Appropriateness of Government's Enforcement of the Code in Haida Gwaii– the Queen Charlotte Islands

Complaint Investigation 010305

FPB/IRC/62

March 2002

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The Investigation

In March 2001, the Forest Practices Board received a complaint from the Council of the Haida Nation (the complainant) asserting a lack of timeliness and efficiency in government enforcement of the Code for road building and harvesting activities involving two cutblocks on Graham Island, Haida Gwaii (the Queen Charlotte Islands.)

Background

The licensee, Weyerhaeuser Company Limited (formerly MacMillan Bloedel Limited) holds a tree farm licence on Graham Island in the Queen Charlotte Islands Forest District. In May 1997, the Ministry of Forests (MOF) approved road building and silviculture prescriptions for two cutblocks, Demon 408 and Demon 409, located about 25 kilometres northwest of Queen Charlotte City. A few days after the approval, the licensee began blasting rock for road construction to access the cutblocks. In late May, a bird survey crew under contract to the Ministry of Water, Land and Air Protection (formerly the Ministry of Environment, Lands and Parks) discovered a great blue heron nest near cutblock Demon 408 and two more within a wildlife tree patch in cutblock Demon 409.

The great blue heron is considered a candidate for threatened species status in BC. There are only ten recorded great blue heron nests on Haida Gwaii, including those at the Demon site. Discovery of the Demon heronry was significant to local forest resource knowledge. The great blue heron is known to abandon its nest if disturbed during courtship and nesting, therefore, forestry activities or other disturbances nearby can compromise successful of breeding.

Active heron nests are a resource feature under the Forest Practices Code. Code planning requirements ensure consideration for the protection of known resource features. The heronry was not discovered until after silviculture prescriptions and road layout and design for the cutblocks were approved, and those plans did not reference this resource feature. However, section 51(2) of the *Forest Practices Code of British Columbia Act* (the Act) makes allowance for resource features being overlooked. When a previously unidentified resource feature is discovered, a licensee must stop or modify its activities to refrain from threatening the feature.

The Ministry of Water Land and Air Protection (MWLAP) told the licensee that delaying a portion of road construction and seasonally restricting timber removal would be an appropriate operational response to discovery of the heron nests. The district manager told the licensee to include MWLAP's recommendations in revised operational plans for the cutblocks. In June 1997, the licensee amended the silviculture prescriptions. The amendment of the prescription for Demon 409 placed a timing restriction on use of heavy equipment. The district manager approved the amendment on July 1, 1997.

In March 1998, MOF received a complaint about equipment use during the timing restriction. Staff in the MOF Compliance and Enforcement (C&E) program began investigating the licensee's activities in the area.

Two weeks later, the licensee voluntarily reported to MOF that it had cut trees in trespass within the Demon 409 wildlife tree patch. The harvested trees did not contain heron nests. C&E staff began a second investigation concerning the trespass harvesting in the wildlife tree patch.

MOF took 27 months to resolve the public complaint about the timing restriction infraction. During that period, the Queen Charlotte Islands Forest District had three different district managers. In June 2000, the district manager in place concluded that the licensee had contravened the Code by failing to conduct forest practices in accordance with an operational plan. The district manager imposed an administrative penalty of $10,000 on the licensee.

In February 2001, the complainant asked MOF about the trespass harvesting investigation. The ministry's C&E staff told the complainant that the trespass investigation was ongoing and could take time to complete. The complainant contacted the Forest Practices Board and the Board decided to investigate whether government's enforcement of the Code was appropriate.

Relevant Legislation

Sections 117 and 119 - *Forest Practices Code of British Columbia Act*

Section 4 - *Administrative Remedies Regulation*

Discussion

The purpose of government enforcement is to promote compliance with the Code. Planning and communication affect compliance, and these processes influence government's ability to enforce the Code appropriately. In the Board's view, enforcement usually begins with government field inspections of forestry activities. If an inspection identifies problems, there are a number of tools available to government to promote compliance. Actions escalate in severity and may include verbal or written instructions, stop-work orders, administrative penalties, prosecution and licence cancellation.

Did government prevent or detect non-compliance with the Code?

Government did not prevent either instance of non-compliance concerning the timing restriction or the trespass harvesting.

Government detection of non-compliance can be through direct observations by staff, reports from the public or other agencies, and self-reporting by licensees. In this case, the public reported the timing restriction contravention and the licensee voluntarily reported the trespass harvest.

What did government do to promote compliance?

