Forest Appeals Commission

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APPEAL NO. 2000-FOR-009(d)

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.

BETWEEN:	Forest Practices Board	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Husby Forest Products Ltd. Naden Harbour Timber Ltd. Sitkana Timber Ltd. Dawson Harbour Logging Co. Ltd. TimberWest Forest Limited	**THIRD PARTIES**
AND:	Council of the Haida Nation	**INTERVENOR**
BEFORE:	A Panel of the Forest Appeals Commission Alan Andison, Chair Kristen Eirikson, Member James Hackett, Member	
DATE:	October 29, 30, 31; November 1, 2 and 3, 2001 Concluding in writing on October 18, 2002	
PLACE:	Queen Charlotte City, B.C.	

APPEARING:	For the Appellant:	Calvin Sandborn, Counsel John Pennington, Counsel
	For the Respondent:	Bruce R. Filan, Counsel
	For the Third Party:	Robert Brash
	For the Intervenor:	Cheryl Sharvit, Counsel

MAJORITY DECISION OF PANEL MEMBERS ALAN ANDISON AND JAMES HACKETT

APPEAL

This is an appeal by the Forest Practices Board (the "Board") of an administrative review panel decision dated November 22, 2000, confirming the approval of the 1999-2003 forest development plan (the "Plan") for five licences, four of which are

held by the Husby Group of Companies (the "Husby Group"). The Husby Group consists of Husby Forest Products Ltd., Naden Harbour Timber Ltd., Sitkana Timber Ltd., and Dawson Harbour Logging Co. Ltd. TimberWest Forest Limited holds the fifth licence. For the purposes of this decision, all five licensees are referred to as the Husby Group. Rory Annett, District Manager of the Queen Charlotte Islands Forest District, Ministry of Forests (the "District Manager"), approved the Plan in determinations dated October 22, 1999, and November 26, 1999.

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 one 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 the timing of, and the Plan's consistency with, watershed assessments for the Tartu and Naden watersheds would be heard separately. Accordingly, those issues are addressed in a separate decision (see *Forest Practices Board v. Government of British Columbia*, Appeal No. 2000-FOR-009(c), October 23, 2003)(unreported).

This decision addresses the approval of certain cutblocks within the Plan that overlap with, or are situate within, areas that were identified as draft forest ecosystem networks ("FENs") in previous forest development plans. Those draft FENs were developed, in part, because they contained marbled murrelet habitat or habitat that may be suitable for marbled murrelets.

The Board requests that the Commission set aside the approvals of the 51 cutblocks that are covered by the Plan and that overlap with areas that were previously identified as FENs. Alternatively, the Board requests that the approvals for 5 cutblocks containing the most significant overlaps be set aside. Those cutblocks are: TOR 035, DIV 430, DAV 037, NAD 061, and LIG 066.

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 Graham Island in the Queen Charlotte Islands, also known as Haida Gwaii, for the period from 1999 through 2003. This decision is concerned with three of the forest licences covered by the Plan:

> FL A16869 held by Husby Forest Products Ltd. (the "Husby Licence"), consisting of 41,108 hectares; its major watersheds are the Cave, Davidson, Haines and Torney.

FL A16872 held by Naden Harbour Timber Ltd. (the "Naden Licence"), consisting of 29,183 hectares; its major watersheds are the Lignite, Naden and Roy.

FL A16871 held by Sitkana Timber Ltd. (the "Sitkana Licence") consisting of 7,599 hectares; its major watersheds are the Tartu and Canyon.

The first two licences are situated in the Eden Landscape Unit (the "Eden LU") on northwest Graham Island. The third is situated near Rennett Sound on southwest Graham Island.

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. The *Code* and the *Operational Planning Regulation*, B.C. Reg. 107/98 (the "*Regulation*") set out the scope, general content, and information requirements for forest development plans. Section 18(1)(e) of the *Regulation* requires the person preparing a forest development plan to ensure that the plan includes information for the plan area about a number of "known" items, including FENs, wildlife habitat areas, old growth management areas, protected areas, and various other non-timber resources. The term "forest ecosystem network" and the word "known" are both defined in the *Regulation*, and therefore, have specific meanings that are relevant to this decision and will be set out later in the decision.

Under 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]

In addition, section 41(3) of the *Code* provides that a district manager "may" approve a forest development plan "only if" it meets the requirements of subsection (1). "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."

Between 1996 and 1998, the Husby Group prepared a number of forest development plan submissions that covered the areas now covered by the Plan. These earlier forest development plans discussed draft FENs that were identified in the Husby, Naden, and Sitkana Licence areas based on wildlife and biodiversity assessments conducted by the Husby Group between 1994 and 1996. The draft FENs included areas that could not be harvested, such as swamps and existing

protected areas, as well as areas containing rare ecosystems and habitat for red[1] and blue listed species such as the marbled murrelet.

The marbled murrelet is a red listed sea bird that nests in old growth trees, and is found in coastal areas of the eastern Pacific Ocean from Alaska to central California, including parts of the Queen Charlotte Islands. The bird's reproductive rate is very low because only one egg is laid each year and nest predation by other birds is high. In 1991, marbled murrelets were designated by the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") as a "threatened" species in Canada. Their "threatened" status was confirmed by COSEWIC in 2001. The main threat to the marbled murrelet is the loss of old growth nesting habitat.

The marbled murrelet is also an "identified wildlife" species under the *Code*. Identified wildlife are species and plant communities that have been approved by both the chief forester of the Ministry of Forests ("MOF") and the deputy minister of Water, Land and Air Protection ("WLAP"), formerly the Ministry of Environment, Lands and Parks, as requiring special management. The Managing Identified Wildlife Guidebook, which was issued by MOF in February 1999 and is commonly referred to as the Identified Wildlife Management Strategy ("IWMS") is designed to address habitat requirements of species that require special management, particularly species at risk.

If the chief forester and the deputy minister of WLAP designate an "identified species," they may also designate wildlife habitat areas ("WHAs") for that species. The IWMS recommends setting aside 10% to 12% of the landscape in WHAs to protect marbled murrelet habitat. That 10% to 12% is to be made up of suitable habitat, or originally suitable habitat where sufficient suitable habitat does not exist. Suitable habitat for marbled murrelets is described at page 69 of the IWMS, which discusses preferred tree species and heights, and states that age class 9 (250 years+) is preferred, but age class 8 (151 years+) is acceptable if older forest is not available. It also describes features such as large limb platforms used for murrelet nesting. The IWMS recommends that WHAs for marbled murrelets should be a minimum of 200 hectares in area and a minimum of 600 metres in width to provide interior forest conditions. It recommends that where 200 hectares of suitable habitat are not available, WHAs may be smaller, but should include a 100-metre buffer. If the WHA is narrower than 500 metres in width, a buffer of approximately 100 metres of old growth forest or advanced second growth (more than 60 years old) should be included.

The draft FENs identified in the Husby, Naden, and Sitkana Licence areas were developed, in part, to provide suitable habitat for marbled murrelets. The draft FENs were discussed in a forest development plan submitted by the Husby Group in

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[1] The Ministry of Water, Land and Air Protection defines red-listed species as "Taxa being considered for or already designated Extirpated, Endangered or Threatened. Extirpated taxa no longer exist in the wild in British Columbia, but occur elsewhere. Endangered taxa are facing imminent extirpation or extinction. Threatened taxa are likely to become endangered if limiting factors are not reversed."

1996, and were included in maps of the Husby, Naden, and Sitkana Licence areas. The 1996 forest development plan also indicated that the District Manager had prohibited development within the draft FEN boundaries, pending the completion of a Local Resource Management Plan ("LRMP") process in the district that would confirm draft landscape units and objectives. Forest development plans submitted by the Husby Group in 1997 and 1998 also referred to the draft FENs.

However, the 1999-2003 Plan did not discuss the draft FENs, show the draft FENs on maps, or provide an explanation for proposing cutblocks within the boundaries of the draft FENs in the Husby, Naden, and Sitkana Licence areas. The Plan refers to the wildlife inventories on which the draft FENs were initially developed, and refers to red and blue listed species, but does not specifically mention the marbled murrelet. The Biodiversity section of the Plan states:

> The 1994-1996 Wildlife Inventory Report for the Husby Group of Companies which was submitted with the 1997 FDP's for this licence was a first step in assessing wildlife distribution and habitat requirements. The report created a valid and detailed inventory of wildlife habitat within the forest licence. The inventory summary data, species matrix and map showing wildlife survey stations, and the distribution of red and blue listed species detections.
>
> In order to ensure adequate protection of critical wildlife habitat it is the intention of the licensee to seek direction and input from the agencies regarding current practices and considerations for designation of wildlife habitat areas.

The last paragraph from the Biodiversity section may allude to the fact that, when the Plan was submitted on or about May 20, 1999, MOF was in the process of a transition regarding its policies on area-based management tools for conserving identified wildlife. FENs were no longer being used as the primary tool for protecting wildlife habitat, as the purpose of FENs was primarily to protect connectivity in the forest, and not necessarily to identify and protect critical wildlife habitat. Instead, WHAs and old growth management areas ("OGMAs") were being developed through a process described as landscape level planning, which involves developing objectives for landscape units. OGMAs are areas that contain, or are managed to replace, specific structural old-growth forest attributes, and which are mapped and treated as special management areas. Like WHAs, OGMAs are designated during the landscape level planning process. Landscape units typically cover a watershed or series of watersheds, and range in size from 5000 to 100 000 hectares. Landscape unit objectives are objectives established for a landscape unit to guide forest development and other operational planning. Under section 4 of the *Code*, the Minister of Forests is responsible for establishing landscape units and landscape unit objectives, but in practice these tasks are delegated to district managers and designated WLAP officials.

The concepts of WHAs and OGMAs, and how MOF should manage critical wildlife in the interim before WHAs and OGMAs were designated, are discussed in the IWMS and related policy documents. For example, the chief forester's policy regarding

the implementation of interim measures, which was attached to a February 15, 1999 covering letter from the chief forester and the Deputy Minister of the Ministry of Environment, Lands and Parks (MELP) approving the IWMS, states as follows:

> Interim Measures
>
> Interim Measures are designed to minimize the effects of forest or range practices on critical habitat attributes such as a nest site, and an adjacent area (interim zone) until a decision is made by the chief forester and deputy minister of Environment Lands and Parks (CF and ADM-MELP) on a proposed WHA. The purpose of this section is to describe how interim measures are to be applied and under whose authority.
>
> It is the opinion of the statutory decision makers (CF and ADM-MELP) that pending the designation of a WHA, interim measures should be applied to maintain those features of a proposed WHA critical to the survival of a species (Table 1). They are a prudent measure to ensure the qualities of a proposed WHA are maintained and provide a protective buffer for those critical features. Interim measures are not mandatory but are provided here for district managers and forest licensees to consider during the preparation and evaluation of operational plans.
>
> Interim measures should be applied to WHA proposals accepted by the RES in step 2 of the procedures for establishing WHAs. It is recommended that the species general wildlife measures be applied within the interim zone. When a WHA is approved, interim measures should remain until such time as the WHA is designated and "known" as defined in the Forest Practices Code of BC). When a WHA is rejected, maintenance of the interim zone is not required; however, other Code mechanisms, such as wildlife tree patches, may be used to maintain the critical feature. The number of interim sites that can be in place at any one time for some species has been limited (See "Planning thresholds" and Appendix 10 in the Procedures and Measures document).
>
> Recommended interim zones for Identified Wildlife

Species	Habitat attribute	Interim zone (-ha)	Interim zone (m)
(31 red and blue listed species are listed), including:			
Queen Charlotte Goshawk	nest site	12	200 m radius
Marbled murrelet	nest site*	113	600 m radius

> *Nest site refers to occupied stands as defined in the Resource Inventory Committee (RIC) inventory manual for marbled murrelets

In October and November 1999, the District Manager issued determinations approving each licence area within the Plan. Letters attached to the determinations provided rationales, and set out more specific comments or requirements pertaining to certain cutblocks. The approval letters for the Husby, Naden, and Sitkana Licences do not refer to marbled murrelets or the draft FENs. However, interim protection measures were provided for Queen Charlotte Goshawk nests. Under "Stand Level Biodiversity," the rationale letters state:

> The Identified Wildlife Management Strategy is currently being implemented. The first stage is the implementation of interim measures. The interim measures are designed to minimise the effects of forest practices on critical habitat attributes, such as nest sites and adjacent areas until a decision is made by the Chief Forester and the Deputy Minister of Environment, Lands and Parks on a proposed WHA [wildlife habitat area]. In order to avoid either anticipating or limiting the decisions of the Chief Forester and the Deputy Minister of the Ministry of Environment, Lands and Parks, the documented locations of active Queen Charlotte goshawk (accipiter gentilies var. laingi) nests will require a 12 hectare reserve centred on the nest tree.

