



# Forest Appeals Commission

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## APPEAL NO. 1998-FOR-07

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> | Riverside Forest Products Ltd.           | <b>APPELLANT</b>   |
| <b>AND:</b>     | Government of British Columbia           | <b>RESPONDENT</b>  |
| <b>AND:</b>     | Forest Practices Board                   | <b>THIRD PARTY</b> |
| <b>BEFORE:</b>  | A Panel of the Forest Appeals Commission |                    |
|                 | David Ormerod                            | Panel Chair        |
|                 | Bruce Devitt                             | Member             |
|                 | Geza Toth                                | Member             |

**DATE OF HEARING:** January 28-29, and March 4-5, 1999

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

**APPEARING:** For the Appellant: Daniel Bennett, Counsel  
For the Respondent: Bruce Filan, Counsel  
For the Third Party: Calvin Sandborn, Counsel

## APPEAL

This is an appeal by Riverside Forest Products Ltd. ("Riverside") against an Administrative Review decision of July 14, 1998. The Review Panel upheld the May 6, 1998, determination of the District Manager that Riverside caused a landslide which damaged the environment, contrary to section 45(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*"), and that Riverside also failed to install or maintain adequate road drainage structures as required by sections 12(1)(i) [now 13(1)(i)] and 17(1) [now 18(1)] of the *Forest Road Regulation*, BC Reg. 172/95 (the "*Regulation*"). The Appellant requests that the Review Panel's decision be wholly rescinded.

The Forest Appeals Commission has the authority to hear this appeal pursuant to section 131 of the *Code*.

## BACKGROUND

In late 1995, Riverside obtained Ministry of Forests ("MOF") approval of its Pre-Harvest Silviculture Prescription and Logging Plan for Block 9, Cutting Permit 108, of Forest Licence A18667, (Crescent Lake Operating Area, Penticton Forest District) ("Block 9"). In June 1996, Riverside also obtained a Road Permit, approving road construction into Block 9.

The Logging Plan specified that Riverside was to complete all harvesting and rehabilitation on Block 9 by November 1996. Accordingly, Riverside finished log yarding and hauling activities by mid-November of that year. Riverside had used a back-spar in its log yarding operations on Block 9. Because an early snowfall forced the crew out of the area, it did not complete the back-spar trail rehabilitation or the road deactivation in the required time frame. On December 5, 1996, MOF approved a minor amendment to the Logging Plan, which extended the completion date to late 1997 for some of the necessary rehabilitative work, such as re-contouring and grassing the back-spar trail. The amendments did not extend the deadline for drainage control and deactivation of the back-spar trail.

Steering meetings between MOF and licencees in the Penticton Forest District were held in March and May of 1997. These discussions included steps to be taken to monitor road conditions during the spring "breakup." To this end Riverside inspected its operations in the area by helicopter reconnaissance, on May 15, 1997. No problems were recorded at Block 9 at that time. On May 20, 1997, Riverside employee Fred Swetitch undertook a general inspection of the roads in the area, and discovered a landslide originating in Block 9. Upon closer investigation, he found a damaged culvert on the upper spur road ("Road 5A") which was impeding water flow through the culvert, and also found that there was no ditch block present to prevent the diverted water from flowing down the ditch.

Mr. Swetitch observed that water diverted at the damaged culvert was flowing down the ditch on the uphill side of Road 5A, ponding at a low point, and from there, flowing across the road onto the open slope above the initiation point of the slope failure. Below this area the back-spar trail ran approximately parallel to Road 5A, and crossed the swale (within which the slide event occurred). Mr. Swetitch observed that a pond had formed in the back-spar trail due to a debris berm on the lower side. Mr. Swetitch at that time attempted temporary repair of the culvert, installed a ditch-block to stop the water diversion into the ditch and breached the pond berm on the back-spar trail. Riverside reported the slide to MOF the next day.

