



**Forest
Practices
Board**

Hasty/Aylwin Watersheds

*A Request for Community Watershed Status Under
the Code*

**FPB/IRC/08
Complaint 980149**

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The Investigation

The Red Mountain Residents Association (the Association) is a member of the Slocan Valley Watershed Alliance, and has been active in watershed protection since 1986. The Association represents 40 of the 52 *Water Act* licensees in the Hasty and Aylwin domestic watersheds, located in the Slocan Valley, near Silverton, BC. The water licensees, and others, depend on the consistency of water quality, quantity, and timing of flow from the watersheds for domestic consumption, power, and irrigation uses.

In August 1997, the Association wrote to the regional manager of the Nelson Forest Region requesting that the "Hasty/Vevey/Aylwin watershed" be designated as a community watershed under section 41 of *the Forest Practices Code of British Columbia Act* (the Act).

The regional manager chose not to make a decision on the application at that time. Instead, he wrote to the president of the Association and informed him that evaluation criteria were being developed to ensure that designations in the region were made in accordance with the Forest Practices Code, and that the Ministry would be ready to begin evaluations by January 1998. For a number of reasons, the evaluation criteria were not established until October 1998.

On May 13, 1998, the Sierra Legal Defence Fund submitted a complaint to the Forest Practices Board on behalf of the Association. The complaint asserted that the regional manager, Nelson Forest Region, Ministry of Forests, and the regional water manager, Kootenay Region, Ministry of Environment, Lands and Parks, had failed to exercise their discretion to designate the Hasty/Aylwin Watershed as a community watershed.

The Act requires that a person who makes a complaint to the Board must state the relief sought. The complainant requested the following:

1. The Board conduct an investigation into the failure of the managers to exercise their discretion to designate the Hasty/Aylwin watershed as a community watershed under section 41 of the Act.
2. The Board investigate the standards being used to evaluate applications for the establishment and "decommissioning" of community watersheds, and make recommendations.
3. The Board investigate any refusal to designate the area as a community watershed if such a decision is made.

Scope of the Investigation

The Board investigated the assertion of a failure of the two managers to exercise their discretion to designate the Hasty and Aylwin watersheds as community watersheds under section 41 of the Act. The Board chose not to investigate aspects of the complaint involving standards and a potential refusal to designate the area as a community watershed because there were opportunities for the complainant to provide input on those matters prior to decisions being made. These opportunities provided a remedy adequate in the circumstances.

The Board addressed two main questions in investigating the complaint:

1. Did the regional managers comply with the requirements of the Act and regulations regarding the request for designation as a community watershed?
2. Was it reasonable for the Ministry of Forests regional manager to defer making a decision on the application until the evaluation criteria were established?

The Board considers discretionary decisions to be integral in the effective implementation of the Code. The Board reviews discretionary decisions to help ensure that the public's interests are being served by those responsible for managing forest resources as required under the Code.

Background

Nearly 500 watersheds in British Columbia are designated as community watersheds under the Code. Community watersheds are defined by three criteria:

- the water source is from a stream where the water is used for human consumption
- the stream is licensed under the *Water Act* for a waterworks purpose or a domestic watershed purpose controlled by a water users' community
- the drainage area is not more than 500 square kilometres

In general, community watershed designation may be desirable to a group of water users because water management is significantly improved when compared to domestic watershed requirements. The Code includes 42 regulations that restrict forestry and range activities in community watersheds.

In 1996, the government published the *Community Watershed Guidebook* to guide and regulate forest resource activities in community watersheds. Guidebooks are an integral component of the Code which describe procedures, practices and results that are consistent with the legislated requirements of the Code.

Although not legally binding, the *Community Watershed Guidebook* contains advice in the form of recommended criteria to assist decision-makers in determining whether an area should be designated as a community watershed. According to the guidebook, watersheds can be evaluated on the following criteria:

- need for additional community water
- water supply alternatives
- land ownership and land use
- watershed drainage area
- natural suitability of the watershed to supply clean water

Also in 1996, staff of the Ministry of Environment, Lands and Parks, and Ministry of Forests in Nelson began receiving a number of applications for community watershed status, and requests from water users for information regarding application for community watershed status. Many of these applications were simply letters from water users requesting that an area be designated as a community watershed. The Ministry of Forests regional manager was of the opinion that he did not have enough information to make decisions, and that the criteria outlined in the *Community Watershed Guidebook* provided insufficient direction for both applicants and decision-makers.

