

# B. C. TAP WATER ALLIANCE

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April 3, 2008

Chair & Council Members  
Private Managed Forest Land Council  
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Victoria, B.C. V8N-6J3

## Comments and Critique of PMFLC's March 13, 2008 Decision re TimberWest Logging Violation in Beech Creek, Comox Lake, Vancouver Island (File IN0703)

On May 21, 2007, I registered a complaint to the PMFLC wherein I provided photos and description of an alleged violation of clearcut logging along the Beech Creek water course by TimberWest (the complaint is registered, along with presentation information about Comox Lake, in a section on the Tap Water Alliance's website, under "Community Watershed Issues"). On April 1, 2008, some ten months later, I finally received information about my complaint, a copy of executive director Stuart Macpherson's cover letter of March 26, 2008, and attached documents. Reading the summary of facts, I was disappointed and astonished to learn that the PMFLC

- has rescinded its September 27, 2007 *Determination* charging TimberWest with a \$35,000 penalty for two violations under Section 18 of the *Private Managed Forest Land Council Regulation*;
- and found on March 13, 2008 that "TimberWest could not have contravened the regulation", because it "exercised due diligence under Section 29 of the *Private Managed Forest Land Act*."

As argued below, I find it hard to believe that such a blatant violation of clearcut logging stretching 200 meters along a riparian zone on Beech Creek in the Comox Lake drinking watershed could simply be brushed off because the logging company, TimberWest, was considered by Council to be an upstanding and conscientious steward over its timberlands.

### The Facts

The following are the "facts" as stated from three 2007, PMFLC documents found on the PMFLC's website ([www.pmflc.ca](http://www.pmflc.ca)).

As documented in Stuart Hamilton's July 2007 *CW500 Block Assessment* of TimberWest's 2005 forestry operations at Beech Creek, "the left bank was completely logged and no trees were retained

in the riparian area.” Though not specifically stated in the contents of Hamilton’s report, the map on page three of the report indicates some 200 meters of riparian area was completely removed.

Stuart Macpherson’s July 23, 2007 assessment report to the PMFLC states on page 2: “from my review of the facts outlined in Mr. Hamilton’s report it appears that the owner has contravened section 18 the Private Managed Forest Land Council Regulation as during harvesting sufficient trees along a 200 m section on one side of Beech Creek were not retained.”

Finally, in the PMFLC’s September 27, 2007 *Determination*, on page three it states that “all of the trees within the area located in the buffer area between the clearcut area and an approximate 200 m length of Beech Creek were felled and removed.” The report also states that “TimberWest does not dispute any of the evidence presented to the investigation report as the evidence relates to describing the events which occurred in Block CW500.”

The information clearly points to the fact that there is every reason to believe that TimberWest was, and is still, responsible for violating Section 18 of the *Private Managed Forest Council Regulation* within the Beech Creek riparian zone in the Comox Lake drinking watershed, as well stated in the PMFLC’s *Determination*, and should be charged accordingly.

### **Missing Reports**

I did not receive, nor find on your website, a copy of TimberWest’s August 28, 2007 written response submission, nor TimberWest’s two written submissions provided to the PMFLC during the appeal process in November, 2007 (the submissions are referred to in the *Reconsideration* as Appendix 1 and 2, but are not attached in the package I received). Seeing that I am the complainant, I have to ask the PMFLC why these documents were not included in the package I received on April 1, 2008, nor provided to me previously (additional concerns regarding the improper release of information are stated below).

### **Conversations with Mr. Macpherson**

As I read through “all” the documents provided on your website, I became troubled not only about information reported in the documents, but also about the PMFLC and Mr. Macpherson. Allow me to explain.

During the course of 2007, following my written complaint of May 21, 2007, I contacted and spoke to Mr. Macpherson on both his cell phone and office land line on a number of separate instances. At no time, following the release of Mr. Macpherson’s July 2007 report, or following the release of Mr. Hamilton’s July 2007 report, or following the arrival of TimberWest’s August 2007 response report, or following the finding of the PMFLC in September 2007, did Mr. Macpherson inform me of these reports, submissions or of the PMFLC *Determination* during our telephone conversations. Mr. Macpherson, as described below, also failed to volunteer disclosure to me regarding the fact that he had been informed of this violation by TimberWest in July 2005, and that he had investigated the site in November 2005 and had, presumably, made his own determination. Mr. Macpherson stated to me on April 2, 2008 that he was not required to inform me of these matters.

## The PMFLC's Secret *Determination* of September 27, 2007

Why was the complainant, nor the public, left uninformed, out of the loop, by Mr. Macpherson, or by the PMFLC, of the Council's *Determination* of September 27, 2007? I find this secrecy most disturbing, for both personal and greater public interest reasons. Aside from the perceived rights of a given complainant, members of the Comox Valley public, including the area's newspaper reporters, kept in keen contact with me throughout 2007 and early 2008 asking me for any updates from the PMFLC regarding my complaint. Now the public is confronted with information about a series of silent undertakings, where "public interest" has obviously been ill-served and unprotected.

