



File: 23060-20/ 33102  
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January 25, 2016

Cooper Creek Cedar Ltd.  
c/o Craig Upper and Bill Kestell  
P.O. Box 850  
Salmo, BC V0G 1Z0

Dear Mr. Upper and Mr. Kestell:

**Re: Contravention Determination and Notice of Penalty Levied under Section 71  
(2) (a) of the *Forest and Range Practices Act***

This is further to my letter dated August 28, 2015 and the opportunity to be heard (OTBH) given to Cooper Creek Cedar Ltd. (Cooper Creek Cedar), conducted on September 21, 2015 respecting the alleged contravention of section 21 of the *Forest and Range Practices Act* (FRPA). I have now made my determination in this matter, as described below.

**Authority**

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

**Legislation**

***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.

## **Issues**

### **The following issues are relevant to this case:**

1. Has there been a contravention of section 21(1) of FRPA?
2. Do any of the defences of due diligence, mistake of fact or officially induced error apply?
3. If there has been a contravention, what amount of penalty if any, is appropriate?

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

1. Cooper Creek Cedar did contravene section 21(1) of FRPA;
2. None of the defences apply; and
3. It is appropriate to levy a penalty in the amount of \$5,000.00 under section 71(2)(a)(i) of FRPA. An invoice will be issued under separate cover.

### **Based on the evidence, I am satisfied that the following facts are not in dispute:**

- Cooper Creek Cedar is the holder of Forest Licence (FL) A56529, as identified in the licence document.
- The block that is the subject of this determination is FL A56529 CP 9 Block 4.
- The District Manager, in his letter dated July 12, 1999, made known the Scenic Areas within the Kootenay Lake Forest District.
- FL A56529 CP 9 Block 4 is located in a polygon having an established Visual Quality Objective (VQO) of Partial Retention (PR).
- The approved Forest Stewardship Plan (FSP), to which Cooper Creek Cedar is a signatory, acknowledges the VQOs established by the district, and commits to a strategy to manage visual quality within a known scenic area.
- Prior to harvest, Timberland Consultants completed a Visual Impact Assessment (VIA) of A56529 CP 9 Block 4 at the request of Cooper Creek Cedar.
- The VIA used a single viewpoint at the center point of the Kootenay Lake ferry crossing.
- During the harvesting of CP 9 Block 4, Cooper Creek Cedar did not conduct any visual inspections from the Kootenay Bay ferry landing to ensure that the visual design of the cut block met the VQO of partial retention.

**Cooper Creek Cedar presented the following additional evidence, summarized:**

- Cooper Creek Cedar exercised due diligence by completing a VIA for CP 9 block 4.
- The licensee had other issues to address during the development of CP 9 Block 4, and watershed issues were paramount.
- Cooper Creek Cedar consulted with the Ministry of Forests and Range when deciding on viewpoints for the VIA. The Ministry was provided with a copy of the VIA prior to CP issuance.
- The Ministry reviewed the design of CP 9 Block 4, stating the “proposal, while visible, should have relatively minor and primarily short-term impact” on visuals.
- The VIA did review the landscape from a major viewpoint, namely the center point Kootenay Lake ferry crossing.
- The VIA did determine the percent alteration from that viewpoint.
- The VIA did describe how the visual design is consistent with the VIA guidebook.
- The licensee did use design techniques to mitigate the visual impact of the block.

**Discussion and Analysis**

The specific contravention alleged by the Natural Resource Officer is that Cooper Creek Cedar failed to achieve the visual quality result in its FSP by altering the visual landscape on CP 9 Block 4 to a greater extent than permitted by the established VQO — to the point of Modification rather than Partial Retention (PR) — and by not fully carrying out the VQO strategy described in its FSP.

When FRPA came into effect in 2004, the “known scenic areas” became legal objectives through FRPA sections 180 and 181. In a letter to licensees issued on July 12, 1999, the District Manager of the day made known the scenic areas for the Kootenay Lake TSA. That letter referenced Visual Quality Classes, which were continued as VQOs under section 17 of the Government Actions Regulation (GAR).

FRPA section 21(1) contains two requirements, each of which have to be met. Holders of FSPs must ensure that the intended results specified in the plan are achieved and the strategies described in the plan are carried out.

