



# 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. 2000-FOR-009(c)

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>	Husby Forest Products Ltd. Naden Harbour Timber Ltd. Sitkana Timber Ltd. Dawson Harbour Logging Co. Ltd. TimberWest Forest Ltd.	<b>THIRD PARTY</b>
<b>AND:</b>	Council of the Haida Nation	<b>INTERVENOR</b>
<b>BEFORE:</b>	A Panel of the Forest Appeals Commission Alan Andison, Chair Kristen Eirikson, Member Bruce Devitt, Member	

**DATE OF HEARING:** November 8, 9 and 19, 2001

**PLACE OF HEARING:** Victoria, B.C.

**APPEARING:** For Appellant: Calvin Sandborn, Counsel  
For Respondent: Bruce Filan, Counsel  
For Third Party: W.R. (Bob) Brash

## MAJORITY DECISION OF PANEL MEMBERS ALAN ANDISON AND BRUCE DEVITT

### APPEAL

This is an appeal by the Forest Practices Board (the "Board") of a Review Decision dated November 22, 2000, confirming the approval of the 1999-2003 forest development plan (the "Plan") for five licences held by the Husby Group of Companies and TimberWest Forest Ltd. Rory Annett, District Manager of the Queen Charlotte Islands Forest District (the "District Manager"), approved the Plan in determinations dated October 22, 1999, and November 26, 1999. The Husby Group of Companies consists of four companies that hold timber harvesting rights

on Crown land within the Plan area: Husby Forest Products Ltd., Naden Harbour Timber Ltd., Sitkana Timber Ltd. and Dawson Harbour Logging Co. Ltd. In addition, the Plan covers a licence held by TimberWest Forest Products Ltd. For the purposes of this decision, all of these companies will be referred to as the Husby Group of Companies (the "Husby Group").

The appeal was brought before the Forest Appeals Commission (the "Commission") pursuant to section 130(2)(c) of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "Code"). Under section 138 of the *Code*, the Commission may confirm, vary or rescind the determination appealed from. The Commission may also refer the matter back to the person who made the determination, with or without directions.

This decision addresses two of the Board's three grounds for appealing the approval of the Plan. After a hearing was commenced to hear submissions on all of the grounds for appeal, the Commission determined that submissions concerning whether the Plan adequately manages for marbled murrelet habitat would be heard by a separate panel of the Commission. Accordingly, that issue will be addressed in a separate decision.

This decision addresses the grounds for appeal concerning the timing of, and the Plan's consistency with, watershed assessments in the following areas:

- (1) Forest Licence A16871 held by Sitkana Timber Ltd. (the Upper Tartu and Outer Tartu watersheds); and,
- (2) Forest Licence A16872 held by Naden Harbour Timber Ltd. (the Naden watershed).

The Board requests that the Commission set aside the District Manager's approval of several cutblocks and associated roads in the Tartu watersheds and Naden watershed.

## **BACKGROUND**

The Plan describes the logistics of forest resource development, including timber harvesting, road development, and management for non-timber resources, for 5 licences on Northwest Graham Island in the Queen Charlotte Islands, also known as Haida Gwaii, for the period from 1999 through 2003. The Plan was jointly prepared by the licensees, which make up the Husby Group.

Forest development plans are the highest level of operational plan in the context of timber management. Lower level (more site-specific) operational plans, such as silviculture prescriptions and logging plans, are developed based on a forest development plan. Under the *Code* and the *Operational Planning Regulation*, B.C. Reg. 107/98 (the "*Regulation*"), forest development plans (and range use plans, which are not relevant to this appeal) are the only operational plans that must be submitted for public review and comment before they may be approved by a district

manager. District managers have discretion to determine whether lower level operational plans may be reviewed by the public prior to approval.

The *Code* and the *Regulation* set out the scope, general content, and information requirements for forest development plans. Under section 14(1) of the *Regulation*, a "watershed assessment" may have to be prepared, in certain circumstances, before a forest development plan is made available for public review. Of relevance to this appeal is section 14(1)(c) of the *Regulation*, which states that a watershed assessment must be carried out if a district manager "determines" that it is necessary for a watershed.

A watershed assessment is an assessment of the cumulative impact that proposed forest activities and developments would have on stream flows, suspended sediment, landslide and stream channel stability within the watershed. Forest managers can use the results of a watershed assessment to evaluate the sensitivity of the watershed to future forest developments, and attempt to prevent or mitigate the impacts of activities on the watershed. For coastal areas of British Columbia, including the Queen Charlotte Islands, the *Regulation* requires that watershed assessments must be carried out in accordance with the Coastal Watershed Assessment Procedure Guidebook published by the Ministry of Forests ("MOF"). That guidebook sets out the components of, and process for conducting, a Coastal Watershed Assessment Procedure ("CWAP").

In this case, the parties agree that a CWAP was prepared for the Naden watershed before a draft of that portion of the Plan was submitted for public review. The parties also agree that a CWAP was not prepared for the Tartu watersheds before the draft Plan was submitted to the District Manager or submitted for public review, or before the Plan was approved. Rather, a CWAP for the Tartu watersheds was completed after the Plan had been approved.

On May 20, 1999, the Husby Group submitted the Tartu watershed portion of the draft Plan to the District Manager. The draft Plan included information pertaining to cutblocks in the lower Tartu, outside of the CWAP area, that had previously been approved under an earlier forest development plan, as well as proposing cutblocks in the Upper and Outer Tartu that were subject to approval as part of the draft Plan. On May 29-31 and June 1, 1999, a notice was published advising that the draft Plan was available for public review and comment.

According to section 41(1) of the *Code*, a district manager *must* approve a forest development plan if:

- (a) the plan... was prepared and submitted in accordance with this Act, the regulations and the standards, *and*
- (b) the district manager is satisfied that the plan ... will adequately manage and conserve the forest resources of the area to which it applies.

[emphasis added]

"Forest resources" is defined in section 1 of the *Code* as "resources and values associated with forests and range including, without limitation, timber, wildlife, fisheries, recreation, botanical forest products, forage and biological diversity."

In October and November 1999, the District Manager issued five determinations approving each licence area within the Plan. The Tartu watersheds and Naden watershed portions of the Plan were approved in two determinations dated October 22, 1999. Approval of those portions of the Plan was subject to a condition, stated as follows in the District Manager's determinations:

Section 17(3)(b) of the [*Code*] requires that prior to the submission of an FDP [forest development plan]; the licensee must collect and analysis [sic] data pertaining to terrain, terrain stability and hazards associated with instability. A recent review of terrain stability overview information in the Queen Charlotte Islands Timber Supply Area suggests that the existing overview may not sufficiently reflect terrain conditions. Accordingly, the approval of this FDP is subject to the condition of providing accurate terrain stability information. This information will be provided by submitting either; detailed terrain stability assessment for each timber harvesting and road construction proposal, or by the submission of a report prepared by a qualified registered professional. This information is to be submitted at the time of, or prior to, the submission of the silviculture prescription or road permit.

The proposed cutblocks covered by these portions of the Plan were given either conditional Category A approval, or Category A approval. Under section 20(3) of the *Regulation*, if a terrain stability field assessment is required for a proposed cutblock, the licensee may apply for a cutting permit only if the cutblock is included as a Category A cutblock in an approved forest development plan that includes certain statements about the cutblock's compliance with the terrain stability field assessment.

Letters attached to the determinations provided rationales, and set out more specific comments or requirements pertaining to certain cutblocks.

The Board requested an administrative review of the District Manager's determinations. The issues raised by the Board included whether the District Manager determined that a CWAP should be conducted for the Tartu watersheds before the Plan was submitted for public review, and whether the Plan is consistent with the results of the CWAP that was prepared for the Naden watershed.

In a decision dated November 22, 2000, the majority of a three-person Review Panel confirmed the District Manager's approval of the Plan. One member wrote a dissenting decision with respect to the issue of adequate conservation and management of marbled murrelet habitat.

On December 18, 2000, the Board appealed the approval of the Plan to the Commission.

On June 12, 2001, the Commission received an application from the Council of the Haida Nation for intervenor or party status in the appeal.

On September 7, 2001, the Council of the Haida Nation was granted limited intervenor status in this appeal (*Forest Practices Board v. Government of British Columbia (Husby Group of Companies, Permit Holder)*, Appeal No. 2000-FOR-009(b)) (unreported).

The Council of the Haida Nation later withdrew their participation in the portion of the appeal that is addressed in this decision.

The Board's grounds for appeal that relate to this portion of the appeal may be summarized as follows:

### **Tartu watersheds**

1. The District Manager should not have approved approximately 17 cutblocks in the Tartu watersheds because:
  - Previous district managers had "determined," pursuant to section 14(1)(c) of the *Regulation*, that a watershed assessment (a CWAP) was required for the Tartu watersheds,
  - A CWAP was not conducted prior to the draft Plan being submitted to the District Manager, contrary to section 14(1) of the *Regulation*, which requires a licensee to carry out a watershed assessment *before* it submits a forest development plan, and
  - Consequently, approval of the Tartu watershed cutblocks was contrary to section 41(3) of the *Code*, which forbids approval of a plan that was prepared contrary to the regulations.
2. The Review Panel erred in deciding that previous district managers had not "determined" that the Tartu CWAP was necessary.

### **Naden Watershed**

1. The District Manager erred in approving 2 cutblocks and associated roads in the Naden watershed because:
  - The statement in the draft Plan that the Plan *is consistent with* the results and recommendations of a watershed assessment is an inaccurate and incorrect statement, contrary to section 18(1)(y) of the *Regulation*. Specifically, a substantial portion of the cutblock NAD032 contained in the Plan was situated on Class IV soils, contrary to the CWAP recommendations,
  - There was no explanation for the inconsistency between the Plan and the contents of the recommendations of CWAP,

- Consequently, approval of these cutblocks was contrary to section 41(3) of the *Code*.
2. The Review Panel erred when it decided that the Plan complied with section 18(1)(y) of the *Regulation*.

At the hearing, the Board requested that the Commission set aside the approvals of 17 cutblocks and associated roads in the Tartu watersheds, and 1 of the 2 cutblocks in the Naden watershed:

- Tartu watersheds: cutblocks TAR 030, TAR 031, TAR 032, TAR 040, TAR 041, CAN 030, CAN 033, CAN 034, CAN 035, CAN 036, CAN 055, CAN 056, CAN 057, CAN 058, CAN 059, CAN 060, and CAN 061; and
- Naden watershed: cutblock NAD032.

At the time of the hearing, 4 of the cutblocks in the Tartu watersheds had been logged.

The Government and the Husby Group request that the Commission dismiss the appeal, and confirm the District Manager's approval of the Plan.

## ISSUES

### A. Tartu watersheds:

In order to decide whether the cutblocks in the Tartu watersheds should have been approved as part of the Plan, the Commission must determine the following issues:

1. Whether a district manager made a "determination" under section 14(1)(c) of the *Regulation* that a CWAP was necessary for the Tartu watersheds before the Plan was submitted for review.
2. Whether the District Manager had authority under section 41 of the *Code* to give conditional Category A approval of the cutblocks in the Tartu watersheds.

### B. Naden watershed:

In order to decide whether the Naden watershed cutblock should have been approved as part of the Plan, the Commission must determine the following issues:

1. Whether the Plan, specifically, cutblock NAD032, was *consistent* with the results and recommendations of a watershed assessment (CWAP), in accordance with section 18(1)(y) of the *Regulation*.
2. If not, whether the District Manager had authority under section 41 of the *Code* to give conditional Category A approval for cutblock NAD032.
3. If not, whether setting aside the approval of cutblock NAD032 is appropriate in light of events that occurred after the conditional approval of that cutblock.

## RELEVANT LEGISLATION

### The Code

The following sections of the *Code* were in force when the District Manager approved the Plan, and are relevant to this appeal:

#### Definitions

1 (1) In this Act:

“**determination**” means any act, omission, decision, procedure, levy, order or other determination made under this Act, the regulations or the standards by an official or a senior official; [from Sept 1996 consolidation, repealed March 30, 2001]

#### General planning requirements

17 (1) Before the holder of an agreement under the *Forest Act* or the *Range Act* prepares an operational plan or amendment for submission to the district manager, the holder must carry out the assessments required by the regulations and collect and analyze the data required by the regulations to formulate operational plans, and make the assessments, data and analyses available to the district manager.

(2) Without limiting subsection (1), if required by the regulations and in accordance with the regulations, the holder must do the following:

(a) identify and classify the following:

...

(b) assess watersheds that meet the prescribed requirements to determine the impact of proposed timber harvesting and related forest practices;

...

(3) Without limiting subsection (1), if required by the regulations and in accordance with the regulations, the holder must collect and analyze data respecting the following:

(a) site and soil conditions;

(b) terrain, terrain stability and hazards associated with instability;

...

**Approval of plans by district manager or designated environment official**

- 41** (1) The district manager must approve an operational plan or amendment submitted under this Part if
- (a) the plan or amendment was prepared and submitted in accordance with this Act, the regulations and the standards, and
  - (b) the district manager is satisfied that the plan or amendment will adequately manage and conserve the forest resources of the area to which it applies.
- (2) Before approving a plan or amendment the district manager may require the holder to submit information that the district manager reasonably requires in order to determine if the plan or amendment meets the requirements of subsection (1).
- (3) The district manager may approve an operational plan or amendment only if it meets the requirements of subsection (1).
- ...
- (5) The district manager may make his or her approval of a forest development plan or amendment subject to a condition.

**The Regulation**

The following sections of the *Regulation* were in effect when the District Manager approved the Plan, and are relevant to this appeal:

**Definitions**

- 1** (1) In this regulation:
- “reconnaissance terrain stability map”** means a map produced from aerial photographs, with few or no ground checks, that identifies unstable and potentially unstable terrain;
- “terrain stability field assessment”** means an on-site assessment by a qualified registered professional, of either the potential impact of timber harvesting, or the construction of excavated or bladed trails, on terrain stability, carried out in accordance with procedures set out in the Ministry of Forests’ publication, “Mapping and Assessing Terrain Stability Guidebook,” as amended from time to time;
- “unstable or potentially unstable terrain”** means an area identified on a reconnaissance terrain stability map as an area that has unstable or potentially unstable terrain;

**“watershed assessment”** means an assessment of the cumulative impact that proposed activities and developments would have on stream flows, suspended sediment, landslide and stream channel stability within the watershed;

**Watershed assessments required before review of forest development plans**

- 14** (1) Subject to subsections (3), (4) and (5), before making a forest development plan available for review under section 27, a person must have carried out a watershed assessment within the previous 3 years of the submission date for the following areas under the plan
  - (a) a community watershed
  - (b) a watershed with significant fisheries values or licensed domestic water users and significant sensitivity, as determined by the district manager and a designated environment official
  - (c) a watershed for which the district manager determines an assessment is necessary.
- (2) A watershed assessment under subsection (1) must be carried out in accordance with
  - (a) the Ministry of Forests’ publication titled, “Coastal Watershed Assessment Procedure Guidebook,” as amended from time to time, for areas on the Coast...

**Map and information requirements for all forest development plans**

- 18** (1) A person must ensure that a forest development plan includes the following information for the area under the plan:
  - ...
  - (h) the approximate location of
    - (i) construction of a road, including construction of a bridge or major culvert that is part of the road, if the road is a proposed forest service road or is proposed to be authorized by a road permit;
  - (q) the approximate location of cutblocks proposed to achieve Category A status if the proposed forest development plan is approved;
  - ...
  - (y) a statement

- (i) that the forest development plan is consistent with the results and recommendations of a watershed assessment required under section 14, or
- (ii) if the forest development plan is inconsistent with the results and recommendations of the watershed assessment, that explains the reason for the inconsistency and the reason the person believes it should be approved in spite of the inconsistency.

**Category A cutblocks**

**20** (3) In addition to the requirements of section 19 (1) of the Act, if a terrain stability field assessment is required for a cutblock under sections 16 or 17, the holder of an agreement is eligible to apply for a cutting permit only if the cutblock is included as a Category A cutblock, in a forest development plan given effect or approved, that states that the cutblock is consistent with the assessment's results and recommendations,

...

**Limited protection for cutblocks and roads**

**21** (1) After a cutblock has been included as part of an approved forest development plan as a Category A cutblock, or a road has been included as part of an approved forest development plan, the district manager, or for an area referred to in section 41(6) of the Act the district manager and the designated environment official, may refuse to approve a subsequently proposed forest development plan on the grounds that the part of the subsequently proposed forest development plan that is the cutblock or road fails to meet the requirements of sections 10(1)(d) and 41 of the Act, only if any of the following occurs in the period referred to in subsection (3):

...