The landslide was approximately 800 metres in length and, while varying in width, was "fairly narrow." The slide began approximately one-third of the way down Block 9, below the crossing of the swale by the back-spar trail, and proceeded down the block within the swale. It crossed over a section of lower road, through a stand of mature timber, across another road, and then ran out in a regenerating block, and across a third road. It was later determined that the slide destroyed 71.98 m<sup>3</sup> of mature timber, and 0.5 hectares of 15 year old regeneration.

A number of MOF and Riverside personnel and consultants subsequently investigated the site to determine the probable cause of the slide, and to calculate the costs of the resulting damages.

On March 11, 1998, an "Opportunity to be Heard" meeting was held before the Penticton District Manager, John Wenger. The District Manager determined that Riverside had contravened section 45(1) of the *Code*, and sections 12(1)(i) and 17(1) of the *Regulation*. He levied penalties as follows:

- \$3,500 for contravening section 45(1) of the *Code*;
- \$140 for contravening section 12(1)(i) of the *Regulation*; and
- \$1,400 for contravening section 17(1) of the *Regulation*.

The District Manager's determination was subsequently upheld in its entirety by a Review Panel.

Riverside appealed the Review Panel's decision to the Forest Appeals Commission.

Pursuant to section 131(5) of the *Code*, the Forest Practices Board took part in the appeal hearing as a Third Party. The Board's primary interest in this appeal is in the interpretation and application of section 45 of the *Code*.

## **ISSUES**

Riverside is appealing each aspect of the Review Panel's decision, thereby bringing three primary issues before the Commission:

1. Whether Riverside contravened section 12(1)(i) of the *Regulation* by failing to install a ditch block downstream of a cross drain culvert;
2. Whether Riverside contravened section 17(1) of the *Regulation* by failing to adequately inspect and repair a road, and thereby ensure the functionality of the road's drainage systems.
3. Whether Riverside is liable for carrying out forest practices that resulted in damage to the environment, in contravention of section 45(1) of the *Code*.

## **RELEVANT LEGISLATION**

### ***Forest Practices Code of British Columbia Act***

- 45** (1) A person must not carry out a forest practice that results in damage to the environment.

(2) Subject to subsection (3), a person does not contravene subsection (1) if, with respect to the forest practice referred to in subsection (1),

(a) the person is acting in accordance with an operational plan or a permit issued under this Act or the regulations, or

...

(3) A person must not carry out a forest practice if he or she knows or should reasonably know that, due to weather conditions or site factors, the carrying out of the forest practice may result, directly or indirectly, in

(a) slumping or sliding of land,

(b) inordinate soil disturbance, or

(c) other significant damage to the environment.

**63** (1) Subject to subsection (4.1) a person who uses a road under the authority of a road permit, a timber sale licence that does not provide for cutting permits, a cutting permit or a special use permit must maintain it until

(a) the road is temporarily, semi-permanently or permanently deactivated,

....

On an appeal, the Commission has the following authority granted to it under section 138 of the *Code*

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

(a) confirm, vary or rescind the decision appealed from,

(b) make any decision that the person whose decision is appealed could have made, or

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

***Forest Road Regulation, BC Reg. 172/95***

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

(a) construct bridges, culverts, fords and ditches that are necessary to maintain surface drainage patterns;

...

(c) ensure that the drainage system

...

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

...

(i) install ditch blocks immediately downstream of all cross-drain culvert inlets, except where ditch water converges at the culvert inlet;

**17.** (1) A person who maintains a road under section 63 of the Act must inspect the road and repair the road to ensure that

...

(b) the drainage systems of the road are functional,

...

**20.** A person who carries out temporary deactivation of a road must, in accordance with a deactivation prescription prepared or approved by the district manager, do all of the following:

(a) remove or breach any windrows on the outer edge of the roads surface;

(b) repair or remove bridges as necessary;

(c) if there is a risk of adversely affecting the road and other forest resources through erosion, construct waterbars or cross-ditches along the road, or inslope or outslope the road, as appropriate;

(d) carry out inspections at frequencies commensurate with the risk to the road, its users, and adjacent forest resources, to assess the adequacy of ditches and culverts and the requirements for improving drainage works, road surfacing or revegetation;

(e) remedy inadequacies identified by inspections within a period of time that is reasonable, taking into account the risk to the road, its users and the environment.

