP) applicable to TFL 52 includes a result or strategy that WF will maintain the VQO's within established visual polygons by conducting visual assessments from established viewpoints to determine that new harvesting opportunities will conform to the VQO. Measures to meet the VQO will be applied. This result or strategy was not achieved or carried out.

Summary of the Evidence

Following is a brief summary of the evidence. Both parties provided extensive documents supporting their positions. These documents are available if required. I have considered all the evidence whether it is mentioned here or not.

There is an agreed statement of facts dealing with the very basic elements of the case. The agreed statement confirms WF as the holder of TFL 52, that Cutting Permit (CP) 220 was harvested in the summer of 2007, that a partial retention (PR) VQO applies to CP 220, that WF completed a visual impact assessment for the block, and that there has been no public complaint with respect to the visual impact of harvesting. Much of the other evidence is contradictory, but the following points are not in dispute:

- CP 220 is located 3 km west of the north end of Bowron Lake, just west of Bowron Lake Park and about 100 km east of the City of Quesnel. This cutting permit included some timber killed by the mountain pine beetle (MPB) and was intended to capture the value of that timber before it was lost.
- CP 220 is visible from viewpoints on Bowron Lake and from the road near Bowron Lake Lodge. These viewpoints are experienced by many people visiting the park and surrounding area. Bowron Lake is a well-known destination because of its scenic canoe route.
- The visual condition prior to harvesting of CP 220 was PR, and the VQO is also PR. There was some history of timber harvesting in the area visible from the two selected viewpoints, but it had "greened up" to the point where it did not represent the modification condition.
- Scenic areas and VQO's were legally established for this area in 2001 and remain in effect.

WF and FS staff did not agree on the following evidence:

- FS evidence based on three post-harvest assessments indicated that, from both viewpoints, a VQO of modification had been achieved and consequently section 22(1) of FRPA was contravened. The design of the cut block included some positive elements (leave area) and some unnatural elements, notably one straight boundary, hard edges, a notch on the ridge line and scattered leave trees along the skyline. It is a dominant feature in the visible landscape.

- WF provided evidence to the effect that it had not contravened the legislation and had in fact achieved the VQO. WF asserted that it met the qualitative definition of PR in that its block is easy to see, is small to medium in scale, and is similar to natural elements in its characteristics. WF also noted that a natural, irregular block design resulted from following the pine timber types in delineating the block. WF indicated that the scattered trees left along the skyline resulted from wind damage to a wildlife tree patch.
- WF evidence dealt with the difference between landforms and landscapes in the context of visual impact. WF indicated that there is no reference to landforms in the legislation, definitions, etc, and the only relevant area for the purposes of assessing visual impact is the landscape. Landscape means the area visible from a viewpoint while landforms are sub-units within the landscape or sometimes the same, if there is only one landform in the landscape. The area affected by harvesting was within the numeric guidelines for PR if the assessment is done at the landscape level.
- FS staff advised that the numeric guidelines used by WF were appropriate guides for assessing impact to landforms but not the larger landscapes that comprise multiple landforms. FS staff also gave evidence that the landform is the correct piece of land to consider when assessing visual impact.

Findings of Fact

There is an element of professional judgement in determining what VQO has been achieved after an area is harvested. I accept the assertion of Landscape Forester Peter Rennie that the VQO of modification was achieved by WF's CP 220. I also accept the evidence that both parties provided to some degree that the visual impact depends more on the qualitative factors (ease of viewing, scale, and natural versus angular or rectilinear in shape) than the calculated percentage of the landform or landscape that is directly altered by harvesting. The calculated impact is a tool but is not definitive. There has been a contravention of section 21(1) of FRPA.

Defences

Section 72 of FRPA provides that:

For the purposes of a determination of the minister under section 71 or 74, no person may be found to have contravened a provision of the Acts if the person establishes that the

(a) person exercised due diligence to prevent the contravention,

(b) person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, or
(c) person's actions relevant to the provision were the result of officially induced error.

At the OTBH the issue of a due diligence defence was raised and discussed. WF indicated that it made reasonable efforts to ensure that the proposed alteration was consistent with the VQO. In summary,

- Six WF staff members are trained in visual landscape design.
- Block design in visually sensitive areas is peer reviewed.
- A visual impact assessment was done as part of the harvest planning process.

The test of due diligence involves whether or not the event that caused the contravention was reasonably foreseeable, and if it was, whether or not the person responsible took all reasonable care to prevent it.

The failure of harvesting to achieve the intended VQO is a reasonably foreseeable circumstance. It has happened in the past in British Columbia when visual impact assessments are not used or when they are used incorrectly.

The standard of care associated with conducting a visual impact assessment in an area seen by thousands of visitors annually would normally include the use of a qualified professional or specialist in the field. The actual practice where the party who conducted the assessment had not been trained in visual landscape design does not meet the standard of all reasonable care. The defence of due diligence does not succeed.