It should also be noted that the Plan approval also allowed cutblocks within the Duu Guusd, a 148,000 hectare area to the west of the Eden LU. In the early 1990's, Cabinet declared the Duu Guusd a Protected Area Study Area under Part 13 of the *Forest Act*, which provides for temporary deferrals while land use designations are being studied. On November 29, 1999, the Minister ordered suspension of four cutting permits approved in the Plan, a matter which is under litigation in the courts. The Commission was informed that, unless renewed by Cabinet, the temporary deferral for the Duu Guusd will expire at the end 2001. Subsequent Cabinet orders, the most recent being B.C Reg. 73/2003, have extended the deferral of the Duu Guusd from timber harvesting until December 31, 2004.

The Board requested an administrative review of the District Manager's determinations approving the Plan, partly on the basis that the District Manager should not have approved the Plan given that it fails to address or even mention measures for conserving marbled murrelets.

In a decision dated November 22, 2000, the majority of a three-person administrative 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. The Board submits that the District Manager approved 51 cutblocks, in areas previously managed for marbled murrelets and other wildlife through a system of draft FENs, without reasonable consideration of whether the Plan would adequately manage and conserve marbled murrelets, contrary to sections 41(1)(b) and 41(3) of the *Code*. The Board also argues that the approval of the Plan was

contrary to section 41(1)(a) of the *Code*, which requires that a forest development plan must be prepared in accordance with the *Code* and associated regulations.

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

On September 7, 2001, the CHN 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 CHN requests that the Plan be set aside respecting all cutblocks that overlap the draft FENs.

Both the Government of British Columbia (the "Government") and the Husby Group request that the Commission confirm the Plan as approved.

The Husby Group also requested that it be awarded its costs in this appeal. This issue will be subject to a separate hearing, if it is pursued after the issuance of this appeal decision.

ISSUES

The issues raised by this application are as follows:

1. Whether hearings before the Commission are properly *de novo* hearings or hearings on the record.

2. Whether the Plan was prepared and submitted in accordance with section 41(1)(a) of the *Code*.

3. Whether the Plan adequately manages and conserves marbled murrelets in the area under the Plan, in accordance with sections 41(1)(b) and 41(3) of the *Code*.

   This issue involves a consideration of the following sub-issues:

   (a) Are marbled murrelets a "forest resource," as defined in the *Code*?

   (b) Was the District Manager obliged to consider whether the Plan adequately managed and conserved marbled murrelets, even if the Plan was not required to include information about draft FENs or areas that were being considered as potential WHAs or OGMAs?

   (c) What does "adequately manage and conserve" mean in the context of section 41(1)(b) of the *Code*?

   (d) In this case, what is the "area under the plan" in the context of section 41(1)(b) of the *Code*? Specifically, did the District Manager properly consider marbled murrelet habitat outside the boundaries of the cutblocks, roads, and other developments proposed in the Plan.

(e) What is the relevance of MOF knowledge about the draft FENs and marbled murrelets, prior to the approval of the Plan, in the context of section 41(1)(b) in this case?

(f) What is the relevance of the IWMS and related policies in approving the Plan?

(g) Based on the evidence before the Commission, does the Plan approval meet the requirements of section 41(1)(b) with respect to marbled murrelets?

RELEVANT LEGISLATION

The following sections of the *Code* are relevant to this decision. Other relevant sections of the Code and related regulations are set out in the text of the decision.

Preamble

WHEREAS British Columbians desire sustainable use of the forests they hold in trust for future generations;

AND WHEREAS sustainable use includes

(a) managing forests to meet present needs without compromising the needs of future generations,

(b) providing stewardship of forests based on an ethic of respect for the land,

(c) balancing economic, productive, spiritual, ecological and recreational values of forests to meet the economic, social and cultural needs of peoples and communities, including First Nations,

(d) conserving biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources, and

(e) restoring damaged ecologies;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows…

Definitions

1 (1) In this Act:

"forest resources" means resources and values associated with forests and range including, without limitation, timber, water, wildlife, fisheries, recreation, botanical forest products, forage and biological diversity;

Forest development plans: content

10 (1) Subject to subsections (2) to (5), a forest development plan must comply with the following:

...

(b) it must include, for the area under the plan,

...

(ii) matters required by regulation

(c) it must specify

...

(ii) measures that will be carried out to protect forest resources;

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.

...

(3) The district manager may approve an operational plan or amendment only if it meets the requirements of subsection (1).

1. Whether hearings before the Commission are properly *de novo* hearings or hearings on the record.

The Government submits that the hearing before the Commission is not a hearing *de novo*, and therefore, the Commission should not consider any evidence that came to light after the Plan was approved.

The Government relied on statements made by Lambert J.A. in *Thomas Paul v. The Forest Appeals Commission and The Attorney General of British Columbia and the Ministry of Forests*, 2001 BCCA 0537 (hereinafter *Paul*), for this proposition. In that decision, Lambert J.A. said at paragraph 54:

> If the Forest Appeals Commission has jurisdiction to decide questions of aboriginal title and aboriginal rights that jurisdiction must be regarded as conferred by the generality of s. 131(8)(d) [of the *Code*]. There is no similar provision with respect to the District Manager or the Administrative Review Panel, the former being authorized to make determinations about occurrences, and the latter to review them. *But since the Forest Appeals Commission is not authorized to conduct hearings de novo on the very points which the District*

> *Manager was required to determine, but only to hear an appeal, the better assumption must be that the implication of jurisdiction to decide questions of aboriginal title and aboriginal rights, if it is to be made with respect to the Forest Appeals Commission, must also be made with respect to the District Manager and the Administrative Review Panel*.
>
> [emphasis added]

The Husby Group submits that the Commission should not consider any evidence that came to light after the Plan was approved. Accordingly, the Husby Group submits that a hearing before the Commission should not be *de novo*.

The Board submits that the hearing before the Commission is a hearing *de novo*.

The CHN adopts the same position as the Board.

The Commission notes that, subsequent to the conclusion of this appeal, the Supreme Court of Canada overturned the Court of Appeal decision in *Paul* (*Paul v. British Columbia (Forest Appeals Commission*), 2003 SCC 55. However, the parties in the present appeal did not make further submissions on the effect of the Supreme Court of Canada's ruling on the issue of the nature of appeal hearings before the Commission.

In any event, the Commission notes that Lambert J.A.'s comment regarding the nature of a hearing before the Commission is *obiter dictum* and was not made in the context of characterizing the Commission's hearing procedure for the purposes of determining the applicable standard of review. Further, Lambert J.A. is the only judge to specifically refer to the matter. Donald J.A.'s concurring decision is silent on the matter. In her dissenting decision, Huddart J.A. does not specifically mention *de novo* jurisdiction, but does describe the Commission's powers in broad terms.

The Commission has considered the parties' submissions and finds that, in general, the nature of an appeal to a tribunal is to be determined by examining the relevant provisions of the tribunal's enabling statute. The Commission finds that the relevant provisions of the *Code* indicate that the Legislature intended to allow the Commission to be flexible in how it handles appeals, and that it is open to the Commission to both hear new evidence and consider the findings of the decision-makers below, thus allowing the Commission to effectively conduct an appeal as a hearing *de novo*.

Section 131(12) states that parties in appeal to the Commission may do as follows:

131 (12) The parties may

(a) be represented by counsel,

(b) present evidence, *including but not limited to evidence that was not presented in the review under section 129,*

(c) if there is an oral hearing, ask questions, and

(d) *make submissions as to facts, law and jurisdiction.*

[emphasis added]

Under sections 132 and 133, respectively, the Commission may order parties to deliver written submissions and may make an interim order in an appeal.

Section 135 provides the Commission with the same powers as the Supreme Court to summon and enforce the attendance of witnesses, to compel witnesses to give evidence and to require production of records.

Section 137 gives the Commission wide powers to admit evidence, including the power to retain, call and hear an expert witness. In *Weyerhaeuser Company Limited v. Government of British Columbia* (Appeal No. 2000-FA-009, March 21, 2002) (hereinafter *Weyerhaeuser*), the Commission noted that the Alberta Court of Appeal in *Calgary General Hospital Board and Williams*, (1982) 142 D.L.R. (3d) 736 (at pages 738-9) held that similar powers under the Alberta *Hospitals Act* were "hardly consistent with a limited appeal on the record."

Not only are those powers described above normally ones which are indicative of a *de novo* jurisdiction, but there is no practical purpose to be served in giving the Commission the power to hear fresh evidence and to retain, call and hear an expert witness if the Commission's role is limited to that proposed by the Government and the Husby Group.

In addition, the Commission has considered section 138(1), which states:

138 (1) On an appeal of a determination or of the confirmation, variance or rescission of a determination, the commission may consider the findings of

(a) the person who made the determination that is being appealed, or

(b) the reviewer.

While section 138(1) states that the Commission "may" consider the findings of the person who made the determination and the review panel, the Commission is not required to consider their findings, nor is the Commission limited to considering only the evidence before the decision-makers below. Further, section 131(12)(b) provides that a party may "present evidence, including but not limited to evidence that was not presented in the review under section 129." On a plain reading of that subsection, the Commission finds that it is not bound to the record before the decision-maker below; it is entitled to go beyond a mere review for errors of fact, law and jurisdiction. This supports the conclusion that the Commission is *not* bound to hear matters as "true appeals."

Finally, section 131(12)(d) states, in part, that a party may make submissions "as to facts." Again, this suggests that the Commission will be involved in making fresh

findings of fact, not simply taking the findings of the decision-maker appealed from as given.

In its submissions, the Government emphasized an amendment to the wording of the Commission's powers under the *Code*. Section 138(2) of the *Code* now reads:

138 (2) On an appeal, the commission may

(a) confirm, vary or rescind the determination, order or decision, or

(b) refer the matter back to the person who made the initial determination, order or decision with or without directions. [check wording used at the time]

The *Code* previously had a third remedy option, which provided that on considering an appeal, the Commission may make any decision that the person whose decision is appealed could have made.

The Government argues that the removal of that former remedy from the *Code* suggests an intention on the part of the legislature to change the nature of appeals before the Commission.