## DISCUSSION AND ANALYSIS

### 1. Whether Riverside contravened section 12(1)(i) of the *Regulation* by failing to install a ditch block downstream of a cross drain culvert.

It is common ground that Riverside did not install a ditch block downstream of the damaged culvert on Road 5A, prior to the landslide; the issue before the Commission is whether, in the circumstances, a ditch block was required.

Riverside submits that it did not contravene section 12(1)(i) of the *Regulation* by failing to install a ditch block at the culvert. Riverside points out that the requirements in section 12(1)(i) apply only to "cross drain culverts." It says that the culvert at issue was not a cross drain culvert, but was in fact a "stream culvert," used to carry stream flow from one side of the road to the other. It notes that the *Regulation* does not require the installation of ditch blocks downstream from stream culverts. Riverside also notes that the fact that the culvert at issue may have carried some ditch water in addition to stream water does not change its characterization as a stream culvert.

Contrary to Riverside's submissions, the Respondent submits that the damaged culvert on Road 5A was a cross drain culvert under the *Regulation*, as it carried not only stream water, but also ditch water. The Respondent takes the position that Riverside therefore acted in contravention of section 12(1)(i) of the *Regulation* by failing to install a ditch block immediately downstream of the culvert at issue.

The Forest Practices Board also submits that the definition of "cross drain culvert" includes situations where ditch water is mixed with stream water. It says that the Appellant's position would require ditch water to be "pure" ditch water before the culvert carrying it could fall within the definition of a "cross drain culvert." The Board maintains that this is an unduly narrow interpretation of the *Regulation*, and cannot be reconciled with a fair construction of the *Code*.

The *Regulation* defines the relevant terms as follows:

**"culvert"** means a transverse drain pipe or log structure covered with soil and lying below the road surface;

**"cross-drain culvert"** means a culvert used to carry ditch water from one side of the road to the other;

**"ditch block"** means a blockage that is

- (a) located directly downgrade of a cross-drain culvert or cross-ditch, and
- (b) designed to deflect water flow from a ditch into a cross-drain culvert;

“**stream culvert**” means a culvert used to carry stream flow in an ephemeral or perennial stream channel from one side of the road to the other.

The Commission finds that on the evidence, the damaged culvert at Road 5A was clearly intended to carry a watercourse under the road, and as such it was a “stream culvert.” The Panel agrees with Riverside that the fact that the culvert carried some ditch water in addition to the stream water does not mean that it should be characterized as a cross drain culvert.

Section 12(1)(i) requires that ditch blocks be installed to deflect ditch water into cross drain culvert inlets. The Commission finds that section 12(1)(i) should be interpreted to apply narrowly to cross-drain culverts, whose primary purpose is to move ditch water under the roadway. As the subject culvert was not a cross-drain culvert, but a stream culvert, the Commission finds that section 12(1)(i) was applied in error.

The Commission accepts the Respondent’s evidence that the water in the uphill ditch of the culvert flowed down the ditch away from the culvert, and subsequently across a low point of the road onto a potentially unstable slope. The Commission also accepts that the ditch-block installed by Riverside, upon discovering the slide, was effective in preventing this water-flow. The Commission finds that the design, construction and maintenance of the drainage structures in the subject section of Road 5A were inadequate to deal with the water-flows.

Consequently, the Commission finds that although Riverside’s failure to construct a ditch-block below the culvert was not in breach of section 12(1)(i), Riverside did not ensure that the drainage systems prevented water from being directed onto potentially unstable stopes. On the evidence, the Commission finds that the diversion of water could have been prevented with a ditch block installed as an auxiliary structure at the subject stream culvert.