Section 3.6.1 of Cooper Creek Cedar's FSP describes a "Result/Strategy" that applies to "All FDU's with VQO's". Section 3.6.1 states that VQOs were formally established in 1999 and are continued as legal objectives through FRPA sections 180 and 181 and GAR section 17. By including this information in the FSP, Cooper Creek Cedar recognized the legal nature, applicability and enforceability of these VQOs. Although the FSP does not include an explicit commitment to achieving the applicable VQOs, it does set out a strategy for doing so. The strategy specifically refers to the Visual Impact Assessment Guidebook (2nd Ed., January 2001), stating that the VIA will describe how the visual design is consistent with the strategies and guidelines in the Guidebook.

I note that page 4 of the Guidebook states that:

*In the context of the visual resource management process, visual design principles are used in the development of landscape- and stand-level cutblock designs to achieve VQOs and visual resource guidelines. [emphasis added]*

The Guidebook's visual design principles are intended to lead to the development of designs that *achieve* VQOs that have been legally established. Although there is no express statement in Cooper Creek Cedar's FSP committing the plan holder to achieving legally established VQOs as an intended result, the intention to achieve established VQOs is the only sensible interpretation of the "Result/Strategy" in section 3.6.1 of the FSP and is almost certainly the understanding that would have been shared by the minister's delegate and the plan preparer when the FSP was approved. In meeting the FSP approval test's requirement to include an intended result or strategy in one's FSP that is consistent to the extent practicable with objectives set by government for visual quality, the only approvable result or strategy is one that is designed to achieve legally established VQOs. Accordingly, I find that the intended result specified in the FSP was to achieve the particular VQO established for each scenic area.

The boundary between Modification and PR VQOs bisects CP 9 Block 4 in the northern third of the cut block. The expert opinion of the landscape forester, presented by Compliance & Enforcement (C&E) in Appendix 6 of the binder, is that the predominant landform is almost wholly contained within a PR polygon, and therefore CP 9 Block 4 should be assessed as having a PR objective. In the agreed statement of facts, the representative of Cooper Creek Cedar agreed that A26529 CP 9 Block 4 is located in a VQO of PR.

In its "Result/Strategy" in section 3.6.1 of its FSP, Cooper Creek Cedar committed to carrying out a VIA that would "review the visual landscape from major viewpoints". It did carry out a VIA, but only reviewed the visual landscape from a single major viewpoint, which was at the center point of the Kootenay Lake ferry crossing.

The VIA Guidebook, published in 2001, refers to the selection of viewpoints as follows:

*Make a preliminary list of the locations from which the proposed operation may be visible (e.g., highway rest areas, recreation sites, and communities) and transfer them onto the map prepared for the assessment package.*



*Complete the assessment from the viewpoint(s) that provide the best view of the land-form or unit on which the proposed operation is to occur. These viewpoints may or may not correspond to those shown on the visual landscape inventory map. Confirm the viewpoint(s) selection with the district office.*

*Locate the viewpoints identified in the office and select the one(s) that provides the best view of the proposed operation being assessed. Identify and number these viewpoints on the topographic base map (1:20 000 scale or larger). Familiarize yourself with the landscape and the proposed operation by travelling throughout the study area as much as possible, taking note of special features, road stops, viewpoints, traffic pull-offs, and traffic conditions.*

In addition, the Ministry's Forest and Range Evaluation Program (FREP) *Protocol of Visual Quality Effectiveness Evaluation Procedures and Standards*, published in October 2008, establishes that, when assessing the Visual Quality effectiveness, an evaluation must be conducted at **all** important viewpoints (p. 5). This is in keeping with the intent of the visual quality provisions which are designed to offer a level of protection to viewscapes in designated scenic areas from publicly significant viewpoints. In other words, the VQO must be achieved from each publicly significant viewpoint.

The Kootenay Bay ferry landing viewpoint is located along a busy scenic corridor. Most visitors using this route would stay at this location for some period of time, allowing a prolonged viewing duration. The number of views and the static nature of the visit combine to make the ferry landing an important viewpoint. In my view, the ferry landing was the most obvious publicly significant viewpoint, even more so than the center point of the Kootenay Lake ferry crossing, the viewpoint used by Cooper Creek Cedar.