In *Weyerhaeuser*, the Commission considered the effect of similar changes to the Commission's powers in appeals under the *Forest Act*. The relevant provisions of the *Forest Act* and the *Code* are virtually identical. In *Weyerhaeuser*, the Commission stated as follows after considering the relevant provisions of the *Forest Act*:

> The Commission is of the view that, even with the statutory changes, the Commission still retains *de novo* powers. There are various provisions in the *Forest Act* which point to that conclusion.
>
> First, under section 149(2), the Commission has retained the power to "confirm, vary or rescind" the decisions below. In *British Columbia (Minister of Health) v. British Columbia (Environmental Appeal Board)* [1996] B.C.J. No. 1531, Romilly J. made these observations regarding a similar power held by the Environmental Appeal Board under section 5(4) of the *Health Act*:
>
> > Under s. 5(4) of the Act, when hearing an appeal from a person 'aggrieved by the issue or the refusal of a permit for a sewage disposal system', the Board 'may confirm, vary or rescind the ruling under appeal'. *This legislation identifies a clear legislative intent to provide the Board a wide ambit of appellate authority. Unlike in other statutes, the Board is not limited to determining whether there are, for example, 'errors of law' or even 'errors of mixed fact and law'; rather, it may 'confirm, vary or rescind', the decision of the statutory officer, and enjoys the widest possible scope of remedial powers.*

> [emphasis added]
>
> The language "confirm, vary or rescind" in the *Forest Act* can be contrasted with the language employed in section 150 of the *Act* which provides for a statutory appeal to the courts from a decision of the Commission merely on questions of law or jurisdiction. Clearly, the Legislature intended the Commission to have much broader powers on appeal than a court on a subsequent statutory appeal.
>
> The Commission finds that a purposive interpretation of the *Forest Act* leads to the conclusion that the Legislature intended for appeals of specialized questions of forestry to come before the Commission, that the Commission would have an opportunity, should it so desire, to consider those questions from its own specialized perspective, and for the courts to provide a supervisory role, ensuring that no errors of law or jurisdiction are made by the Commission. Therefore, the better view of the amendment to the *Forest Act*, is that the Legislature was attempting to move the Commission down the "spectrum" away from pure appeals *de novo*, giving it the flexibility to decide appeals in a more efficient manner by relying on the findings below, and not necessarily conducting a true hearing *de novo* appeal in every case.
>
> Thus, the Commission can consider information that was before the decision-maker below as well as new evidence in order to make a decision on the issues in the appeal.

The Commission finds that the reasoning in *Weyerhaeuser* is equally applicable to the present case. In section 138(2) of the *Code*, as in section 149(2) of the *Forest Act* cited above, the Commission has retained the power to "confirm, vary or rescind" the decisions below. The language "confirm, vary or rescind" in that section can be contrasted with the language employed in section 141(1) of the *Code*, which provides for a statutory appeal to the courts from a decision of the Commission "on a question of law or jurisdiction" only. Clearly, the Legislature intended the Commission to have much broader powers on appeal than a court on a subsequent statutory appeal. The Commission finds that a purposive interpretation of the *Code* leads to the conclusion that the Legislature intended for appeals of specialized questions of forestry to come before the Commission, that the Commission would have an opportunity, should it so desire, to consider those questions from its own specialized perspective, and for the courts to provide a supervisory role, ensuring that no errors of law or jurisdiction are made by the Commission. Therefore, the Commission finds that it is unreasonable to conclude from the removal of section 138(1)(b) that the Legislature intended to convert appeals to the Commission to "true appeals."

Accordingly, the Commission finds that it may consider information that was before the District Manager and the review panel, as well as new evidence that the parties have presented at the hearing before the Commission, in deciding the issues in an appeal.

2. Whether the District Manager should have rejected the Plan because it failed to meet the requirements of section 41(1)(a) of the *Code*.

The Board's submissions

The Board notes that, under section 41(3) of the *Code*, a district manager "may approve" a forest development plan "only if it meets the requirements of subsection (1)." For convenience, section 41(1) of the *Code* states:

> 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.

The Board advised that it relies primarily on section 41(1)(b), not section 41(1)(a), for the following reasons. The Board acknowledges that, at the time when the Plan was approved, no WHAs or higher level plans had been designated to protect marbled murrelets anywhere in the province. The Board concedes that, as a result, marbled murrelets may not have been a forest resource that required the "mandatory content" of specific protective measures under section 10(c)(ii) of the *Code* and the *Regulation*. In other words the Plan may not have been required to include, as "mandatory content," protective measures for marbled murrelets, and therefore, the Plan may not have been in breach of section 41(1)(a) of the *Code*.

Nevertheless, the Board invited the Commission to consider the following submissions regarding whether there was a contravention of section 41(1)(a) of the *Code*.

The Board notes that, under section 41(1)(a), the Plan had to be prepared and submitted in accordance with the *Code* and regulations. The Board submits that the Plan fails to meet the requirements of section 41(1)(a) of the *Code* because it contravenes section 10 of the *Code*, and therefore, the Plan should not have been approved. Specifically, section 10(1)(b)(ii) of the *Code* states that a forest development plan "must include, for the area under the plan…matters required by regulation." Further, section 10(1)(c) states that a forest development plan must specify:

> (ii) measures that will be carried out to protect forest resources.

The Board submits that section 10 requires that a forest development plan must specify measures to protect "forest resources" such as marbled murrelets, in addition to meeting the requirements of the regulations. The Board submits that this requirement is separate from the requirement to comply with the regulations.

Thus, it is a free-standing and overriding statutory requirement; it is not subordinate to the content requirements found in the *Regulation*.

The Board further submits that it is inconsistent with section 10, and the spirit and intent of the *Code*, for the Plan not to specify measures to protect marbled murrelets. The *Code*, not the *Regulation*, defines "forest resources," and this definition clearly includes marbled murrelets given that it includes "wildlife" and "biological diversity." Marbled murrelets are also an identified species, and a threatened species, and therefore inherently require consideration of protective measures. The Plan fails to specify measures to protect marbled murrelets, despite the fact that previous forest development plans prepared by the Husby Group included draft FENs that were, in large part, designed to protect marbled murrelets. Consequently, the District Manager should have sent the Plan back to the Husby Group with directions to specify how the Plan would protect marbled murrelets.

The Board notes that this argument may appear to be inconsistent with the Commission's previous decision in *Forest Practices Board* v. *Government of British Columbia*, Appeal No. 96/04(b), June 11, 1998 (unreported) (hereinafter *Klashkish*). However, the Board submits that the present case is distinguishable from *Klashkish*. Alternatively, the Board submits that *Klashkish* should be reconsidered on this point.

The Government's 41(1)(a) submissions

The Government maintains that the District Manager had no obligation under section 18 of the *Regulation* to consider the draft FENs in approving the Plan since they were only draft FENs, not formally adopted FENs that had been established in a higher level plan or approved by designated officials prior to June, 1995, nor were the draft FENs "known" as defined in section 1 of the *Regulation*.

Section 18(1)(e) of the *Regulation* states:

A person must ensure that a forest development plan includes the following information for the area under the plan:

...

(e) the following known items:

(i) protected areas;

(ii) designated areas under Part 13 of the *Forest Act*;

(iii) wilderness areas;

(iv) sensitive areas established in accordance with the Act;

(v) wildlife habitat areas;

(vi) forest ecosystem networks;

(vii) old growth management areas;

…

"Known" is defined in section 1 of the *Regulation* as follows:

> **"known"** means, when used to describe a feature, objective or other thing referred to in this regulation as "known," a feature, objective or other thing that is
>
> (a) contained in a higher level plan, or
>
> (b) otherwise made available by the district manager at least 4 months before the operational plan is submitted for approval;

The Government further submits that the draft FENs were subject to limitations and inaccuracies. By definition, a FEN is established for the purpose of maintaining or restoring natural connectivity, not for management of marbled murrelets. The concept of a FEN was used in the past, but is not considered a management tool today.

The Government further submits that, when the Plan was approved, there were no "known" WHAs or OGMAs in the Husby Group licence areas. In the absence of WHAs, there was no policy by which the District Manager could protect marbled murrelets.

With regard to section 10(1)(c)(ii) of the *Code*, the Government submits that the Plan must specify "measures that will be carried out to protect forest resources," but there is no mandatory statutory requirement that a forest development plan must include information about draft FENs or marbled murrelets. Section 10 (1)(b) of the *Code* mandates what must be included in a forest development plan, whereas section 10(1)(c) mandates what must be specified in a forest development plan to protect "those" resources. In other words, section 10(1)(c) only says that the Plan must describe in detail the measures that will be carried out to protect the forest resources that are required to be covered in the Plan. It is not required that the Plan specify all measures being carried out to protect forest resources, as the Commission's decision in *Klashkish* states. To ascertain what forest resources are required to be addressed in a forest development plan, one must refer to section 18(1) of the *Regulation*.

The Government argues that *Klashkish* states that the *Regulation* provides a detailed account of the specific forest resources that must be identified and described in a plan, and there is no express requirement for the licensee to go beyond those specified resources when preparing its plan. Additionally, only those measures that will be carried out to protect those specified measures must be specified in a forest development plan. In support of those submissions, the Government refers to the *Klashkish* decision.

Also in support of those submissions, the District Manager testified that he was not required to consider whether the Plan contained the draft FENs. He stated that, in his view, section 18 of the *Regulation* only requires the inclusion of FENs that were formally designated before 1995, or included in a higher level plan, in forest development plans. He further stated that the draft FENs would not have been "known," as that word is defined in the *Regulation*, because "known" items listed in section 18 are those that are known to a district manager or designated environment official 4 months prior to submission of an operational plan. He further indicated that elevating the draft FENs to "known" status would have required sign-off by the chief forester and a designated WLAP official before June 15, 1995, when the *Code* came into effect. In this case, the draft FENs were not officially designated before 1995, nor included in a higher level plan. Therefore, the draft FENs were not covered by section 18 of the *Regulation*.

The District Manager further testified that the areas being considered as potential WHAs were not "known," as that word is defined in the *Regulation*, because "known" items listed in section 18 are those that are known to a district manager or designated environment official 4 months prior to submission of an operational plan. He also stated that no WHAs or OGMAs had been developed for the Eden LU when the Plan was submitted, and section 18 of the *Regulation* only requires that formally designated and "known" WHAs or OGMAs be included in forest development plans.

Findings

The Commission notes that this issue is primarily one of statutory interpretation of the relevant sections of the *Code* and the *Regulation*. The Commission has reviewed the sections of the *Code* and the *Regulation* that were cited by the parties, as well as section 17 of the *Code*. The Commission has also considered its previous decision in *Klashkish*, and concludes that its findings in that case with regard to the interpretation of section 10(1)(c)(ii) of the *Code* are equally applicable to the present appeal.

In *Klashkish*, one of the issues before the Commission was whether a forest development plan complied with section 10(1)(c)(ii) of the *Code*. The Appellant argued that the plan in that case did not meet the requirements of section 10(1)(c)(ii) because the plan specified no measures to protect forest resources outside of the specific cutblocks and roads covered by the plan. The Commission found that the plan specified measures that would be carried out to protect forest resources identified within cutblocks, roads and adjacent areas, but the plan was deficient to the extent that no protective measures were specified for forest resources outside of those areas that may be affected by the proposed harvesting operations.