The Council had formally charged TimberWest with two violations under its *Regulation*, and yet it chose not to disclose this matter to the public – **WHY NOT?** The possible fact that the PMFLC simply forgot to do so, or that it thought it didn't need to, is inexcusable, that goes without saying. I then attempted to discover the reasons behind this matter from Mr. Macpherson in a conversation I had with him on the morning of April 2, 2008. Mr. Macpherson stated that "I actually asked whether to make this public. I was told that it wasn't appropriate." I then asked Mr. Macpherson who it was that instructed him not to make the *Determination* report public. He reluctantly admitted and identified that it was the PMFLC chair, Trevor Swan, who instructed him to keep the *Determination* from public disclosure.

Why would the PMFLC chair not wish to disclose its *Determination* to the public or to the respectful rights of the complainant? Of what benefit could such a decision to withhold disclosure possibly make, one might ask, based on this line of reasoning? Was there someone else behind the scenes instructing the chair to keep the *Determination* internal? Those are relevant questions. I would hazard a comment, that such a controversial decision would obviously prevent the public and a keenly interested media from drawing attention to and investigate the violation, its nature, TimberWest's forestry practices within or without drinking watershed areas, and ultimately to the larger political arena, namely the controversial recent amended legislation by the BC Liberal government to private forest land legislation and regulations and oversight by the PMFLC.

Anyone who has been tracking the history of private forest land practices is familiar with the NDP government's intent in the early 1990s, following the release of the 1991 Forest Resources Commission, to harmonize public and private forest lands under one equal legislative Forest Practices Code – years of public complaints and investigations had led up to the debates of 1994 and 1995. That intent has come under significant amendments and weakened purposes by the present provincial administration, leading to the present practices, violations and frenzied entrepreneurial activities on private forest lands, many of which have come under recent and intense public scrutiny.

Moreover, the element of secrecy seems to comply with many other governmental circumstances and delaying tactics in B.C., where members of the public are kept from obtaining documents and information.

By failing to disclose the *Determination* and the appeal process to the public, the PMFLC has only aided in making a smaller blemish larger, in that the later consequences, as witnessed in its delayed March 2008 *Reconsideration*, may actually now create "double trouble" by newly interested inquiring minds on its highly questionable revision.

## **The July 25, 2005 Email from TimberWest and Mr. Macpherson's Subsequent Investigation File**

The intrigue behind the PMFLC's secrecy to not release the *Determination* report doesn't seem to stop there. It apparently goes back a few years. In Mr. Macpherson's assessment report of July 23, 2007 (*Investigation Report: Harvesting beside Beech Creek, Comox Lake Community Watershed*), he provides some interesting, but selective, details about the subject area in question at Beech Creek.

Evidently, TimberWest voluntarily informed PMFLC executive director Mr. Macpherson in a July 25, 2005 email "of a cutblock at Beech Creek", wherein "a reserve zone had not been left on one side of Beech Creek" (page 1) by its logging contractor. Mr. Macpherson then contacted TimberWest's Manager of Forestry Programs, John Philips, leaving Mr. Philips with ample freedom to contact Mr. Macpherson at a later "suitable date" "once (the company's) operations had been completed." A copy of the email was not appended in Mr. Macpherson's report.

Mr. Macpherson finally "completed inspection of the site" some four months later on November 17, 2005, on a helicopter flight with Mr. Philips over the infraction area above Beech Creek. However, Mr. Macpherson failed to describe or make specific reference to the area of violation in the summary of his inspection, only citing the "riparian buffer" that "had been left on one side along one section of Beech Creek" (page one). What is extremely odd is that Mr. Macpherson does not describe or refer to the violation area in question, the "reserve zone" reference by Mr. Philips in his earlier email. Mr. Macpherson simply states "that I did not observe any environmental harm and that TimberWest would have to apply for variance to Council". In other words, in Mr. Macpherson's extremely vague accounting, he makes no remarks to the violation area in question and then simply excuses TimberWest of any possible contraventions under the *Private Managed Forest Council Regulation*. Again, a copy of the evidence, this time Mr. Macpherson's "inspection file", was not appended to his July 23, 2007 report.

Then Mr. Macpherson states, based on Mr. Hamilton's Block Assessment Report, that "it appears the owner has contravened section 18 of the Private Managed Forest Land Council Regulation as during harvesting sufficient trees along a 200 m section on one side of Beech Creek were not retained" (page 2). Because Mr. Macpherson's November 2005 inspection file is not attached, the public has no idea of why this contradictory inspection incident was left in dormancy until the public complaint of May 21, 2007, and the consequent Determination of the PMFLC in September 2007.