Based on the VIA Guidebook, the FREP Protocol, and the intent of the visual quality provisions, I find that Cooper Creek Cedar should have included the Kootenay Bay ferry landing as a significant public viewpoint in its VIA. The failure to do so was inconsistent with its FSP "Result/Strategy" 3.6.1 in which it committed to carrying out a VIA that would "review the visual landscape from major viewpoints".

The next question is whether or not the established VQO of PR was met from major viewpoints. The relevant VQO definitions in section 1.1 of the Forest Planning and Practices Regulation (FPPR) are:

Partial Retention: Consisting of an altered forest landscape in which the alteration, when assessed from a significant public viewpoint,

- (i) is easy to see
- (ii) small to medium in scale, and
- (iii) natural and not rectilinear or geometric in shape.

Modification: Consisting of an altered forest landscape in which the alteration, when assessed from a significant public viewpoint, is

- (i) is very easy to see, and
- (ii) is
  - (A) large in scale and natural in its appearance, or
  - (B) small to medium in scale but with some angular characteristics.

Regarding the scale of the alteration of CP 9 Block 4, C&E presented evidence that the alteration is large in scale when viewed from the Kootenay Bay ferry landing, which I have found to be a significant public viewpoint. A FREP visual quality evaluation was completed by the district stewardship forester on CP 9 Block 4. The district found the adjusted Visual Quality Class to be 8.45%, in excess of the 7% that is generally accepted to be the upper limit of visual alteration for partial retention. The regional landscape forester also offered the opinion that the alteration is large in scale. The licensee did not attempt to refute the district's findings with respect to the scale of the alteration. The photographs that were presented as part of the Ministry's case support the conclusion that the visual alteration on CP 9 Block 4 is large in scale and very easy to see from the ferry landing. Accordingly, I find that the visual alteration is large in scale and very easy to see when viewed from the ferry landing.

C&E also presented the opinion of the regional landscape forester to the effect that, when viewed from the perspective of the ferry landing, CP 9 Block 4 possesses angular characteristics consistent with a Modification VQO. This opinion was expressed in the regional landscape forester's email dated March 20, 2015, and presented in the C&E case binder. Cooper Creek Cedar did not provide evidence to refute the expert opinion put forward by C&E. I have reviewed the photographic evidence presented in the binder, and find that the block in question does exhibit angular characteristics when viewed from the Kootenay Lake ferry landing, and is therefore not natural in appearance. The photographs reveal three 90° angles, among other angular characteristics.

The definition of a Modification VQO in section 1.1 of the FPPR describes an alteration that is very easy to see and either large in scale and natural in its appearance or small to medium in scale but with some angular characteristics. My findings reveal an alteration on CP 9 Block 4 that is very easy to see, large in scale, and with some angular characteristics, which easily meets the definition of Modification in section 1.1 of the FPPR. In consideration of the foregoing findings, I have determined that CP 9 Block 4 exceeds the definition of PR and is more consistent with the definition of Modification.

### **Do the facts support a finding of contravention if no defences apply?**

I conclude that the facts set out above support a finding of a contravention of section 21(1) of FRPA, provided the defences set out in section 72 of FRPA do not apply, because, by failing to meet the established objective of PR, Cooper Creek Cedar did not achieve the intended visual result in its FSP, and by failing to include an important publicly significant viewpoint in its VIA, did not fully carry out the strategy described in its FSP, contrary to section 21(1) of FRPA.

### **Do any defences apply?**

Section 72 of FRPA describes 3 statutory defences: mistake of fact, due diligence and officially induced error. Cooper Creek Cedar presented evidence in support of the due diligence defence and the officially induced error defence. However, I am satisfied that that none of the defences apply in this case.

For the defence of due diligence to apply, it must be shown that the person took all reasonable care to avoid the contravention. This does not require achieving a standard of perfection or doing everything that could possibly be done to prevent a contravention, but it does require the person to prove on a balance of probabilities that they took all measures that would reasonably be expected in the circumstances to avoid the contravention.

The due diligence of a company will turn on whether or not the acts or omission that led to the contravention were directed or approved by the company, and, if not, whether the directing or controlling mind of the company established a proper system to prevent the contravention and whether the company took all reasonable steps to ensure the effective operation of that system.

Cooper Creek Cedar did take important steps to avoid the contravention: the company had multiple conversations with residents and the district; it retained a consultant to complete a VIA and the company submitted that assessment to district staff. However, the VIA was inadequate as it only assessed the VQO from the vantage of the centre point of the Kootenay Lake ferry crossing and left out the arguably more important public view from the ferry landing.

