



# Forest Appeals Commission

Fourth Floor 747 Fort Street  
Victoria British Columbia  
**Telephone:** (250) 387-3464  
**Facsimile:** (250) 356-9923

Mailing Address:  
PO Box 9425 Stn Prov Govt  
Victoria BC V8W 9V1

## APPEAL NO. 1999-FOR-02

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

<b>BETWEEN:</b>	Forest Practices Board	<b>APPELLANT</b>
<b>AND:</b>	Government of British Columbia	<b>RESPONDENT</b>
<b>AND:</b>	Gloria O'Brien	<b>THIRD PARTY</b>
<b>BEFORE:</b>	A Panel of the Forest Appeals Commission	
	David Ormerod	Panel Chair
	James Hackett	Member
	Lorraine Shore	Member
<b>DATE OF HEARING:</b>	November 2, 1999	
<b>PLACE OF HEARING:</b>	Queen Charlotte City, B.C.	
<b>APPEARING:</b>	For the Appellant:	Calvin Sandborn, Counsel
	For the Respondent:	Dawn House, Counsel
	For the Third Party:	Gloria O'Brien

## APPEAL

This is an appeal by the Forest Practices Board ("FPB") against an administrative review decision dated June 14, 1999. The Review Panel rescinded a May 13, 1999 Stop Work Order ("SWO") issued to Gloria O'Brien by an official with the Queen Charlotte Islands Forest District. The SWO was issued to limit environmental damage caused by a perceived contravention of the terms of a Timber Sale Licence ("TSL"), a Road Permit and the *Forest Road Regulation*.

The Forest Appeals Commission has the authority to hear this appeal pursuant to section 131 of the *Forest Practices Code of British Columbia Act* (the "Code").

## Powers of commission

**138** (1) On considering an appeal, the commission may

- (a) confirm, vary or rescind the decision appealed from,
- (b) make any decision that the person whose decision is appealed could have made, or

(c) refer the matter back to the person who made the determination, with or without directions.

The FPB requests that the SWO be referred back to the Review Panel, and that the Review Panel be directed to reconsider the matter pursuant to section 138(1)(c) of the *Code*.

## BACKGROUND

Gloria O'Brien, of Port Clements, operates a small business forest enterprise. Timber Sale Licence (TSL) A58336 was issued to Mrs. O'Brien by the Queen Charlotte Islands Forest District in April 1999, authorizing the harvest of approximately 2000 cubic metres of timber in the Boulton Lake area. Road Permit R10848 was also issued in April to allow the temporary reactivation of the Boulton Lake Branch One road, to facilitate the removal of the timber harvested under the TSL. The road reactivation plan, appended to the Road Permit, included the temporary installation of two minor log "box culverts" over Class S3 and Class S4 tributary streams of the Seven Mile Creek, which drains into Masset Inlet, north of Port Clements.

Although not placed before the Commission, the FPB asserts that TSL A58336, which provided the authority for the harvesting area to be accessed under the Road Permit, contained provisions restricting certain operations from taking place during a June 15 to August 15 "fisheries window."

According to the O'Briens, the Road Permit allowed construction of the road and culverts prior to the June 15 to August 15 "fisheries window," as no "in-stream" work was required.

A "pre-work" conference was held between representatives of the licensee and the Ministry of Forests on April 28, 1999. Randy O'Brien and Travis O'Brien represented the licensee, while Carl Thompson and Mikel Leclerc represented the Ministry of Forests. By this date, the box culvert had been constructed over the S3 classified stream.

From the documents provided by Mrs. O'Brien, a severe storm occurred on or about May 6, which caused sand from the road approaches to the culverts to flow off the road and slough into the streams. Travis O'Brien attempted to remove some of the sand from the streams with hand tools, and notified the Ministry of Forests of the problem.

On May 10, 1999, Stephanie Coe, a Compliance and Enforcement officer with the Ministry of Forests, Queen Charlotte Islands Forest District, received word from the licensee that sand from the reactivated road had slumped into the stream at one of the box culverts. The site was inspected by Ms. Coe and Mr. Thompson on May 11 and photographs were taken. Alan Cowan of the Department of Fisheries and Oceans Canada ("DFO") was advised of remedial action being taken by the licensee outside of the June 15 to August 15 "fisheries window" which Ms. Coe understood to be in effect for the TSL and Road Permit.