Historically, *Water Act* licences were issued by the Ministry of Environment, Lands and Parks without referral to other agencies for review. The ministry lacks the resources to monitor the status of licenses. This has led to a number of *Water Act* compliance issues including lack of works, substandard works, use of works other than licensed, or works being placed on others' properties.

To address these issues and also to ensure a consistent message regarding community watersheds across ministries, a working group made up of representatives of the ministries of Environment, Lands and Parks, Forests, Health, and Employment and Investment staff was set up to establish a regional procedure for designating community watersheds under the Forest Practices Code.

The proposed procedure would include a memorandum of understanding between ministries, and an application form. It would outline the requirements for achieving community watershed status, list criteria for evaluating applications, and describe the ministries' expectations of water users (e.g. monitoring) if status were achieved.

The Ministry of Environment, Lands and Parks, regional water manager and the Ministry of Forests, regional manager also decided in August 1996 to defer making any decisions regarding community watershed applications until after the Kootenay-Boundary Land Use Plan Implementation Strategy had been approved by government.

In July 1997, the implementation strategy was approved by the government. It stated, in part, that the process for establishing additional community watersheds would be defined. This was the role of the interministerial working group.

The Arrow Forest District Manager was considering road permit R03127 for Slocan Forest Products during the late summer and fall of 1998. The proposed road lies within the Hasty and Aylwin watersheds, which the Red Mountain Residents Association had requested be designated as a community watershed.

Investigation Findings

Compliance with Code Requirements

Section 41(10) of the Act relates to the designation of an area as a community watershed:

41(10) The regional manager may designate an area as a community watershed if

- a. *in the opinion of the regional manager and a designated environment official it should be designated as a community watershed, (emphasis added)*
- b. the area is all or part of the drainage area above the most downstream point of diversion for a water use that is for human consumption and that is licensed under the Water Act for a domestic purpose or a waterworks purpose, and
- c. the area is not an area referred to in subsection (8) (a).

Subsection (c) prevents the designation of an area as a community watershed if it already is a community watershed.

A regional manager is not required by the Code to designate an area as a community watershed. Section 41(10) allows a regional manager to use his or her discretion in deciding whether or not to designate an area as a community watershed, only if the criteria in (a), (b), and (c) above are met. In particular, both the regional manager and regional water manager must have the opinion that the area should be designated. In this case, the regional manager of forests decided to defer making a decision on the application until the evaluation criteria were developed. In his opinion, evaluation criteria were necessary so that applications could be evaluated in a consistent manner prior to designation decisions being made in accordance with the Code. That decision, and the opinion leading to it, was supported by the designated environmental official, the regional water manager.

FINDING 1:

The Ministry of Forests regional manager applied his discretionary power consistent with Code requirements when he decided to defer making a decision on the application for community watershed status until the evaluation criteria were established. Both the Ministry of Forests regional manager and the regional water manager, as designated environment official, complied with the requirements of the Code.

The Board's Evaluation of the Regional Manager's Decision

When a complaint concerns the exercise of discretion by a statutory decision-maker under the Code, the Board generally chooses to comment on the exercise of that discretion. The Code gives decision-makers discretion to make decisions. The Board reviews these decisions to help ensure that forest resources are managed in the public's interest.

The standards the Board uses in evaluating discretionary decisions is not whether the decision is the best decision. It is:

"Was the decision consistent with sound forest practices, did it achieve the intent of the Code, and was it based on an adequate assessment of available information?"

The Board considers additional factors related to the circumstances of a decision before reaching a conclusion. The Board may also consider whether the decision-making process was fair.

The Board considers these questions in the context of general public expectations about how decisions are made under the Code. In reporting its conclusions, the Board uses the ordinary meaning of terms like "reasonable," "appropriate," "adequate," and "fair."

In this case, the Board considered whether it was reasonable for the regional manager to defer making a decision on the community watershed application until the evaluation criteria were established.

Both Ministry of Forests and Ministry of Environment, Lands and Parks staff believe that the 1996 *Community Watershed Guidebook* provides inadequate criteria for making designation decisions. According to the two ministries, the brief letters of application for community watershed status that have been received to date indicate that more defined criteria are required.

The Ministry of Forests is also concerned that future decisions to designate or refuse to designate areas as community watersheds may be appealed. Ministry staff feel that they will be in a better position to defend decisions if all applications are considered using an identical process.

The Board accepts the ministries' rationale for developing evaluation criteria and an application package for water users.