With regard to the proper interpretation of section 10(1)(c)(ii), the Commission considered that section within the context of section 17 of the *Code* and the *Regulation*, and stated as follows:

As we have stated previously, the OPR provides a detailed account of the specific resources or values that are to be identified and described in a plan. There is no express requirement for the licensee to go beyond those specified resources and values when preparing its plan. In fact, section 17 of the *Code* sets out a guide for the preparation of a plan and only identifies those things required by regulation as matters to be included in the plan. Section 17 states:

General planning requirements

17 (1) Before the holder of an agreement under the Forest Act or Range Act prepares an operational plan or amendment for submission to the district manager, the holder must carry out the assessments 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:

(i) streams, wetlands and lakes;

(ii) wildlife habitat areas;

(iii) scenic areas;

(iv) recreation features;

(v) areas that are required by the regulations to be identified and classified;

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

(c) assess cultural heritage resources.

(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;

(c) forest health including pests and other forest health hazards;

(d) *any prescribed matters*.

[emphasis added]

> The Commission finds that the forest resources which are to be covered in the plan are those set out in the various sections of the OPR. Once the resources have been identified, described or assessed in accordance with the OPR, section 10(1)(c)(ii) requires the licensee to show how *those* resources will be protected – i.e., specify the "measures" that will be employed to protect them. It is only after both steps are taken that the District Manager is then in a position to determine whether the plan will "adequately manage and conserve the forest resources of the area to which it applies" in accordance with section 41(1) of the *Code*…

The Commission adopts the reasoning in *Klashkish* and finds that sections 10(1)(b) and 17 of the *Code*, together with the *Regulation*, set out the mandatory content of a forest development plan. The forest resources to be addressed in a plan are identified by the *Code* and the *Regulation*, and section 10(1)(c) of the *Code* requires that a plan include measures to protect those specific forest resources, rather than all forest resources. There is no requirement for the Plan to specify measures that will be carried out to protect forest resources that do not fall within the purview of the *Regulation* and sections 10(1)(b) and 17 of the *Code*.

The Commission notes that the B.C. Supreme Court came to a different conclusion in *Western Canada Wilderness Society v. Cindy Stern et al.*, 2002 BCSC 1260. In that case, Shabbits J. discussed the meaning of section 10(c)(ii) in relation to whether a forest development plan was required to contain measures to protect spotted owls. The district manager had concluded that section 10(1)(c)(ii) was "specifically related to a Forest Resource that must be addressed within a Forest Development Plan." She found that since neither section 10 of the *Code*, nor the regulations, required information specifically related to spotted owl, that section 10(1)(c)(ii) did not require that the plan include "measures that will be carried out to protect" the owl. Shabbits J. found that the district manager had erred, stating as follows at paragraph 66:

> The interpretation of s. 10(1)(c)(ii) is not, in my opinion, one that lends itself to competing arguments. Section 10(1)(c)(ii) is straightforward. It provides that a Forest Development Plan must specify measures that will be carried out to protect forest resources. It is a fact that the Owl is a forest resource that requires protection. If the plan and amendment which the decision-maker was considering did not specify measures that would be carried out to protect the Owl, the Plan and amendment would not be in compliance with s. 10(1)(c)(ii). I am for that reason of the opinion that the decision-maker erred in law in ruling that s.10(1)(c) did not apply to the Owl.

However, the Commission distinguishes those findings on the basis that the Court did not consider or address the interrelationship between sections 10 and 17 of the *Code*.

Furthermore, the Commission notes that section 10 of the *Code* was amended by the *Forest Statutes Amendment Act (No. 2), 2002*, which came into force on December 17, 2002, by adding the following subsection:

> (4) A forest development plan that
>
> (a) at any time before the coming into force of this subsection, was approved under section 41 or given effect under section 40, and
>
> (b) was in effect immediately before the coming into force of this subsection
>
> is conclusively deemed to have complied with subsection (1)(c)(ii) as that provision existed at the time the forest development plan was approved or was given effect.

The Plan was approved by the District Manager and was in effect before this subsection came into force. Consequently, section 10(4) of the *Code* applies to the Plan, and the Plan is deemed to have complied with section 10(1)(c)(ii) of the *Code*.

In any event, the more specific issue here is whether information about the draft FENs was mandatory content in the Plan. Thus, the Commission has reviewed the relevant statutory provisions to determine whether the legislature intended that forest development plans must include information about "draft" FENs included in the area under a plan. In doing so, the Commission has considered the definition of "forest ecosystem network" found in the *Regulation* and the list of items set out in section 18(e) of the *Regulation*.

Section 18(1)(e) of the *Regulation* expressly requires that a forest development plan must include information about known FENs. "Forest ecosystem network" is defined in section 1 of the *Regulation* as follows:

> "forest ecosystem network" means an area
>
> (a) established under a higher level plan, or
>
> (b) approved by the district manager and an employee of the Ministry of Environment, Lands and Parks before June 15, 1995,
>
> for the purpose of maintaining or restoring the natural connectivity within an area, but a forest ecosystem network established under paragraph (b) expires on June 15, 2003;

The Commission notes that neither the definition of "forest ecosystem network" nor the list of items in section 18(1)(e) refer to "draft" forest ecosystem networks. If the legislature had intended that draft FENs must be included in forest development plans, then it would have included "draft forest ecosystem networks" in the items listed in section 18(e) of the *Regulation*, or used language to that effect in the definition of "forest ecosystem network." Accordingly, the Commission finds that draft FENs are not mandatory content in a forest development plan.

Before applying the above findings to the facts in this appeal, the Commission notes that the Board has conceded that the Plan may not have breached section 41(1)(a) of the *Code* because marbled murrelets may not have been a forest resource requiring the "mandatory content" of specific protective measures under section 10(c)(ii) of the *Code* and section 18 of the *Regulation*. The Board makes this concession based on the fact that, when the Plan was approved, no WHAs or higher level plans had been designated to protect marbled murrelets anywhere in the province.

The Commission finds that, when the Plan was submitted, no WHAs, higher level plans or FENs had been officially designated to protect marbled murrelets in the Queen Charlotte Islands Forest District. Draft FENs had been identified in the area under the Plan area, but they were not established in a higher level plan or approved by designated officials prior to June 1995, and therefore do not fall under the statutory definition of "forest ecosystem network." Therefore, the Commission finds that the Husby Group had no obligation under section 18 of the REGULATION or the relevant sections of the *Code* to include information about the draft FENs in the Plan. As such, it is irrelevant whether the draft FENs were "known" when the Plan was submitted, for the purposes of section 18(e) of the *Regulation*.

In addition, the Commission finds that, when the Plan was submitted, there were no "known" WHAs or OGMAs in the Queen Charlotte Islands Forest District. The evidence indicates that no WHAs or OGMAs had been incorporated into a higher level plan for the area, or "otherwise made available" by the District Manager or a designated environment official at least 4 months before the Plan was submitted. Specifically, the District Manager testified that although the Eden LU had been proposed as a pilot project for landscape unit planning in the District, no landscape unit objectives, OGMAs or WHAs had been established for the Eden LU when he approved the Plan. Furthermore, this approach is consistent with the Interim Measures policy issued by the chief forester of MOF in February 1999, which recommends using interim measures to protect features of a proposed WHA to ensure that the qualities of the proposed WHA are maintained until the proposed WHA has been approved or rejected. In particular, the Interim Measures policy states:

> When a WHA is approved, interim measures should remain *until such time as the WHA is designated and "known" as defined in the Forest Practices Code of BC.*
>
> [emphasis added]

Accordingly, the Commission finds that there was no requirement to include, as mandatory content under section 10 of the *Code* and section 18(e) of the *Regulation*, information about areas being considered for future designation as WHAs or OGMAs in the area under the Plan.

In summary, the Commission finds that the Husby Group was not required to include, as mandatory content information about draft FENs within the area under the Plan. Nor was it required to include information about potential WHAs or

OGMAs. Accordingly, the Commission finds that the failure to include information in the Plan about draft FENs and potential WHAs or OGMAs did not breach the *Code*, and the District Manager did not err in finding that the Plan was prepared and submitted in accordance with the *Code* and the regulations, as required under section 41(1)(a).

3. Whether the Plan was approved in accordance with sections 41(1)(b) and 41(3) of the *Code*.

The Board's submissions on this issue may be summarized as follows. The Board submits that even if marbled murrelets were not covered by a mandatory content requirement, the District Manager was obligated under section 41(1)(b) of the *Code* to be satisfied that the Plan would adequately manage and conserve forest resources, including marbled murrelets, in the area under the Plan. The Board submits that the District Manager must reject a forest development plan that does not adequately conserve threatened species that he knew about. The Board argues that, in this case, the Ministry had a wealth of information about marbled murrelets in the area, and about specific areas of valuable murrelet habitat. In addition, it had knowledge that previous forest development plans for the same area had contained a draft FEN specifically designed to conserve prime marbled murrelet habitat. Yet, the Plan failed to mention marbled murrelets, explain why the draft FENs had been omitted, mention how marbled murrelets would be dealt with during the "gap" in time when the establishment of FENs was being replaced with the establishment of landscape units and WHAs, and failed to discuss what would be done to ensure that the proposed logging would not unduly affect marbled murrelets. Consequently, the Board maintains that the Plan failed to adequately manage and conserve marbled murrelets as a forest resource, contrary to section 41(1)(b), and the District Manager should not have approved the Plan.

The CHN's submissions support the Board's submission on this. In addition the CHN submits that the precautionary principle must be taken into account when considering section 41(1)(b). Specifically, it submits that if there is any risk of harm to a forest resource, then the Plan should not be approved.

The Government submits that the District Manager properly approved the Plan, and the Plan adequately manages and conserves marbled murrelets as a forest resource, as required under section 41(1)(b).

The Husby Group submits that the Plan did not need to include the draft FENs as there was no solid documentary evidence to support the information that the draft FENs were based on.

The Board's submissions raise the following sub-issues:

(a) Are marbled murrelets a "forest resource," as defined in the *Code*?

The Board maintains that marbled murrelets are a "forest resource," as that term is defined in the *Code*. Section 1 of the Code defines "forest resources" as follows:

> **"forest resources"** means resources and values associated with forests and range including, without limitation, timber, water, *wildlife*, fisheries, recreation, botanical forest products, forage and *biological diversity*;
>
> [emphasis added]

The Government agrees that marbled murrelets are forest resources within the meaning of section 41(1)(b).

The District Manager testified that he considered marbled murrelets to be "forest resources" within the meaning of section 41(1)(b) of the *Code*, and gave them consideration in his decision to approve the Plan.

The Commission finds that marbled murrelets are "forest resources" as defined in section 1 of the *Code*. Marbled murrelets are clearly "wildlife," and there can be no question that their existence contributes to the "biological diversity" of coastal forests in British Columbia. As such, marbled murrelets area a "forest resources" within the meaning of section 41(1)(b) of the *Code*.

(b) Was the District Manager obliged to consider whether the Plan adequately managed and conserved marbled murrelets, even if the Plan was not required to include information about draft FENs or areas that were being considered as potential WHAs or OGMAs?

The Board submits that, in addition to checking that the Plan had all of the mandatory content that the legislation requires, the District Manager must consider the adequacy of management and conservation of forest resources, pursuant to section 41(1)(b) of the *Code*. The Board notes that section 41(1)(b) requires the District Manager to be "satisfied" that the Plan will adequately manage and conserve" resources. The Board submits that, if a district manager has information that raises questions about conservation of a forest resource, he or she must consider that information and be satisfied that the resource will be adequately managed and conserved. In doing so, if a district manager has information about a threatened species in the area under a forest development plan, the manager is obliged to consider that information and consider that species when deciding whether the plan adequately conserves that resource. The Board maintains that this requirement applies regardless of whether the threatened species is covered by mandatory content requirements.