- (e) a watershed assessment is completed for an area under the forest development plan, and
- (f) the assessment reveals a condition that negatively affects the watershed,
- (g) either there was no previous watershed assessment, or there was a previous watershed assessment, but it did not reveal the condition, and
- (h) the recommendations in the current assessment specify that the cutblock should not be harvested as planned or the road should not be located, constructed, modified or deactivated as planned;

...

- (3) The period referred to in subsection (1) is the period from 4 months before the forest development plan that is in effect was submitted for approval until 4 months before the proposed forest development plan is submitted for approval.

## EVIDENCE

### A. Tartu Watersheds

It may be of assistance to first reiterate the Board's concerns in relation to this watershed. It argues that the District Manager and the review Panel erred in approving the cutblocks in the Tartu watersheds because:

- Previous district managers had "determined," pursuant to section 14(1)(c) of the *Regulation*, that a CWAP was required for the Tartu watersheds,
- A CWAP was not conducted prior to the draft Plan being submitted to the District Manager, contrary to section 14(1) of the *Regulation*, which requires a licensee to carry out a CWAP *before* it submits a forest development plan,
- Consequently, approval of the Tartu watershed cutblocks was contrary to section 41(3) of the *Code*, which forbids approval of a plan that was prepared contrary to the regulations, and

#### *Approval of the Plan*

The determination approving the portion of the Plan that covers the cutblocks proposed in the Tartu watersheds states that the approval is subject to the licensee providing "accurate terrain stability information," but does not refer to CWAPs. However, in an attached letter titled "General and Specific Cutblock Comments," the District Manager made the following reference to CWAPs:

#### Coastal Watershed and Assessment Procedures

By letter of December 16, 1997, you were advised that the Upper Tartu Creek and Outer Tartu Creek were identified as priority areas requiring a Coastal Watershed Assessment Procedure (CWAP). You were also requested to provide a timetable within which this CWAP would be completed.

At this point in time the CWAP study for this area has yet to commence. Be advised, therefore, that the proposed blocks within these drainages that are not under cutting permit will not receive silviculture prescription approval until such time that the CWAP is completed.

The General and Specific Cutblock Comments letter addresses 22 cutblocks that were proposed for the Tartu watersheds. Three of those cutblocks are given Category A approval, with a requirement that specified additional information be

provided. The specific comments for the other 19 cutblocks set forth a CWAP condition, as follows:

Category A Approval will be granted once the following(s) have been satisfied: ... This block will not receive Category A status until such time as the CWAP is completed for this watershed, which is a condition. As per section 41(5) of the FPC Act, Category A approval will be granted once the condition or conditions have been fulfilled.

In addition, the "Rationale" appended to the approval sets forth the following:

#### FDP Requirements

A CWAP for the Upper and Outer Tartu Creeks was required in a letter dated December 16, 1997, from the District Manager. This letter outlined that over the next year and a half the licensee was to undertake the preparations for conducting the CWAP. Plans have been started, however, to date no schedule for the CWAP has been prepared. The December 16, 1997 letter did not specifically require the licensee to carry out a CWAP by a certain date. The letter did indicate that a schedule for the completion for a CWAP was to be submitted to the District Manager within eighteen months. The content of the letter therefore requires a CWAP for the Upper and Outer Tartu watersheds. However, as no definite date for the completion of the CWAP has been set, Section 14 of the Regulation cannot be applied. Instead I have determined that Section 41(5) of the Code is the most appropriate approval mechanism. Section 41(5) of the Code allows the approval of the Plan subject to a condition. This condition is the completion of the CWAP for the Upper and Outer Tartu watersheds and is within the scheme and scope of the Code, which meets the test of Section 41(3) of the Code. Consequently, the cutblocks within these watersheds will not be Category A approved until the CWAP has been completed and the CWAP demonstrates that the cutblocks will adequately manage and conserve the forest resources within these watersheds. The remaining cutblocks (those not within the Upper and Outer Tartu watersheds) meet all the requirements of the FPC Act and Regulations and as per Section 41 of the FPC Act must be approved.

The attached Rationale letter also states that comments were received from Alan Cowan, an employee of the federal Department of Fisheries and Oceans ("DFO") in the Queen Charlotte Islands, that he "required sufficient advance notice for the proposed roundtable CWAP for the Tartu Inlet operating area" as well as making several specific comments relating to cutblock access and bridges. It also states that no comments were received from Alvin Cober, a Forest Ecosystem Specialist with the Ministry of Water, Land and Air Protection ("WLAP"), or the public.

The District Manager testified that neither DFO nor WLAP made comments with respect to a CWAP not having been completed.

Mr. Cober testified as a witness for the Board. He explained that the Skeena Region of WLAP is devoting its limited resources to CWAP processes and Identified Wildlife Species Management processes, and that MOF is aware that regional WLAP staff are no longer conducting reviews of forest development plans. He also indicated that he understood that a CWAP would be done, based on e-mail correspondence with Cam Paterson of MOF with respect to the Plan and the CWAP. The original May 27, 1999 e-mail message from MOF states:

Dan Biggs [then the MOF's Timber Officer in the Queen Charlotte Islands] is not sure how significant the fisheries values are in Tartu and if they are applicable to section 14 of the OPR [Regulation], even thou [sic] the district sent out a letter advising Sitkana to complete a CWAP. ... It seems to me that we can't approved [sic] these blocks or FDP [forest development plan] for that matter until they complete the CWAP. There a lot [sic] of blocks proposed over the next couple of years.

Mr. Cober's May 27, 1999 reply refers to significant runs of pink salmon and also the presence of chum, coho, steelhead and other fish species. He then describes the process by which he and Jack Hamey of MOF had "arrived at the information that went into the All-licensee letter that the DM signed off on Feb. 1/96 which listed the watersheds requiring CWAPs and the priorities for the completion."

Mr. Cowan also testified for the Board. He explained that DFO did not comment on the CWAP because the Tartu watersheds had previously been identified as a priority, and that it is a matter of provincial policy whether a CWAP is completed before a forest development plan. Consequently, there is not much he can do if there is no CWAP, apart from withholding his comments. He stated that, in a June 29, 1999 meeting with Husby engineers, he discussed the CWAP and got a commitment on paper that a CWAP would be scheduled, that data gathering for the CWAP report would commence in September, and that a roundtable to review the CWAP would be struck.

On January 15, 2000, the Husby Group submitted an amendment to the portions of the Plan covering the Tartu watersheds. The amendment contains revisions of the previously proposed cutblocks "based on the completed CWAP for Tartu Inlet, which is submitted to the CWAP Roundtable concurrent with this application." The amendment proposes 14 cutblocks in the Outer Tartu watershed (Canyon Creek) and 27 cutblocks in the Upper Tartu watershed, to be logged between 2000 and 2002.

The Commission was informed that a CWAP was submitted for the Tartu watersheds in December 1999. The District Manager explained that a revised CWAP was done in April 2000, which was submitted to the CWAP roundtable, because a number of cutblocks had been removed from the Plan and replaced by others. The second CWAP was necessary to address the replacement cutblocks. The CWAP process was completed in January 2001.

Bob Brash, Vice-President of Husby Forest Products Ltd., and a former district manager in the Queen Charlotte Islands Forest District, gave evidence on behalf of

the Husby Group. Mr. Brash testified that the cutblock replacements did not result from environmental concerns; rather, they were for fiscal and operational reasons, and the CWAP resulted in changes to only 1 to 2 hectares in several cutblocks. Mr. Brash also indicated that a number of cutblocks had been changed from heli-clearcut logging to heli-selection logging, which would have less environmental impact, due to concerns that the proposed rate of cut would affect hydrology. Furthermore, none of the harvesting done in 2000 or 2001 affected the CWAP area.

#### *The "Determination" Evidence*

A great deal of additional evidence was presented to the Commission with respect to whether a district manager had determined that a CWAP was necessary for the Tartu watersheds before the Plan was submitted. The evidence presented to the Commission included the following:

#### **The November 27, 1995 letter**

The Board submitted a letter dated November 27, 1995, to all major licensees from Mr. Brash, then the district manager. The letter was sent in anticipation of an upcoming "Summit Meeting" to discuss the process for forest development planning in the District. It included an attached list of the "District CWAP Schedule of Priorities" which either listed specific due dates or indicated that a CWAP was "to be scheduled" for all District watersheds. The Outer Tartu and Upper Tartu watersheds are listed as "To Be Scheduled."

#### **The January 18, 1996 letter**

The Board submitted a January 18, 1996 letter from Mr. Brash, then district manager, to the Husby Group, which states that:

Due to the intensity of past and proposed developments in this operating area, Coastal Watershed Assessments (CWAPs) will be required for future development in the Outer and Upper Tartu watershed. To date they have not be [sic] scheduled.

The Board argues that, in this letter, Mr. Brash had clearly determined that a CWAP was required for the Tartu watersheds.

The Government argues that this letter only states that a CWAP is required prior to "future development," and not before submission of the Plan.

#### **The February 1, 1996 letter**

The Board submitted a February 1, 1996 letter from then district manager, Mr. Brash, to all Major Licensees, subsequent to December and January Summit Meetings. This letter attaches a "District CWAP Schedule of Priorities" dated January 29, 1996, which is similar to the "District CWAP Schedule of Priorities" attached to the letter dated November 27, 1995. The Outer Tartu and Upper Tartu continue to be listed as "To Be Scheduled."

With respect to the November 1995 and February 1, 1996 letters attaching the respective District CWAP Schedules of Priority, Mr. Cowan testified that he attended the Summit Meetings, and that all of the CWAPs on the list were priority watersheds for CWAPs. He also testified that he had placed stars beside the watersheds where CWAPs would be done first, since those were the areas that licensees indicated they would be operating in. Approximately 20 of the 52 listed watersheds are starred. Mr. Cowan stated that he had put a star beside the Upper Tartu watershed but not the Outer Tartu watershed.

Mr. Cowan stated that one of the reasons for the Summit Meetings was that MOF was attempting to coordinate the submission of forest development plans from major licensees, so that MOF and referring agencies could schedule reviews throughout the year. It was his understanding that the CWAP list had been put together by MOF and WLAP, and that MOF had placed dates beside some of the CWAPs relating to forest development plan submission dates. He testified that the "to be scheduled" status did not indicate that those watersheds were lower priority than ones with specific dates. It just indicated that the scheduling for the forest development plan submission had not taken place. He also indicated that the priority list had been reviewed at the meetings. By consensus, the list had been reduced to the "bare ones needed;" that is, the starred ones where licensees were currently or planning to be operating.

Mr. Cober supported Mr. Cowan's testimony with respect to the Summit Meetings and District CWAP Schedule of Priorities. He stated that he and a MOF staff person had put together the priority list, and that the watersheds were ones that they had determined were priorities. It was his understanding that all of the watersheds on the list would require CWAPs prior to a licensee operating in that area. He said that the list was presented to the licensees at the Summit Meeting in December 1995, and was accepted by the licensees. He noted that the first edition of the CWAP Guidebook had been issued in April 1995, and, at the time, CWAPs were being done for areas where the companies were conducting ongoing operations. He indicated that the dates related to the submission dates for plans covering current operating areas, and did not indicate that those areas were higher priorities. He characterized the "to be scheduled" watersheds as those with "future priority" rather than "lower priority", based on when a licensee was planning on submitting a forest development plan for an area, which would trigger the CWAP process. He could not recall any discussion that any of the areas listed were not priorities, only discussion relating to the licensees' capacity to complete CWAPs where they were currently operating.

Mr. Brash testified that the number of CWAPs on the list was overly ambitious, because MOF lacked the staff to review them in the allocated period. He explained that the *Code* was new at that time, resulting in staff operating in a "*Code-plus*" environment, and that the number of CWAPs being proposed exceeded the capability of licensees and MOF to deal with. He does not recall anyone saying that CWAPs had to be done for the watersheds on the Priority List before the next forest development plan. He pointed out that the Outer Tartu watershed was not starred

on Mr. Cowan's list, and stated that he could not recall the Upper or Outer Tartu watersheds ever having been a high priority watershed for a CWAP.

The Government submitted that the November 1995 and the February 1996 letters were not determination letters. Rather, they were broad planning documents that addressed a process for future discussions in the context of the newly enacted *Code*.

### **The December 16, 1997 letter**

The Board submitted a letter dated December 16, 1997, from then district manager, Cindy Stern-Krishka, to the Husby Group stating that this watershed "has been identified as a priority area requiring a Coastal Watershed Assessment Procedure." It further states that:

Over the next eighteen months, please indicate your anticipated completion dates for this CWAP, so we may initiate the first phase of roundtable discussions.

The District Manager stated that the December 16, 1997 letter was brought to his attention after submission of the Plan. He also stated that, after reviewing the letter, he decided it had not been a determination since it was not worded strongly enough to require that a CWAP be submitted prior to the Plan. The District Manager interpreted the letter to mean that a CWAP schedule had to be submitted within 18 months, not that a CWAP had to be completed within that time. He also pointed out that an April 17, 2001 e-mail from Ms. Stern-Krishka explained that her December 1997 letter did not state or intend for the CWAP to be completed before the next forest development plan, and would have stated so if that was her intention.

The Board noted that on October 5, 1999, the Husby Group provided the requested schedule for completion of the CWAP, which missed the 18-month deadline by several months.

The District Manager acknowledged that the Husby Group's consultants had told him they had forgotten the 18-month requirement for setting up the Tartu watersheds CWAP. This would have occurred in the summer of 1999, after submission of the draft Plan. He also testified that when he told staff they needed to be more diligent, they said they had forgotten the 18-month deadline.

Mr. Brash testified that he had remembered the requirement, but had set priorities in light of resources and other deadlines, and the CWAP for the Tartu watersheds had no deadline. He also indicated that he would have heard from MOF if it was important.

### **The letters to MacMillan Bloedel Limited**

The Board also provided 2 letters dated December 16, 1997 and October 9, 1998 to MacMillan Bloedel Limited, another licensee operating in the Queen Charlotte

Islands, from Ms. Stern-Krishka. The Board submits that those letters support its argument that a district manager had determined that the Husby Group must complete a CWAP prior to submission of the Plan. Specifically, the Board submits that those letters confirm that MOF intended for licensees to complete CWAPs during the "18 months" referred to in the December 16, 1997 letter to the Husby Group and MacMillan Bloedel, and not just commence CWAPs or provide a schedule during that time.

The Board submitted that the December 16, 1997 letter to MacMillan Bloedel is virtually identical to the one addressed to the Husby Group on the same date. It also states:

Over the next eighteen months, please indicate your anticipated completion dates, so that we may initiate the first phase of roundtable discussions...

The October 9, 1998 letter states that:

As identified in our letter of December 16, 1997, Canyon Creek, Drill Creek and Ghost Creek are priority drainages for CWAPs. It is expected that these will be completed in time for your next FDP submission.

#### **The May 27, 1999 e-mails by Mr. Patterson of MOF and Mr. Cober of WLAP**

Mr. Patterson's e-mail, mentioned above, states that the "district sent out a letter advising Sitkana to complete a CWAP" and also states that "It seems to me that we can't approved [sic] these blocks or FDP [forest development plan] for that matter until they complete the CWAP." Mr. Cober's May 27 reply to MOF describes the process by which he and Jack Hamey of MOF had "arrived at the information that went into the All-licensee letter that the DM signed off on Feb. 1/96 which listed the watersheds requiring CWAPs and the priorities for the completion."

#### **The June 14, 1999 letter**

The Board provided a copy of an unsigned letter dated June 14, 1999, from Dan Biggs of MOF to the Husby Group. Among other things, the letter requires an addendum to the Plan outlining the schedule for completion of a CWAP covering the Tartu watersheds, as part of the submission of supplemental information after the 60-day review period.

However, Mr. Biggs testified that the June 14, 1999 letter was an unsigned draft, and that he could not find a record of it having been sent. He did not recall writing the letter, but could not deny that he wrote it. He surmised, based on the header information, that it may have been an unsent draft, written by another MOF staff person.

Given that the letter was not signed, there is no record of it having been sent, and Mr. Biggs does not recall writing the letter, the Commission gives this letter no weight as evidence that a determination had been made.

## DISCUSSION AND ANALYSIS

### A. Tartu watersheds

#### 1. Whether a district manager made a “determination” under section 14(1)(c) of the *Regulation* that a CWAP was necessary for the Tartu watersheds before the Plan was submitted for review.

