

Watershed Protection at Anderson Lake

Complaint Investigation

060711



FPB/IRC/124

April 2007

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The Investigation

The Board received a complaint in March 2006, from a resident of Anderson Lake, between Pemberton and Lillooet. The complainant was concerned that logging south of McGillivray Creek at Anderson Lake would harm mule deer winter habitat and a local water supply.

The complainant stated that he did not have an adequate opportunity to review a watershed assessment report describing the risk to water, and that the logging may compromise the area's potential designation as a community watershed (for which there has been a long-standing application to government). The complainant also said that N'Quatqua Logging Company Ltd. (the licensee) significantly changed its previously-approved timber harvesting plans without public notice. The complainant believes the change warranted additional public consultation.

This report deals with the complainant's concerns about water and public consultation. The board will report separately on the issue concerning mule deer winter habitat.

Background

The complainant represents the 17 owners of a 146-hectare strata development on Anderson Lake south of McGillivray Creek. The property has been licensed since the 1920s to use water draining from Crown land above for domestic use, irrigation, power generation and fire-fighting.

The licensee is a logging company that operates on behalf of the N'Quatqua First Nation. Anderson Lake is part of the traditional territory of the N'Quatqua people. In the 1990s, the licensee's allocated volume of timber was to come from cutblocks designed by BC Timber Sales (BCTS)¹. These included five previously approved cutblocks south of McGillivray Creek within the complainant's watershed, as well as other cutblocks further away.

Ultimately, the licensee considered the cutblocks further away to be uneconomic and it decided not to log that timber. In 2001, to cost-effectively obtain its allocated volume of timber, the licensee proposed an additional eight cutblocks south of McGillivray Creek. The licensee wanted to design these new cutblocks itself; however, as it does not prepare its own forest development plan (FDP), it arranged to include the new cutblocks in a BCTS FDP. This arrangement meant the licensee and BCTS would collaborate to assure that cutblock planning and forest development plan commitments would be met.

¹ Previously the Small Business Forest Enterprise Program of the Ministry of Forests.

In 2001, the complainant objected to six of the cutblocks. After consulting with the Ministry of Environment (MOE)², the licensee decided to drop one cutblock. The complainant, meanwhile, thought that designation as a community watershed under the Forest Practices Code would help protect its water supply from damage from forest practices so, in March 2002, the complainant applied to government for such status. However, after five years, government has not yet decided whether to approve the complainant's application.

In October 2002, the Ministry of Forests and Range (MOFR)³ approved BCTS' 2002-2007 FDP. The approved plan contains the five previously approved BCTS cutblocks and the seven newly-approved licensee cutblocks south of McGillivray Creek. The 12 cutblocks cover almost 160 hectares.

The licensee did not proceed to log the approved cutblocks for several years because of a poor timber market. However, as the market improved, in 2005 the licensee hired a consulting forest professional to begin detailed planning for the cutblocks. Two cutblocks were discarded. The ten finalized cutblocks cover 140 hectares, of which almost 90 hectares were to be logged.

Given the prior lack of activity, the complainant had assumed that plans to log the area had been abandoned, and so was surprised in 2005 to see new flagging tape marking the cutblocks. The complainant's concern increased when he learned that the timber would not, as he had understood, be selectively logged (where only individually selected trees are removed). The complainant believed the area was to be clearcut instead, and thought such a change to the silviculture system would require additional public consultation.

In fall 2005, the complainant contacted BCTS with his concerns about water and the long-standing community watershed application. BCTS was unaware of the complainant's application and decided to check if the licensee's plans would meet government's standard for logging within a community watershed. BCTS asked the licensee to complete a watershed assessment report as if the area were a community watershed. It was that report the complainant later felt that he had inadequate opportunity to review.

² The Ministry of Environment was previously called the Ministry of Water, Land and Air Protection and, before that, the Ministry of Environment, Lands and Parks. For a few years, some previous environment ministry functions were transferred to the now defunct Ministry of Sustainable Resource Management. For simplicity, this report refers to the current name, the Ministry of Environment.

³ Previously the Ministry of Forests.