Field inspections promote compliance with the Code and identify problems with forest practices. In the Queen Charlotte Islands Forest District, a C&E officer reviews approved road permits and silviculture prescriptions and conducts field inspections. C&E staff do not inspect all forestry activities. Priorities for inspection include sites near fish streams, areas with unstable

terrain or other identified concerns. The C&E officer responsible for the Demon area gave road construction a high priority for inspection because of a nearby fish stream.

On July 23, 1997, the C&E officer inspected the road construction. At the time, the officer was unaware a heronry had been discovered nearby. A Code compliance concern at a stream crossing was identified and resolved as a result of the road inspection. The resolution of this issue suggested that the purpose of a compliance field inspection was met. It is the Board's opinion that field inspection of the road construction was appropriate.

Why was the C&E officer unaware of the heronry at the time of road inspection?

The C&E officer used the approved permit file containing the Demon road layout and design to guide her inspection of the road. The road permit and road layout and design used by the C&E officer were approved prior to discovery of the heron nests, and neither document referred to the heronry. However, the district manager had approved the amended silviculture prescriptions with provisions to identify and protect the heron nests before the July 1997 road inspection took place. The information about the herons should have been available to the officer. The Board is satisfied the road permit (and thus the road layout and design) had been referred to C&E staff. The Board was not able to determine if C&E staff received the approved silviculture prescriptions or subsequent amendments.

The discovery of the heronry was an event of enough significance to prompt the licensee and government to amend approved silviculture prescriptions to address the risk created by forestry activities. Yet, neither the road permit nor the Demon road layout and design were updated to include the conditions designed to protect the heronry. These documents can contain provisions to accommodate non-timber resources that may be harmed by or influence road location.

In this instance, consistency between planning documents is not a Code requirement. However, sound forest management suggests that expected forest practices be consistently described in all documents used for planning, implementation and compliance purposes.

In the Board's opinion, MOF should have ensured that either the road permit or the road layout and design was updated to reflect the amended silviculture prescription provisions to address risk to the heronry.

Achieving compliance with the Code requires clear communication of anticipated forestry activities. Other than referral of approved plans and permits to C&E staff, there was no formal process in the district for discussion of resource management issues among MOF, MWLAP and C&E staff. Lack of effective communications created the situation where the C&E officer was unaware of the heronry at the time of the road inspection. Had the road-related documents been updated, or discovery of the herons and the resulting plan amendments been discussed with C&E staff, it seems likely that a compliance concern about timing of the licensee's activities would have been identified during the July 1997 road inspection.

Was enforcement of reported non-compliance timely?

Investigation concerning the timing restriction

After receiving the public complaint in March 1998, C&E staff investigated the licensee's activities concerning the heron nests and the timing restriction described in the Demon 409 silviculture prescription. The investigation concerning the timing restriction was nearly complete by June 1998, when the investigating officer took six months leave. This caused a delay, as the officer's attendance would have been required for a hearing. In January 1999, C&E staff formally notified the licensee of a suspected contravention of the Code. Elapsed time for investigation of the timing restriction, including the investigating officer's leave, was about 10 months.

MOF policy states that a C&E officer must be timely in gathering sufficient information for a senior official to make an informed decision within the time limit set by law. When an investigation is complete and the officer recommends an administrative penalty, MOF policy states that C&E staff will notify a senior official that an administrative penalty decision is required. The district manager is the only senior official in the Queen Charlotte Islands Forest District. In March 1999, C&E staff told the district manager a decision would be required about the alleged non-compliance of sections 51(2) and 67(1) of the Act. Twelve months elapsed from the initial public complaint through the investigation period to notification of a senior official. In the Board's opinion, the time taken by C&E staff to complete the investigation and to notify the district manager was appropriate.

Timeliness of the administrative penalty decision

The time limit for levying an administrative penalty under section 117(1) of the Act is three years after the facts on which the penalty is based first came to the knowledge of a senior official.

In April 1999, the investigating officer and licensee presented their evidence about the timing restriction. The district manager then took 13 months to determine that the licensee had contravened section 67(1) but not section 51(2) of the Act. The district manager explained that he needed time to clarify and consider the complexity of the evidence. In addition, he said that other pressing district issues were demanding his time. Regional MOF staff said that senior officials are expected to make administrative penalty decisions as expediently as possible, but not to overlook pertinent facts. In the circumstances, the Board considered this to be a lengthy period of time for a decision. However, the senior official met the three-year time limit required by the Code.