The parties’ general positions on this issue are as follows:

- The Board submits that the District Manager, and previous district managers, determined pursuant to section 14(1)(c) of the *Regulation* that a CWAP was necessary for the Tartu watersheds before submitting the Plan for review.
- The Government submits that a determination, within the meaning of section 14, was not made, and therefore, it was not necessary to submit a CWAP for the Tartu watersheds before submitting the Plan.
- The Husby Group submits that no CWAP was required prior to submission of the Plan.

#### *Submissions of the Board*

Specifically, the Board submits that section 14(1)(c) of the *Regulation* clearly states that, once a district manager has determined that a CWAP is necessary, the licensee is required by law to carry out the CWAP before the review and comment period for the applicable forest development plan. It submits that, on a plain reading, section 14(1)(c) of the *Regulation* provides that “before making a forest development plan available for review under section 27, a person must have carried out a watershed assessment” for “a watershed for which the district manager determines an assessment is necessary.”

The Board submits that a district manager had determined that a CWAP was necessary for the Tartu watersheds long before the Plan was prepared. In support of this submission, the Board refers to the January 18, 1996 letter, the letters attaching the CWAP Schedule of Priorities, and the December 16, 1997 letter. The Board submits that each of those letters required that a CWAP be conducted, and therefore show that a determination was made under section 14(1)(c) of the *Regulation*.

The Board also argues that the October 22, 1999 General and Specific Cutblock Comments letter, which accompanied the approval of the Plan, acknowledged that a CWAP had been required. This letter states that:

By letter of December 16, 1997, you were advised that the Upper Tartu Creek and Outer Tartu Creek were identified as priority areas requiring a Coastal Watershed Assessment Procedure (CWAP).

The Board submits that the word “necessary,” as used in section 14(1)(c), has the same meaning as “required,” as used in various letters. The Board maintains that a determination that a CWAP is “required” is no different from a determination that a

CWAP is "necessary." Although "necessary" is not defined in the *Code*, the Board submits that dictionaries define it as meaning "required." The Board also notes that the definition of "determination" in the *Code* is broad, and may include any "act" or "decision."

In support of its interpretation of section 14(1)(c), the Board referred to the following portion of the MOF publication titled, *Coastal Watershed Assessment Procedure Guidebook (CWAP) Interior Watershed Assessment Procedure Guidebook (IWAP)*, 2<sup>nd</sup> ed., Version 2.1, April 1999 (the "CWAP Guidebook"):

The prescribing forester prepares the forest development plan. In doing so, he or she must consider both the hydrologist's recommendations and the comments received from the [CWAP] Watershed Advisory Committee.

The Board also submits that compliance with the CWAP Guidebook is a legal requirement, since section 14(2) of the *Regulation* requires watershed assessments for areas on the coast to be carried out "in accordance with" the CWAP Guidebook.

#### *Submissions of the Government*

The Government argues that a district manager had not determined, within the meaning of section 14(1)(c), that a watershed assessment was necessary for the Tartu watersheds. It submits that the CWAP Schedule of Priorities and the letters cited by the Board do not indicate that a CWAP must be completed by a specific date. Rather, they notified the licensee that a CWAP would be required in the future.

The Government submits that the words "determines an assessment is necessary" in clause (c) should be interpreted in light of the phrase "before making a forest development plan available for public review" in subsection (1). The Government submits that a district manager must determine that a watershed assessment is necessary "before the forest development plan is made available for review", which did not occur in this case.

Based on this interpretation, the Government submits that, since the CWAP Schedule of Priorities and the letters referred to by the Board did not specifically state that a CWAP was necessary *before* making a forest development plan available for review, or specify a date on which a CWAP was to have been completed, a section 14 determination had not been made. It also submits that even the January 1996 letter only required that a CWAP be done before future development, and not before review of the Plan.

The Government also argues that a district manager did not determine that a CWAP was "necessary" within the meaning of section 14(1)(c), because the letters submitted by the Board indicate that a CWAP was "required" but not "necessary" in the future.

Additionally, the Government submits that the letters cited by the Board must be viewed in light of the statutory provisions in effect at the time. In support of these submissions, the District Manager testified that the letters issued by former district

managers (Ms. Stern-Krishka and Mr. Brash) were written in a different statutory context. He stated that, before June 1998, there was no statutory requirement to complete a CWAP prior to submitting a forest development plan for approval. Therefore, if one of their letters had intended a CWAP to be required before the Plan was submitted, it would have stated that requirement. In this regard, the Government refers to section 32(1)(c) of the *Operational Planning Regulation*, B.C. Reg. 174/95:

### **Watershed assessment**

**32** (1) For the purposes of section 17(2)(b) of the Act, a person proposing to carry out timber harvesting... under a forest development plan in the following areas must carry out a watershed assessment to the satisfaction of the district manager:

...

(c) a watershed for which the district manager determines an assessment is necessary.

The Government also argues that determinations made by a district manager must comply with administrative fairness. Therefore, a determination that a watershed assessment is necessary should contain more than an indication that an area has been identified as requiring a CWAP at some future time. The District Manager testified that an important reason for his decision to place conditions on the cutblocks, rather than require a CWAP prior to approval of the Plan, was his view that the licensee should, as a matter of administrative fairness, be given adequate and fair notice of the need to submit a CWAP. The District Manager testified that, in his field review of the Tartu watersheds, he realized that the watersheds really did need a CWAP, sooner rather than later. Since he felt a determination under section 14 of the *Regulation* had not been made previously, he imposed a condition under section 41(5) of the *Code* that a CWAP had to be conducted prior to approval of silviculture prescriptions for the cutblocks.

Finally, the Government submits that, while the *Code* may refer to the CWAP Guidebook, that Guidebook provides only policy guidance and is not binding.

### *Submissions of the Husby Group*

The Husby Group argues that the District Manager reasonably concluded that the completion of a CWAP was not necessary at the time the Plan was submitted. The Husby Group submits that such a decision is clearly within the District Manager's discretion under the *Regulation*.

Mr. Brash testified that forest development plans are continually updated over the 5-year planning cycle, and that the question is only when CWAPs, which are required to be updated every 3 years, are inserted into that process.

*Rebuttal submissions of the Board*

In reply, the Board submits that there was no change in the meaning of the relevant statutory provisions after June 1998. The Board submits that when sections 32(1)(c) and 15(6)(g) of the previous *Regulation* are read together, the intent was clear that watershed assessments must be prepared before submitting a forest development plan. The Board refers to section 15(6)(g) of the *Regulation*, as it was before June 1998:

**15** (6) A person must ensure that a forest development plan sets out, for the area under the plan, the results of any

...

(g) watershed assessment that is required to be carried out under section 32

Further, the Board submits that, as a matter of common sense, a determination that a CWAP is "required" is no different from a determination that a CWAP is "necessary." The Board maintains that, based on the interpretation suggested by the Government, a determination would have to contain the statement that "the assessment is necessary before making a forest development plan available for review." The Board maintains that such a statement is unnecessary because the legislation already contains that requirement.

In addition, the Board submits that section 14 of the *Regulation* does not require a district manager to set a specific deadline when he or she determines that a CWAP is necessary. The Board submits that the timing of a CWAP is a matter more within the purview of a licensee than MOF, as licensees decide when to conduct operations in a given watershed. MOF may not be aware of a licensee's intention to operate in a specific watershed until a forest development plan is submitted.

Finally, the Board submits that administrative fairness does not require a determination to specify a deadline for completing a CWAP.

*Commission findings*

The Commission agrees with the parties that a watershed assessment should ideally be prepared before a forest development plan is submitted. The Commission notes that this may optimize the licensee's ability to take into account potential hydrological issues when planning harvesting and road building operations, and may improve the public's ability to undertake an informed review of the plan. However, the issue is not whether a CWAP **should have** been done before the Plan was submitted. The requirement to carry out a watershed assessment under section 14(1)(c) of the *Regulation* (and section 32(1)(c) of the previous *Regulation*) is only triggered when a "determination" is made by a district manager. Therefore, the issue is whether a "determination" within the meaning of section 14(1)(c) of the *Regulation* was made before the Plan was submitted.

In deciding this issue, the Commission considered the meaning of “determination” within its statutory context, and whether any of the letters cited by the Board establish, on a balance of probabilities, that such a determination was made before the Plan was submitted. An overlapping consideration is whether any of those letters provided notice that a determination had been made.

“Determination” is broadly defined in the *Code*. For the purposes of this appeal, further guidance on the meaning of “determination” is provided by the context of that word within section 14 of the *Regulation*. Use of the words “determines an assessment **is necessary**” in clause (c) suggests that the determination involves deciding that conducting a watershed assessment in a particular watershed is a **necessity**. In the Commission’s view, a determination that an assessment is a necessity for a particular watershed is different from a determination that a watershed is a **priority** for conducting an assessment.

It is also instructive to consider the nature and effects of a determination under section 14(1)(c) of the *Regulation*. Such a determination is a discretionary administrative decision made in response to a specific factual situation. A watershed assessment is a technical procedure focused on a particular watershed. “Watershed assessment” has a specific technical definition in section 1(1) of the *Regulation*. It is reasonable to presume that, in making such a determination, a district manager formulates an opinion, as a professional forester and manager of public forests, that there may be hydrological risks associated with proposed developments in a particular watershed, and that the risks to timber and non-timber values in the watershed warrant an “assessment of the cumulative impact that proposed developments and activities would have on stream flows, suspended sediment, landslide and stream channel stability within the watershed.” Such a determination is more specific and technical in nature than a decision that a particular watershed is a priority for an assessment, relative to other watersheds in a forest district.

A determination under section 14(1)(c) triggers certain obligations for a licensee. Specifically, it requires a licensee to carry out a review of existing information about the watershed, conduct field assessments, and prepare a comprehensive report that is usually reviewed by an advisory group consisting of persons with technical expertise. The assessment is conducted at the licensee’s expense, by a hydrologist in consultation with professional foresters. The evidence indicates that a CWAP process may take 6 months to a year, although the initial hydrologist’s report can usually be prepared in 2 to 3 months. Given that a licensee must commit resources and time to this process, a district manager should be clear in indicating that she or he has made a determination that obligates the licensee to undertake the procedure.

As a discretionary administrative decision, the duty of fairness applies to determinations under section 14(1)(c). The Commission notes that the duty of fairness is flexible, and the requirements of fairness in particular circumstances can be assessed by considering certain factors. As stated by L’Heureux-Dubé J. for the majority of the Supreme Court of Canada in *Baker v. Canada (Minister of*

*Citizenship and Immigration*), [1999] S.C.J. No. 39 (hereinafter *Baker*), at paragraph 22:

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

The Court provided a non-exhaustive list of factors for determining what procedural protections may be required under the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself.

In addition to the factors already considered by the Commission, the Commission notes that a determination under section 14(1)(c) is not quasi-judicial in nature, and does not affect a licensee's timber harvesting rights. Those considerations would suggest that minimal procedural protections are required.

However, as noted above, such a determination does impose requirements that may affect a licensee's financial interests or timber harvesting plans. In addition, there is no statutory right to an administrative review or an appeal to the Commission, of a determination under section 14(1)(c) of the *Regulation*. Sections 127 and 128 of the *Code* list the types of determinations for which a person subject to a determination, or the Board, may request a review. Under section 130(3) of the *Code*, no determination may be appealed unless the determination has first been reviewed. Neither section 127 nor 128 provides that a determination under the *Regulation* may be subject to a review. In that regard, the Commission notes the following passage from *Baker*:

Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted...

This suggests that a licensee subject to a determination under section 14(1)(c) should be afforded the minimal procedural protections for a fair and open procedure. The Commission finds that, at a minimum, the duty of fairness requires that a district manager give the licensee clear notice that he or she has made such a determination.

Neither the *Code* nor the *Regulation* give express guidance concerning the contents of a notice of determination under section 14(1)(c). Section 164(1)(b) of the *Code* simply addresses the means of “giving” a “notice or other document that the government... is required or permitted to give to a person” under the *Code* or the regulations. In contrast, section 117(5) of the *Code* requires that a senior official who levies a penalty under sections 117, 118 (4) or (5,) or 119 must give notice of that determination by setting out specific information.

However, in light of the nature and effects of a determination under section 14(1)(c), the Commission finds that such a notice should clearly indicate to the licensee that a district manager has formed a professional opinion that there may be hydrological risks associated with proposed developments in a particular watershed, and that the risks to timber and non-timber values in the watershed warrant obligating the licensee to carry out a watershed assessment in that watershed. The notice should leave no doubt that a determination has been made under section 14(1)(c). For example, the notice may state that “a determination has been made under section 14(1)(c) of the *Regulation* with respect to the Upper Tartu watershed.”

In this case, the Commission finds that none of the letters cited establish, on a balance of probabilities, that a district manager (incumbent or past) “determined,” before the Plan was submitted, that it was necessary for the licensee to carry out a CWAP in the Tartu watersheds. The letters indicate that the Tartu watersheds were considered “priority” watersheds in relation to others in the District, and that a determination that a CWAP was necessary for the Tartu watersheds **would** be made in the future. However, the letters do not provide clear notice that a determination **had** been made under section 14(1)(c) of the *Regulation*.

In particular, the Commission finds that the letters dated November 27, 1995, and February 1, 1996, referring to the District CWAP Schedule of Priorities address broad planning issues in the District and a process for future discussions. Those letters were written in the context of the *Code* being relatively new legislation. At that time, the licensees and MOF were trying to set priorities for completing the many forest development plans that were required as a result of the *Code*. Those letters do not indicate that a determination had been made under section 14(1)(c) concerning the Tartu watersheds.

The letter dated December 16, 1997, from Ms. Stern-Krishka requests that the licensee indicate within 18 months its “anticipated completion dates” for a CWAP in the Tartu watersheds. The Commission finds that this letter indicates that priorities for CWAPs had been established within the District, and that the District Manager was planning to make a determination under section 14(1)(c) concerning the Tartu watersheds. However, that letter did not indicate that such a determination had been made. Ms. Stern-Krishka’s April 17, 2001 email confirms that her intent was “to identify that the Tartu was a priority watershed to begin a CWAP... if I had intended to require the CWAP to be completed prior to the next FDP submission, I would have stated that clearly as an expectation.”

In summary, the Commission finds that the letters cited by the Board provide insufficient evidence that a district manager had formed the opinion that the hydrological risks associated with proposed developments in the Tartu watersheds warranted obligating the licensee to actually carry out a watershed assessment in the Tartu watersheds. The letters simply indicate that the Tartu watersheds were considered priorities for CWAPs relative to other watersheds in the District, and that the licensee should anticipate that a determination would be made sometime in the next several months.

For all of these reasons, the Commission finds that a district manager did not determine, before the Plan was submitted, that a CWAP was necessary for the Tartu watersheds pursuant to section 14(1)(c) of the *Regulation*.

The next question is whether the conditional approval of the cutblocks in the Tartu watersheds was sufficient to satisfy the requirements of section 41 of the *Code*.

**2. Whether the District Manager had authority under section 41 of the Code to give conditional Category A approval of the cutblocks in the Tartu watersheds.**

The Board submits that once a determination has been made that a CWAP is necessary, a licensee is required by law to carry out the CWAP before the relevant forest development plan is submitted for review. The Board further submits that since the licensee breached section 14 of the *Regulation* by failing to submit a CWAP before the Plan was submitted for review, the Plan automatically fails to meet the requirement of section 41(1) of the *Code* that the Plan be prepared "in accordance with the regulations." Under section 41(3) of the *Code*, a plan may only be approved if it meets the requirements of section 41(1). The Board maintains that since section 41(3) forbids the approval of the Tartu watersheds portion of the Plan, this section forbids the approval of the cutblocks in the Tartu watersheds. Therefore, according to the Board, the District Manager had no authority to issue a conditional approval, and should have rejected the cutblocks until the CWAP was completed.

The Board also submits that the District Manager's conditional approval of the Tartu cutblocks was contrary to MOF policy. The Board refers to the following statement from the MOF document titled, "Administration of Forest Operational Plans" dated January 20, 1999:

With respect to approval subject to a condition, the condition should not be something that brings the operational plan up to satisfying the requirements of section 41(1). If the condition is a red light indicator, then the plan really does not meet section 41(1) and should not be approved. Section 41(3) states that the first thing you do is approve the plan only if it meets the requirements of section 41.