It is the Commission’s finding that *Regulation* section 12(1)(c)(iv) [now 13(1)(c)(iv)] could have been applied. However, as no evidence on this point was led by the parties in the appeal, the Commission chooses not to make a finding of contravention, as no opportunity has been provided to make submissions. Further, the Commission finds that this inadequacy in design and construction of the drainage systems can be more generally dealt with under section 17 of the *Regulation*, as considered below.

**2. Whether Riverside contravened section 17(1) of the *Regulation* by failing to adequately inspect and repair a road, and thereby ensure the functionality of the road’s drainage systems.**

Riverside contends that section 17(1) only applies to a person who maintains a road under section 63 of the *Code*. It says that section 63 is clear that the obligation to maintain is only in effect until a given road is deactivated, temporarily or otherwise. Riverside argues that Road 5A was temporarily deactivated in November 1996, and

so Riverside was under no further maintenance obligations, including the section 17(1)(b) obligation to ensure the functionality of the road's drainage systems.

Riverside also says that, even if the road was not temporarily deactivated, section 17 "requires inspections at frequencies that take into account certain risks," and that it is only as a result of such inspections that an obligation to repair arises. Riverside notes that it inspected Block 9 by air on May 15, 1997, and undertook a road inspection trip on May 20, 1997. Riverside says that under the circumstances, these inspections were appropriate and sufficient.

The Respondent argues that Riverside was still required to maintain the road at the time the culvert on Road 5A was damaged. It says that Riverside contravened section 17(1)(b) of the *Regulation* by failing to ensure that the drainage system was properly functioning.

The Forest Practices Board agrees with Riverside's position that section 17(1) does not apply where the road in question has been temporarily deactivated. However, the Board says that in the present matter, Riverside had not met the minimum requirements for deactivating a road, as set out in the *Regulation*. Specifically, the Board points out that section 20(d) of the *Regulation* [now 23(d)] requires that a person who carries out temporary deactivation of a road must inspect the road to "... assess the adequacy of ditches and culverts and the requirements for improved drainage works, road surfacing or revegetation."

It is the Board's position that Riverside did not adequately assess the culvert at the time of the supposed "deactivation." The Board notes that Riverside's Statement of Points states that the road "... would have been buried in the snow when the deactivation was completed." The Board says that "deactivation of a road cannot be considered complete – so as to eliminate *Code* maintenance obligations – if the road has not been adequately inspected." As a result, the Board says that the obligations of section 17(1) still applied to Riverside, and Riverside breached section 17(1)(b) by failing to ensure that the road's drainage systems were functioning properly.

Although, by Mr. Swetitch's testimony, the road surface and road ditches had been cleaned no work had been done to remove or modify drainage structures consistent with section 20 [now 23] of the *Regulation*. There was no definite deactivation plan placed before the Commission with respect to the harvesting operations on Block 9 and its associated use of Road 5A. The Commission finds that Road 5A was not deactivated, even temporarily, on the evidence presented in this appeal.

Therefore, the Commission finds Riverside was obliged pursuant to section 17(1)(b) to ensure that the drainage systems of Road 5A were functional, and that by failing to do so, Riverside contravened section 17(1)(b) of the *Regulation*. The Commission notes that in both the original determination by the District Manager, and in its administrative review, MOF found contravention of section 17(1), but on the specific point of failing to ensure the functionality of the road's drainage



systems, which is the specific requirement of section 17(1)(b). It is not necessary for the Commission, in this case, to make a finding on the frequency of road inspection, or on the generality of what constitutes adequate road repair.

**3. Whether Riverside is liable for carrying out forest practices that resulted in damage to the environment, in contravention of section 45(1) of the Code.**

Riverside contends that it did not contravene section 45(1) because the landslide was an "act of God," caused by the winter's weather in the area, and not by Riverside's forest practices.