Investigation of trespass harvesting

C&E waited a few months before undertaking a field investigation of the trespass harvest reported by the licensee in April 1998, to avoid disturbing the herons. In August 1998, noting that the preliminary investigation was complete, the district manager asked the licensee to provide an estimate of area and volume of timber felled and an impact statement so that MOF could establish the extent and severity of the non-compliance. In early September 1998, the

district manager's office received a detailed response from the licensee. By November 1998, C&E staff had collected all the field evidence necessary in order to proceed to a senior official for a determination on the investigation.

Three years later, MOF has yet to formally allege that the licensee contravened the Code by its trespass harvest in the wildlife tree patch. C&E staff maintain that there is no urgency to allege a contravention because forest resources are not at risk. They also considered that the licensee is both unlikely to re-offend, and will eventually pay stumpage to the Crown for timber cut.

C&E staff delayed presenting the trespass investigation to the district manager in order to separate the two investigations concerning the same licensee, so as not to confuse the issue. The Queen Charlotte Islands Forest District typically has high staff turnover, including district managers, who sometimes only work part time. From 1997 to date, there have been five district managers responsible for the forest district. Given the workload and the limited experience of the new district managers, C&E staff believe that they should decide when best to present completed investigations for determination.

MOF's policy is to be timely when conducting investigations, and upon completion, to notify a senior official that a determination is required. The Forest Appeals Commission (Case 96/05b) decided that swift regulatory response is key to effective deterrence. Enforcement decisions should be timely to provide certainty of outcome to both the complainant and the accused, and to guard against further offences. In this case, the trespass harvest investigation was considered timely. However, the determination and penalty process has been delayed for over three years. The Board considers this delay to be inappropriate.

Time limit for administrative penalty concerning the trespass harvest

The time limit for levying an administrative penalty under section 117(1) of the Act is three years from when a senior official first becomes aware of the facts on which a penalty would be based. The district manager first corresponded with the licensee about the trespass harvest in the wildlife tree patch in August 1998.

For reasons of fairness and objectivity, C&E staff do not normally discuss facts of an investigation with a district manager until a date is set for the hearing of evidence. This delays the onset of the time limit, which allows an investigation to take as long as necessary to be thorough. C&E staff opinion is that the August 1998 correspondence did not mean a senior official had knowledge of the facts on which the levying of a penalty might be based. C&E staff explained that section 110 of the Act states that a senior official may order a licensee to provide information, so the district manager had to correspond with the licensee.

The district manager at the time told the Board that her signature confirms she was aware of the letter's content. The letter indicates a Code contravention was likely. The August 1998 letter, and further correspondence from a subsequent district manager, contains some, but not all of the facts of the trespass harvest. The correspondence indicates that a senior official first had

knowledge of facts establishing a likely contravention in August 1998. During September 1998, another senior official became aware of the extent and severity of the non-compliance.

In the Board's opinion, the three-year time limit for levying an administrative penalty under section 117(1) of the Act has expired. However, section 119 provides for penalties specific to unauthorized timber harvesting and is not subject to a time limit under the Code. Should a senior official eventually determine there was a contravention, an administrative penalty under section 119 may still be levied.

Did government enforcement achieve compliance with the Code?

Regarding the timing restriction, the district manager penalized the licensee $10,000 for failing to conduct forest practices in accordance with an approved operational plan. To date, $10,000 is the largest administrative penalty levied in the Queen Charlotte Islands Forest District. The district manager intended that this penalty would encourage the licensee to improve communication, quality control and protection of resource features. The licensee considered the penalty and changed its operating procedures to ensure consistency of planning and to improve communication between its staff, operators and MOF.

The Board considers the promotion of compliance with the Code as fostering improvement of future forest practices. The Board accepts the district manager's decision to levy the administrative penalty as appropriate.

Government has not yet brought the matter regarding the trespass harvest in the wildlife tree patch to a close.

Conclusions

In the Board's opinion, some aspects of government enforcement were appropriate but others were not.

The Board considers that government appropriately undertook field inspection of the road construction to detect or prevent problems with Code compliance. However, government activities did not prevent instances of non-compliance with the Code. In the circumstances, a lack of communication between MOF and MWLAP staff led to C&E staff remaining unaware of the heronry. The road permit file containing the road layout and design, used by C&E staff for compliance inspection, was not updated to reflect changes made to silviculture prescriptions designed to protect the herons. If someone had told C&E staff about discovery of the herons, it seems likely that they would have identified the timing restriction compliance concern. This might have prevented both the timing restriction contravention and eventual complaint to the Board.