The relevant question is whether, by accepting a VIA from its consultant that did not include the view from the ferry landing, the licensee took all reasonable measures to prevent the contravention.

In light of the guidance provided by the VIA Guidebook and the FREP Protocol regarding the choice of publicly significant viewpoints, and the intent of the visual quality provisions in FRPA, all discussed above, I find that the licensee did not take all reasonable measures to avoid a contravention when it accepted a VIA that did not include the ferry landing as a viewpoint. While the use of consultants is perfectly acceptable in the normal course of forestry business, in order to avail oneself of the due diligence defence, a person or company must establish a process for monitoring the work of their consultants to ensure that legislated requirements and standards are met. No evidence was presented to me to show whether, or the extent to which, Cooper Creek Cedar monitored the work carried out by Timberland Consultants or evaluated the resulting VIA. Therefore, I find that Cooper Creek Cedar did not take all reasonable care in this case and the due diligence defence must fail.



The defence of officially induced error would apply if the contravention occurred as a result of erroneous advice given to Cooper Creek Cedar by a government official. The licensee discussed possible viewpoints with the district, and submitted the completed VIA to the district. The district did participate in these discussions, and reviewed the completed VIA. However, no evidence was offered to suggest that the district advised the licensee to conduct the VIA using a single viewpoint from the ferry route, or that the licensee was not required to meet a PR. I find that the defence of officially induced error does not apply in this case.

### **Is a penalty appropriate and if so how much?**

Under section 71(2) (a)(i) of FRPA and section 12 of the Administrative Orders and Remedies Regulation, I am authorized to impose a penalty of up to \$50,000 for a contravention of section 21(1). Alternatively, under section 71 (2) (a) (ii) of FRPA, I may refrain from levying a penalty if I consider that the contravention is trifling and that it is not in the public interest to do so. If I do levy a penalty, I must consider the factors in FRPA section 71 (5) (a) (ii).

(a) Previous contraventions, if any, of a similar nature by Cooper Creek Cedar:  
*Cooper Creek Cedar has not previously contravened section 21(1) of FRPA, nor has there been a previous instance of not meeting an established VQO.*

(b) The gravity and magnitude of the contravention:  
*The licensee did make an effort to meet the Visual Quality Objective. Cooper Creek Cedar met with local residents and the district, and completed a visual assessment. While the residents did express some concern over the visual impact of the block, it was not their foremost consideration.*

*I have found that CP 9 Block 4 does not achieve the objective of partial retention, but the outcome is not appalling. The percentage of alteration was not calculated to be far outside the size range generally accepted as meeting the definition of partial retention. While much of the block appears to be geometric in shape, parts of the block exhibit a form that is natural in appearance.*

(c) Whether the contravention was repeated or continuous:  
*The contravention was not repeated or continuous.*

(d) Whether the contravention was deliberate:  
*There is no indication that the contravention was deliberate.*

(e) Any economic benefit Cooper Creek Cedar derived from the contravention:  
*Cooper Creek Cedar would have received a small, unquantified economic benefit from harvesting a larger cutblock than would have been possible if the VQO was met.*

(f) Cooper Creek Cedar's cooperativeness and efforts to correct the contravention:  
*Cooper Creek Cedar was co-operative throughout this investigation. During discussion with Visual Management experts, the parties agreed that there were no measures to be taken to reduce the visual impact of the cutblock.*



- (g) Any other considerations that the Lieutenant Governor in Council may have prescribed:

*There are no other prescribed considerations.*

Having regard to the facts of this case, I have decided the contravention is not trifling, and that a monetary penalty is required both for specific and general deterrence purposes. Visual quality is an important value within the framework of forestry legislation. It provides some balance between the forest industry's need for wood and the tourism industry's need to retain as much of the beauty of BC's natural landscape as possible. It also helps preserve the natural beauty of the landscape for BC residents. A great deal of effort has gone into the delineation and classification of polygons in visually sensitive areas in BC to safeguard views in visually sensitive areas. To that end, it is crucial that visually altered landscapes do not exceed the level of alteration permitted by established VQOs.