The CHN submits that the District Manager's duty under section 41(1)(b) to consider whether the Plan adequately conserves and protects forest resources is separate from his duty under section 41(1)(a) to ensure that the Plan complies with section 18 of the *Regulation*. The CHN submits that the Commission previously held in *Klashkish* that a district manager is required to determine that a forest development plan contains all necessary information about the area under the plan to permit an analysis of 41(1)(b), notwithstanding the limited mandatory content of a plan under the *Code*.

The District Manager submits that he had no authority to refuse the Plan for failing to contain information about the draft FENs and potential WHAs or OGMAs, since those were not required content. However, the District Manager acknowledged that he has the authority to refuse cutblocks in a forest development plan, and that he had used this authority, most often when a licensee had not conducted necessary terrain stability assessments for a cutblock. He stated, however, that there must be an adequate evidentiary basis to support a refusal, and that he did not think there was an adequate evidentiary basis in this case. He also explained that the evidentiary basis must be "known" four months before the forest development plan is submitted, according to the definition of "known" in the *Regulation*.

The District Manager also acknowledged that he has the authority to refuse plans under section 41(1)(b) of the *Code*, in addition to ensuring that the requirements in section 18 of the *Regulation* are met for plan submissions. He stated that under section 41(1)(c) of the *Code*, he has the authority to require that a licensee provide additional information or assessments. However, he did not require the Husby Group to submit additional assessments or information with respect to marbled murrelets and their habitat needs prior to making his determination.

The Commission finds that a district manager must, in approving a forest development plan, determine whether a forest development plan complies with the *Code* and the regulations, and, as a separate question, be satisfied that the forest development plan will adequately manage and conserve forest resources. The requirements in sections 41(1)(a) are distinct from those is section 41(1)(b). If the district manager only needed to determine whether a forest development plan contains all of the mandatory content required by the legislation, then section 41(1)(b) in the *Code* would be redundant. This is contrary to the presumption in statutory interpretation that the legislature had a reason for including section 41(1)(b) in the *Code*.

The Commission notes that the B.C. Court of Appeal reached a similar conclusion in *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District) and Cattermole Timber*, 2003 BCCA 403 (hereinafter *Cattermole*). The Commission has reviewed the decision in *Cattermole*, and finds that it provides significant direction regarding the proper interpretation of section 41(1)(b).

Madam Justice Prowse, writing for a unanimous Court in *Cattermole*, states at paragraph 44:

> [44] The underlying purpose of the Code is sustainable use of forests. As stated in the preamble, this involves a consideration of many interests and values, both short-term and long-term. Within that framework, s. 41(1) provides specific criteria which must be met by a person seeking approval of an FDP. A great deal of information must be provided in that FDP before approval can be given. *Once the other requirements of the Code are met, s. 41(1)(b) provides that a DM must approve an FDP if "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."* The test to be satisfied under this section is a subjective one based on the opinion of the DM making the decision.
>
> [emphasis added]

The Court's comments above construe section 41(1)(b) as imposing a duty on district managers that is distinct from ensuring that a forest development plan meets the "other requirements of the Code."

In summary, the Commission finds that, under section 41(1) of the *Code*, a district manager must determine:

(a) whether a forest development plan meets all of the requirements of the *Code* and the regulations, including the mandatory content requirements set out in the legislation, and

(b) whether that plan "will adequately manage and conserve the forest resources of the area to which it applies."

Applying that reasoning to the present appeal, along with the previous finding that marbled murrelets are a forest resource within the meaning of section 41(1)(b), the Commission finds that the District Manager was obliged to consider whether the Plan adequately managed and conserved marbled murrelets, even if the Plan was not required to include information about draft FENs or areas that were being considered as potential WHAs or OGMAs.

(c) What does "adequately manage and conserve" mean in the context of section 41(1)(b) of the *Code*?

The Board submits that the legal question under section 41(1)(b) is whether the District Manager could on "reasonable grounds" have been satisfied that the Plan met the test of "adequate management and conservation." The test is not whether the District Manager was satisfied, based on overriding evidence, that the Plan would lead to harm to a forest resource, or that a critical threshold for damage has been met, which the Board maintains was the test applied by the District Manager.

The CHN supports many of the Board's arguments. It also argues the central question in this appeal is the licensee's obligation to ensure that forest resources in the area of the Plan are adequately managed and conserved. This does not mean that every resource within a plan area must be considered. Rather, where it is known that there is a threatened species, a district manager must be satisfied the plan manages and conserves that species. Alternatively, proper assessment must be done to ensure that there is sufficient suitable habitat remaining in the area under a plan.

The CHN states that the District Manager could not have been satisfied that the Plan will adequately manage and conserve the marbled murrelets or biological

diversity in the plan area. Marbled murrelets are a red-listed species, and the loss of a species leads to a decline in genetic and biological diversity.

The CHN argues that the rules of statutory interpretation require the *Code* to be read in its grammatical and ordinary sense. The word "adequate" is not defined by the *Code*, and the plain meaning of the word "adequate" does not imply that forest resources should be conserved as little as possible; rather, they should be conserved as much as necessary. Black's Law Dictionary (6th ed.) defines adequate as:

> Sufficient; commensurate; equally efficient; equal to what is required; suitable to the case or occasion; satisfactory.

The CHN further argues that the *Code* preamble aids in the interpretation of other *Code* sections when there is any doubt as to their meaning, by revealing the underlying purposes of the *Code*. Section 41 must be interpreted in a manner consistent with the preamble, which states that the *Code's* purpose is the "sustainable use of the forests [British Columbians] hold in trust for future generations." Further, sections (a) and (d) of the preamble are relevant to the issues of management and conservation.

The CHN states that the interpretation of the *Code* should be consistent with customary and conventional international law as far as possible, unless a contrary intention is explicitly evident. In support of that submission, the CHN cites *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. The CHN notes that the *Code* does not define "biological diversity." The CHN argues, therefore, that the *Convention on Biological Diversity*, 5 June 1992, should be used to interpret "biological diversity" in a manner that prioritizes conservation, including conservation of endangered species and biological diversity, with a view to ensuring that the forests can meet the needs of future generations. Additionally, the CHN maintains that the precautionary principle set forth in the *Convention on Biological Diversity* should be applied when making decisions under the *Code*. The CHN cites the majority decision in *114957 Canada Ltee. (Spraytech, Societe d'arrosage) v. Hudson (Town)*, [2001] S.C.J. 42 (hereinafter *Spraytech*) in support of its submissions regarding the application of the precautionary principle.

In summary, the CHN argues that the plain meaning of section 41(1)(b) is not that a district manager must approve a forest development plan *unless* satisfied it will *not* adequately manage and conserve." On the contrary, it requires district managers to be satisfied that a plan *will* adequately manage and conserve forest resources.

The Government submits that the legal test under section 41(1)(b) is whether a forest development plan creates "an unacceptable risk to the resource." If a district manager is aware of an unacceptable risk to the conservation of a forest resource that is not required to be conserved in a plan, he or she may refuse to approve the plan. The Government submits that there was insufficient information known or presented to the District Manager which would have permitted him to consider that

the developments proposed in the Plan would create an unacceptable risk to marbled murrelets or the conservation of marbled murrelets.

The Government also submits that "adequate" conservation pursuant to section 41(1)(b) does not mean taking the highest and best measures, but only what is necessary to conserve the resource.

The District Manager testified that his duty under section 41(1)(b) of the *Code* is "adequate" management and conservation of forest resources, which does not mean total conservation of marbled murrelets as a forest resource, but rather what is necessary to manage and conserve the resource. Mr. Annett stated that, in his opinion, he must approve a forest development plan unless there is an unacceptable risk to the forest resource. He indicated that in making his determination, it was appropriate to consider available habitat both within the Plan area and outside the Eden LU, particularly since the nearby Duu Guusd appeared to have plenty of habitat and he had indications that the Minister of Forests was potentially considering the Duu Guusd for protection and may suspend the Plan in that area.

The District Manager further indicated that "adequate" has to be considered in light of the legal and policy context, where authority over marbled murrelets rests with the chief forester and deputy minister of WLAP for designation of WHAs as recommended in policy documents such as the IWMS and Landscape Unit Planning Guidebook. He stated that, in his mind, it is these policies that describe "adequacy."

For convenience, the Commission has set out below relevant portions of *Cattermole*, where the Court considered the proper interpretation of "adequately manage and conserve" in the context of a decision to approve forest development plan that included areas containing spotted owl habitat. The Court also considered the relevance and applicability of the precautionary principle in relation to section 41(1)(b) of the *Code*:

> [53] …s. 41(1)(b) does not preclude approval of an FDP if there is any element of risk to a forest resource, even where that forest resource is an endangered species. The fact and degree of risk are relevant matters for the DM to take into consideration in determining whether an FDP adequately manages and conserves a forest resource, but the language of the section is not framed in language which admits of no risk. It does not require a DM to be satisfied that forest resources are managed and conserved, but simply that they are "adequately" managed and conserved. Had the Legislature intended to preclude all logging in an area in which there were endangered species, it could have done so by clear language to that effect…
>
> [54] As the preamble to the *Code* indicates, sustainable use of forests requires a consideration of various factors, including the factors referred to in paras. (a) to (e) of the preamble (set out at para. 14, supra). Thus, economic use of the forests, such as that proposed by

> Cattermole in its FDP, must be assessed within the context of the other resources and values set out in the preamble. While s-s. (d) of the preamble speaks of "conserving" biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources, s. 41(1)(b) qualifies the word "conserve" with the adverb "adequately." In my view, the word "adequately" connotes an aspect of proportionality; of a balancing of factors in relation to the forest resource(s) under consideration.
>
> [55] In enacting s. 41(1)(b), the Legislature recognized that some degree of risk to forest resources would likely flow from harvesting, and left it to the DM to determine whether a particular proposal for harvesting contained in an FDP "adequately" (not "perfectly") managed and conserved the relevant forest resources.
>
> [56] The question of whether Cattermole's FDP would adequately manage and conserve the spotted owl involved a risk-based analysis…
>
> [73] In my view, whether an FDP provides for adequate management and conservation of a forest resource is ultimately a fact-driven judgment call which the Legislature chose to leave to those working in the field who are familiar with the application of the *Code* and the other statutes which govern forest resources and their management…
>
> [80] …although Ms. Stern may not have given full effect to the precautionary principle, in that she granted approval of Cattermole's FDP in the face of some risk to the spotted owl, I conclude that her decision reflects a degree of caution akin to that reflected in the precautionary principle. Since the precautionary principle was not incorporated in the *Code*, and since I am satisfied that s. 41(1)(b) does not preclude the approval of an FDP if there is an element of risk to a forest resource, I am unable to find that Ms. Stern's failure to give full effect to the precautionary principle in her decision renders an otherwise reasonable decision, patently unreasonable.

The Commission adopts the Court of Appeal's reasoning in *Cattermole*, and has applied it to the present appeal. In this case, the Commission finds that the proper question for the District Manager in this case was whether the Plan would "adequately," rather than perfectly, manage and conserve forest resources in the area under the Plan, including marbled murrelets. Conserving marbled murrelet habitat in the interests of ecological, cultural, and spiritual values had to be balanced against allowing forest development in the interests of economic values. The question of whether the Plan would adequately manage and conserve the marbled murrelet, as a forest resource, involved a risk-based analysis, as described above by the Court of Appeal.