The Board submits that the wording of the condition in the District Manager's approval of the Tartu cutblocks does not clearly require that the recommendations in the CWAP report, once finalized, must be followed. Instead, it only requires that a CWAP be conducted before the cutblocks will be given Category A status, or

before submitting a silviculture prescription. The October 22, 1999 letters attached to the Plan approval contained the following:

- The comment letter set forth the specific comment for each cutblock that *"This block will not receive Category A status until such time as the CWAP is completed for this watershed, which is a condition."*
- As a general comment, it stated *"that the proposed blocks within these drainages that are not under cutting permit will not receive silviculture prescription approval until such time that the CWAP is completed."*
- The accompanying Rationale letter provided the further explanation that: *"Consequently, the cutblocks within these watersheds will not be Category A approved until the CWAP has been completed and the CWAP demonstrates that the cutblocks will adequately manage and conserve the forest resources within these watersheds."*

The Board also argues that placing the condition on the cutblocks was contrary to the principles of sound planning, and defeated the purpose of the watershed assessment requirement to identify issues in the watershed and to plan around them – not add these later as a postscript. The Board submits that a forest development plan that determines where road and blocks will go before an assessment is done risks the wasteful management of both ecological resources and timber. The Board submits that, based on the testimony of Mr. Brash, road permits appear to have been issued for mainline roads before the CWAP was done, and that a number of cutblocks needed to be modified after the CWAP was done, even if only 1 or 2 hectares were involved.

Furthermore, the Board argues that rejection of the Plan until the CWAP was complete would have avoided the situation where some of the approved Tartu development is not consistent with the final CWAP that was completed after the Plan was approved, a situation that the Board says still exists today. The Board submitted that not requiring a CWAP prior to submitting a forest development plan may result in a reluctance to modify a previously developed and engineered plan, and may deny the public and agencies an opportunity to consider information contained in a CWAP during their review of a forest development plan.

The Government and the Husby Group submit that the Tartu watersheds were effectively protected when the District Manager made his approval of the Plan subject to the condition that the cutblocks in the Tartu watersheds "will not be Category A approved until the CWAP has been completed."

The District Manager testified that, rather than reject the Plan, he imposed a condition that he felt would serve both to protect the resource and allow the Plan to proceed. He also stated that he did not believe his actions were a precedent for circumventing the regulations, but rather were based on the situation.

The Government further argues that the condition had the same effect as requiring a CWAP prior to review of the Plan. The condition did not authorize the cutblocks to be harvested until after a CWAP had been completed, and, therefore, the approval

adequately dealt with the conservation and management of forest resources. The Government argues that the practical effect of the condition was that, if the proposed cutblocks did not conform to the CWAP recommendations, those cutblocks would be removed from the Plan and remitted to Category I (i.e. "for informational purposes only") under section 19 of the *Regulation*.

The Government also submits that by virtue of the District Manager's residual authority under section 21(1)(e) of the *Regulation*, Category A cutblocks may not be harvested in the event that a watershed assessment subsequently indicates that a cutblock or road would negatively affect the watershed.

The District Manager testified that the intent of the condition was that the cutblocks would not receive Category A status unless they were consistent with the CWAP, in accordance with his authority under section 21(1)(e).

The Husby Group submits that this is largely a moot issue, and that the effect of placing a condition on the Plan had the same effect as requiring a CWAP prior to approval of the Plan.

Mr. Brash stated that no cutblocks would be given silviculture prescription approval before the CWAP was in place, and that a second CWAP, based on an alternate layout, has now been completed. He stated that the Husby Group will consider changing a cutblock even it has already been approved. Mr. Brash also testified that a completed forest development plan will always have issues to resolve at the operational stage. He submitted that a pragmatic approach was needed at the time, in order to keep jobs and revenue flowing due to the tight window of time available for harvesting in the Tartu watersheds.

#### *Commission findings*

The Commission agrees with the Board that a district manager has no authority to approve a forest development plan that does not meet the requirements of section 41(3) and 41(1) of the *Code*. Section 41 of the *Code* contains mandatory provisions for approving and rejecting forest development plans. It requires a district manager to approve a plan if it was "prepared and submitted in accordance with" the *Code* and the regulations. It also requires a district manager to be "satisfied that the plan or amendment will adequately manage and conserve the forest resources of the area to which it applies." Section 41(3) specifies that a district manager "may approve an operational plan or amendment only if it meets the requirements of subsection (1)." Consequently, if the Plan was not prepared and submitted in accordance with the *Regulation*, and the District Manager nonetheless approved it, there was a breach of section 41(3) of the *Code*.

However, the Commission has found that no determination was made under section 14(1)(c) of the *Regulation* before the Plan was submitted, and, therefore, no breach of section 14(1) occurred. Thus, there is no basis for the Commission to conclude that District Manager failed to comply with section 41(1)(a) of the *Code* as a result of a breach of section 14(1) of the *Regulation*.

With respect to section 41(1)(b) of the *Code*, the Commission accepts that the District Manager took the precaution of imposing a condition of approval that he believed would protect the watershed. Further, the District Manager testified that he realized, before he approved the Plan, that a CWAP was necessary for the Tartu watersheds "sooner rather than later." It was fully within the District Manager's authority to refuse to approve the Tartu cutblocks until such time as the CWAP was completed.

The Commission also notes that the Plan was approved in October 1999, without the benefit of a CWAP hydrology report. The Commission accepts that it is important to sound planning that a watershed assessment be done at an early stage of planning, and that, optimally, the results of a CWAP should be considered by the licensee during its creation of a forest development plan.

However, in this case, by making the CWAP a condition of the authorization, the District Manager has ensured that the forest resources in the Tartu are adequately managed and conserved, while at the same time approving the Plan in accordance with requirements of the *Code*. The Commission also finds that, in the circumstances, the District Manager properly exercised his discretion and ensured that the Plan Holder was accorded an administratively fair process.

Accordingly, the Commission upholds the approval of the cutblocks in the FDP as approved by the District Manager.

## **B. NADEN WATERSHED ISSUES**

### **EVIDENCE**

To put the evidence in context, the Commission will first reiterate the Board's main concerns in relation to the Naden watershed. It maintains that the District Manager and the Review Panel erred in giving conditional approval to cutblock NAD032 in the Plan, and associated roads, because:

- The statement in the draft Plan that the Plan *is consistent with* the results and recommendations of a watershed assessment is an inaccurate and incorrect statement, contrary to section 18(1)(y) of the *Regulation*. Specifically, a substantial portion of the cutblock NAD032 contained in the Plan was situated on Class IV soils, contrary to the CWAP recommendations,
- There was no explanation for the inconsistency between the Plan and the contents of the recommendations of CWAP, contrary to section 18 (1)(y) of the *Regulation*.
- Consequently, approval of these cutblocks was contrary to section 41(3) of the *Code*.

The 1995 *Mapping and Assessing Terrain Stability Guidebook*, and a second edition of that guidebook dated August 1999, define classes of terrain as I, II, III, IV and V. The classification is based upon the likelihood that stability problems will develop (e.g., slumping, landslides) following timber harvesting or road

construction. The classification range is I for the least impact to V for high likelihood.

The most relevant classes for the purposes of this decision are IV and V terrain, which are as follows:

Terrain stability class

- IV Expected to contain areas with a moderate likelihood of landslide initiation following timber harvesting or road construction.
- V Expected to contain areas with a high likelihood of landslide initiation following timber harvesting or road construction.

*The 1997 Terrain Stability Field Assessment*

Coast Forest Management Ltd. ("Coast Forest") prepared a "Post-Layout Terrain Stability Field Assessment" of proposed cutblock NAD032, dated February 28, 1997, (the "1997 Terrain Assessment"). The 1997 Terrain Assessment was conducted by Craig Mount, who was then a Terrain Specialist in Training, and was signed and sealed by Sharon Scott, Terrain Specialist and Review Geoscientist. The 1997 Terrain Assessment was one of the assessments used in preparing both the initial CWAP and a CWAP update for the Naden watershed, and was also referred to in determination letters issued in 1997 and 1998 with respect to previous forest development plans.

The 1997 Terrain Assessment states that it relied upon a 1996 1:5,000 scale topographic map showing the locations of roads and timber falling boundaries, as well as proposed helicopter/conventional harvesting split lines. 1:2,000 scale profiles for deflection lines and road profiles were used. A Terrain Stability and Terrain Classification Report, based on a 1994 1:20,000 map, was also used. The 1997 Terrain Assessment determined that the terrain mapping of NAD032, which showed that it was comprised of Class III and IV slope stability classes, is accurate.

*The CWAP*

An initial CWAP was completed for the Naden watershed in November 1996, and a CWAP update was prepared in 1997. The December 1997 *Naden River Coastal Watershed Assessment Procedure Update* (the "CWAP Update") prepared by Coast Forest incorporates the results of field, channel and road assessments conducted for cutblock NAD032. It summarizes the 1997 Terrain Assessment and a December 1997 update to that assessment by Sharon Scott.

The CWAP Update refers to the definitions of Post Harvest Failure Potential (PHFP) and Sediment Delivery Potential (SDP) set forth in the *Mapping and Assessing Terrain Stability Guidebook* (Ministry of Forests, 1995). PHFP is defined as "the maximum potential for failure under which harvesting is recommended" and uses a 5-class system ranging from Negligible (N), Very Low (VL), Low (L), Moderate (M) to High (H). SDP is defined as indicating "the maximum potential for sediment delivery in a stream network under which harvesting is recommended." It uses a

5-class system ranging from Very Low (VL), Low (L), Moderate (M), High (H) to Very High (VH).

The CWAP Update makes a variety of specific comments and recommendations with respect to the hydrological concerns within cutblock NAD032. The "Assessment Summaries" relating to the Eden Lake South-West and West Sub-Units indicate that there are hydrologic concerns with 3 streams, described as streams 1, 5 and 6, affected by the NAD032 cutblock. The Eden Lake West Sub-Unit Assessment Summary states as follows:

NAD032 is situated on Class III and IV terrain. Stream 1, a steep headwater stream, drains onto class II and IV slopes. Excluding the area within NAD 032, stream 1 has been entirely harvested... There are hydrologic concerns due to the moderate SDP [sediment delivery potential] associated with Stream 1.

The Eden Lake South-West Sub-Unit Assessment Summary states:

Streams 5 and 6 which flow into fish-bearing streams are gullied below the cutblock. The cutblock was assessed with a medium SDP [sediment delivery potential] and a low PHFP [post-harvest failure potential]. There are hydrological concerns due to the moderate SDP associated with streams 5 and 6.

In the CWAP Update, relevant recommendations relating to these sub-units are as follows:

- Proposed cutblock management guidelines include harvesting only areas assessed to have a low (L) post-harvest failure potential (PHFP) and a low (L) sediment delivery potential (SDP). Additionally limit the 5-Year Rate of Cut to no more than 10% of the Sub-basin area.
- Retain windfirm buffers on streams with a SDP greater than low (L).
- Proposed cutblock NAD 032 has a medium SDP and therefore needs to be reviewed due to hydrological concerns

An "Interpretation Worksheet" at Appendix F of the CWAP Update summarizes recommendations to the roundtable, as follows:

Do not allow additional roads in sensitive areas.

Do not allow logging on or above any Class IV or V slope.

Mr. Cober testified that those recommendations were endorsed by the CWAP roundtable.

The CWAP Update also refers to "Davidson/Naden CWAP Stability Comments" dated December 11, 1997, prepared by Sharon Scott, and attached to the CWAP, which states that cutblock NAD032 is:

Two gullied streams within the west side of the cutblock drain directly into fish-bearing streams...

Streams within the cutblock were assessed and the gullied portions of the stream within the opening were assessed. Streams 5 and 6 are gullied below the cutblock. There is a low probability of PHFP in the block but if sediment gets into Streams 5 and 6 below the block then it will likely reach the fish streams below. Within the block Streams 5 and 6 have a low SDP whereas outside the block it is moderate.... Stream 1 has a moderate SDP.

*Previous forest development plan submissions*

According to Mr. Brash, proposed cutblock NAD032 was referred to in forest development plans submitted in 1997 and 1998. The 1:20,000 reconnaissance level map submitted with the 1997 and 1998 forest development plans indicates that the same areas in the western half of NAD032 as are shown in the map attached to the draft Plan are located on Class IV and V terrain which is marked to be clearcut. The gross size is 42.6 ha, according to the map table in the 1997 and 1998 plans. Mr. Brash stated that the 42.6 ha cutblock includes a wildlife tree patch, resulting in a net size of 37.9 ha.

The previous district manager, Ms. Stern-Krishka, did not approve cutblock NAD032 as it was then proposed. In the "Comments" part of an August 14, 1998 determination letter, Ms. Stern-Krishka referred to her review of the 1997 Terrain Assessment and the CWAP as follows:

After reviewing both the terrain stability field assessment dated February 28, 1997 for NAD 32 and interim CWAP recommendations it would appear that the proposed NAD 32 block does not conform to some of the CWAP recommendations. The terrain report acknowledges that the block contains areas of class IV terrain yet the CWAP recommendations for the Eden Lake sub-basin place restrictions on harvesting on unstable terrain.

**Harvesting authority, Silviculture Prescriptions, and Logging Plans may not be applied for during the term of the FDP until the FDP is updated to include the following information or assessments:**

The block must be modified to incorporate recommendations made in the Naden River CWAP.

A new DTM [digital terrain model] submitted once the block has been modified to incorporate the CWAP recommendations.

[emphasis in the original]

An October 21, 1997, determination letter from Ms. Stern-Krishka to Naden Harbour Timber Ltd. rejecting proposed cutblock NAD032 contains the same initial paragraph as the August 14, 1998, determination letter, and further states:

During the next CWAP round table members meeting to be held before the end of this year, we suggest that you present all necessary information surrounding NAD 32 to round table members for discussion.

*The submitted Plan*

The Plan in issue here, which was submitted on May 20, 1999, states as follows:

Watershed Assessment

In 1997, Coastal Watershed Assessment Procedures (CWAP) were completed for the Davidson, Naden, Roy, Privation/Tiens and Marion watersheds. Management recommendations for these watersheds were then developed by the district CWAP roundtable. This roundtable consists of representatives of MOF, DFO and MELP [now WLAP]. Its purpose is to evaluate proposed development in the light of completed CWAPs. Additional recommendations to the roundtable were submitted in January 1998.

The submission also contains a statement of consistency with the results of the CWAP:

Measures to Protect

All cutblock and road development proposed in this plan conforms to the conclusions and recommendations of the roundtable.

As stated above, the draft Plan included a 1:20,000 reconnaissance level map, which indicates that the western half of cutblock NAD032 is located on Class IV terrain. A very small segment on the north-harvesting boundary of that western half is marked as Class V terrain. The Class IV and V terrain is indicated to be clearcut. The map table and the "Harvest Summary Table" portion of the draft Plan state that the gross area of cutblock NAD032 is 21.3 hectares.

However, the 1:20,000 scale reconnaissance map submitted with the draft Plan showed cutblock NAD032 to be 42.6 hectares, and that the size and configuration of NAD032 on the map had not changed between 1998 and 1999. The result was that, while the map table in the draft Plan listed NAD032 as 21.3 ha, the map attached to the draft Plan showed NAD032 to be 42.6 ha. Mr. Brash testified that this was a mapping error and that the mapmaker simply forgot to update the cutblock outline on the map to reflect the decreased area of the cutblock.

Mr. Brash also provided an e-mail from Bryan Fraser, RPF (Registered Professional Forester), of Coast Forest. Mr. Fraser is the registered professional forester who signed off the draft Plan. This e-mail summarized the evolution of proposed cutblock NAD032, as follows:

The 1998 FDP block area was 37.9 [hectares], which did not meet the requirement for low sediment delivery potential in the CWAP. Through consultation with Sharon Scott, a revised block design was agreed to which

she said would achieve the low SDP. The new block configuration was 21.3 [hectares] and was submitted in the 1999 FDP.

Mr. Cober testified that the cutblock was essentially the same on the maps attached to the 1997 and 1998 forest development plans as it was on a map included with the 1997 Terrain Assessment. Mr. Cober also testified that it is generally the cutblock shown on the map attached to a forest development plan that is used in the field, and not the size as listed in the text or map table in a draft plan.

#### *The approved Plan*

Relevant portions of the determination letters in which cutblock NAD032 is approved are provided as follows.

The October 22, 1999, Approval letter states:

A recent review of terrain stability overview information in the Queen Charlotte Islands Timber Supply Area suggests that the existing overview may not sufficiently reflect terrain conditions. Accordingly, the approval of this FDP is subject to the condition of providing accurate terrain stability information. This information will be provided by submitting either: detailed terrain stability field assessment for each timber harvesting and road construction proposal, or by the submission of a report prepared by a qualified registered professional. This information is to be submitted at the time of, or prior to, the submission of the silviculture prescription or road permit.