WF also raised the reasonable mistake of fact defence. A reasonable mistake of fact is a reasonable mistake about the existence of a circumstance or set of circumstances which, if true, would establish that an alleged contravener did not contravene the law. This defence succeeds when

- the mistake was a mistake of fact.
- the mistake was reasonable.
- had the mistaken fact been true, there would have been no contravention.

A reasonable belief is one that a person exercising all reasonable care would likely have held in those same circumstances.

WF provided the following assertion with respect to mistake of fact. "WF believed that using landscape as the reference for the VQO consistency test was the correct methodology. A majority of the best available information, including legislation, references landscape when completing visual design and assessments. WF believes that if landscape was in fact the terms of reference, then a contravention would not have occurred." I assume that the "VQO consistency test" referred to above means the ranges of disturbance that apply to particular VQO's, as discussed in Appendix 8 of the Visual Impact Assessment Guidebook.

The Visual Impact Assessment Guidebook is probably the definitive authority on VIA procedures in British Columbia. Appendix 8 of the guidebook is entitled: Calculating percent alteration in perspective view. The procedures in this appendix use the term landform in Step 1 and Step 2 of a five step process. This fact alone would be enough to raise some question as to the applicability of landform versus landscape as the basis for analysis in the mind of a person using all reasonable care.

The chapter of the guidebook that deals with visual impact assessment procedures uses the term "landform" frequently in the context of being the basic unit of visual impact analysis, and is clear that the numerical analysis is only one of three elements of any assessment of a visual simulation. A person using all reasonable care in conducting a VIA would not conclude that impact to a landform is unimportant and only the impact at the landscape level matters. The reasonable mistake of fact defence does not succeed.

The defence of officially induced error was not raised.

Determination

Based on the evidence, I find that there has been a contravention of section 21(1) of FRPA.

Section 21(1) of FRPA requires the holder of a FSP to ensure that the intended results specified in the plan are achieved and that the strategies described in the plan are carried out. In this instance, the result or strategy specified in WF's FSP is that WF will maintain the VQO's within established visual polygons by conducting visual assessments from established viewpoints to determine that new harvesting opportunities will conform to the VQO. Measures to meet the VQO will be applied.

The harvesting in CP 220 of TFL 52 did not conform to the VQO for the area.

Determination of Penalty

In determining the appropriate penalty, I am required to consider the six factors listed in section 71(5) of FRPA. There are no other considerations prescribed by the Lieutenant Governor in Council.

- **previous contraventions of a similar nature by the person**

There are no previous contraventions of a similar nature.

- **the gravity and magnitude of the contravention**

The gravity and magnitude of the failure to achieve the VQO are not readily assessed. WF advised that no complaints had been made to the company in the two-plus seasons since the harvesting was done, despite visitors probably numbering in excess of 20,000. This fact is indicative of limited gravity and magnitude, although people who are upset with the visual impact might or might not seek out the forest company responsible to complain. Another mitigating factor is that visual impact of harvesting decreases over time as the new forest on cut blocks grows taller. A third mitigating fact is that the block was designed to maximize recovery of beetle-killed pine while leaving healthy timber intact. The large number of visitors

seeing this cut block tends to indicate a higher gravity and magnitude. I consider the gravity and magnitude of the contravention to be towards the lesser end of the hypothetical scale, but not negligible or insignificant.

- **whether the contravention was repeated or continuous**

The contravention was not repeated and continuous.

- **whether the contravention was deliberate**

There is no evidence that the contravention was deliberate; the contrary is true.

- **any economic benefit derived by the person**

There was no evidence of any economic benefit to WF as a result of its actions.

- **the person's cooperation and efforts to correct the situation**

WF's cooperation with the investigation was entirely appropriate. There is virtually nothing that can be done to correct the specific situation with respect to CP 220.

Penalty

The maximum penalty for contravention of section 21(1) of FRPA is $50,000. This contravention is characterized by not being deliberate, of limited gravity and magnitude, and it is a first offence. However the achievement of results is such an important component of the FRPA model that a modest deterrent to future contraventions by WF and other FSP holders is needed. I have determined that a deterrent penalty of $2,500 is appropriate.

This determination will become part of WF's performance record and will be considered by delegated decision makers, making determinations in the future, in the event of future contraventions.

My determinations under section 71 of FRPA do not relieve WF from any other actions that the government is authorized to take with respect to these contraventions.

The penalty amount of $2,500 is due March 31, 2010 subject to the stay under section 78 of FRPA resulting from a review or appeal of these determinations, as referenced in the covering letter. An invoice for the penalty will be sent under separate cover.

Gerry Grant, R.P.F.
District Manager
Quesnel Forest District

January 22, 2010

Pages 8 through 20 redacted for the following reasons:
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