(d) In this case, what is the "area under the plan" in the context of section 41(1)(b) of the *Code*? Specifically, did the DM properly consider marbled murrelet habitat outside the boundaries of the cutblocks, roads, and other developments proposed in the Plan.

The Board argues that the District Manager erred in looking outside the area of the Plan and considering the Duu Guusd, which is temporarily suspended, and other areas that do not contain prime marbled murrelet habitat. The Board submits that the District Manager acknowledged that the Duu Guusd only contains patches of suitable habitat.

The CHN submits that the "area of the plan" is not a fluid concept. The evidence of murrelets within the area of the Plan is based on scientific survey data, and is much stronger than speculative evidence of marbled murrelets in the areas outside the Plan.

The Government submits that consideration of forest resources pursuant to section 41 means that forest resources as a whole must be considered, including resources that are outside the area of a particular forest development plan. Forest resources must be considered not just within the area of the proposed developments. Rather, a district manager must consider forest resources as a whole, including those parts that are outside of the plan area. For instance, there could be a forest development plan with one cutblock and one nest, with thousands of nests outside that cutblock. On a narrow reading of section 41(1)(b), district managers would only be able to consider that one nest inside the plan area, not the others outside.

It submits that the proper approach to be taken by a district manager when considering a forest resource that is not required to be included in a plan pursuant to the *Regulation* is to refer to both section 41 and the preamble to the *Code*. One of the purposes of the *Code* identified in the preamble is to sustain all forest resources. Therefore, the Government submits that the District Manager properly assessed the risks to all forest values, and concluded that the Plan adequately managed and conserved the forest resources.

In support, the Government cites the Commission's decision in *Klashkish*.

The phrase "area under the plan" is not defined in the *Code*. However, in *Klashkish*, the Commission previously considered the meaning of this phrase in the context of section 41(1)(b) of the *Code*, and concluded as follows:

> Area under the plan is generally described in section 13 of the OPR. It states:
>
> > 13. (1) A person must ensure that a forest development plan addresses *an area sufficient in size to include all areas affected by the timber harvesting and road construction or modification operations proposed under the plan.* [emphasis added]
>
> ...

> In this case, [the licensee] has defined the area of the plan in its transmittal letter of December 12, 1995, and in the public notice of November 29, 1995. Section 13(1) states that the area has to be large enough to include *all* the areas *affected* by the proposed timber harvesting and road construction or modification operations. The area under [the licensee's] plan appears to meet this requirement - it includes all areas that will be affected by [the licensee's] proposed operations.
>
> Having said that, the Respondent and [the licensee] are correct that the content requirements do not always apply to the entire area of the plan. One must look to the specific legislative requirements to see whether information is required for the entire area under the plan; for *an area* under the plan; or for just the cutblocks themselves. For example, section 10(b) of the OPR provides that for "the area under the plan," certain maps and schedules be provided and that matters required by regulation be addressed. On the other hand, section 10(c)(i) provides that the FDP specify silvicultural systems and harvesting methods that will be carried out *within the cutblocks*.
>
> ...
>
> The Commission finds that the Brooks Bay FPD specifies the measures that will be carried out to protect resources identified within the cutblocks, roads and adjacent areas. However, as the plan does not identify resources or values outside of those areas, no measures have obviously been specified.
>
> To the extent that there are forest resources outside of the areas affected by the proposed operations that were not identified and no protective measure specified, the plan is deficient. However, without specific evidence of the plans failings in this regard, the Commission is not in a position to make decision on specific items.

The Commission has adopted this reasoning in the present appeal, and finds that for the purposes of ensuring that a forest development plan adequately manages and conserves forest resources in the area under the plan, as required under section 41(1)(b) of the *Code*, a forest development plan should address an area sufficient in size to include all areas affected by the timber harvesting and road construction or associated operations proposed under the plan.

In this case, the Commission finds that the District Manager properly considered the existence of suitable nesting habitat for marbled murrelets in forest areas outside the boundaries of the cutblocks, roads, and other developments proposed in the Plan, but adjacent to those areas, such as the Duu Guusd.

(e) What is the relevance of MOF knowledge about the draft FENs and marbled murrelets, prior to the approval of the Plan, in the context of section 41(1)(b) in this case?

The Board submitted that if the District Manager had information about a threatened species in the Plan area, the District Manager was obliged to consider

that information and consider whether, on reasonable grounds, the Plan will adequately manage and conserve this species. The Board argued that the District Manager did have such information in this case.

The Board argues that MOF had a wealth of information about marbled murrelets in the area, and about specific areas of valuable murrelet habitat, including wildlife inventories, as well as knowledge that previous forest development plans for the same area had contained draft FENs designed, in part, to conserve murrelet habitat. The Board submits that this information was not fully considered by the District Manager, he did not seek expert assistance, he did not discuss marbled murrelets or the draft FENs in his rationale letters, and he did not provide any discussions regarding dropping the draft FENs or addressing the transition from FEN to WHA and LUPG designations. Given that marbled murrelets had been a high priority issue in this area for several years, it was unreasonable for the District Manager to fail to address these concerns or require that the licensee address these concerns.

The Board submits that the District Manager could not have reasonably considered marbled murrelets in accordance with section 41(1)(b) when he approved cutblocks in the Plan that overlapped with areas that had, in previous forest development plans, been managed as draft FENs for the benefit of marbled murrelets and other wildlife. It submits that it was not necessary for the draft FENs to have been formally signed-off to be recognized.

The Board submits that the draft FENs were delineated on the basis of scientific study and wildlife inventories, including studies of marbled murrelets, developed in accordance with MOF policies in the Biodiversity Guidebook. In the Biodiversity Guidebook, a FEN is described as "a contiguous network of representative old growth and mature forests (some of which provide interior habitat conditions) delineated in a managed landscape." It suggests that FENs should take advantage of areas in which timber harvesting is already constrained, in order to form the network "building blocks." It further states that "In mountain and valley systems with wet climates, where contiguous old growth forest was a dominant component of natural landscapes, the delineation of FENs is especially important." The benefits of FENs are described as ensuring representation of a full range of ecosystems, providing forest interior habitat, providing wildlife species with areas of refuge during periods of disturbance, and providing a continuum of relatively undisturbed habitat for indigenous species that depend on mature and old-growth forests.

The Board further submits that, once the draft FENs were developed, policy and practice in the Queen Charlotte Islands Forest District prior to the Plan was to direct development away from the draft FENs, or minimize the impacts of development. The Board notes that the existence of the draft FENs was relied upon in many MOF approval documents relating to the Husby Group's licences. The Board also provided various MOF approval letters and correspondence in support of the submission that the draft FENs had been considered in past forest development plans and were intended to remain in place until landscape unit planning occurred. The Board argues that, if a threatened species has been acknowledged and planned

around for many years, it must be considered to determine whether it is now being adequately managed and conserved, especially if previous conservation measures such as the draft FENs have been dropped.

In support of its submissions, the Board called three witnesses:

> Sharon Mansiere-Deschesne, a University of Okanagan Associate Professor, who previously worked as an ecologist for the Husby Group. Ms. Mansiere-Deschesne was accepted as an expert on the biology, life history, habitat needs and behaviour of marbled murrelets, and the identification and survey of marbled murrelets;
>
> Al Cober, Forest Ecosystem Specialist (Biologist 3), Habitat Protection Branch, WLAP; and
>
> Sean Sharpe, Wildlife Section Head, Skeena Region, WLAP. Mr. Sharpe was accepted as an expert in wildlife management and conservation biology.

Ms. Mansiere-Deschesne gave evidence that she developed a system of draft FENs, based on the wildlife inventories and assessments she had conducted for the Husby Group between 1994 and 1996. The FENs were mapped out in the Husby and Naden Licence areas, approximately 90% of which are situate within the Eden Landscape Unit, and the Sitkana Licence area in the Tartu watershed near Rennett Sound. The FENs developed in 1996 totaled approximately 17,000 hectares. Based on mapping provided by Mr. Cober, 12,716 hectares of the FENs were within the Eden Landscape Unit.

Ms. Mansiere-Deschesne identified 68 cutblocks in three licence areas that overlapped with the 1996 draft FENs, 51 of which were determined to overlap with cutblocks approved in the Plan. The 17 other cutblocks overlapping the draft FENs had been approved in previous years. A GIS map folio of the Eden Landscape Unit was prepared by Mr. Cober, which indicated that the Eden Landscape Unit portion of the overlaps amounted to 314 hectares, 243 hectares of which were overlaps with cutblocks proposed in the Plan and 71 hectares of which were overlaps from logging or cutting permit approvals between 1997 and 2001. The overlaps with draft FENs outside the Eden Landscape Unit were not mapped.

According to Ms. Mansiere-Deschesne, protection of marbled murrelet was a primary, but not the sole purpose of the draft FENs, and a variety of other ecosystems were captured within the draft FENs. She reported that the draft FENs were developed based on the guidelines in MOF's Biodiversity Guidebook (1995), which sets out steps for designing and managing FENs. The draft FENs were also based on the wildlife inventories she conducted in the 3 licence areas between 1994 and 1996. She reported that the draft FENs were intended to capture 18% of the total landbase and 13% of the old growth seral stage in accordance with the Biodiversity Guidebook.

The Commission was shown map overlays of the draft FENs that confirm that there is extensive overlap of the draft FENs with areas that were previously logged, particularly areas that were logged along riparian zones prior to the Husby Group acquiring the licences.

Ms. Mansiere-Deschesne's report indicates that the draft FENs were developed by first including areas constrained for timber harvest, such as riparian management areas, existing protected areas (lake shore management areas, terrain sensitive areas, visually sensitive areas) and inoperable areas such as swamps. Habitat for locally important red and blue listed species, especially marbled murrelets and representative rare ecosystems, were then added. Ms. Mansiere-Deschesne also advised that in the process of developing the draft FENs, she widened the riparian areas and other areas of the draft FENs to encompass interior habitat needed by marbled murrelets. Though many of the cutblock incursions into the draft FENs were minor, she indicated that decreasing the width of some of the draft FENs would cause a reduction in interior habitat, which could seriously impact marbled murrelet use of the areas.

Ms. Mansiere-Deschesne indicated that the draft FENs were developed from maps, as well as information she gathered during wildlife, plant and habitat surveys. There had been limited "ground-truthing" of some of the sites, apart from discussions with several Husby Group employees more familiar with the areas. She also pointed out that the initial FEN boundaries were developed as drafts, and it was anticipated that improvements and changes would be made. The 1997 forest development plan submission noted that minor changes had been made to the original draft FEN boundaries based on ground reconnaissance.

The CHN submits that the Husby Group and the District Manager were aware of the presence of murrelets in the Plan area, the draft FENs, and the need to protect marbled murrelet habitat from logging and road building activities, and the District Manager failed to give that knowledge proper consideration.

The District Manager testified that he was aware that past forest development plan submissions by the Husby Group had included the draft FENs. He also stated that staff had briefed him on the Husby Group's previous plan submissions and the wildlife inventories conducted by Ms. Mansiere-Deschesne, although he was erroneously informed that the inventories were not conducted according to Resource Inventory Committee standards.

However, the District Manager indicated that the purpose of draft FENs was to maintain or restore natural connectivity to an area, and many parts of the draft FENs in the Husby Group's licences were created for connectivity purposes and not to protect marbled murrelet habitat. He also stated that the draft FENs in the Husby Group's licences were subject to inaccuracies because they were based on inadequate cover maps without sufficient "ground-truthing," as indicated in Ms. Mansiere-Deschesne's report. As such, he submitted that the draft FENs would not have been formally approved even if there was authority to do so.