However, the application for a permit to build approximately four kilometres of road through the Hasty and Aylwin watersheds added a complication to this complaint. The complainant asserts that if the road permit is approved, road construction and harvesting in the Hasty and Aylwin watersheds will pose a threat to the water users' drinking water supply. The Association is concerned that the delay in reviewing the application will allow operations to proceed. The complainant believes that road construction would be prevented or at least altered if the area were designated as a community watershed.

The Ministry of Forests regional manager was aware of the application for road permit R03127, through discussions with the district manager of the Arrow Forest District. He considered the perception that he was delaying making a decision on community watershed designation for the purposes of allowing less restricted road building.

As a result, the regional manager asked the district manager for additional information. Would there be any changes in either road construction or location if the area was designated as a community watershed? The district manager considered the proposed road in light of standards for roads in community watersheds and roads in domestic watersheds and anticipated no practical difference in road location or design.

After reviewing the district manager's analysis, the regional manager was satisfied that there would be no "on the ground" change to the proposed road if the area was designated as a community watershed. This reasoning implies that, for all practical purposes, the proposed road will be built to community watershed standards.

The Board recognizes that since the area has not been designated as a community watershed, not all community watershed requirements have been met. For example, there is no community watershed round table in place to guide planning. However, the Board decided to review the road permit, specifically focusing on factors that could affect road location or construction method. In other words, would designation as a community watershed require any "on the ground" changes to the road as proposed in the permit application?

Code requirements pertaining to road location and construction in a community watershed include ensuring that a road not be located within 100 metres upslope of a known community water supply intake, among others. In this case, the proposed road will not be located within 100 metres upslope of any domestic water intake. A summary of requirements affecting road location and construction in community watersheds and the status of the proposed road in relation to those requirements is provided in Appendix 1.

Appendix 1 shows that the proposed road meets all of the location and construction requirements of a road in a community watershed except one—the soil erosion field assessment. Since the area has not been designated as a community watershed, a report entitled "soil erosion field assessment" has not been prepared. However, terrain stability mapping, including a mass wasting hazard map, a sediment deliverability map, and a sediment yield map was conducted in 1985 by a professional pedologist.

Was the 1985 mapping still reliable? The complainant believes that the mapping is "completely inadequate." The main reason is that the classification system used in 1985 differs from the system in place today. In 1996, a professional engineer reviewed the 1985 mapping and checked the data on the ground to provide a level of confidence for the soil information. The engineer found the 1985 data to be "fairly consistent" with his own observations but cautioned that the existing data should be used with a degree of conservatism for planning purposes.

The Ministry of Forests considers the mapping to be equivalent to a soil erosion field assessment. The district manager advised the regional manager that surface soil erosion concerns identified by the mapping would be addressed in a Construction Recommendations and Drainage Plan. The plan proposes construction methods specifically to minimize sediment production.

FINDING 2:

The Board concurs with the regional manager's conclusion that, even if the area were designated as a community watershed, there would be no need for 'on the ground' changes to the road to meet basic Code requirements for community watersheds.

However, the Board also notes that additional Code requirements could be imposed in the future if the area were designated as a community watershed, and that those requirements could affect road location. For example, a round table could impose restrictions on road locations within the watershed.

In summary, the regional managers recognized the need to develop evaluation criteria and assess all applications based on consistent criteria. They considered that the

interministerial working group had nearly completed new community watershed evaluation criteria. The Ministry of Forests regional manager satisfied himself that deferring his decision until the evaluation criteria were available would not result in any "on the ground" changes to the road planned to be constructed under permit R03127. The regional manager's decision was reasonable.

FINDING 3:

The Board finds that the regional manager considered relevant factors when he deferred his decision on the application for community watershed status for the Hasty and Aylwin watersheds, and that his decision was reasonable.

The investigation found no evidence that the regional manager delayed making a decision simply to allow development to take place, and recent events support this position. As of November 1998, the road permit had not been approved and was not a district priority. The evaluation criteria were established and distributed to individuals and groups who had previously shown interest in achieving community watershed status.

Conclusion

The Act provided the Ministry of Forests regional manager with the discretion to designate the Hasty and Aylwin watersheds as community watersheds. The regional manager chose to defer making a decision until community watershed application evaluation criteria were established. The Board found that the regional manager's decision complied with Act requirements and was reasonable.

During the investigation, it became apparent that the complainant felt that the two ministries were not very forthcoming with information about the status of evaluation criteria development and, to a lesser extent, the road permit application. The complainant sought information on the evaluation criteria through freedom of information requests.