The General and Specific Cutblock Comments letter contains a general comment that states:

#### Coastal Watershed Assessment Procedures

Various levels of Coastal Watershed Assessment Procedures (CWAPs) have been completed for the Naden watershed and its sub-basins. Recommendations arising from these CWAPs, plus roundtable discussions, must guide development proposals in this watershed. Coastal Watershed Assessment Procedures recommendations are to be accounted for when terrain specialists and engineering staff are conducting field assessments and block layouts. If development proposals are made within the plan that appear to contradict direction provided in the CWAP, then a rationale must be provided that justifies the proposal.

The General and Specific Cutblock Comments letter makes the following specific comment with respect to cutblock NAD032:

- **Category A Approval will be granted once the following condition(s) have been satisfied.**

The CWAP for the Naden River watershed recommended that no harvesting be allowed above and around sensitive soils and that road construction on sensitive soils was to be avoided. The updated CWAP

identified Cutblock NAD032 as having a medium sediment delivery potential and therefore needs to be reviewed for hydrological concerns. Prior to submission of a silviculture prescription, the CWAP recommendations must be incorporated into this cutblock. This block may conflict with these recommendations and areas which contain sensitive soils must be avoided. The FDP text states that all proposals conform to the CWAP recommendations. It appears that this proposal is in conflict with these recommendations.

The Rationale letter states as follows:

With respect to the Eden Lake sub-unit, Cut blocks NAD020 and NAD032 appear to be in conflict with the recommendations of the CWAP given the terrain mapping that was provided in the FDP. The CWAP for the Eden Lake sub-unit recommended that no harvesting be allowed above and around sensitive soils and that road construction on sensitive soils be avoided. This recommendation does not appear to have been followed given the proposed locations of the cut blocks and roads. As a result these cut blocks are approved with a condition, as per Section 41(5) of the Forest Practices Code of British Columbia Act. Prior to submission of the silviculture prescriptions, the CWAP recommendations must be incorporated into these cut blocks and the access thereto.

*The decision to approve cutblock NAD032*

The District Manager testified that he approved this portion of the Plan because it contained the statement that the cutblocks were consistent with the CWAP roundtable recommendations and had been signed off by an RPF. He further indicated that in the course of making his decision, staff had brought to his attention that it appeared harvesting was proposed on unstable Class IV terrain, based on the 1:20,000 terrain map submitted with the draft Plan. He indicated that this raised a red flag; however, he did not consider the terrain map to be generally accurate, given its date and scale.

The District Manager further testified that he approved cutblock NAD032 since he had no reason to believe that the Plan contained an incorrect statement of consistency, given that he could not be certain that NAD032 was situated on Class IV terrain. He felt that he needed a substantial evidentiary basis to refuse to approve a cutblock once signed off by an RPF. He further indicated that he had no proof that NAD032 could not conform to the CWAP prior to the silviculture prescription stage. Out of an abundance of caution, he added the condition that the CWAP recommendations be incorporated into the layout and roads for cutblock NAD032, prior to the silviculture prescription.

The District Manager acknowledged that he was not aware of the 1997 Terrain Assessment when he made his determination, and was not aware of it until it was presented to him at the Review Panel hearing. As a result, his decision was based on the 1:20,000 terrain map, and not the 1:5,000 map in the 1997 Terrain Assessment.

The District Manager testified that it was not a mistake to approve cutblock NAD032. He explained that section 18(1)(q) of the *Regulation* requires that when a forest development plan is submitted, it need only include the approximate locations of cutblocks proposed for Category A status, and that often these are merely "cartoons" of what the cutblocks later become. He stated that about 98 percent of cutblocks are later revised, and he had no reason to believe that cutblock NAD032 would not be revised to bring it into conformity. The District Manager indicated that the licensee could make the cutblock smaller or otherwise bring it into compliance prior to the silviculture permit stage.

*Events subsequent to the approval of the Plan*

Events subsequent to the approval of cutblock NAD032 are relevant to determining an appropriate remedy in these circumstances. The Commission was provided with a 2000 Addendum to the 1997 Terrain Assessment, a 2001 Terrain Assessment, and a 2001 Silviculture Prescription for NAD032, which are discussed below.

Mr. Brash also advised the Commission that an updated CWAP report was completed in November 2001. The District Manager testified that the current District Manager had issued a road permit for NAD032, but had not approved the silviculture prescription.

*The 2000 Assessment Addendum*

An April 20, 2000 letter (the "2000 Addendum") prepared by Sharon Scott became an addendum to the 1997 Terrain Assessment. The 2000 Addendum states that it is intended "to clarify the CWAP issue of sediment delivery potential for proposed cutblock NAD 032 based on an adjusted layout."

The adjusted layout referred to in the 2000 Addendum is based on the deletion of the eastern portion of cutblock NAD032, as construed in the 1997 Terrain Assessment. This would be the 21.3 ha version of the cutblock, which the RPF indicated he was referring to when he signed the Plan containing the statement that "all of the cutblock and road development proposed in this plan conforms to the conclusions and recommendations of the roundtable."

The 2000 Addendum refers to the CWAP Update for the Naden watershed as requiring a "low" post-harvest failure potential and a "low" sediment delivery potential. It notes that, in the original block configuration, streams 1(1), 1A(1) and 1B(1) had moderate sediment delivery potentials and that streams 5(1) and 6(1) had a low sediment delivery potential within the cutblock, but downslope of the cutblock the sediment delivery potential was "moderate."

In the 2000 Addendum, Ms. Scott states that the cutblock confines were modified to exclude streams 1(1) 1A(1) and 1B(1), and that a riparian management plan had been developed for streams 5(1) and 6(1) because they were assessed as having a moderate sediment delivery potential. The 2000 Addendum concludes that the adjusted (21.3 ha) layout "meets the recommendations of low post harvest failure and sediment delivery potential."

*The 2001 Terrain Stability Field Assessment*

A Terrain Stability Field Assessment for cutblock NAD032 dated August 14, 2001 (the "2001 Terrain Assessment"), was prepared by Marian Oden, M.Sc., of Madrone Environmental Services Ltd. That assessment was signed and sealed by Ken Hughes-Adams, M. Eng., P. Eng., of that company. It assesses the likelihood that a landslide will result from road construction or harvesting, on a six-class scale of "very low" to "very high." Its objective is to make recommendations that reduce the terrain stability hazard to "low" within the proposed development area.

The map attached to the 2001 Terrain Assessment does not indicate the size of cutblock NAD032. However, Mr. Brash testified that the report attached to the map which is attached to the 2001 Terrain Assessment is the same as the revised August 28, 2001 map attached to the July 20, 2001 silviculture prescription, discussed below. In that map, cutblock NAD032 is proposed as having a gross size of 37.5 ha, including a 2.7 ha Wildlife Tree Patch.

The 2001 Terrain Assessment rates the terrain stability hazard in cutblock NAD032 as "low" or "very low" based on the harvesting methods and recommendations proposed in the report. For 3 of the 6 terrain units within the cutblock, the assessment is based on "single tree selection with helicopter yarding." The 2001 Terrain Assessment also states that 4.8 ha will be heli-yarded "with only up to 30% of the basal area of the heli-select area removed and all openings within this area will be less than 0.3 ha in size." Very detailed yarding recommendations are set forth for terrain unit 4. The 2001 Terrain Assessment also states that if a large landslide occurred in the western half of the cutblock, it would "likely enter the large gully downslope and trigger a debris torrent that would reach fish-bearing waters." If a landslide occurred on the eastern half of the cutblock, "it would likely partially deposit on the narrow benches, spur roads, and/or Naden Mainline before reaching Eden Lake."

Gordon Butt, a Registered Professional Geoscientist with Madrone Environmental Services Ltd., testified on behalf of the Husby Group. He stated that he had reviewed Ms. Oden's work and indicated that although Ms. Oden is not yet qualified as a Registered Professional Geoscientist, she has a great deal of experience assessing terrain conditions in the Queen Charlotte Islands. He also explained that the Class I to IV system set forth in the *Mapping and Assessing Terrain Stability Guidebook* is a broad scale planning tool used in reconnaissance mapping, but that mapping is not the focus of terrain assessments, which take more of a risk management approach. He also indicated that the Class IV soil issue is not addressed in this report.

The Husby Group argued that the 2001 Terrain Assessment confirms that there is no terrain risk associated with developing cutblock NAD032. However, the Board argued that because the 2001 Terrain Assessment does not address the issue of Class IV soils, cutblock NAD032 cannot be said to conform to the CWAP recommendations. The Board also expressed concern that the 2001 Terrain Assessment did not address issues relating to Class IV soils below cutblock NAD032, and noted that the CWAP recommendations "do not allow logging on or

above any Class IV or V slope." Mr. Butt acknowledged that the 2001 Terrain Assessment may be more limited in addressing those issues below the cutblock than previous assessments.

*The Silviculture Prescription*

Mr. Brash provided a copy of the silviculture prescription dated July 20, 2001, pertaining to cutblock NAD032, and a revised silviculture prescription map dated August 28, 2001. The silviculture prescription states as follows:

**FDP:** This prescription is consistent with the submitted 1999-2003 Forest Development Plan

**CWAP:** This prescription is consistent with the 1997 CWAP for the area and addendum CWAP dated December 2000.

Under the "Watershed" section, the silviculture prescription states:

The current CWAP recommends this block be evaluated for hydrology. Terrain Stability Field Assessment reviewed risk of sedimentation to streams. All recommendations within the report have been followed; sedimentation risk is low to very low.

Thus the development of this block is considered consistent with the CWAP.

Mr. Brash testified that the revised silviculture prescription map shows cutblock NAD032 to be 34.8 ha, not including a 2.7 ha Wildlife Tree Patch. A comparison of the August 2001 silviculture prescription map and the map for cutblock NAD032 attached to the Plan shows that a small triangular area surrounding streams 1A and 1B in the eastern half of the proposed cutblock has been deleted, and the remaining portion to the east is marked for heli-select harvesting. In addition, the map attached to the silviculture prescription shows a change to the north-west portion of the cutblock, where the boundary has been extended north to encompass a new area, which is also marked for heli-select logging. This new north-west portion is located in areas that were indicated to be Class IV and V terrain on the map attached to the Plan.

Mr. Cober testified that 1/2 of the cutblock NAD032, as represented in the 1997 Terrain Assessment map, was on Class IV terrain. He also stated that the cutblock, as represented in the silviculture prescription map, has nearly the same footprint as the cutblock set forth on the maps attached to the forest development plan submitted in 1998 and the draft Plan.

## DISCUSSION AND ANALYSIS

### B. Naden Watersheds:

#### 1. Whether the Plan, specifically, cutblock NAD032, was *consistent* with the results and recommendations of a watershed assessment (CWAP), in accordance with section 18(1)(y) of the *Regulation*.

Most of the arguments of the Board and the Government with respect to this issue were predicated upon the assumption that cutblock NAD032, as approved, was approximately 42.6 ha in size, as depicted on the map attached to the draft Plan, and not 21.3 ha in size, as depicted in the map table and text of the draft Plan. However, based on the e-mail from the registered professional forester who signed off the draft Plan, it appears that the proposed cutblock was 21.3 ha in size. If so, and presuming that the 21.3 ha were situated on the Class III terrain or lower within the cutblock, there would be little in issue here.

However, subsequent to the approval of the Plan, cutblock NAD032 has been proposed as 37.5 ha in size. As well, the District Manager's comments in the 1999 determination letters, as well as his testimony and the Government submissions, suggest that the District Manager believed that he was approving a cutblock larger than 21.3 ha.

The Board submits that the statement in the draft Plan that "All cutblock and road development proposed in this plan conforms to the conclusions and recommendations of the (CWAP) roundtable" was incorrect, and that the requirements of section 18(1)(y) of the *Regulation* were not met. The Board submits, therefore, that the Plan cannot be approved pursuant to section 41(1) and 41(3) of the *Code*, which require that the Plan be prepared in accordance with the regulations.

Assuming that a larger cutblock had been conditionally approved, the Board argues that a substantial portion of the cutblock is on Class IV soils contrary to the CWAP recommendations. The Board submits that section 18(1)(y) of the *Regulation* requires a statement of consistency, or an explanation if there is an inconsistency, in the draft Plan. The Board submits that the District Manager was, or should have been, aware that the RPF's sign off was incorrect. The Board submits that not only was there a discrepancy within the draft Plan concerning the size of the proposed cutblock, but information was readily available in the MOF District office which would have confirmed that the proposed cutblock was inconsistent with the CWAP recommendations.

Specifically, the Board notes that the 1997 Terrain Assessment was filed with previous forest development plan submissions. The Board maintains that the 1997 Terrain Assessment confirmed that the 1994 1:20,000 terrain map, upon which the map attached to the draft Plan was based, had correctly identified that cutblock NAD032 was situated on Class III and IV soils. Furthermore, the previous district manager had explicitly referred to the 1997 Terrain Assessment in her 1997 and 1998 determination letters, which stated that the "terrain report acknowledges that the block contain areas of class IV terrain yet the CWAP recommendations...place

restrictions on harvesting on unstable terrain.” The letters also specifically stated that “the block must be modified to incorporate recommendations made in the Naden River CWAP.” The Board maintains, therefore, that even a cursory review of the 1997 Terrain Assessment or the previous plan approvals would have confirmed that cutblock NAD032 was situated on Class IV soils and the statement of consistency was inaccurate.

The Board also submits that the statement in the Rationale letter accompanying the 1999 determination letter refers to the inconsistency between the CWAP recommendation and the statement of consistency in the Plan. The Board submits that the District Manager should have required the licensee to either resolve the inconsistency or provide an explanation for the inconsistency as required by section 18(1)(y)(ii) of the *Regulation*. In the absence of either an accurate statement of consistency or an explanation for the inconsistency, cutblock NAD032 should not have been approved. The Board argues that, at a minimum, the District Manager should have required the licensee to provide further information to verify the accuracy of the statement of consistency once the discrepancy in the draft Plan was identified. The Board also submits that MOF policy did not support the District Manager issuing a conditional approval in these circumstances.

The Board submits that the District Manager acknowledged at the Review Hearing, upon apparently reviewing the 1997 Terrain Assessment for the first time, that he had made a mistake in approving cutblock NAD032. The Board submits that the Review Panel erred when it appeared to find that section 18(1)(y) simply requires that a forest development plan contain a statement of consistency, without requiring that it be accurate. It also submits that the Review Panel erred in failing to adequately consider key evidence; namely, the 1997 Terrain Assessment, and the District Manager’s admission that he should not have approved cutblock NAD032 in light of that document.

The Board argues that an inaccurate statement of consistency cannot meet the requirements of section 18(1)(y). The Board submits that if false statements are acceptable, then numerous statutory requirements concerning the information to be included in forest development plans, could be met by untrue statements – as long as the statement is present on the plan and the plan is professionally sealed. The Board argues that public confidence in the *Code* would be undermined if approvals could be obtained based on untrue information.

The Board also submits that the inclusion of a statement of consistency, or a statement of inconsistency and explanation for that inconsistency, serves an important purpose at the forest development plan stage. It maintains that such statements are relied upon by the public and agencies when reviewing a draft forest development plan. The Board submits that an explanation of inconsistency operates as a “red flag” in these circumstances, and a false statement would be misleading. The Board argues that, in this case, the Husby Group deprived the public and agencies an opportunity to provide effective comment, by failing to provide the statement of inconsistency.

The Government argues that the District Manager approved the Plan on the basis of the statement of consistency contained in it. The Government submits that when the District Manager approved the Plan, there was no proof before him that the proposed cutblock was inconsistent with the CWAP recommendations. The Plan was signed and sealed by an RPF, and the District Manager could not have ascertained from the maps available to him that the proposed cutblock included Class IV terrain. Therefore, he was not in a position to reject the Plan. The Government also submits that knowledge of the 1997 Terrain Assessment should not be ascribed to the District Manager simply because it was somewhere within the District office.

The Government also argues that the Board has the onus of establishing that the statement of consistency is wrong, on a balance of probabilities, and that the Board has not done so. Namely, the Board has not established that NAD032 is situated on Class IV terrain.

With respect to the Rationale letter accompanying the 1999 determination letter, the Government notes that cutblock NAD032 was one of 2 cutblocks that “appear to be in conflict with recommendations in the CWAP based on the terrain mapping” provided with the Plan. It does not state that there was an actual conflict. Therefore, it simply indicates that the District Manager was aware of a **potential** conflict. The government also submits that the District Manager acted out of an abundance of caution by imposing a condition to ensure that, if there was a conflict, it would need to be resolved before submitting a silviculture prescription for cutblock NAD032.