Relevant Legislation

The complainant's concerns relate to forest planning and practices under the *Forest Practices Code of British Columbia Act* and regulations (the Code).⁴

Discussion

The Board investigated these issues:

1. Was the risk to water adequately assessed?
2. Did the complainant have adequate opportunity to review a watershed assessment report about the risk to water?
3. Was government's delay in deciding whether the area should be a community watershed reasonable?
4. Was additional public consultation about the silviculture system required?

1. Was the risk to water adequately assessed?

The complainant believed that logging would damage the local water supply and compromise the area's value as a potential community watershed.

Forest managers sometimes use a watershed assessment to assess the risk of logging to water supply. A watershed assessment considers the physical characteristics of a watershed, and the effect of past and proposed forest practices on water quality, quantity and timing of flow. In this case, there was no legal requirement for a watershed assessment to be done prior to approval of BCTS' forest development plan, so no assessment was done.

Nevertheless, the Code required BCTS to include measures in its forest development plan to protect water. BCTS did so; it committed to use methods that minimized impacts on sensitive soils and natural drainage patterns. BCTS identified, in its approved FDP, that maintenance of water quality would be a prime objective in all of its operations.

Before applying for a cutting permit, the licensee was required⁵ to complete a terrain

⁴ In January 2004, the *Forest and Range Practices Act (FRPA)* replaced the Code as British Columbia's forest practices legislation. The transitional provisions of FRPA state the Code continues to apply to forest practices carried out under a forest development plan. This continues until there is an approved forest stewardship plan under FRPA, at which point the requirements of FRPA apply.

⁵ Section 17 (1) *Operational and Site Planning Regulation*

stability field assessment (TSFA) for any areas with a high likelihood of landslide, evidence of unstable ground, or a slope of 60 percent gradient or more. A TSFA can address the concern that slope failures and soil erosion could damage a water supply or water quality. In this case, nine of the ten cutblocks required a TSFA but only eight were assessed. No assessment is available for cutblock 16-4. For this cutblock, the licensee failed to comply with the Code. Cutblock 16-4 is located above a stream with a downstream water license. The potential for slope instability to negatively impact that water supply remains unknown. However, while planning the cutblock, the licensee recognized a moderate likelihood of landslide and chose not to harvest that potentially problematic area within the cutblock.

The TSFAs identified several potential hazards that could affect downstream water values. The assessments included recommendations to reduce risk to water quality, which the licensee addressed during cutblock planning. For example, an area of potentially unstable ground was dropped from harvesting, a challenging road segment was re-engineered, and some erosion-prone gullies were reserved from logging, while other gullies are to be logged using methods that avoid soil disturbance.

After the complainant brought his concerns forward, the licensee did a watershed assessment at BCTS's request (there was no legal requirement to do so). The assessment included a review of potential peak flow increases; sediment supply changes; streamside conditions; and an analysis of watershed characteristics, stream channel conditions and hydrology. The licensee's assessment concluded that the logging as planned would pose a low risk to downstream water values. However, the assessment also recommended several repairs to existing roads to improve previously altered drainages and reduce the potential for erosion. BCTS agreed to do that work on behalf of the licensee.

Given that BCTS was to some extent managing as if the area was a community watershed, Board staff compared the licensee's plans and activities to the standards set out in the Code's *Community Watershed Guidebook*. The guidebook suggests no more than a moderate hazard level for peak flow, that the area of the watershed in a clearcut condition not exceed 30 percent, and that average cutblock size be less than 20 hectares. All these criteria were met.

In addition, in a community watershed, the Code prohibits cutting trees within 100 metres upslope of a water intake, and/or where a TSFA identifies a high risk of landslide. Clearcutting is generally prohibited where the landslide risk is moderate or high. In the case of this complaint, no cutblocks or roads are located within 100 metres of a water intake, high landslide risk areas were earlier eliminated from the plan, and the licensee had generally avoided logging on terrain that it considered sensitive.

In summary, even though the licensee had no obligation to meet that standard, the logging as planned is consistent with government's guidance about managing forest practices in a community watershed. Therefore the logging will not compromise the areas' value as a potential community watershed.

The licensee adequately assessed the risk to water; there is a low risk of damage to water supply.