The obvious questions remain:

- Why wasn't TimberWest charged by Mr. Macpherson for violating the provisions under Section 18 of the *Regulations* in 2005 as the PMFLC later charged the company in September 2007 for so doing?
- Would the matter have simply disappeared, or been submerged in abeyance, if the complainant had not filed his complaint?
- Are there other, similar undisclosed instances of this that need to be investigated by some independent, or oversight, agency?

## **Irrelevancy in the March 13, 2008 *Reconsideration***

The issues stated in the PMFLC's four-page long March 13, 2008 *Reconsideration* document that rescinds the Council's September 27, 2007 well-reasoned *Determination* against TimberWest, following the appeal hearing in early November 2007, appear to be irrelevant and obscure.

Without TimberWest's two written submissions that led to the Council's 180 degree shift, it is difficult to understand the details behind the *Reconsideration*. That is why I am requesting a copy of the submissions from the PMFLC. Meanwhile, I must rely on the summary statements provided by the Council concerning TimberWest's appeal arguments.

The reason for my stating the Council's issues are irrelevant is because they simply appear to be so. A contract is a contract, no matter who may execute the contract for the delegated licensee. If TimberWest's unidentified contractor had failed to carry out the owner's riparian harvesting plans that TimberWest apparently and so diligently discussed with its contractor, then TimberWest, under contract law, is liable for any infractions, plain and simple. And, if TimberWest is so charged, it can seek compensatory remedies under the law against its own contractor. That's the way the business world operates, or so we expect.

However, the PMFLC has provided some special, provisional loop-hole exemptions for TimberWest and its contractor in its *Reconsideration*, exemptions that seem to be lacking in logic. There seem to be two main arguments.

The first is that TimberWest had somehow "exercised all due diligence" regarding the violations previous to its contractor actually clearcutting the buffer zone. What this has to do with the violations is not clear, merely that it seems that the presumed intent of TimberWest was to prevent the violations from occurring by its contractor. That, of course, does not change the fate of what occurred. The Council now seems intent on believing that TimberWest is no longer responsible for what occurred.

The second Council argument is that "the removal of the buffer area" was somehow unforeseen, "not reasonably foreseeable". What the Council seems to be saying is that the clearcutting incident was 'accidental'. If it was clear from Council's deliberations that TimberWest had practiced "due diligence", and that its contractor did not "move a marked harvesting boundary", how could the violation have been 'an accident'? There isn't a discussion about this important question. Furthermore, Mr. Macpherson states in his July 27, 2007 report assessment that TimberWest failed to make "an application for exemption from the tree retention requirement for large streams (section 18) under section 3" (page 4), ruling out any possibility by the PMFLC to excuse TimberWest in its *Reconsideration*. The way that the Council seems to wiggle out of this murky and confusing argument is that if "the [clearcutting] event was reasonable (sic, "reasonably") foreseeable," i.e., that the violation was not an accident and was done purposely by the contractor, then "the Council is" somehow "satisfied that TimberWest took all reasonable measures to prevent the event from occurring." So, if TimberWest isn't responsible, and its contractor isn't responsible, then who is? Answer: nobody. That conclusion is sheer nonsense.

What do these weak arguments by the PMFLC mean, one might ask? What they mean is that the PMFLC no longer intends to charge TimberWest for the violations, even though there are no firm grounds provided in the Council's revisionist finding for not charging the company. When one takes

a careful examination of the arguments in the *Reconsideration* they merely amount to hollow sophistry.

In line with the spirit of the day, there may be another message here governing community watersheds in private forest lands, namely that an already weakened law can easily be bent by a decision-making body which apparently operates, through the behest of the provincial government, beyond public involvement, scrutiny and accountability.

Beyond the burdensome technicalities related to recent controversial laws that now allow logging in community watersheds, community watersheds ought to be fully protected on both public and private lands, under one law for all.

Sincerely,



Will Koop,  
Coordinator, B.C. Tap Water Alliance

cc. Comox-Strathcona Regional District Board of Directors  
Comox Valley Water Watch Coalition & Vancouver Island Water Watch Campaign  
Save Our Valley Alliance (Port Alberni)  
Rich Coleman, Minister of Forests and Range  
Bob Simpson, NDP opposition Forests & Range Critic  
Barry Penner, Minister of Environment  
Shane Simpson, NDP Environment Critic  
Pat Bell, Minister of Agriculture and Lands  
Dr. Perry Kendall, Provincial Medical Health Officer  
Jane Sterk, BC Green Party Leader  
John Wareing, David Suzuki Foundation  
Jill Thompson, Sierra Club, Victoria  
Joe Foy, Western Canada Wilderness Committee  
Marilyn Burgoon, Slocan Valley Watershed Alliance  
West Coast Environmental Law Association  
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