On May 12, 1999, Mr. Cowan visited the site and advised the licensee that no heavy vehicular traffic should cross the S3 and S4 classified streams. On May 13, 1999, Ms. Coe issued the SWO to prevent vehicular traffic, including heavy machinery and pickup trucks, from crossing the two culverts across the S3 and S4 classified streams, so that she could investigate further. She cited three contraventions as the basis for the SWO:

- a) Section 2.01 of the TSL [Schedule A] and section 6.01 of the Road Permit: "reactivation of Boulton Lake road outside of summer season defined as June 15 - August 15, 1999."
- b) Section (a) of the TSL [sic]: road reactivation plan not submitted.
- c) Section 13(1)(c)(vi) of the *Forest Road Regulation*: "Structures do not meet approved design."

On May 17, 1999, a field review of the culvert structures and road approaches was undertaken by Dave Weir, Engineering Officer and Louis Bourcet of the Ministry of Forests.

On May 25, Mrs. O'Brien requested a review of the SWO, challenging the contraventions set out therein. Ann Thompson, review official with the Ministry of Forests, advised the parties that she appointed Val Ciaponni, the Tenures Manager of the Vancouver Forest Region, to conduct the review and that the review would be conducted by conference call on June 8th, 1999.

On June 7, one day before the review, a more detailed engineering inspection of the site was conducted by Mr. Weir and Ms. Coe.

On June 8, 1999, the administrative review of the SWO was undertaken by teleconference, chaired by Mr. Ciaponni. Mrs. O'Brien and Ms. Coe participated by telephone. On June 14, 1999, Mr. Ciaponni rescinded the SWO. He states:

In rendering a decision on this Administrative Review, I was obligated to consider whether the contraventions that were identified in the SWO were correctly applied, and, further, if the issuance of the SWO was an appropriate approach based on the circumstances.

Mr. Ciaponni found that there was no evidence to support the contraventions. In particular, he found that there was no contravention of section 2.01 of the TSL, as Mrs. O'Brien was working under the conditions set out in the Road Permit documentation which did not include any reference to the "summer season timing windows." Regarding section (a), which the Reviewer referenced as section 2.01 of the TSL, and section 13(1)(c)(vi) of the *Forest Road Regulation*, he found that there was no evidence provided that a road reactivation plan had not been submitted, and no evidence to suggest that "structures do not meet approved design."

The FPB appealed this decision on the grounds that the Reviewer failed to consider all relevant evidence, and applied an incorrect legal test for the issuance of a SWO.

It wants the Commission to send the matter back to Mr. Ciaponni and direct him to apply the correct legal test and consider all relevant evidence. The Ministry of Forests supports having the matter sent back to the Reviewer for re-consideration of the facts, but disputes that the Reviewer applied an incorrect legal test.

Mrs. O'Brien argues that she was not in contravention of any section of the *Code* as alleged in the SWO. She argues that both she and the Ministry were given an opportunity to present evidence at the review, and argues that the review decision should be upheld. She submits that there was poor work in the field by the Ministry of Forests, and that additional information was gathered after the SWO was issued, but before the review began.

The Commission notes that two days after the review (June 10), a letter was sent by Ms. Coe to Mrs. O'Brien, advising her of the results from the June 7 engineering inspection. The letter states that the culvert structures and road approaches did not meet the specifications required by the Road Permit, and that the SWO would be lifted on June 15 to allow them to be rebuilt within the "fisheries window."

**ISSUES**

1. Whether the Reviewer adequately considered the relevant evidence.
2. Whether the Reviewer applied the correct legal test.
3. Whether the matter should be referred back to the Reviewer.

**RELEVANT LEGISLATION**

*Forest Practices Code of British Columbia Act*

**Stopwork order**

**123** (1) If an official considers that a person is contravening a provision of this Act, the *Forest Act* or the *Range Act*, or the regulations or the standards made under those Acts, the official, in accordance with the regulations, may order that the contravention cease, or cease to the extent specified by the order until the person has a required licence, permit, plan, prescription or approval.