The District Manager also advised that the planning context had changed by the time he considered the Plan. He stated that draft FENs were no longer included in the "tool kit" of planning options and were no longer being developed. He explained that biodiversity concepts such as FENs were based on connectivity principles that are considered to be less important than current concepts such as creating WHAs and OGMAs through landscape unit planning processes. He stated that MOF Guidebooks had been issued earlier in 1999 describing the IWMS policy for creating WHAs, as well as the LUPG policy for establishing landscape unit objectives and OGMAs through the landscape unit planning process. The District Manager also explained that although the Eden Landscape Unit had been proposed as a pilot project for landscape unit planning, landscape unit objectives, OGMAs, and WHAs had not been established for the Eden Landscape Unit when he approved the Plan.

The Husby Group submits that the draft FENs had always been preliminary and were intended to be dynamic. Mr. Brash stated that although Ms. Mansiere-Deschesne had done a good job with the information she had, FEN development was very limited. He stated that the draft FENs had been removed from the Plan because they were no longer part of the template at that time.

Based on the evidence, the Commission finds that, prior to the approval of the Plan, MOF staff in the Queen Charlotte Islands Forest District, including the District Manager, knew that the draft FENs has been developed, in part, to conserve marbled murrelet habitat, and had been incorporated into previous forest development plan submissions for the area covered by the Plan. Although the draft FENS were not required content in the Plan and were based on imperfect data, the evidence indicates that the draft FENs were based on the best available information at the time concerning the locations of important wildlife habitat. Data concerning marbled murrelet nesting habitat was compiled in the Husby Group wildlife inventory, and the draft FENs were developed as an important first step in identifying and protecting critical habitat for marbled murrelets and other wildlife. As such, the Commission finds that MOF knowledge about the draft FENs and marbled murrelets was relevant to the District Manager's decision on whether the Plan adequately managed and conserved forest resources, including marbled murrelets, under section 41(1)(b) of the *Code*.

(f) What is the relevance of the IWMS and related policies in approving the Plan?

The District Manager stated that the Interim Measures policy issued by the chief forester in February 1999 with the IWMS, which is set out earlier in this decision, provides non-binding guidance for a district manager to set aside habitat areas prior to WHA designation. He indicated that he did not apply this policy to marbled murrelets when he considered the Plan because the policy provides for areas to be set aside after WHAs have been identified and accepted by the Rare and Endangered Species Specialist at step 2 of the process, which had not taken place in the Eden Landscape Unit at that time.

He stated that he had received prior policy directions from the chief forester not to consider any part of the timber harvesting land base ("THLB"), for marbled murrelet WHAs. The District Manager stated that, when he considered the Plan, the policy was that marbled murrelet WHAs could only be placed in the non-contributing land base ("NCLB"). The NCLB was described as including constrained areas such as riparian zones, steep or unstable terrain, and non-harvestable or unusable areas such as marshes and logged over areas where re-growth was not occurring.

The Commission finds that, while the District Manager may consider the policies he referred to in determining whether the Plan adequately managed and conserved marbled murrelets in the area under the Plan, those policies should not have been applied in a manner that fetters his discretion under sections 41(1)(b) and 41(3) of the *Code*. Policies are intended to assist decision-makers in exercising discretionary powers.

In addition, the Commission notes that the March 1999 Landscape Unit Planning Guide provides (at p. 2) that where OGMA targets for a variant cannot be met in the NCLB, consideration should be given to partially constrained areas. The February 1999 letter from the chief forester that accompanied the IWMS policy states that "There is a one percent timber supply impact applied to the [IWMS] as part of the overall six percent impact that was assigned to FPC requirements such as the Biodiversity Guidebook and the Riparian Management Areas Guidebook." In other words, up to 1% of the THLB could be set aside for conservation purposes if the 10% to 12% target in the IWMS for WHAs could not be met using the NCLB. In the Commission's view, the policy direction that up to 1% of the THLB could be set aside supercedes the earlier policy direction from the chief forester not to consider any part of the THLB for marbled murrelet WHAs.

Therefore, although the IWMS recommends that areas should be set aside after WHAs have been identified and accepted by the Rare and Endangered Species Specialist at step 2 of the process, and no WHAs had been accepted in the Eden Landscape Unit when the Plan was approved, the District Manager still had discretion under section 41 of the *Code* to reject cutblocks containing important marbled murrelet habitat when he considered the Plan.

(g) Based on the evidence before the Commission, does the Plan approval meet the requirements of section 41(1)(b) with respect to marbled murrelets?

The Board argues that the District Manager could not have been reasonably satisfied that the Plan would adequately manage and conserve marbled murrelets, given that the Plan:

- no longer referred to the draft FENs;
- authorized substantial new development in the FENs;
- authorized substantial logging of prime marbled murrelet habitat that will reduce their populations;

- authorized the harvest of perhaps the very best scientifically studied and documented marbled murrelet habitat in the Queen Charlotte Islands; and

- foreclosed the best options for applying conservation measures for marbled murrelets.

The Board submits that there is no evidence that the Plan contained, or the District Manager conducted, a proper assessment of the Plan area to ascertain the amount and location of suitable marbled murrelet habitat that would be left. The Board submits that the Plan failed to mention that the draft FENs were no longer being recognized, give reasons for dropping the draft FENs, address the possible impacts upon marbled murrelets, or address how the transition from FENs to landscape unit designations and the establishment of WHAs would be handled. Thus, the Plan failed to adequately manage and conserve marbled murrelets as a forest resource, contrary to section 41(1)(b).

The Board submits that many of the cutblocks proposed in the Plan contain extremely valuable marbled murrelet habitat. Approximately 75% of the overlap of the cutblocks into the draft FENs occurs in the type of habitat associated with marbled murrelets. The cutblocks approved in the Plan severely compromise the best options available for establishing marbled murrelet WHAs within the constraints of present provincial government policy. Recent habitat suitability mapping, based on algorithms that identify forest characteristics, shows that four of the five WHA options identified are eliminated and reduced to less than 200 hectares as a result of the developments proposed in the Plan, and the only remaining one is the most marginal area. There is significant evidence that only one-third of the 10-12% target set forth in the IWMS can be met in the Eden Landscape Unit. The Board submits that the IWMS requires that this target be met in each landscape unit.

The Board argues that cutblock LIG 066 significantly impacts one of the best WHA options available. It is placed in the middle of a large area in the draft FEN near the survey site that had the highest murrelet occupied activity of all three forest licences. The Board submits that there was no evidence that the high murrelet values in LIG 066 were considered prior to approving the Plan.

The Board argues that a critical threshold has been reached for marbled murrelets, as indicated by the COSEWIC classification of marbled murrelets as a threatened species and the provincial red-listing of marbled murrelets.

In support of those submissions, the Board referred to the testimony of its experts, which is discussed in detail below.

The CHN supported many of the Board's submissions. The CHN submits that the District Manager's failure to require and/or consider existing information regarding marbled murrelet habitat, constitutes a breach of his obligations under section 41(1)(b). The CHN argues that the District Manager omitted matters of direct importance by ignoring the potential consequences of the Plan for the marbled murrelet and Haida Gwaii's biodiversity. The CHN argues that a central principle of

sustainable development is the notion of preserving options for the future. The approval of the Plan has limited the options for creating suitable WHAs for marbled murrelets, and this is particularly important where the issue of aboriginal title to the land remains unsettled. In addition, the CHN argued that the Plan fails to manage forest resources to meet the needs of First Nations in whose territory the proposed forest activities will take place.

The Government argues that the District Manager's decision was reasonable in the circumstances, on the basis of the information before him. The Government submits that marbled murrelets were duly considered by the District Manager in approving the Plan, and that his decision was made in context of there being large amounts of marbled murrelet habitat on northwest Graham Island and the Queen Charlotte Islands as a whole. On the basis of this knowledge, the District Manager concluded that there was no evidence that a critical threshold for marbled murrelets had been reached.

The Government further submits that administrative fairness requires that decisions made by the District Manager must be based on sound evidence. A district manager cannot refuse to approve a forest development plan based only on general concerns about marbled murrelets or because they might be present within the plan area.

In response to the Board's submission that a critical threshold has been reached for marbled murrelets, the Government argues that there is no evidence-marbled murrelets are at a critical limit, or that the loss of murrelets in the Eden Landscape Unit would limit the ability to conserve marbled murrelets. The Government notes that its experts, whose testimony is discussed further below, estimated that 35 nesting pairs would be affected, assuming worst case scenarios, and that the loss of 35 pairs is insignificant to the persistence of the species.

Similarly, the Government maintains that there is insufficient evidence to support the conclusion that there is an unacceptable risk to marbled murrelets if the Plan proceeds. The Government argues that the developments proposed in the Plan will not undermine the persistence or future conservation of marbled murrelets. The extent to which proposed harvesting in this case might affect marbled murrelet habitat or populations in the Queen Charlotte Islands is unknown. The Government notes that Ms. Mansiere-Deschesne's report does not say that the approved cutblocks will reduce the Queen Charlotte Islands' population of marbled murrelets below a level that may be necessary to conserve them.

The Government submits that what is relevant to the issue is whether there is evidence to support the theory that the reduction in the size of the habitat will exceed an acceptable necessary level for the conservation of the resource. The Government maintains that marbled murrelet nesting density is low, and only small number of birds would be affected in each cutblock. Logging is a short-term threat to those few birds, but not to the remainder of the populations. The Government submits that the timber harvesting proposed in the Eden Landscape Unit would affect less than 1.5-2% of the Queen Charlotte Islands' population and 0.72% of

the BC population of marbled murrelets. The area of habitat affected will have little effect on future persistence of the marbled murrelet population in the Queen Charlotte Islands.

The Government also argues that approval of the Plan is not contrary to the IWMS. The Government maintains that the IWMS recommends, but does not require, that 10-12% of suitable habitat be protected, and that 10-12% of suitable and originally suitable habitat be protected. It also recommends, but does not require, that WHAs must be a minimum of 200 hectares in size, but they may be smaller where such an area is not available. The Government also submits that the IWMS recommends that intensive surveys be conducted over two years prior to establishing WHAs, rather than selecting areas on the basis of mapping and air photos, particularly when logarithms developed to assist that process are very inaccurate. On this basis, the Government submits that there is no indication that IWMS targets are not being met. If originally suitable and smaller WHAs were considered, there are sufficient areas in Eden LU to meet the 10-12% habitat protection recommended under the IWMS.

In conclusion, the Government notes that the Commission has a great deal more information before it in making its decision than was before the District Manager. The Government submits that the Commission should give reasonable deference to the District Manager's decision. Nevertheless, the Government maintains that no cogent evidence was presented to the Commission to establish that the harvesting will reduce marbled murrelet numbers in the Queen Charlotte Islands. There is also no cogent evidence of a decline in the marbled murrelets' numbers in Queen Charlotte Islands, or that they are at a critical threshold.

The District Manager testified that he spent approximately 3 hours flying over the Plan area, and another hour flying over the Duu Guusd on a low helicopter flight. He stated that, based on those aerial surveys, he determined that there was sufficient old growth habitat for marbled murrelets. He stated that the decision to approve the Plan was not one that he made lightly, and he conducted a cutblock-by-cutblock review of the Plan. The District Manager testified that he reviewed agency and public comments on the Plan, and made at least two oral requests for WLAP to provide comments on the Plan. However, WLAP did not respond. Based on his knowledge from flying over the area and information provided by MOF staff, he stated that he saw nothing that led him to believe marbled murrelets were at a critical threshold.