2. Did the complainant have adequate opportunity to review a watershed assessment report about the risk to water?

The complainant asserts that MOFR gave the licensee authority to cut timber before the complainant could properly review a report that assessed the risk to its water supply. On February 6, 2006, BCTS, the licensee, MOFR and the complainant discussed the results of the licensee's watershed assessment. At that point, the field evaluation was done but the final watershed assessment report had not yet been written. The group reviewed a map and discussed the assessor's preliminary findings. It was a technical presentation and the complainant could not tell whether the assessment was sound. He asked, given his community watershed application, that MOE be given an opportunity to comment on the assessment⁶. The licensee said it would send the written watershed report to MOE on February 20, when it expected the report to be completed. In fact, the report was not done until March 1, 2006. The licensee sent the report to MOE on March 3, but did not include any maps, so MOE could not do a complete review. MOFR issued the cutting permit on March 15, but MOE did not receive the watershed assessment maps until March 20.

The complainant's understanding was that MOFR would not issue a cutting permit until MOE had commented on the watershed assessment. Finding the cutting permit issued before that happened left the complainant feeling betrayed and bewildered.

MOFR explained that it had not promised any delay. MOFR expected that MOE would provide its comments directly to the complainant. In the meantime, the licensee had requested a cutting permit; MOFR had received a copy of the professionally-prepared watershed assessment report, understood the risk to water to be low, and proceeded.

Other than the complainant's belief, there is no evidence that suggests MOFR promised to delay the cutting permit. There was clearly a mutual understanding that MOE would review the assessment; however, the complainant's and MOFR's differing expectations about the MOE review were not communicated to one another. The complainant did not have an adequate opportunity to review the watershed assessment report because MOFR issued the cutting permit before the complainant could obtain a response from MOE. In the circumstances, MOFR was not obliged to delay its business and, in the end, MOE never did comment on the watershed assessment.

The complainant did not have an adequate opportunity to review the watershed assessment report because MOFR issued the cutting permit before the complainant could obtain a response from MOE. However, MOFR was not obliged to delay its business.

⁶ The government staff person responsible for community watershed applications had earlier transferred from MOE to another ministry but continued to represent MOE in regard to the complainant's application.

3. Was government's delay in deciding whether the area should be a community watershed reasonable?

In March 2002, the complainant applied to MOE for community watershed status under the Forest Practices Code. The Code provides an increased level of protection for water quality from forest practices in community watersheds. Watershed assessments must be carried out, and there are additional forest practices requirements to protect water intakes, and to prevent landslides, sedimentation, and changes to water flow and timing. The complainant anticipated such status would better protect its water supply from logging. Indeed, additional protection from the effects of forest practices is the sole purpose of the community watershed designation.

In October 2002, when the MOFR district manager approved the BCTS FDP, the area was not a community watershed and none of the constraints applied. Nor was the potential for community watershed designation a factor in FDP approval because MOE, contrary to the voluntary process illustrated in the *Community Watershed Guidebook*, did not advise MOFR about the complainant's application. Consequently, when he approved the FDP, the district manager was unaware there was an application for community watershed status over the area.

Five years later, the complainant's application remains undecided. This is not for lack of a procedure; the criteria used by government managers for community watershed designations were described in 1996 in the *Community Watershed Guidebook*. That guidebook recommends evaluating the community's need for water, alternative water sources, land status, watershed size, and suitability of the watershed as a long-term water source.

However, government has evaluated none of these criteria for the complainant's watershed. Government staff handling the complainant's application explained that not long after MOFR approved the BCTS FDP, the licensee indicated that the area near McGillivray Creek was not likely to be logged. To MOE, that eliminated the urgency to deal with the application. At the time, MOE's emphasis was on cancelling unnecessary community watersheds, not on creating new ones.

Periodically, the complainant called MOE to check the progress of its application; however, the application never again became a priority for ministry attention. It was kept in abeyance, then misplaced for a time, then resurrected. Ultimately, the application languished as government twice re-organized the ministry responsible, changed staff, and converted its operations from the Forest Practices Code to the *Forest and Range Practices Act* (FRPA).