***Forest Road Regulation***

**Drainage construction**

13. (1) A person required to construct or modify a road in compliance with section 62 (1) of the Act must do all of the following when constructing the drainage system for the road:

...

(c) ensure that the drainage system

...

- (iv) prevents water from being directed onto potentially unstable slopes or soil material,

## DISCUSSION AND ANALYSIS

### 1. Whether the Reviewer adequately considered the relevant evidence.

The FPB submits that the Reviewer did not consider all relevant evidence in reaching his decision. In particular, the FPB asserts that the Reviewer did not:

- (i) look at the photographs taken at the site on May 11,
- (ii) consider evidence of the engineering inspection completed on June 7th, and
- (iii) consider other relevant evidence in support of the cited contraventions.

The FPB does not take issue with the Reviewer's findings that Ms. Coe erred in citing a contravention of section (a) of the TSL (road reactivation plan not submitted), as the Road Permit attachments did contain a road reactivation plan with instructions. The FPB's key concern is that the Reviewer's failure to consider relevant evidence affected his assessment of the alleged *Forest Road Regulation* contravention, in that the missing evidence supports Ms. Coe's assertion that the culvert structures were inadequate, and that there was risk that further damage could be done to the fish streams if vehicles were to continue using the culverts.

#### i) Photographs

The photographs at issue were tendered as exhibits at the hearing before the Commission and discussed at length at the hearing. There are a total of 26 photographs taken on May 11th. The photographs show features of the S3 and S4 classified streams at the crossings that raised concerns with Ms. Coe.

In a letter dated June 4, 1999, Ms. Thompson, the review official who set up the review, advised the parties that they should be prepared to discuss the specific issues in dispute at the review, and to provide the reviewer with relevant evidence to support their key arguments. The letter also stated "please contact me for more information or if you have any questions regarding this process."

Ms. Coe testified that she contacted Ms. Thompson on two occasions, on June 4th, after receiving the letter, and on June 7th. She advised the Commission that she offered to provide the photos for the review process, but was told that she only needed to provide the SWO, as the discussion at the review would reveal other evidence. Ms. Coe testified that Ms. Thompson was definite in saying that she only needed the SWO. Therefore, the Reviewer did not receive the photographs.

In its closing submissions, counsel for the Government conceded that there seemed to be some confusion over what evidence was needed, and she was "certainly concerned" that the Reviewer did not have the photographs.

The Commission finds that the photographic evidence was clearly relevant and important to a proper assessment of the SWO. The photographs were taken on the day Ms. Coe first inspected the site, and the conditions depicted in the photographs were presumably a reflection of the conditions present when she was forming her decision to issue the SWO. If they had been before the Reviewer, his decision may have been different.

ii) Engineering inspection

The FPB also argued that the Reviewer erred in refusing to consider the evidence regarding the engineering inspection completed on June 7. The Reviewer makes the following finding at page 5 of his decision in relation to the alleged contravention of section 13 of the *Forest Road Regulation* (structures do not meet approved design):

At the hearing, Ms. Coe referred to subsequent inspection activities after the fact at the site in question. I place no weight on these statements in that only that evidence that led up to the issuance of the SWO has been considered in this Administrative Review.

The FPB submits that the Reviewer should have considered this subsequent evidence to the extent that it supported the proposition that, at the time that the SWO was issued, the official reasonably considered that a contravention was taking place, and that it reflected the conditions that the field official was evaluating at the time she made the order. It argues that the conditions of the structures at the time of the subsequent inspection are, at least, some evidence of what their condition may have been earlier, and it is not evidence that should have been summarily ignored.

The Commission finds that the Reviewer took a very narrow view of his jurisdiction in terms of the evidence he could consider. Under section 129(2) of the *Code*, a reviewer can decide the matter "based on one or more of the following:"

- (a) the request for review and the ministries' files;
- (b) the request for review, the ministries' files and any other communication with persons the reviewer considers necessary to decide the matter, including communicating with the person or board requesting the review and with the person who made or failed to make the determination;
- (c) an oral hearing.