In this case, Cooper Creek Cedar went some distance in its efforts to achieve a VQO of PR on CP 9 Block 4, but fell short by excluding the ferry landing viewpoint from its VIA and subsequent visual assessments. From the ferry landing, the alteration is large and very easy to see, and the design of the block appears quite angular in some respects. There is a very good chance that this result would have been avoided had the ferry landing been included in the VIA. As the cut block greens up, the visual alteration will subside.

Most of the penalty factors discussed above point to a monetary penalty at the lower end of the penalty range. This is the company's first contravention of this nature, the contravention was not repeated or continuous, the contravention was not deliberate, Cooper Creek Cedar was co-operative, and the company did attempt to achieve the established VQO. The gravity and magnitude of the contravention are not too severe and only a small economic benefit would have been derived from the contravention by harvesting more timber than the company should have.

In light of all the foregoing factors, I have determined that it is appropriate to levy a deterrent penalty in the amount of \$5,000.00. This will serve as a deterrent in the future to both the company and to others engaged in forestry in BC, and will remove any economic benefit the company derived from the contravention.

**Determination does not forestall other actions that may be taken.**

Please note that this determination does not relieve Cooper Creek Cedar from any other actions or proceedings that the government is authorized to take with respect to the contravention described above.

### **Opportunity for correcting this determination.**

For 15 days after making my contravention determination and penalty determination under section 71, I am authorized under section 79 of FRPA to correct certain types of obvious errors or omissions. I may do this on my own initiative or at your request. If you think there are valid reasons to correct the determination, you may contact me at (250) 825-1101 within this 15 day period.

### **Opportunities for review and appeal.**

If you have new information that was not available at the time I made this determination, you may request a review of my determination on the basis of this new information. A request for review must be in writing, must be signed by a representative of Cooper Creek Cedar, or on its behalf, and must contain:

- a. the company name and address; and the name of the person, if any, making the request on its behalf;
- b. the address for serving a document on Cooper Creek Cedar or the person acting on its behalf;
- c. the new evidence that was not available at the time this determination was made; and
- d. a statement of the relief requested.

This request should be directed to me, at 1907 Ridgewood Road, Nelson, BC and I must receive it ***no later than three weeks*** after the date this notice of determination is given or delivered to you. If you request a review, you may appeal the decision made after the completion of the review to the Forest Appeals Commission.

The provisions governing reviews are set out in section 80 of FRPA and in the Administrative Review and Appeal Procedure Regulation. Please note the **3 week time limit** for requesting a review.

Alternatively, if you disagree with this determination, you may appeal directly to the Forest Appeals Commission.

The appeal request must be signed by a representative of Cooper Creek Cedar, or on its behalf, and must contain:

- a. the company name and address; and the name of the person, if any, making the request on its behalf;
- b. the address for serving a document on Cooper Creek Cedar or the person acting on its behalf;
- c. the grounds for appeal;
- d. a statement of the relief requested; and
- e. a copy of this determination.

The Forest Appeals Commission must receive the appeal ***no later than three weeks*** after the date this notice of determination is given or delivered to you.

The provisions governing appeals are set out in sections 82 through 84 and sections 140.1 through 140.7 of FRPA, and in the Administrative Review and Appeal Procedure Regulation.

To initiate an appeal, you must deliver a notice of appeal, together with the requisite supporting documents, to the Forest Appeals Commission. A notice of appeal may be delivered to the following address:

The Registrar, Forest Appeals Commission  
PO Box 9425, Stn. Prov. Govt.  
Victoria, BC V8W 9V1

Please note the **3 week time limit** for delivering a notice of appeal.

**Determination is stayed pending review or appeal.**

Under section 78 of FRPA, my contravention determination and penalty determination under section 71 are stayed until Cooper Creek Cedar has no further right to have this determination reviewed or appealed, after which time they take immediate effect.

**Performance Record.**

As Cooper Creek Cedar the holder of an agreement under the *Forest Act*, my determinations under section 71 will become part of Cooper Creek Cedar's performance record, pursuant to section 85 (2) of FRPA, subject to decisions made on review or appeal.

Yours truly,

A handwritten signature in black ink, appearing to read 'G. Wiggill', written in a cursive style.

Garth Wiggill  
District Manager  
Selkirk Forest District

pc: Ian Brown, Compliance Leader, Kootenay Boundary Region  
Compliance and Enforcement Branch  
Forest Practices Board