The Government also argues that it was not a mistake to approve this cutblock, because imposing the condition achieved the same legal and practical effect that would be achieved by requiring the licensee to clarify the potential inconsistency. Such measures as updated terrain assessment information, reconfiguration into a smaller cutblock, or using different silviculture methods would have ensured that cutblock NAD032 conformed to the CWAP recommendations, and that the environment was protected.

The Husby Group supports the Government’s submission that the Plan was correctly approved based on the RPF’s sign off of the statement of consistency. The Husby Group also argues that this issue is largely based on a mapping error, and refers to the RPF’s email as evidence that he signed off cutblock NAD032 on the basis that it was 21.3 ha in size. As such, it would not have been located on Class IV soils, and would have been consistent with the CWAP recommendations.

The Husby Group also submits that both it and the MOF knew that, when the draft Plan was submitted, cutblock NAD032 would require further examination, and that some adjustment might be needed upon completion of further fieldwork. The Husby Group further argued that no practical purpose was being served by finding in favour of the Board on this issue since any development of cutblock NAD032 must conform with the CWAP recommendations prior to submission of the silviculture prescription and that, in any event, there will be no risk to forest

resources. Further, the Husby Group argues that the later 2001 Terrain Assessment bears this out.

### *Commission Findings*

The Commission agrees with the Board that the District Manager should have sought clarification about the size of cutblock NAD032 before approving the cutblock. It is clear that the District Manager was aware that the consistency statement signed by the RPF was potentially incorrect, and it is of little importance whether the inconsistency was only an apparent inconsistency, as argued by the Government, or an actual inconsistency as argued by the Board. Once the District Manager was aware that the statement of consistency may not be accurate, he should not have approved the cutblock.

It was open to the District Manager to consult with the licensee and the RPF and point out the potential inconsistency to see if it could be clarified. In the absence of verification, it was open to the District Manager to require that the draft Plan be amended to include a statement of inconsistency and an explanation for it, in keeping with the requirements of section 18(1)(y) of the *Regulation*. It was not acceptable for the District Manager to conditionally approve a cutblock and thereby allow a licensee to avoid the requirements of section 18(1)(y).

The Commission also agrees with the Board that the statement of consistency must be accurate in order to comply with section 18(1)(y) of the *Regulation*. In this case, the statement would only have been accurate for a 21.3 ha cutblock, which does not appear to have been what the District Manager believed he was approving. If he had been certain of that, there would have been no need for the conditions that he placed on the approval of the cutblock.

The Commission further finds that the statement of consistency is not accurate with respect to the 42.6 ha cutblock set out on the map attached to the Plan, or the 37.5 ha cutblock later proposed on the silviculture prescription. There was no evidence before the Commission that a larger cutblock would not include Class IV soils, contrary to the specific recommendation in the CWAP that there be no logging on or above Class IV soils.

The Commission finds that public confidence in the *Code* would be undermined if forest development plans could be approved based on incorrect information. A false statement misleads public participants and reviewing agencies. The Commission agrees with the Board that a statement of inconsistency is a "red flag" alerting public and agency reviewers to comment on the implications of the inconsistency and suggest possible mitigative measures.

As statutory decision-makers, district managers have a duty to ensure that statutory requirements are met and that forest resources are adequately protected. It is not sufficient for a district manager to approve plans simply on the basis that they have been signed and sealed by a registered professional. While a district manager can place considerable reliance on a professionally endorsed document, he or she must still ensure that *Code* requirements are met.

For all of these reasons, the Commission finds that the portion of the Plan that addresses cutblock NAD032 does not comply with section 18(1)(y) of the *Regulation*.

**2. If not, whether the District Manager had authority under section 41 of the *Code* to give conditional Category A approval for cutblock NAD032.**

*Commission Findings*

The Commission has found that section 18(1)(y) of the *Regulation* was contravened. Consequently, the Plan automatically fails to meet the mandatory requirement of Section 41(1)(a) of the *Code* that the plan be prepared in accordance with the regulations. Section 41(3) is also breached, as it only authorizes a plan to be approved if it has met the requirements of section 41(1). As a result, the District Manager had no authority to issue the conditional approval of cutblock NAD032.

The arguments put forth by the Government and the Husby Group that, for all practical purposes, the conditional approval would ensure that cutblock NAD032 complies with the recommendations in the CWAP cannot be supported since section 18(1)(y) of the *Regulation* was clearly breached. A statement of consistency, or an explanation for any inconsistency, is required at the forest development plan stage, and this statement must be accurate.

The legislation and MOF policy require that Category A status is not to be given unless cutblocks already satisfy certain essential requirements. Giving conditional Category A status may lead to problems. If a cutblock cannot meet the basic requirements, it should be given Category I status (for information purposes) and not approved in that plan. It can be put forth again in the next year of the plan, once it has met the basic requirements.

The Commission also finds that the wording of the conditional approval with respect to cutblock NAD032 is open to different interpretations. The Approval letter does not mention the condition. However, it specifies the condition that updated terrain mapping information be provided. The General and Specific Cutblock Comment letter states that "sensitive soils" are to be "avoided," rather than referring to the CWAP recommendation that there be "no logging on or above Class IV or V slopes." In one place, the Approval letter appears to give the District Manager authority to approve the cutblock upon provision of an explanation, rather than meeting the condition, whereas the Rationale letter indicates that the CWAP recommendation must be met. In yet another place, it could be interpreted either way.

The wording of the condition as set forth in the Rationale letter also indicates that roads are to be subject to the condition. However, the Commission agrees with the Board that silviculture prescriptions do not address roads outside a cutblock. Therefore, at best, this condition would only cover roads within the cutblock.

Accordingly, the Commission concludes that it was not sufficient under section 41 of the *Code* to give conditional Category A approval of cutblock NAD032.

**3. If not, whether setting aside the approval of cutblock NAD032 is appropriate in light of events that occurred after the conditional approval of that cutblock.**

*Commission Findings*

The Commission has determined that the portion of the Plan addressing cutblock NAD032 did not meet the requirements of section 18(1)(y) of the *Regulation*, and consequently sections 41(1)(a) and 41(3) of the *Code*. The Commission is not persuaded that the conditional approval of the cutblock served any practical purpose, especially given the difficulties encountered in tracking the boundaries of cutblock NAD032 through its various permutations. The statement of consistency in the Plan applies to a 21.3 ha version of cutblock NAD032 that is not situated on Class IV soils. While section 18(1)(q) of the *Regulation* authorizes a forest development plan to provide an "approximate" location of a cutblock, the Commission finds that the larger NAD032 is far too large to comply with that section. While cutblocks may frequently be revised and refined prior to silviculture prescription approval, section 18(1)(q) cannot be used to justify increasing the size of cutblocks in this manner, especially a controversial cutblock such as NAD032 that is now nearly twice the size of the cutblock that the RPF endorsed. Further, the 37.5 ha cutblock that has been proposed in the silviculture prescription may contain significant Class IV soils, as the location of such soils in relation to that cutblock has not been accounted for.

The statement of consistency within the Plan did not apply to a 37.5 ha cutblock. A failure to include a correct statement of consistency or inconsistency in the Plan cannot be cured by placing a statement of consistency in the silviculture prescription for a cutblock this size. As well, from the wording of the statement of consistency in the July 2001 silviculture prescription, it is not certain that the RPF signing the silviculture prescription was aware of all of the CWAP recommendations, especially the specific recommendation that there be no logging on or above Class IV soils. The statement of consistency only refers to the 1997 CWAP Update and a 2000 CWAP Addendum that was not provided to the Commission. The August 28, 2001 "revised" silviculture prescription map is also not the map that was apparently initially submitted with the silviculture prescription, and is therefore not the map to which the silviculture prescription statement of consistency applies. A review of the cutblock also indicates that the revised cutblock appears to contain a small amount of new area, which may be on Class IV or V terrain. From the forest development plan statement of consistency contained in the silviculture prescription, it is also not certain that Husby Group made the new RPF aware of the "mapping error" and that the previous RPF's statement of consistency only applies to a 21.3 ha cutblock, since a 37.5 ha cutblock cannot be seen to be consistent with a 21.3 ha cutblock.

The Commission is also aware that an updated CWAP report was recently prepared, and that any new recommendations that may arise from that report may resolve some or all of these concerns. An updated statement of consistency that applies to cutblock NAD032, as reconfigured, and in respect of these updated recommendations, would therefore be appropriate in the circumstances. By setting aside the current approval for cutblock NAD032, consistency with the updated

recommendations will need to be achieved, if and when the cutblock is resubmitted for approval. Alternatively, in accordance with section 18(1)(y) of the *Regulation*, the Husby Group will need to provide an explanation for the inconsistency, which will then properly be subject to public review and comment.

For all of the above reasons, the Commission rescinds the District Manager's determination approving proposed cutblock NAD032.

## **DECISION**

In making this decision, the Panel of the Forest Appeals Commission has considered all of the evidence before it, whether or not specifically reiterated here.

The Commission confirms the District Administrator's approval of 17 cutblocks in the Tartu watersheds.

The Commission rescinds the approval of cutblock NAD032 in the Naden watershed.  
The appeal is allowed, in part.

Alan Andison, Chair  
Forest Appeals Commission

Bruce Devitt, Panel Member  
Forest Appeals Commission

October 23, 2003

**MINORTY DECISION OF PANEL MEMBER KRISTEN EIRIKSON****DISSENT**

There had clearly been a determination made that the Tartu needed a CWAP. This is why the Tartu was placed on the MOF Schedule of Priorities, which was twice sent to all licensees and discussed at two FDP Summit Meetings. In addition, the Husby Group was formally notified in three additional letters sent to it that a completed CWAP was required for the Tartu.

Four of the five letters sent to the Husby Group were written by District Managers, who are RPF's, and constitute reasoned and informed determinations, in their professional opinion, that a CWAP was necessary for the Tartu prior to development. The licensee was notified of this requirement many times, yet proceeded to propose development of the Tartu before obtaining even an initial CWAP report or starting the CWAP process. The CWAP process was only initiated in October 1999 after the FDP had been conditionally approved.

If there was any issue as to the timing of when the CWAP for the Tartu should have been completed, which in itself is clear from the letters sent to the licensee, this issue is well addressed in section 14 of the *Regulation*, which specifies that watershed assessments are required before review of forest development plans, as follows:

**Watershed assessments required before review of forest development plans**

**14** (1) Subject to subsections (3), (4) and (5), before making a forest development plan available for review under section 27, a person must have carried out a watershed assessment within the previous 3 years of the submission date for the following areas under the plan

...

(c) a watershed for which the district manager determines an assessment is necessary.

The issue in this case is not only whether a determination had previously been made, but also whether the District Manager failed to comply with section 41 of the *Code* when he conditionally approved the Plan without requiring a CWAP at that time. This issue is simply not addressed in the majority decision, which only asks the questions whether a past determination had been made. There was no question that the Tartu needed a CWAP. This was not disputed by the parties, who only disputed that the notices were not clear as to the timing of when the CWAP was required. The District Manager effectively determined that a CWAP was necessary for the Tartu at the time he approved the Plan. He, therefore, did not have the authority to allow the CWAP to be submitted at a later stage in the planning process. Section 14 of the *Regulation* requires that the CWAP be filed at the FDP stage.

Even if the past notices are only considered to be notices that “a determination will be made” in keeping with the majority decision, it would have been in no way unfair for the District Manager to require that the Husby Group complete a CWAP prior to review and approval of the plan at the time the Plan was submitted. Instead, the District Manager proceeded to approve the Plan subject to a badly worded conditional approval, which is not a method of approval supported by the *Code*, regulations or MOF policy and procedure.

Section 41 of the *Code* contains mandatory provisions for approving and rejecting forest development plans. It requires a District Manager to approve a plan if it was “prepared and submitted in accordance with this Act, the regulations and the standards,” and also requires a District Manager to be “satisfied that the plan or amendment will adequately manage and conserve the forest resources of the area to which it applies.” Section 41(3) also specifies that a district manager “may approve an operational plan or amendment only if it meets the requirements of subsection (1).”

Since the submitted FDP was not prepared in accordance with section 14 of the OPR, and the District Manager nonetheless approved it, there is a breach of section 41 of the *Code*. The *Code*, the *Regulation*, the CWAP Guidebook and MOF policy and procedure, for good reason, simply do not authorize a District Manager to require a CWAP at a later stage in the planning process. Where a CWAP is necessary, as one was here, it must be completed at the 5-year FDP stage prior to development of the Plan and public and agency review of the Plan. Lacking the CWAP, the District Manager could also not have been satisfied that the Plan effectively managed and conserved the forest resources pursuant to *Code* section 41(1) at the time he approved the Plan. Further, the regulations and MOF Policy and Procedure do not support the issuance of a conditional approval in this situation.

Unlike most appeals to the Commission, the licensee has not been charged with a violation of the *Code* and because no stay was issued and cutting has proceeded, there are virtually no consequences to the licensee as a result of this decision. Instead, this appeal was brought by the Board as a result of a review of MOF procedures, which showed that there had been non-compliance with the *Code* and regulations in the issuance of the 1999-2003 FDP.

This appeal mechanism was developed as an alternative to the public having a direct right of appeal. The Board's authority is limited to requesting reviews of forest development plans where complaints from the public or its own audits have revealed non-compliance with procedures. This is an important “watch-dog” function, as there is no other legal mechanism for ensuring that the MOF is complying with the *Code* and regulations and the relationship between MOF and licensees has the perception of being a close, internalized relationship that excludes other agencies, the public and aboriginal groups beyond the FDP stage. There is no right of appeal or review available at later stages in the planning process, such as when cutting permits, road permits and silviculture permits are issued, or as in this case, when conditions are removed from conditional approvals.

The majority decision appears to consider this case more from the perspective of whether the licensee complied with the *Code* than whether the *Code* was properly applied in the making of the decision. The issue in this case is whether the District Manager complied with the *Code*, regulations and MOF policy. He did not. The reasons for this conclusion are outlined in more detail below.

### **Had there been a past determination?**

The majority decision interprets that the many notices provided to the licensee do not provide clear notice that a determination had been made. However, on their face, they very clearly require that a CWAP is to be conducted prior to development of the Tartu. When the Husby Group chose to develop logging operations within the CWAP was totally a matter within its purview. The initial MOF letters therefore could not and did not specify a date for completion. The two later letters do specify time frames. If there is any issue as to when the CWAP was required by in the initial notices, section 14 of the *Regulation* very clearly answers this question. It must be completed before the FDP review stage of the planning process, not at a later stage.

The testimony of MOF and Husby officials in respect of the past determination letters must be regarded in light of the fact that the non-compliance with the *Code* arose after a Board review of events that had already taken place. The only explanation available for not having required a CWAP as required by the *Code* and regulations was a weak argument that MOF notices did not specifically state a deadline by which the CWAP was to be completed. In addition, in the process of making this argument, attempts were made to obfuscate the routine MOF regulatory process and the parties failed to disclose certain letters to the Board and attempted to deny that others had been sent.

The five letters notifying the Husby Group of the CWAP requirement for the Tartu consisted of two "All Licensee" letters and three specific letters to the Husby Group, as follows:

**Two "All Major Licensee" letters (November 27, 1995 and February 1, 1996)** from Mr. Brash, who was then the District Manager for the Queen Charlotte Islands Forest District. These letters attach a list of the District CWAP Schedule of Priorities for watersheds that would require CWAPs. On both Schedules, the Upper and Outer Tartu are listed as "to be scheduled." The CWAP process was discussed in two "FDP Summit Meetings" held with licensees on **December 15, 1995** and **January 9, 1996**. Mr. Brash, as then District Manager, represented MOF at the meetings.

The evidence is that these watersheds were the Queen Charlotte Islands watersheds that MOF and WLAP officials had identified as needing to have CWAPs completed pursuant to new *Code* requirements. At the meetings, the watersheds given specific dates for the CWAP process were watersheds in which licensees were operating in or soon to be operating in. Due to a lack of availability of professional hydrologists and limited agency resources to conduct CWAP processes, many of the identified watersheds were to be scheduled later when licensees intended to

operate in those watersheds. The Tartu was not yet scheduled because the Husby Group was not immediately intending to conduct forestry operations in the CWAP portion of the Tartu.

If licensees had disputed the placement of any of these watersheds on the CWAP schedule of priorities, they had a fair opportunity at these meetings to discuss or dispute this with MOF officials. Because MOF and licensees have long term working relationships, they would also have had other opportunities to discuss or write to the MOF District Manager or Regional Manager about inclusion of a watershed on the priority list. No evidence was presented to the effect that the Tartu should not have been included on the CWAP List. Mr. Brash testified that he did not recall that the Tartu was ever a priority. However, neither the licensee nor MOF disputed that the Tartu needed a CWAP, only that the timing of when it was required by was unclear.