Even at the lowest level of review, which is akin to a review on the record, a reviewer bases his or her decision on the Ministry files. In this case, the Ministry files should have contained the photographs and other documentary evidence, including any notes or information regarding the subsequent inspection. When an oral hearing is convened, as was done in this case, the evidentiary basis for the

review decision is even broader as the parties are provided with an opportunity to give oral evidence.

The Commission has previously commented on the role of a reviewer. In *Tolko Forest Products Ltd. v. Government of British Columbia* (Appeal No. 96/09, April 9, 1997) (unreported), the Commission stated:

...the review process was intended to provide reviewers with significant flexibility in the manner in which they can perform the second instance "re-examination" or "reconsideration," depending on the circumstances. In our view, this re-examination or reconsideration is to be done with a view to revision or re-determination if something be found wrong or lacking.

The oral testimony regarding the subsequent inspection should have been considered to the extent that it assisted the Reviewer in this re-examination or reconsideration. The Commission agrees with the FPB that it should not have been dismissed out of hand simply because it was obtained after the SWO was issued. To the extent that it assisted in determining the conditions present at the time the SWO was issued - in accordance with the test for the issuance of a SWO under section 123 (see issue #2) - the subsequent inspection should have been considered by the Reviewer.

The Commission recognises that the results of the engineering inspection of June 7 may not have been known by the O'Briens at the time of the hearing, as the inspection took place the day before. However, provided that they had an opportunity to respond to the information, procedural fairness would be preserved. If they could not have properly responded to that information, the Reviewer could have taken a break or adjourned the hearing to allow the O'Briens sufficient time to review the evidence.

iii) Other relevant evidence regarding the alleged contraventions

a) Section 2.01 of the TSL - road reactivation outside of summer season

In the SWO, Ms. Coe cited a contravention of section 2.01 of the TSL, noting that reactivation of the road was being done outside of the June 15 to August 15 "summer season." The Commission interprets that "summer season" is used by Ms. Coe in reference to the "fisheries window" restriction. The Reviewer found that the Road Permit document did not make any mention of the "timing windows," that Mrs. O'Brien was working under the conditions that were set out in the Road Permit, and, therefore, he could not "support this contravention." In this connection, the circumstances surrounding the issuance of the Road Permit are particularly relevant to the events that followed.

The O'Briens testified that they were operating in compliance with the conditions of their permits. Randy O'Brien testified that the road reactivation requirements had been discussed in early April with Rick Johnson, the Small Business Officer with the Queen Charlotte Islands Forest District, and, as no in-stream work was required,

they were advised that the road permit could be issued without delay. The reactivation plan map, attached to the O'Briens' Road Permit, has a notation on the top that reads:

Culvert installation must take place during the Fisheries Window between June 15 - Aug. 15.

Mrs. O'Brien's position was that, as the culverts were to be installed using old sill logs, as indicated on the reactivation plan map, there would not be any in-stream work required. Stringer logs could be placed across the sills without affecting the streams, and, therefore, the O'Briens believed they were complying with the Road Permit.

However, Mr. Cowan of DFO testified that, outside of this two-month window, "in-stream" forest road and bridge work in this area was prejudicial to fish conservation. He stated that there was an understanding between DFO and the Ministry of Forests that such work would be restricted to the window. Mr. Cowan testified that this condition was understood to apply to Mrs. O'Brien's licence, that DFO has consistently voiced concerns about the fisheries sensitivity of the area to the Ministry of Forests, and that this particular licence was a "test" case for harvesting in a manner that would not prejudice the fisheries values.

Ms. Coe's testimony made it clear that she understood that the "fisheries window" requirement provision of the Road Permit precluded any culvert construction outside of the window. Further, Ms. Coe testified that the above notation had been partially obliterated on the Ministry of Forest's own file copy of the reactivation plan map.

At the conclusion of the hearing before the Commission, the FPB stated that there was confusion around the reactivation plan requirement for a fisheries window and, therefore, it was "not pressing" this issue.