Moreover, Riverside says since all of the harvesting and road deactivation had occurred in the fall of 1996, Riverside was not actually carrying out a forest practice that could have led to the damage at the time of the slide. It maintains that in order for section 45(1) to apply, a violation must lead directly to environmental damage. Riverside says that the case of *Houston Forest Products Ltd. v. British Columbia* (Forest Appeals Commission, Appeal No. 96/07, February 29, 1997) (unreported), supports its contention in this respect. In *Houston*, the Commission found that some forest practice activity must be in progress for a Stop Work Order to be issued. Riverside argues that similarly, in order for a contravention of section 45(1) to occur, forest practices must be ongoing at the time of the environmental damage.

Riverside also submits that even if its forest practices were causal factors in the landslide, section 45(1) is inapplicable, because Riverside may invoke the defence in section 45(2) of the Code. Riverside relies on the case of *Chetwynd Environmental Society v. Dawson Creek Forest District* (1995) 13 B.C.L.R. (3d) 338 at p. 348 (B.C.S.C.) in support of its argument that, pursuant to section 45(2), a person who harms the environment while acting in accordance with a valid operational plan or permit, does not contravene section 45(1).

Riverside submits that at all relevant times it was acting in accordance with its Logging Plan. It says that the Logging Plan, as amended, allowed Riverside until November 1997, to rehabilitate the back-spar trail, and so it was not in breach of the Logging Plan by failing to rehabilitate before the slide occurred in May of that year. Riverside contends that if the area required rehabilitation prior to spring run-off, then the Logging Plan amendment to extend the date for compliance should not have been granted. Moreover, Riverside says that although the Logging Plan permitted it to construct a "bladed trail" (as defined in the *Cutblock and Road Review Regulation*) for the back-spar, the trail Riverside ultimately constructed for the back-spar was not in fact "bladed", and so it did not require water barring for drainage control or deactivation.

The Respondent takes the position that several of Riverside's forest practices were causal factors in the landslide and associated environmental damage. Specifically, it refers to Riverside's failure to install a ditch block immediately downstream of the culvert on Road 5A; its failure to ensure that the drainage system around Road 5A

was functional; and its failure to water bar the back-spar trail. The Respondent acknowledges that Riverside was not carrying out these forest practices at the time the landslide occurred. However, it submits that section 45(1) does not require that a forest practice and the resulting environmental damage be contemporaneous. It says that the damage that must be prevented may result after the forest practice has stopped.

The Respondent says further, that section 45(2) provides no defence for Riverside in this matter. The Respondent submits that the purpose of section 45 of the *Code* is to prevent environmental damage that may arise as a result of forest practices, but excuses a person whose forest practices are carried out in accordance with approved operational plans and permits, under the *Code* and its *Regulations*.

The Respondent submits that Riverside cannot invoke the section 45(2) defence because the Logging Plan requirements were not met in respect of the condition of the back-spar trail, as constructed and as it was left in November 1996. In particular, MOF's position is that water bars should have been made across the back-spar trail for drainage control in accordance with the Logging Plan.

In addition, the Respondent says that Riverside did not act in accordance with part 14 of its Forest Development Plan, which requires on-going maintenance of all roads and their associated drainage structures until such time as the roads are deactivated. The Respondent also says that Riverside was not in compliance with the drainage requirements in its Road Permit or its Cutting Permit.

The Forest Practices Board also takes the position that Riverside contravened section 45(1) of the *Code*. It says that a forest practice and the environmental damage it brings about need not be contemporaneous for this provision to operate: if a given forest practice causes environmental damage that only manifests itself later, as in this case, section 45(1) still applies.

The Board submits that a person cannot invoke the section 45(2) defence if the person has contravened a relevant provision of a plan or permit. The Board points out that even though "Rehabilitation" requirements of Riverside's Logging Plan (to re-contour and re-seed the back-spar trail) had been amended to extend the completion deadline, the "Drainage control/deactivation" requirement to construct water bars on the back-spar trail prior to the spring run-off continued without amendment. As such, the Board argues that Riverside was not in breach of the Logging Plan for not rehabilitating the back-spar trail prior to May 1997, but its failure to install water bars for drainage control does amount to a contravention of its Logging Plan. The Board submits that for this reason, section 45(2) of the *Code* cannot exempt Riverside from liability under section 45(1).