It is clear that communication between the complainant and the government was not as good as it could have been, especially in light of the high level of public interest in watershed issues in the Slokan Valley.

Recommendation

Now that the evaluation criteria have been distributed, the government should make extra efforts to ensure that applicants for community watershed status are kept well informed of the status of their applications within the adjudication process.

APPENDIX 1 - *Forest Road Regulation* Requirements Affecting Road Location and Construction in Community Watersheds

Requirement/Section of the Regulation	How the Road Permit Application Addresses the Regulation Requirements
<p>Selecting road location</p> <p>4.(3) A road in a community watershed must not</p> <p>(a) be located within a 100 m radius up slope of a known community water supply intake, unless the district manager and designated environment official agree that the road may be located closer to the intake, or</p> <p>(b) interfere with the known subsurface flow path of a drainage area that contributes to a spring.</p>	<p>The road is not located within 100m upslope of any domestic water supply intakes.</p> <p>The road does not cross through any areas that contribute to any of the currently licensed springs. This was determined by a professional geologist based on topographic maps.</p>
<p>Soil erosion field assessments in community watersheds</p> <p>5. Before a person required to prepare a road layout and design carries out road construction or modification within a community watershed, the person must carry out a soil erosion field assessment for all areas where road construction or modification is proposed, unless soil erosion potential mapping carried out under section 12 of the Operational Planning Regulation indicates that the area does not have a high or very high soil erosion potential.</p>	<p>The Act defines a "soil erosion field assessment" as a site assessment of the susceptibility of the soil to erosion along a proposed road location.</p> <p>Terrain stability mapping, including a mass wasting hazard map, sediment deliverability map, and a sediment yield map were conducted in 1985 by a professional pedologist. The mapping identifies one polygon on the proposed road location as "high sediment deliverability" and "high surface erosion potential."</p> <p>In 1996, the licensee retained a professional engineer to review the 1985 mapping and ground truth the data and provide a level of confidence for the soil information. The</p>

	<p>engineer found the 1985 data to be "fairly consistent" with his own observations but cautioned that the existing data should be used with a degree of conservatism for planning purposes.</p> <p>The Ministry of Forests has accepted this mapping as satisfying the requirement for a soil erosion field assessment. The complainant believes the mapping and associated report to be "completely inadequate." The main reason is that the classification system used in 1985 differs from the system in place today.</p>
<p>Content of road layout and design</p> <p>6. Before a person required to prepare a road layout and design carries out road construction or modification or deactivation, the person must</p> <p>(b) identify fish streams in community watersheds that are in or adjacent to the proposed road or road work</p>	<p>Riparian classifications are shown in the forest development plan.</p>
<p>Road design</p> <p>8.(1) A person required to prepare a road layout and design when determining the road design specifications for the purposes of section 6 (1) (h) must address all of the following:</p> <p>(h) measures to maintain water quality in a community watershed in areas with a high or very high soil erosion hazard as determined soil erosion field assessment under section 5.</p>	<p>A Road Construction Crossing Mitigation Plan for the proposed road was prepared by a professional engineer for use by the licensee to mitigate sedimentation impacts of water crossings during construction.</p> <p>A Construction Recommendations and Drainage Plan was also prepared by a professional engineer to address observed surface and near surface water conditions and to preserve these conditions and minimize sediment production.</p>
<p>Drainage Design</p>	

<p>9.(3)Despite subsection (1) (h), stream culverts in community watersheds must be designed to pass the 100 year return peak discharge without the stream surface rising above the top of the culvert inlet, unless a professional engineer has designed inlet and outlet protection measures.</p>	<p>Culverts pass the 100 year return peak discharge without the stream surface rising above the top of the culvert inlet.</p>
<p>Subgrade construction or modification</p> <p>12.(6)Without limiting subsections (1) to (5), a person required to construct or modify a road in compliance with section 62 (1) of the Act in a community watershed must do all of the following:</p> <p>(a) notify water licensees or their representatives, and designated environment officials of the start date of road construction or modification at least 48 hours before the start of road construction or modification;</p> <p>(b) ensure that rock that is from a known acid generating rock formation is not used for road construction or modification;</p> <p>(c) ensure that road construction or modification does not cause the quality of water to fail to meet the known water quality objectives.</p>	<p>Water licensees will be notified at least 48 hours before the start of road construction.</p> <p>Rock from known acid generating formations is not expected in the area and will not be used for road construction or modification. Water quality objectives will be met.</p>