While there was confusion over this requirement, the Commission finds there is sufficient evidence that, although the Road Permit was effective April 28, the construction of the culverts was restricted to the fisheries window. Further, the Commission finds that the map notation requiring the use of the old sill logs does not eliminate the Road Permit's attached design specifications that all logs used in the culvert construction should be free of rot. Consequently, contrary to the O'Brien's statement that in-stream work would not be required, the Commission finds that the existence of old sill logs at the stream crossings would not guarantee that in-stream work would not be required to build sills and other log-crib work of sound logs.

Although the Commission has not reviewed the TSL documents, Ms. Coe's assertion that the TSL was contravened should have been thoroughly considered by the Reviewer. Unfortunately, the reactivation plan map attachment to the Road Permit that he reviewed did not contain the "fisheries window" requirement as, for some unknown reason, this notation had been obliterated on the copy provided by the District office. However, the documents held by the O'Briens clearly contained this

constraint as a notation in the reactivation plan. Further, Ms. Coe testified that this information was also contained in the Bid Proposal package for the timber sale, and, therefore, was known to the O'Briens prior to tendering their bid.

From the evidence before the Commission, it appears that the "fisheries window" was a major factor in allowing harvesting operations in the area. The inaccurate information before the Reviewer likely affected his finding on this contravention.

b) Section 13(1)(c)(iv) of the *Forest Road Regulation* - structures do not meet approved design

At the hearing before the Commission, the FPB focussed on the Reviewer's finding that there was no evidence to suggest that the "structures did not meet approved design." In its Statement of Points, the FPB states that, in fact, there was evidence given at the hearing that an inadequate amount of fabric had been used in construction, that a guard log was held by a broken piling, that sandy erodible material instead of compact gravel had been used for deck and approach surfacing, and that the sill logs were rotten. The FPB argues that all of this evidence would have been relevant on the section 13 issue before the Reviewer, i.e., that the structures did not meet the approved design, and is contrary to his finding that there was "no evidence" related to this contravention.

Regarding the section 13 contravention, the Reviewer states at page 5 of the decision:

Finally, the SWO stated that "structures do not meet approved design", in contravention of Section 13(1)(c)(vi) of the Road Regulation. I note that this particular contravention was not addressed at the hearing, and therefore I could not consider this information. Again, while I am aware that Ms. Coe referred to subsequent inspection activities after the fact at the site in question, I place no weight on these statements.

The FPB submits that Ms. Coe's concern was that the culverts were, in fact, inadequate structures and therefore a threat to the environment. At the hearing before the Commission, the FPB presented a great deal of evidence in support of Ms. Coe's belief that the structures did not meet approved design, including the photographs.

Randy O'Brien explained the design and construction of the road and culverts. The road was described as "overland," in that the ground was not bladed and ditched, but existing woody debris was spread along the roadway to form a permeable base, and then gravel surfacing material was spread on it in sufficient depth to provide a running surface. Permeability of the road was intended to obviate the need for ditching.

Approaches to the log-culverts were constructed by tying back the log cribs and sills, and securing the tie-backs with shot rock sub-grade material. The sub-grade material was then covered over with surfacing material, without any use of fabric. The log-culverts were constructed of lashed log stringers, wood puncheon to fill in

gaps, and guard logs were placed on top of the outer stringers. The whole superstructure was then covered with fabric, and surfaced with sandy-gravel.

There is disagreement between Ms. Coe and the O'Briens as to whether the surfacing-material of the culverts and approaches was gravel or sand. The Road Permit's attachments required the material to be gravel. Mr. O'Brien submits that they used the gravel pits marked on the reactivation plan, which contained lenses of sand, but that they were selective in choosing the better material for the culvert and approach surfaces. Ms. Coe maintains that the surfacing material used was better described as sand.

Considering the evidence that should have been before the Reviewer, Ms. Coe's assertion that the structures did not meet the approved design appears to be a valid concern. The photographs clearly show sandy surfacing material on the culverts and their approaches, and a substantial volume of sand slumping into the streams from the culvert approaches. From the evidence presented, the Commission agrees with Ms. Coe's position that vehicular traffic over this soft surface material could pre-dispose the site to further erosion of sand into the streams.