The Board says that moreover, a person may contravene section 45(1) even if that person is in technical compliance with all relevant plans. The Board says that section 45(2) is not intended to give "*carte blanche*" immunity for any and all environmental damage, but rather, protects a licensee from liability only for reasonable implementation of the specific authorized activities. It points out that forest practices by their very nature can cause damage to the environment, and

that by virtue of section 45(2), plans and permits authorize how much "damage to the environment" is acceptable under the *Code*.

Further, the Board says that just because something is not specifically prohibited in a plan does not mean that the licensee is authorized to do it. A licensee is only acting "in accordance with" a plan if the licensee acts reasonably in carrying out the specific permitted activity. The Board says that its position in this respect is far different from Riverside's position that if a licensee does not violate a specific, written condition of the plan, then that licensee gains total exemption from section 45(1). The Board says that the Appellant's argument "misconceives the import of section 45(1) and the role of operational plans and permits."

The Commission has viewed videotape and photographic evidence, reviewed the documentary evidence, and heard the testimony of several witnesses, including the three experts, about the amount and distribution of water flows into the swale containing the slide, and the possibility that these water flows may have triggered the slide. The Commission finds that Riverside's submission that the slide was a natural event, brought on by an exceptionally large snow-pack over saturated and unfrozen ground, is not adequately supported by the evidence. The Commission finds that the conditions were not so exceptional as to be regarded as a "life-time" event, and that on the balance of probabilities, this slide event was caused by inadequate measures to maintain natural drainage in the aftermath of Riverside's logging activity.

The weight of the evidence shows that the water diverted along the ditch line on the uphill side of Road 5A spilled over the road onto the upper slope of a seepage area lying immediately above the area of ponding at the point the back-spar trail crossed the swale containing the slide. Although not accurately measured, the Commission finds that this flow was a significant increase in the amount of water flowing over or through the seepage area down into the swale containing the slide.

While there were differences in opinion about the initiation point of the slide the Commission finds that on the weight of the evidence, the increases in sub-surface and surface flows through the seepage area, and along the back-spar trail, into the pond created by the lower debris berm of the trail, and from there onto the particularly steep portion of the headscarp failure, were causative factors in initiating the slide. Whether or not the slide initiated at the headscarp, or at a lower point, is moot.

The slide caused environmental damage by destroying mature timber, scouring the hillside, and depositing material that damaged a lower regenerated forest area. In this regard, Riverside has contravened section 45(1) of the *Code*.

The Commission does not accept Riverside's submissions that because the logging had been complete for the winter, it was not carrying out forest practices at the time of the slide, and therefore could not contravene section 45(1). The Commission finds that the *Houston* decision, cited by Riverside in support of its position in this respect, is not relevant to the present matter. In *Houston*, the Commission found that forest practices have to be active in order for a Stop Work

Order to be issued (otherwise, there would be no “work” to “stop”). The Commission agrees with the Respondent and the Forest Practices Board that the same principle does not extend to determinations of a section 45(1) contravention, and that there is no basis for determining, under section 45(1), that environmental damage resulting from forest practices has to be contemporaneous with the practice.

Section 45(2) protects a licensee from liability only for reasonable implementation of the specific activities authorized by the approved plans and permits, and is not intended to give complete immunity for any and all environmental damage that may result from licensees operating under such plans and permits.

Riverside has argued that even if its forest practices did trigger the slide, they were carried out in accordance with the relevant operational plans and permits. As such, Riverside says that it may not be held liable for contravening section 45(1), because section 45(2)(a) acts as a defence in its favour. Riverside cited the *Chetwynd* case in support of this submission.