The first specific letter to the Husby Group requiring a CWAP for the Tartu was sent on **January 18, 1996** from Mr. Brash, then District Manager, as part of the routine approval process for the Final 1994-98 Development Plan for the Tartu. This Plan approved a number of cutblocks in the lower Tartu area, outside of the CWAP area and was apparently the only plan submitted for the Tartu prior to the 1999 Plan. This General Comments letter identifies 18 various requirements for the Tartu. No. 4 states that:

Due to the intensity of past and proposed developments in this operating area, Coastal Watershed Assessments **(CWAPs) will be required for future development in the Outer and Upper Tartu watershed.** To date they have not be (sic) scheduled. [emphasis added]

These FPD letters are the formal and routine manner in which MOF informs licensees of various regulatory requirements. Licensees are well aware that these are "determination" letters even though the requirements are not routinely specified as such. *Code* and regulation section numbers are not generally specified as licensees are expected to be familiar with these. Requirements are set out but elaborate justifications for routine regulatory requirements are not. Some requirements apply to all future plans, others specify requirements that must be met before the next FDP and others are silent as to timing. These letters are signed by district managers who are RPF's, after they and staff have reviewed the plan and made a site visit to the proposed cutblock areas. It is well understood by licensees that these are requirements that a district Manager considers, in his or her professional opinion, to be necessary in order to meet the requirements of the *Code* and to protect the forestry resource.

The June 18, 1996 letter is clearly a determination letter within the meaning of the *Code*, which was sent to the licensee as part of the routine and formalized MOF plan review process. It is also of note that this letter had not been disclosed by MOF to the Board. It was obtained by the Board from other sources and introduced late into the hearing. The majority decision barely acknowledges this letter or the importance of it and apparently accepts the Crown argument that "required for future development" was not sufficiently clear for this to constitute a determination.

However, in this context, where it is up to a licensee to decide when it intends to commence forestry operations within an area, and section 14 of the regulations specifies that the CWAP must be conducted before review of the FDP, it is abundantly clear that the CWAP was determined to be required before this time.

It is also not a question of just when to insert a CWAP into the ongoing 5-year FDP planning process, which is regularly updated, as Mr. Brash argued. Here, there had not been any previous cutting in the Upper and Outer Tartu and the requirement, for good reason, was to prepare the CWAP prior to development.

Regardless of all of the other notifications, this letter alone is sufficient evidence that a past "determination" had been made requiring a CWAP for the Tartu.

The second specific notice sent to the Husby Group was a **December 16, 1997** letter from the subsequent District Manager, Ms. Stern-Krishka, stating that this watershed "**has been identified as a priority area requiring a Coastal Watershed Assessment Procedure.**" It further states that:

Over the next eighteen months, please indicate your **anticipated completion dates for this CWAP, so we may initiate the first phase of roundtable discussions.**

An April 17, 2001 e-mail message from Cindy Stern-Krishka states that her intent:

was to advise Husby **to begin the CWAP for Tartu so that we could initiate the roundtable discussions.** I did not state or intend for the CWAP to be completed prior to the next FDP submission. ... My letter was intended to identify that the Tartu was a priority watershed to begin a CWAP and that I needed some timelines for **anticipated completion** so that we could schedule agency staff time to work on them.... (I)f I had intended to require the CWAP to be completed prior to the next FDP submission, I would have stated that clearly as an expectation." [emphasis added]

These letters and the explanation provided by the District Manager indicate that it was intended that the Husby Group begin the CWAP process within the 18 months, not that the licensee had 18 months in which to prepare a schedule as the government and Husby Group attempted to argue. If the CWAP had been completed as required within the 18 months, it would have been completed by June 16, 1999, very close to the time that the 1999 Plan was filed. The Plan was not approved until October 1999. If the Husby Group had met this timeline, the CWAP could have been completed before the Plan underwent review.

The December 16, 1997 letter is clearly a determination letter, or at least a follow-up letter to the January 18, 1996 determination letter specifically requiring CWAPs prior to future development of the Tartu. The December 16, 1999 letter effectively sets a deadline of June 16, 1999, since its intention is for the CWAP process to be initiated and completed in 18 months. It is of note that Ms. Stern-Krishka was not produced as a witness, despite Board objections. There was obviously no intention to have the Husby Group complete the CWAP prior to filing its "next" FDP, which

would have been in 1998, approximately six months rather than eighteen months later.

At the time of the December, 1997 letter, MOF would not have known specifically when the Husby Group intended to develop the Tartu. It would have been following up on the CWAP priority scheduling as time and resources were available. Also, since the Husby Group did not prepare an initial CWAP hydrology report or schedule the process during the eighteen months, it would have appeared to MOF that that they did not intend to move into this area for some time. It is not up to MOF to constantly remind licensees to follow through on these requirements, but for licensees to meet them prior to developing an area.

The 1999-2003 Plan that included new development in the upper Tartu watersheds (Tartu and Canyon cutblocks) was filed on May 20, 1999 and approved on October 22, 1999. On May 29-31 and June 1, 1999, a notice was published advising that the draft Plan was available for the 60-day public review and comment period. The requested CWAP schedule was not filed until October 1999, approximately five months after the CWAP process was to have been completed.

Then, on January 15, 2000, an Amended 1999-2003 Plan was submitted to MOF by the Husby Group which substantially increased the number of cutblocks, changed the boundaries of others and changed the logging method to be used to heli-select logging for some cutblocks, due to hydrological concerns that arose from the initial CWAP report prepared by the consultants. This Amended Plan was submitted to MOF subsequent to preparation of the initial report, but prior to the CWAP roundtable meetings with WLAP and DFO participants having taken place.

Another initial CWAP report was submitted for the Amended Plan in April 2000 and the CWAP Roundtable meetings were held after that time. The CWAP process was completed in January 2001 and, according to the participants in the roundtable meetings, the plan at the time of the hearing still did not conform to the recommendations that came out of the CWAP roundtable process. Prior to the time that the CWAP was approved, roads were built and some logging took place in the Tartu, however Mr. Brash testified that none of the harvesting that took place in 2000 and 2001 affected the CWAP area.

The third specific letter sent to the Husby Group was a **June 14, 1999 letter** from Dan Biggs, Timber Officer, MOF. This letter was sent after the Husby Group had filed the Plan and it "...identified several items that need to be addressed as part of the FDP submission." It confirms that the intention of the December 16, 1997 letter had been for the CWAP to be completed within eighteen months, as follows:

By the district manager's letter of December 16, 1997, **you were notified of the requirement to provide a (CWAP) to this office for the Tartu Creek watershed prior to June 16, 1999.** You were also requested to identify anticipated completion dates. You were also requested to identify anticipated completion dates for this CWAP so that the first phase of roundtable discussions could be initiated. This requirement was not addressed in the FDP, nor have we received any

correspondence concerning your intentions. The authority for directing completion of a CWAP comes from Section 14(1)(c) of the Operational Planning Regulation. [emphasis added]

The letter then requires that an addendum to the FDP outlining the schedule for completion of the Tartu CWAP be provided as part of the submission of supplemental information after the 60-day public review period.

This is the letter to which the majority decision erroneously gives no weight, on the basis that Mr. Biggs could not recall the letter, and testified that he thought it had been prepared by another staff person. He thought it was a draft and that since there was not a signed copy in MOF files, he assumed it was not sent. Neither Mr. Biggs nor Rory Annett, the District Manager who approved the Plan, could say with certainty whether the letter had or had not been sent. These are insufficient reasons for assuming the letter was not sent and that it should be given no weight. It can be readily assumed that the signed copy was sent.

As well as this letter, a May 27, 1999 email from an MOF staff person to Mr. Cober of WLAP shows that MOF seriously misled WLAP, an important participant in the CWAP and FDP process, that a CWAP would need to be completed prior to approval of the Tartu cutblocks in the plans. The email states that the "district sent out a letter advising Sitkana to complete a CWAP" and also states that "It seems to me that we can't approved (sic) these blocks or FDP for that matter until they complete the CWAP."

It is abundantly clear that the Husby Group was well informed that it needed to complete a CWAP prior to development of the upper and outer Tartu. Many notices and meetings confirmed that a CWAP was necessary before this area was developed. That is why the Tartu was placed on the Schedule of Priorities, twice sent to the Husby Group. Thereafter, three specific letters were sent to the Husby Group detailing that a CWAP was required for the Tartu. The first of these specifies that the CWAP is required before development of the Tartu. The December 1997 letter was written in order to schedule resources for the Tartu CWAP over an 18-month period and the third letter confirms that the CWAP process was to have been completed by June 1999. If Husby had complied with this schedule the CWAP could have been completed prior to Plan review as required by section 14 of the *Regulation*. Instead, when the District Manager learned that the Husby Group had forgotten to schedule the CWAP, he appears to have decided to overlook the requirement that the CWAP be conducted prior to Plan review.

The reality is that it is up to a licensee when it will move into an area, which means that MOF cannot routinely set specific deadlines for requirements. The majority decision ignores this reality and virtually ignores the three letters to Husby following up on the Schedule of Priorities, which specifically require Husby to complete a CWAP. Of the three specific letters to Husby requiring a CWAP, the first of them is simply not addressed; the second is not explained and the third is given no weight. All of the letters are instead erroneously characterized as simply indicating that the Tartu watersheds were considered priorities for CWAPs relative to other watersheds in the District.

To avoid considering these letters to be determination letters, the majority decision also creates the legal fiction that in order to be clear, a determination must specify that the District Manager had formed the professional opinion that the hydrological risks associated with the Tartu were sufficient to obligate the licensee to carry out a watershed assessment. However, the letters sent to the Husby Group are in keeping with the routine manner in which MOF notifies licensees of requirements and constitute the professional opinion of District Managers that a CWAP was required for the Tartu. In any event, the parties did not dispute that a CWAP was necessary for the Tartu, only the timing of when it was required to be completed, making this an irrelevant issue.

The majority decision further characterizes the two schedules of priority letters and three specific letters to the Husby Group as simply indicating that the licensee should anticipate that a determination would be made in the next several months. The issue of why the District Manager did not then make the determination at the time the FDP was filed was then simply not addressed.

There is no question that these many letters constitute determinations within the meaning of the *Code* and in keeping with the ordinary manner in which MOF sets forth requirements for licensees. If there is any question as to what development means, which there is not, that is answered by section 14 of the *Regulation*: before the FDP is submitted for review. If there is any question with respect to when the FDP was required, which there is not, that is also answered by section 14 of the *Regulation*: before the FDP is submitted for review.

All of the notifications sent to the licensee constitute fair notice to the licensee that a CWAP was required. Any one of these notices would constitute a determination within the meaning of the *Code*. A prior determination had been made and the licensee had clearly and fairly been notified that a CWAP was required prior to development of the Tartu.

### **Was there a “determination” within the meaning of the *Code*?**

The majority decision incorrectly adopts a very narrow interpretation of whether a “determination” had been made within the meaning of the *Code* in order to discount all of the letters sent to the licensee requiring that a CWAP be completed for the Tartu. At the relevant times in issue, section 1 of the *Code* widely defined a determination as follows:

“**determination**” means any act, omission, decision, procedure, levy, order or other determination made under this Act, the regulations or the standards by an official or a senior official

There is no question that the many letters requiring a CWAP constitute “determinations” within this definition. The *Code* and regulations, by definition or otherwise, do not require that notices state they are “determinations” or that detailed rationales and justifications for the various regulatory requirements set forth in the *Code*, regulations and guidebooks relating to forestry practices be specified. Nor do the *Code* and regulations require any advance notice at all of the various requirements that must be met in order for a plan to receive approval. If

this were what was intended, the *Code* and regulations would specify these requirements.

A narrow definition of "determination" contrary to that set forth in the *Code* cannot be imported under the broad rubric of "fairness." Adding these requirements, imports a narrow standard to decisions and requirements that are routinely made by MOF of licensees during the process of plan approval, a process that is well known to MOF and the informed licensees who are governed by the *Code*. A narrow definition of "determination" will also play havoc with the many determinations presently in process. This ruling could mean that licensees can ignore the many requirement letters presently outstanding on the basis that they are unfair, since it has not been the current practice of MOF for these letters to clearly specify that they are determinations or to provide elaborate "professional opinions" for these routine requirements. It will also create a significant and unnecessary amount of red tape for MOF in the course of its future administration of the *Code* and regulations.

The normal course of business is for MOF to notify licensees of various requirements by letter. The most formalized part of the process is for MOF, after Plans are submitted and reviewed, to send the licensee FDP "Approval", "General and Specific Comment" and "Rationale" letters that specify various requirements that must be met before the Plan or specific cutblocks within the Plan can be approved. It is well understood between MOF and licensees that the various requirements that licensees must meet are "determinations" and that the requirements specified in these letters must be met. There is no need for MOF to specify that the requirements are "determinations" and no unfairness because these letters do not contain long-winded passages justifying routine regulatory requirements. Forest company licensees are well-informed participants in the process, are or ought to be familiar with the *Code* and regulations, and are fully aware that anytime MOF corresponds with licensees or makes plan comments informing them of additional requirements that a "determination" has been made, well within the meaning set forth in and intended by the *Code*.

MOF routinely does not give approval to various cutblocks in a submitted Plan until such requirements as proper mapping, terrain stability studies, stream identification, CWAPs, recreational features, riparian assessments, and archaeological studies have been completed. Since the *Code* came into effect in 1995, many of these are routine requirements. In coastal B.C., CWAPs are often required for coastal watersheds. On Queen Charlotte Islands, because of steep slopes, wet soils, wild west coast weather, many fisheries streams and landslides caused by natural occurrences, logging and road building, many valleys have been identified as needing CWAPs. The Tartu is one of these watersheds.

Some planning needs are identified during Plan review by other agencies such as DFO and WLAP, and by First Nations and public participants in the FDP review process and roundtable CWAP process. When cutblocks are not approved because a regulatory requirement has not been met this, of course, may affect a licensee's intended operations, but it is the nature of the regulatory process that many requirements must be met before the plan is laid out at the FDP planning stage. If

regulatory requirements cannot be met or are costly, licensees will often drop certain cutblocks from the Plan or redesign the Plan to avoid a sensitive area.

Licensees are well informed about the *Code* and forestry practices specified in the regulations and guidebooks and if they submit plans that do not meet the types of requirements that apply to a particular terrain, they know that approval will not be given until requirements are satisfied. The *Code*, Regulations or MOF policy and procedure do not specify that any advance notice of these requirements must be given to licensees. Yet, the Husby Group had the advantage of having received five notices that a CWAP would need to be completed for the Tartu prior to development.

Here, we also have a particularly well-informed licensee. Mr. Brash, an RPF and the current Managing Director for the Husby Group, was the District Manager for the MOF Queen Charlotte Region at the time that CWAP requirements were introduced into the *Code*. He signed the two 1995 and 1996 All Licensee letters informing the Husby Group that the Tartu, along with other watersheds, had been placed on a priority list for CWAPs. As District Manager, he represented MOF at the All Licensee meetings discussing priorities for meeting new *Code* requirements. He also wrote the 1996 FDP letter to the Husby Group requiring a CWAP before development of the Tartu. As such, he would be more than well aware of the rationale for the CWAP in the Tartu – which was not disputed in any event – and the hydrological considerations that underlay the reasons for determining that the Tartu required a CWAP prior to development. He would also have been fully aware that section 14 of the 1998 *Regulation*, as well as its predecessor regulation, section 32(1)(c) in conjunction with section 15(6)(g) of the 1995 OPR, required that the CWAP be completed prior to review of the FDP.

A district manager must be particularly careful when dealing with a former district manager who now manages a licensee's operations. The Commission likewise must be particularly careful in assessing a situation where a current district manager is dealing with a former district manager. Justice must not only be done but appear to be done.

Any duty of fairness owed to the licensee in these circumstances is that of minimal procedural standards, in keeping with *Baker*. The nature of the ongoing working relationship between MOF and licensees, the routine manner of the decision-making process, the statutory scheme, and the fact that licensees are well-informed and well aware that cutblocks will not be approved until requirements are met, all dictate that minimal procedural requirements apply to this situation. The statutory scheme does not permit appeals from these discretionary administrative decisions however these are not quasi-judicial final decisions with no available recourse. Licensees have many opportunities to discuss and negotiate requirements that do not appear to be appropriate with MOF officials, district managers and their superiors. They can also amend their Plans to avoid a sensitive area that may entail development costs.