The Commission finds that Ms. Coe reasonably felt that the continuance of operations posed a risk to the fisheries values of the streams, given the information available to her at that time, including Mr. Cowan's advice that no heavy vehicular traffic should cross the streams. The Commission finds that there was a reasonable apprehension of risk by Ms. Coe, and that the issuance of the SWO was an appropriate response to the situation, notwithstanding her imprecise references to the permits, and the legislation and regulations. Her later commitment to lift the SWO on June 15, some five weeks later, and coincident with the fisheries window, was a reasonable position to take. This would allow in-stream remedial work to be done at a period of reduced flow, and, therefore, minimize further damage to the fish spawning and rearing value of the streams.

The Commission recognizes that the issuance of the SWO was a hardship to the O'Briens as it postponed harvesting operations for five weeks. However, from the evidence before the Commission, protection of the environment had not been assured by their decision to construct the culverts and the road approaches outside of the fisheries window. It was further put at risk by using a design, methods and materials that could jeopardize the integrity of the streams in adverse conditions, and which were, by their own description, of a lower standard than were required by the specifications attached to the Road Permit.

On the evidence before the Commission, one of Ms. Coe's key concerns at the time of the SWO was the inadequacy of the structures and the threat to the stream. In our view, the Reviewer should have enquired of the parties as to the conditions and attachments to the bid proposal, the TSL and the Road Permit, in attempting to qualify Ms. Coe's allegation that the culvert construction was deficient. In addition, the Commission finds that if the photographs (at a minimum) and the evidence

regarding the June 7th inspection had been before the Reviewer, he may have come to a different conclusion on this contravention.

## 2. Whether the Reviewer applied the correct legal test.

The FPB has asked the Commission to find that the Reviewer applied the wrong legal test in rescinding the SWO. The FPB argues that the Reviewer rescinded the SWO on the grounds that no *Code* contraventions had been proven to him. On page 2 of his decision, the Reviewer states:

In rendering a decision on this Administrative Review, I was obligated to consider whether the contraventions that were identified in the SWO were correctly applied, and, further, if the issuance of the SWO was an appropriate approach based on the circumstances.

When considering each alleged contravention cited by Ms. Coe in her SWO, the Reviewer states that he is "not able to support this contravention in the SWO."

The FPB submits that the correct legal test for the issuance of a SWO was established by the Commission in *Weldwood v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 96-03, January 30, 1997)(unreported). In that case, the Commission found that the Ministry of Forests had mis-interpreted section 123(1) of the *Code*, and was using language on the SWO form that reinforced this mis-interpretation. The Commission further found that:

... the question properly before the Review Panel was whether or not the official, when issuing a SWO, **reasonably 'considered'** that a contravention was taking place; not whether a contravention did in fact take place. The question of whether a contravention did take place is a separate legal question, and should be determined as a separate issue.  
[emphasis added]

Accordingly, the FPB states that the test is not whether a contravention is proven to a third party; rather, it is whether the field official, and not a later third party, reasonably considered that a contravention was taking place.

The Government agrees that the *Weldwood* case describes the appropriate test to be applied when reviewing the issuance of a SWO. However, it argues that there is no evidence that the Reviewer required proof of the contraventions and suggests that the FPB merely assumes this to be the case. The Government argues that the language used by the Reviewer in his decision simply indicates that he properly deliberated on the cogency of the evidence.

As previously found by the Commission in *Weldwood*, and agreed to by the parties, this Panel finds that the correct test to be applied is whether the issuance of a SWO was justified because it was reasonable for the official to believe that a contravention existed. The wording of section 123(1) of the *Code* is unambiguous: the official need only "consider" that a contravention is taking place to issue a SWO. SWOs are clearly a precautionary device: they are issued to prevent a perceived

contravention from continuing, generally when resource values are imperilled or environmental degradation is occurring.