The 12-month period from an initial public complaint to MOF about the timing restriction through the investigation period to notification of a senior official was considered timely, given

the complexity of the issues and staff circumstances. The additional 13 months taken for the senior official to make a decision about the alleged contravention and to levy an administrative penalty was lengthy, but still within the three years allowed by the Code and was therefore considered appropriate. The determination resulted in the licensee improving its process for forest practices. The severity of the administrative penalty was also considered appropriate to the circumstances.

The Board considers that C&E staff completed the trespass harvest investigation in a timely fashion. However, C&E staff have delayed the subsequent determination and penalty process for administrative reasons for over three years. Although C&E staff were not constrained by a time limit under the Code, the Board considers the delay to be inappropriate. In fairness to all involved, for certainty of outcome and as a deterrent against future offences, it is the Board's view that enforcement decisions should not be unduly delayed.

Commentary

Protection of the herons as a resource feature

The Code provides that resource features can be appropriately protected even if not detected until forest practices are underway. MWLAP told the licensee that delaying a portion of road construction and seasonally restricting timber removal would be an appropriate operational response to discovery of the heron nests. The licensee agreed to amend its operational plans, however road building in the area continued. MWLAP then considered information from both a bird survey crew and the licensee and concluded that road building was unlikely to cause the herons to abandon their nests. However, MWLAP staff did not visit the heronry. The Board considers that had a field visit occurred, it seems likely that road building, and particularly blasting, would have been identified as potentially disturbing to the herons. In the Board's opinion, MWLAP staff should have inspected the heronry soon after its discovery.

The herons either abandoned their nests or were unsuccessful in producing young in both 1997 and 1998. Harvesting in the area ceased in October 1998 (cutblock 409 is not yet fully harvested). Resource agency staff did not visit the heronry in 1999 or 2000. MWLAP staff assumed that the heronry had been permanently abandoned. In June 2001, Board staff determined that one heron nest in Demon 409 had been active that year, but may not have been successful. Board staff did not try to locate the Demon 408 nest. It cannot now be determined whether forest activities harmed the herons in 1997 and 1998.

Time limits

The purpose of an enforcement time limit is to provide certainty and finality of process. Commonly, limitation periods begin when an offence takes place, not when officials become aware of an offence. An offence in a remote location may not be discovered for a long time, so under the Code, the time limit for levying a penalty does not begin until a senior official has knowledge of the facts. C&E staff do not typically discuss investigation facts with a senior official until a hearing is scheduled. This means there is no effective Code time limit from initial

discovery of a potential offence through to completion of the investigation. In the Board's view, it does not seem reasonable that staff can delay finality of the enforcement process by not informing a senior official. For the purposes of section 117(1) of the Act, a suitable compromise could be to begin the time limit when any Code official becomes aware of facts that establish a likely contravention of the Code.

Consideration of evidence and determination of a penalty are important matters and should not be rushed. However, the current three-year time limit from the hearing of evidence to levying a penalty seems generous. While it likely means that few cases would run past the limitation period, such a long period has the potential to implicitly encourage delay in decision-making.

Progress of C&E investigations

During the Board's investigation, both the licensee and complainant expressed frustration that information on the progress of C&E investigations was not readily available to them. MOF staff told the Board that it does not report publicly on the progress of active investigations, but would respond in a general way to a public or licensee query. The Board agrees that preliminary, prejudicial information should not be publicly released; that would be unfair and could compromise the investigation process. However, the Board also believes that public confidence in and continued support for Code compliance efforts would benefit from regular, generalized reporting of government's ongoing and completed enforcement activities.

Recommendations

In accordance with section 185 of the *Forest Practices Code of British Columbia Act*, the Board makes the following recommendations:

1. The Board recognizes that isolation and staff turnover affects the ability of the Queen Charlotte Islands Forest District to deliver its programs in an efficient and consistent manner. Nonetheless, the forest district has sufficient management capability to seek continual improvement to its business practices and performance. The Board recommends that the Queen Charlotte Islands Forest District identify the timely resolution of its Code enforcement processes as a performance measure for the district. In the Board's view, all forest districts should have consistent performance objectives for timely completion of Code enforcement processes.

2. MOF is currently reviewing its organizational structure concerning its compliance and enforcement function. Consistent with previous recommendations, the Board recommends that government implement a structure, or consider changes to the Code that:
    - assure consistency between documents used for both implementation and monitoring of forest practices;
    - provide for consistent application of compliance and enforcement activities;

- require timely completion of compliance and enforcement actions; and
- serve the public need for transparency in reporting of compliance and enforcement actions and outcomes.

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