In *Chetwynd*, Justice Holmes ruled that timber harvesting under an approved logging plan qualifies as an exemption from section 45(1) by power of section 45(2):

In the circumstances here, I do not find substance to the Petitioners' argument that section 45(1) prohibits a person carrying out a “forest practice” resulting in damage to the environment. *Section 45(2) exempts such practice if a person is acting in accord with an operational plan.* Section 21(2) of the *Code* requires a logging plan be approved for tree harvest under a Licence to Cut. Harvest under an approved logging plan therefore qualifies as an exemption in section 45(2). (emphasis added)

The Commission finds that because Riverside was not operating in full compliance with its approved plans and permits at the relevant time, the *Chetwynd* decision is not relevant to its position.

The Commission accepts the Respondent's evidence that the back-spar trail was bladed over part of its length, and in particular at a critical downslope section to the swale where water had been observed to pond. The evidence of surface erosion in the machine tracks of this trail is confirmation that the trail should have been water barred, as required in the Logging Plan, to remove the concentrated flow from the trail. The Commission finds that Riverside contravened its Logging Plan by failing to water bar the back-spar trail.

The Commission also finds that Riverside did not deactivate Road 5A, did not repair the culvert at Road 5A prior to the slide event, and did not have any drainage structures in place to prevent diversion of stream and ditch water across the road onto the seepage area above the swale that led down to the pond created on the back-spar trail, and from there was diverted to the unstable slope in the slide's “headscarp” area.

The Commission finds that due to Riverside's remaining obligations in Block 9 (the continued maintenance or deactivation of Road 5A, and the drainage control on the back-spar trail), the company was still "in operation" on the block, and had on-going responsibilities to prevent damage to the environment by meeting the requirements of the operational plans and permits still in effect.

The Commission finds that Riverside damaged the environment in contravention of section 45(1) of the *Code*, and because it was not in full compliance with the relevant plans and permits, that it has no defence under section 45(2)(a).

Further, the Commission finds that Riverside should have known that its harvesting activities on Block 9, and its associated use of Road 5A would compromise the stability of the land if unfavourable weather conditions were to occur in the winter of 1996/97. There was obviously a heightened level of concern in early 1997, as evidenced in the topics discussed at the joint Forest Service and licensee steering meetings held in March and May, and by the aerial reconnaissance undertaken on May 15. It was imprudent for Riverside not to have checked that the culverts were clear, and ensure adequate drainage from the back-spar trail, prior to their final removal of equipment in late 1996. In particular, the back-spar trail should have been attended to on completion of yarding on October 29, which was some two weeks before the completion of roadside processing and log hauling.

The Commission finds these omissions could be held to be a contravention of section 45(3)(a) of the *Code*. Riverside should have known that the conditions in which they left Road 5A and the back-spar trail might result in slumping or landslides under weather conditions that could occur in the area. The water diversion from the damaged culvert, and the water diversion and ponding on the back-spar trail, on the balance of probabilities, caused the slide. However, it is sufficient to find a contravention under section 45(1) to remedy the error.

## DECISION

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

1. There is no finding of contravention under section 12 [now 13] of the *Forest Road Regulation*.
2. Riverside contravened section 17(1)(b) [now 18(1)(b)] of the *Forest Road Regulation* by failing to ensure the functionality of a logging road's drainage systems; and
3. Riverside carried out forest practices that resulted in damage to the environment, in contravention of section 45(1) of the *Code*.

The Commission has reviewed the original determination of the District Manager in terms of his consideration of section 117 of the *Code*, and finds no reason to reassess the severity of the penalty for these contraventions. Accordingly, the

Commission confirms the penalty of \$3,500 for contravening section 45(1) of the *Code* and \$1,400 for contravening section 17(1) of the *Regulation*. The penalty assessed for the contravention of section 12(1)(i) is set aside.

The appeal is allowed in part.

David Ormerod, Panel Chair  
Forest Appeals Commission

May 31, 1999