Unfortunately, the Reviewer did not set out the test he was applying in his decision. Nor did he testify at the hearing before the Commission. After carefully reviewing the Reviewer's decision and the proper test, the Commission is unable to ascertain what test the Reviewer applied when he considered the evidence before him. The Commission finds, however, that the Reviewer's language "hints" that he was looking for evidence or proof of an "actual contravention". As such, the Commission has doubts that the Reviewer considered the Commission's finding in *Weldwood*.

As it is unclear, on a balance of probabilities, whether or not he applied the correct test, the Commission cannot find that he erred. However, in the future, the Reviewer should set out the appropriate test for an SWO in his review decision to avoid this question from arising.

### **3. Whether the matter should be referred back to the Reviewer.**

The FPB has requested that the Commission refer the matter back to the Reviewer to consider all of the relevant evidence and to apply the correct legal test. The Government has requested that the Commission refer the matter back to the Reviewer to consider all the relevant evidence, without any directions with respect to the correct legal test. Mrs. O'Brien has requested that the Commission confirm the Reviewer's decision and dismiss the appeal.

The Commission has had the benefit of receiving full submissions from the parties on all matters under appeal. In addition, the Commission has heard the relevant evidence that the FPB and the Government are requesting that the Reviewer now hear.

The bulk of the evidence led at the appeal hearing dealt with the design and construction of the culverts and culvert approaches, and with the slumping of sand from the culvert approaches and decks into the streams. The photographs taken at the site provide an unambiguous record of a low standard of construction and damage to fish rearing streams. The Commission is satisfied that the attachments to the Road Permit required, among other things, that:

1. Culvert construction take place within the "fisheries window,"
2. The logs used in culvert construction, including old sill logs from the earlier crossings, be free from rot,
3. The "guard logs" at the sides of the culvert decks be high enough to contain the deck surfacing material,
4. The culvert log stringers be well lashed and gaps be well filled with puncheon,

5. Sufficient road fabric be used to prevent surface material from the culvert decks and deck approaches eroding from the road, and
6. Compactable gravel be used for surfacing.

The photographic and engineering inspection evidence shows that the culverts constructed at the site were materially deficient and that they were constructed earlier than allowed. The consequence of these inadequacies was that sand had been deposited into fish-rearing streams at a period of time that posed a risk to the fish, and that continued use of the structures would likely worsen the situation. The damage that had been done could not be ameliorated at the time due to the seasonal restrictions, and operations needed to be halted until the appropriate time (the "fisheries window").

Although no expert engineering testimony was led on the construction design, methods and materials, Ms. Coe's observations as a forestry technician, together with her understanding of Mr. Weir's findings from the June 7 engineering inspection, point to risky standards of construction that are below the standards attached to the Road Permit. If lower standards had been verbally sanctioned by staff at the District office, the O'Briens should not have proceeded until the Road Permit had been amended. In the Commission's view, Ms. Coe correctly interpreted the requirements of the Road Permit that were in effect at the time of the incident, and determined that a halt to operations was required to limit further damage to the streams.

Accordingly, the Commission finds that Ms. Coe reasonably considered that a contravention was taking place, and that the issuance of the SWO was an appropriate response in the circumstances.

If the Commission were to send the matter back, it would only prolong the finalization of the matter to the advantage of no one. For the above reasons the Commission does not consider it necessary to refer this matter back to the Reviewer for a consideration on the evidence.

Based on all of the evidence before the Commission, the Commission concludes that Ms. Coe correctly "considered" that a contravention was taking place, and there was a need to stop operations, particularly given the state of the structures. Consequently, the Commission reverses the Reviewer's decision to rescind the SWO.

## **DECISION**

In coming to this decision, the Commission has carefully considered all of the evidence before it, whether or not specifically reiterated here. In summary, it is determined that:

1. The Reviewer failed to consider relevant evidence in reaching his decision;
2. There is doubt that the legal test applied by the Reviewer was appropriate; and

3. Ms. Coe's issuance of the SWO was an appropriate measure to take at the time, in order to alleviate the threat of further damage to the fish-rearing streams.

Pursuant to section 138(1)(a) of the *Code*, the Commission therefore reverses the administrative review decision and confirms the issuance of the SWO by Ms. Coe.

David Ormerod, Panel Chair  
Forest Appeals Commission

March 7, 2000