MOE has recently developed an updated process for evaluating community watershed applications under FRPA. MOE says its current priorities are to assess about a dozen community watersheds for potential delisting, as well as to consider a number of outstanding applications for new watershed status, including the complainant's. The ministry plans to start work on the complainant's application in April 2007.

The Board considers that it was unfair and unreasonable of government to provide a specific mechanism for the complainant to obtain added security for water supply, but then fail to evaluate the complainant's application and delay any decision for years while timber harvesting plans proceeded. The complainant, both as a member of the public and as a ministry client, had a reasonable expectation of timely service and resolution.

Government's five-year delay in making any decision on the complainant's community watershed application has been unfair and unreasonable.

4. Was additional public consultation about the silviculture system required?

The complainant stated the licensee significantly changed its previously approved timber harvesting plans without public notice. The complainant believes the changes warranted additional public consultation. Specifically, the complainant is concerned that the cutblocks were originally to be selectively logged, but that the licensee opted instead to harvest by clearcut with reserves.

As required by the Code, a formal opportunity for public review and comment on the BCTS FDP occurred in 2002 prior to approval of that plan. Subsequent to FDP approval, the Code required a further opportunity for public review and comment only when a plan holder (in this case, BCTS) proposed a major amendment to its approved FDP. Consequently, and under certain circumstances, the plan holder could make minor amendments to its plan which did not require either public notice or government approval.

There is corroborative evidence suggesting that BCTS did intend to selectively log the five cutblocks it originally planned south of McGillivray Creek. However, the Code did not require that a specific silviculture system be specified in the FDP, only whether a cutblock will or will not be clearcut. Therefore, FDPs often describe cutblocks simply as "clearcut" or "partial cut". All the cutblocks south of McGillivray Creek, including the seven independently planned by the licensee, were described in the approved BCTS FDP as "partial cut".

"Clearcut" means a silviculture system that removes an entire stand of trees in a single operation from an area one hectare or larger and two or more tree heights in width, and intended to be managed as an even-aged stand. The Code defined partial cutting as a silviculture system in which only selected trees are harvested. This includes seed tree, shelterwood, single tree selection, group selection, retention system, and clearcut with reserves. The Code further defined "clearcut with reserves" as a variation of clearcutting in which trees are retained either individually, or in small groups, for purposes other than regeneration.

To maintain biological diversity, BCTS stated in its approved FDP that it would retain "wildlife tree patches" for each harvested cutblock. Wildlife tree patches are kept for purposes other than regeneration. This means that every "clearcut" that contains a wildlife tree patch could also be defined under the Code as a "clearcut with reserves". Most of the

cutblocks south of McGillivray Creek could be classed as either “clearcut” or “clearcut with reserves”. Nevertheless, since “clearcut with reserves” is also “partial cutting”, the licensee’s site plans are legally consistent with BCTS’ approved FDP. Therefore, neither an amendment nor additional public consultation was required for the licensee to use that silviculture system.

The licensee had discretion to use “clearcut with reserves” as a variant of partial cutting; no additional public consultation was required.

Conclusion

1. Was the risk to water adequately assessed?

The licensee adequately assessed the risk to water; there is a low risk of damage to water supply.

2. Did the complainant have adequate opportunity to review a watershed assessment report about the risk to water?

The complainant did not have an adequate opportunity to review the watershed assessment report because MOFR issued the cutting permit before the complainant could obtain a response from MOE. However, MOFR was not obliged to delay its business.

3. Was government’s delay in deciding whether the area should be a community watershed reasonable?

Government’s five-year delay in making any decision on the complainant’s community watershed application has been unfair and unreasonable.

4. Was additional public consultation about the silviculture system required?

The licensee had discretion to use “clearcut with reserves” as a variant of partial cutting; no additional public consultation was required.

Recommendation

The complainant has waited five years and deserves a timely answer to his long-standing request for community watershed status. The Board makes the following recommendation and, under Section 132 of FRPA, asks the Ministry of Environment to report to the Board on implementation of the recommendation by July 31, 2007:

The Board recommends that the Ministry of Environment act promptly to decide for or against approval of the complainant’s outstanding and long-delayed community watershed application, and that it advise the complainant of its decision in writing.