The parties did not argue that they were owed greater procedural protection on the basis that no formal appeal rights are available and did not dispute that a CWAP

was needed for the Tartu – only the timing of when it was required by. Whether a licensee has a right of appeal is a moot point in this case as well. The District Manager here did not require that Husby conduct a CWAP prior to Plan review, so it is not relevant whether the Husby Group would or could have appealed that decision and such an appeal would have been highly unlikely since there was no dispute that the Tartu ultimately would need a CWAP. The issue in this case is whether the District Manager complied with the *Code*, not whether the Husby Group contravened it and ought to have been given greater procedural protection.

Two “schedule of priority” letters sent to all-licensees and the three specific letters to the Husby Group, which are further discussed below, are clearly “determinations” as defined by the *Code* and meet a far greater standard of procedural protection than required under the *Code* and *Regulation*. Any test of the flexible and variable duty of fairness set forth in *Baker* has clearly been met. The notices very clearly required that a CWAP be completed prior to development of the Tartu.

### **Should a Determination have been made at the time of the FDP submission?**

The notices to the licenses are clearly determinations within the meaning of the *Code* definition of “determination” and are in keeping with the manner that MOF routinely uses to notify licensees of plan requirements. However, even were these letters considered to be notices to the effect that “the licensee should anticipate that a determination would be made sometime in the next several months” as set forth in the majority decision, the issue remains why the District Manager did not then determine at the time the Plan was filed that a completed CWAP must be submitted for the Tartu cutblocks.

It is fully within a District Manager’s authority to require that a CWAP be completed at the time a Plan is submitted, as stated in the majority decision. Further, the *Code*, Regulations, or MOF policy and procedure do not routinely require that licensees be notified in advance. The usual process is for MOF to notify licensees of outstanding requirements at the time the Plan is submitted. There would have been no unfairness to the licensee if the District Manager had, with or without all of the prior determination letters having been sent, made a determination that the licensee must submit a completed CWAP prior to approval of the Tartu cutblocks in the Plan.

The District Manager contravened the *Code*, regulations and MOF policy and procedure in wording and in spirit, when he decided to conditionally approve the Tartu cutblocks instead of making a determination at that time that a CWAP must be submitted prior to Plan review and approval. His reasoning that it would not be fair to the licensee to make this requirement at that time does not stand up. The licensee had had more than sufficient notice that a determination had been made that a CWAP would be required prior to development of the Tartu. Or, if the reasoning of the majority decision is accepted, the licensee had had ample notice that a determination would be made at the time the Plan was submitted.

The issue here is not solely whether there had been a past determination, which there quite clearly had been, but whether the District Manager failed to comply with section 41 of the *Code* when he issued a conditional approval instead of requiring that a CWAP be completed prior to review of the FDP, as required by section 14 of the *Regulation*. The majority decision wrongly decides the first issue and does not address this second issue.

The District Manager had in fact determined that a CWAP was necessary for the Tartu at the time he gave conditional approval to the cutblocks. He testified that in his field review of the Tartu watersheds he realized that the watersheds “really did need a CWAP, sooner rather than later.”

The letters accompanying the Plan approval mirror this thinking. Despite authorizing conditional approval on the shaky basis that the December 16, 1997 letter indicated that a schedule for completion of a CWAP was to be submitted within eighteen months and therefore did not require the licensee to carry out a CWAP by a certain date, the District Manager also stated in the FDP Rationale and Comment letters that “A CWAP for the Upper and Outer Tartu Creeks was required in a letter dated December 16, 1997 from the District Manager” and that “The content of the letter therefore requires a CWAP for the Upper and Outer Tartu.” By virtue of the fact he placed a condition on the cutblocks requiring a CWAP prior to harvesting, the District Manager also in effect determined that a CWAP was necessary for the Tartu.

Clearly, the District Manager had determined a CWAP was necessary for the Tartu. It was not then within his authority to determine that it was only necessary to conduct this CWAP after Plan approval rather than before the Plan was submitted for review pursuant to section 41 of the *Code* and section 14 of the *Regulation*. Section 14 requires that licensees submit the CWAP prior to review. Section 41 of the *Code* contains mandatory provisions that only authorize a District Manager to approve a Plan if it was “prepared and submitted in accordance with this Act, the regulation and standards.” Because the section 14 requirements were not met the District Manager did not have the authority to approve the FDP cutblocks in issue, conditionally or otherwise.

Section 41(1) of the *Code* further requires a District Manager to be “satisfied that the plan or amendment will adequately manage and conserve the forest resources of the area to which it applies.” The Plan was approved in October 1999 prior to a CWAP Report having been prepared. Based on the District Manager’s testimony that the Tartu needed a CWAP “sooner rather than later” and the fact of his conditional approval prior to preparation of the CWAP, it is apparent that the District Manager could not have been satisfied that this requirement was met prior to approving the Plan. In the absence of the hydrology information provided in the initial CWAP Report and through the CWAP roundtable process, the District Manager could not have been “satisfied” that the forest resources would be protected. Thus, a breach of section 41(1) of the *Code* also occurred. The hydrology information was clearly needed and ultimately led to changes in the plan layout. The fact that a significantly amended Plan for the layout of the Tartu cutblocks was submitted after the initial CWAP Report was prepared – yet still before the CWAP Roundtable process had been conducted – is further evidence that the District Manager had

insufficient information upon which to satisfy himself that the resource would be protected.

The *Code*, regulations and MOF policy, for good reason, simply do not authorize a District Manager to require a CWAP at a later stage in the planning process. Where a CWAP is necessary, as one was here, it must be completed before the Plan is prepared and the 5-year FDP is submitted for public and agency review of the Plan, as well as MOF's own review of the Plan.

The District Manager did not comply with the Code in approving the Plan and further committed a serious breach of MOF policy and procedure when he issued a badly worded conditional approval.

### **Did the District Manager have authority to issue a Conditional Approval?**

The *Code* and Regulations do not support the issuing of conditional approvals in this situation. The CWAP is clearly required prior to the submission and review of the FDP under section 14 of the *Regulation* and in the CWAP Guidebook, which is a regulation. In addition, MOF policy and procedure very clearly does not support issuing conditional approvals except for concerns that have arisen during the public review process.

The Board submitted that the MOF *Guide To Approving Forest Operational Plans After June 15, 1998* (Forest Practices Code Bulletin No. 5, May 26, 1998) sets out as follows:

## **2.0 Plan Preparation**

### **Assessments**

**Important Regulation change:** Effective June 15, 1998 (see Section 14 - Transition) assessments will no longer be part of an operational plan. Instead certain assessments will be required to be completed by the proponent before submission of the operational plan for approval. ...

The next section specifies "**Assessments required before submission of FDP**" and lists Watershed Assessments under section 14 of the OPR. The Board also correctly submitted that CWAPs had been required prior to plan preparation since the *Code* came into effect in 1995 under the predecessor regulation, section 32(1)(c) of the OPR, when read in conjunction with section 15(6)(g) of the 1995 OPR.

With respect to conditional approvals, the Bulletin further states:

### **Approval of an operational plan**

#### **FPC41(5) - Approval of FDP subject to a condition**

The DM **only** may approve an FDP or amendment subject to a condition. However, FPC41(3) requires that all the requirements of the FPC and regulations be met and that the DM be satisfied that the plan or

amendment adequately manages and conserves forest resources before the approval with conditions is issued. Therefore, the DM may find there are few situations when a conditional approval is appropriate. This practice should be limited to situations where valid concerns identified during the review process were addressed, but still may require some simple clarification to ensure that the intended action is clearly identified or conveyed.

**Note:** This provision **must not** be used to get around the protection provisions of the new OPR.

The Board also referred to an MOF policy document titled "Administration of Forest Operational Plans for Silviculture Prescriptions", which states:

With respect to approval subject to a condition, the condition should not be something that brings the operational plan up to satisfying the requirements of section 41(1). If the condition is a red light indicator, then the plan really does not meet section 41(1) and should not be approved. Section 41(3) states that the first thing you do is approve the plan only if it meets the requirements of section 41.

The MOF policy and procedure documents directly speak to the situation here. A District Manager must not use conditional approvals to get around the protective provisions of the new OPR. A District Manager must be satisfied that forest resources are adequately managed and conserved before the conditional approval is issued. Conditional approvals are only appropriate where valid concerns are identified during the review process – not here where the review took place without the CWAP having informed the Plan or having been made available for review. Conditions are not something that should be used to bring the operational plan up to satisfying the requirements of section 41(1).

In this case, we have a particularly badly worded conditional approval as well, since the conditional approval does not clearly require that the recommendations of the CWAP process must be followed. Further, although the letters accompanying the Plan Approval refer to the condition, the October 22, 1999 Approval letter itself only states that the Plan is subject to the condition of providing accurate terrain stability information and makes no reference to the CWAP condition.

While the Government argued that the District Manager could use his residual authority under section 21(1) of the *Regulation* to ensure that Category A cutblocks are not harvested if the CWAP shows that cutblocks or roads have negative effects, it is questionable whether section 21(1) properly applies to this situation. The Panel heard only limited argument on this point but a brief review of section 21(1) shows that it applies to Category A cutblocks. However, the Tartu cutblocks do not appear to have been given Category A status in the comment and rationale letters accompanying the plan approval. Section 21(1) also refers to "subsequently proposed FDP's" rather than a District Manager's authority to refuse cutting or silviculture prescriptions for the conditioned cutblocks. Thus, since conditions have been placed on the cutblocks but they have not been given Category A status, they

have been placed in a type of legal limbo that is not supported by the *Code* and regulations.

It is also of note that section 18(1)(y)(i) of the *Regulation* specifies that an FDP must contain a statement that the FDP is consistent with the results and recommendations of a watershed assessment required under section 14, a statement that is signed off by the RPF responsible for the Plan. If an FDP is inconsistent, pursuant to section 18(1)(y)(ii), a statement must be made explaining the reason for the inconsistency and the reason the person believes it should be approved in spite of the inconsistency. These are important statements and the issue of the accuracy of these statements is addressed more fully in the Naden portions of the decision. Here, because the District Manager did not comply with section 14 and require the CWAP prior to the FDP but at a later stage in the process, the FDP does not contain a statement of consistency or explanation as required by section 18(1)(y). Thus, a breach of 18(1)(y) has also occurred.

The government and the Husby Group argued that the conditional approval of the Tartu cutblocks in the Plan had the same practical effect as if the CWAP had been required prior to the Plan review. While this may appear to be true from the licensee's operational perspective, however it ignores the fact significant accountability mechanisms were avoided. It also ignores the fact that roads, which can have major impacts on a watershed, were built prior to the CWAP completion and that the cutblock layout of the Plan was significantly amended in January 2000 after the preparation of the initial CWAP report due to hydrological considerations arising from the report. Proper planning and the *Code*, for good reason, require that CWAPs be completed in advance of plans and inform these decisions from the outset.

The requirement that a CWAP be conducted prior to the FDP stage of the forestry development process is not just a technical requirement. The Board presented a great deal of evidence showing that a CWAP is fundamental to sound planning in watersheds that have been determined to be sensitive prior to preparation of the 5-year FDP for an area, not as a condition to be added later. Evidence was presented by Steve Chatwin, past chair of the technical committee that wrote the 1995 and 1999 editions of the *CWAP Guidebook*. His report explains the rationale for the section 14 regulatory requirement for completing a CWAP prior to approval of an FDP. It states, in part, as follows:

The Coastal Watershed Assessment Procedures Guidebook specifies that a CWAP should be carried out prior to developing a forest development plan. The CWAP examines the extent of past harvesting and road building, the number of landslides (natural and logging caused), the extent of streamside logging and the extent and progress of stream channel instability in the watershed. The purpose of conducting a CWAP is to identify, up front, any broad scale constraints that may be imposed on the location or scheduling of future cutblocks and roads. Examples of constraints that could come out of a CWAP are:

- restrictions on any further harvesting or on rate of harvesting in identified sub-basins or in the entire watershed.
- restrictions on any further road building in identified sub-basins in the watersheds
- increased riparian retention of identified reaches of streams in order to maintain stream channel stability,
- restrictions on roads or cutblocks on steep slopes

The reason a CWAP should be required prior to developing a FDP is that the above constraints have a significant bearing on the location and scheduling of roads and cutblocks that might be proposed in the plan. Completing the FDP before the CWAP is completed defeats the intent of the analysis, as road and cutblocks will be located and scheduled without knowledge of the hydrological hazard within the watershed.

While it can be argued that running a completed FDP through a CWAP analysis accomplishes the purpose of ensuring the plan is within the bounds determined by the CWAP, this is not a recommended practice. In this case, the completed FDP is only one possible solution to the array of constraints identified by the CWAP, but it is unlikely to be the optimum solution. The optimum solution can only be developed by prior knowledge of the hydrological hazards.

Another reason this practice is discouraged is that there is usually resistance to modifying a plan, once it is developed. Our experience has been that the level of hydrological hazard must be very high before the licensee will modify a plan that has already been completed.

Also review and comments on an FDP is difficult without the CWAP on hand. While the CWAP assessments are not part of the FDP, the assessment can be requested by referral agencies or the public. If review and comment has already taken place, before the CWAP was available, the process is not very effective.

In this case, the original Plan that was available for review and comment by DFO, WLAP and other agencies, aboriginal groups and public participants was very different than the amended Plan that was later filed and that at the time of the hearing had still not apparently been finalized to conform with the recommendations of the CWAP roundtable.

There is keen interest in forestry development on Queen Charlotte Islands due to aboriginal land claims, areas of historic, recreational and archaeological interest, and the many sensitive and unique areas on these Islands. The review and comment period serves the important public purpose of ensuring that decisions made under the *Code* are transparent, accountable and made on an informed basis. However, plan reviewers had no opportunity to review or question information available from the CWAP report nor would they have the opportunity to review or

make comments at the stage in the process when the CWAP condition is removed and cutting permits are issued for the Tartu cutblocks. Because the District Manager authorized the conditional approval of these cutblocks, there was also no section 18(1)(y) RPF statement of consistency or explanation that would inform why the Plan was approved despite any inconsistency with the CWAP.

The FDP Plan review is a very limited right of review, as decisions are ultimately made by MOF and there is no right of review and comment at later planning stages. Only the Board has a right to appeal Plan decisions. However, the right to public review and comment is an important right and one that is important to local and international acceptance of the *Code*. Without this review forestry decisions would be completely a matter between MOF and licensees, with no public accountability. When a district manager approves an initial plan that is ill-formed, grants conditional approval for significant planning processes such as CWAPs, and authorizes major amendments to the initial Plan, public accountability and the "one-window" opportunity for plan review by agencies is avoided.

In keeping with *Baker*, it can be said that the statutory, institutional and social context under which forestry decisions are made requires that a duty of fairness is owed to the public and participating agencies to ensure that the procedures used are fair and open and appropriate to the decision being made. Limited resources of MOF and participating government agencies should not be wasted reviewing ill-formed initial plans that lack proper study and accountability statements. Public participants and agencies should have a full opportunity to participate in Plan review of a properly developed plan at the FDP stage, as required in the *Regulation*. The procedural rights of the public as well as those of the licensee must be fully considered in this appeal.

## CONCLUSION

The District Manager, Rory Annett, clearly breached sections 41(1) and 41(3) of the *Code* when he approved the 1999-2003 FDP. Prior determinations had been made that the Tartu needed a CWAP and the District Manager at the time of plan approval determined a CWAP was needed. Yet contrary to the *Code*, Regulations and MOF policy and procedure he conditionally approved the Tartu cutblocks in the Plan and avoided the requirement of section 14 of the *Regulation* that the CWAP must be conducted before the FDP is reviewed and section 18 of the *Regulation* that the CWAP must contain a statement of consistency with the CWAP or explanation if it does not conform. In the absence of a CWAP for the Tartu, he could not have been satisfied pursuant to section 41 of the *Code* that the forest resource was adequately managed and conserved at the time he approved the Plan. Further, the conditional approval he applied to the Tartu cutblocks was badly worded and not authorized under the Regulation and MOF policy and procedure.

The remedy in this case should be that the Plan is not valid with respect to the conditional approval of the Tartu cutblocks. This remedy has almost no impact on the Husby Group, as plans filed subsequent to the completion of the CWAP would by now be in effect with respect to these cutblocks.

A handwritten signature in black ink, appearing to read "Kristen Eirikson". The signature is fluid and cursive, with the first name "Kristen" written in a larger, more prominent script than the last name "Eirikson".

Kristen Eirikson, Panel Member  
Forest Appeals Commission

October 23, 2003