The District Manager also noted the need to balance all factors and assess risk to all forest values, including economic, social and environmental values, in making his decision. He stated that he has a duty of administrative fairness to licensees to not refuse to approve proposed forest development plans merely because of general concerns about marbled murrelets, and that he had concerns that refusing the Plan could result in considerable economic disruption to the licensee, forest workers, and others who rely on the forest industry.

The District Manager also pointed to a number of other factors to justify his decision, including:

- that 22.4% of the land base on the Queen Charlotte Islands was already protected in parks and other protected areas;
- that if the Duu Guusd is protected, it will provide a significant amount of marbled murrelet habitat; and
- that marbled murrelet conservation is being dealt with at a higher level in government, such as through the Marbled Murrelet Recovery Team, which is an interagency committee that is responsible for developing policies on the marbled murrelet.

On behalf of the Husby Group, Mr. Brash discussed the potential economic effects of refusing to approve the Plan.

Mr. Brash stated that the Husby Group had only been operating at 60% of its annual allowable cut ("AAC"), and refusal of the Plan would have worsened this situation. He also indicated that their low harvesting levels largely relate to the Duu Guusd, which contains about 1/3 of their AAC. When this appeal was heard, 22 of the cutblocks in the Plan had been cut and 43 were not logged.

Mr. Brash advised that if the Husby Group had been running at 100% and harvesting their entire annual (or 5 year) AAC, their annual revenue would be $9 million. He stated that if the Plan had not been approved, the Husby Group would have lost significant revenue and about 50 jobs would have been lost. He also stated that the Husby Group could face AAC reductions if it does not maintain its level of cut.

Mr. Brash submitted that there would have been some operational costs associated with reconfiguring the 51 cutblocks that overlap the draft FENs, if MOF had required the Husby Group to resubmit the Plan. However, with respect to cutblock LIG 066, he indicated that it would have been routine to reconfigure it to allow for a WHA.

Expert evidence concerning marbled murrelet populations and preferred nesting habitat

Several expert witnesses testified before the Commission and provided evidence concerning the development of the draft FENs, estimated marbled murrelet populations, preferred marbled murrelet nesting habitat, and the locations in the area under the Plan where marbled murrelets had been detected or were likely to be nesting.

In addition to the three expert witnesses for the Board, whose credentials have been described previously in this decision, two expert witnesses testified on behalf of the Government:

Brian Nyberg, Acting Manager, Integrated Resources Section, MOF. Mr. Nyberg was accepted as an expert in the biology and conservation of marbled murrelets; and

James Steventon, Research Wildlife Habitat Ecologist, MOF, Prince Rupert Forest Region. Mr. Steventon was accepted as an expert in the biology and conservation of marbled murrelets.

The evidence provided by all five witnesses is summarized below.

Marbled murrelet nesting habitat

Ms. Mansiere-Deschesne stated that marbled murrelets nest for about two months between June and late summer each year. She stated that they nest on mossy platforms in old growth forests, and spend a month nesting on their single egg and a month feeding their chick. She advised that the type of habitat most closely associated with marbled murrelet habitat is forests that are 251 years old or older, most often located in valley bottoms, that contain Western Hemlock, and may contain Sitka Spruce, that are 28.5 or more metres tall. She advised that data from the Husby wildlife studies indicated that sites with these characteristics had the greatest numbers of occupied detections. Ms. Mansiere-Deschesne indicated that younger trees do not ordinarily develop the platforms needed for nesting, or have fewer of them. Her report states that not all stands with old tall trees are equally suitable for marbled murrelets, as research shows that the most suitable trees are those with mossy platforms on the branches. She cited several recent studies that confirm that nesting trees are generally located in larger valley bottoms and on lower slopes, which she indicated is likely due to high moisture levels in the areas supporting the growth of trees that develop the platforms used for nesting.

Ms. Mansiere-Deschesne also explained that the nesting trees preferred by marbled murrelets are located in areas where most historic logging has taken place and that are under the most pressure from logging today. She also estimated that 75% of historic logging in the licensed areas held by the Husby Group likely occurred in marbled murrelet habitat.

Mr. Nyberg referred to a recent study in Desolation Sound that showed some marbled murrelets nesting on higher elevation slopes. However, given that there has been extensive logging and fragmentation of habitat in this area, he also indicated that the birds may be using sub-optimal habitat, and conclusions could not be drawn until further studies have been conducted. Ms. Mansiere-Deschesne also advised that some ground nesting has been found on the outer Aleutian Island in Alaska, where there are no ground predators. However, due to predation, she said that ground nesting is rare to non-existent in B.C.

General population estimates for marbled murrelets

Based on a review of current literature, Ms. Mansiere-Deschesne provided estimates of marbled murrelet populations throughout their range from northern California to

the outer Aleutian Islands. She cautioned that their populations have been difficult to assess and that a variety of different survey methods may have been used in making these estimates. The estimates she provided are:

> B.C. - 45,000 to 50,000 based on a 1990 Rodway study. She noted that Berger report uses a figure of 60,000…
>
> Alaska: - a low of 221,000 in a recent study, with earlier estimates as high as 1 million.
>
> Washington, Oregon and California: 27-32,000.

Ms. Mansiere-Deschesne also described various methods used for collecting murrelet data and population estimates. The inventories she conducted on Husby Group holdings are "occupied behaviour" surveys, that require repeated field work inventories over 2 or more years, and involve aural and visual sighting of murrelets at specific field locations. She described this as the best method for determining occupied nesting behaviour in a specific area, as this behaviour is tracked separately from overall counts and below canopy sightings. "Radio tagging or radio telemetry" involves tracking tagged birds and provides detailed information on the basis of tagging a few birds. "Sea counts" are another method that is used for overall population estimates, however, since the birds may fly to different nesting areas, they do not provide specific population counts in an area.

Mr. Steventon mentioned that sea counts generally show lower population estimates than radar tracking. He indicated that a difficulty with sea count studies is that murrelets may fly as far as 30 km to nest. Ms. Mansiere-Deschesne advised that and that murrelets generally fly 20 to 40 km on average from the sea to nest sites for feeding.

Queen Charlotte Islands population estimates:

Ms. Mansiere-Deschesne stated that marbled murrelet populations for the Queen Charlotte Islands could not readily be estimated because no current studies have been done. However, she advised that based on actual survey data, the estimated overall population is between 2600 and 5000 in the Queen Charlotte Islands.

Mr. Stevenson testified that the murrelet population in the Queen Charlotte Islands is approximately 6800, with the highest density populations occurring in the southern Queen Charlotte Islands.

Population estimates in Husby Licence areas:

Population estimates in the draft FENs within the 3 Husby Group licences were provided by Mr. Nyberg and Mr. Steventon, based on population densities found in recent radar surveys in B.C. Mr. Steventon indicated that a recent study in Clayoquot Sound shows 0.04 murrelets per hectare when the entire forested area was surveyed; 0.07 murrelets per hectare when higher elevation slopes were factored out, and 1.0 to 1.5 murrelets per hectare when specific murrelet habitat

was studied. He indicated that similar ratios have been found in two other recent studies, one on northwest Vancouver Island and another of 22 mid-coast watersheds. Using the 0.07 density, Mr. Nyberg estimated that 49 murrelets, or 25 pairs (one pair every 28 hectares) would be impacted by the 700 hectares of draft FEN originally estimated to be affected by the approval of cutblocks in the Plan.

Mr. Steventon, using a figure of 0.05 murrelets per hectare, calculated there would be 35 murrelets in 700 hectares, or even doubling that, 35 nesting pairs impacted in a 700 hectare FEN (one pair for every 20 hectares).

Known and likely marbled murrelet habitat in Husby licence areas:

Ms. Mansiere-Deschesne testified that there are high levels of marbled murrelet habitat in the areas covered by the 3 Husby Group licences. She stated that marbled murrelets were a primary focus of the wildlife inventories she conducted during the summers of 1995 and 1996, with some preliminary assessment having been conducted in 1994. She advised that the inventories were conducted in accordance with Resource Inventory Committee[2] standards, and have been well regarded by other experts working in this field. Ms. Mansiere-Deschesne advised that the murrelet inventories consisted of monitoring the numbers of murrelets detected during a specified period before and after sunrise at 18 stations in 1995, and at the same 18 stations plus an additional 9 stations in 1996, most of which were visited several times. The stations represented different forest characteristics and elevation levels, and some were located in clearcut areas.

The dawn surveys detected hundred of murrelets. "Occupied nesting behavior" was recorded separately and represented approximately 30% of the total detections recorded. Another category, "sub-canopy" detection was also recorded. Ms. Mansiere-Deschesne described occupied nesting behavior as behaviour such as circling, flying below the canopy, or landing on trees. This was also described as the best method for determining nesting populations within a given landscape. Stations within valley bottoms had the highest murrelet occupied nesting detection rates, which was also found in a 1990 Queen Charlotte Islands study referred to by Ms. Mansiere-Deschesne. She also advised that nesting habitat was found to be highest in stands of intact old growth forest rather than in stands situate amongst current or historic cutblocks, indicating that murrelet breeding behaviours are affected by habitat fragmentation and edge effects.

Ms. Mansiere-Deschesne's studies show that several stations had very high levels of murrelet occupied nesting behaviour, particularly those within the Lignite and Davidson Creek watersheds. The Lignite watershed MIGH station, situated near cutblock LIG 066, recorded particularly high levels: a 1995 mean total of 26 occupied nesting behavior detections, 8.5 sub-canopy detections, and 183 total

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[2] The Resource Inventory Committee, now called the Resources Information Standards Committee, was established in 1991 and is responsible for establishing provincial standards for natural and cultural resources inventories.

detections. Ms. Mansiere-Deschesne described this area as having more murrelets than she had seen in any other location.

Ms. Mansiere-Deschesne estimated that over 75% of the changes to the original 1996 draft FEN boundaries overlap with habitat typically associated with marbled murrelets. Her report states that most of the cutblocks have a minor (0-5 hectare) overlap with typical marbled murrelet habitat, 11 have significant overlaps, and two (LIG 066 and TOR 035) have extensive overlaps of 31-40 hectares. She testified that block LIG 066 was of particular importance since it had been placed in the middle of a large area in the draft FEN. She explained that a survey site (the LIG-MIGH station) near this block had the highest numbers of occupied detections of marbled murrelets in her wildlife surveys of the three licence areas.

Mr. Cober's digital map folio shows that the cutblocks approved in the Plan that have the most notable areas of overlap with suitable marbled murrelet habitat are LIG 066, NAD 061 and DAV 037, DIV 430, and TOR 035.

Commission's findings

The Commission finds that the District Manager correctly approved the Plan under section 41(1)(b), with the exception of cutblocks TOR 035, DIV 430, DAV 037, NAD 061, and LIG 066. Based on the evidence that was presented at the appeal hearing, the Commission concludes that those cutblocks should not have been approved because allowing harvesting in those cutblocks would result in an unreasonable degree of risk to marbled murrelets. The evidence shows that those cutblocks contain the most significant overlaps with the draft FENs, which were developed in part to protect marbled murrelet habitat. Additionally, those cutblocks are either known to contain marbled murrelet habitat or contain the greatest amount of suitable habitat for marbled murrelets relative to the other cutblocks proposed in the Plan. In particular, the Commission has considered that:

- Ms. Mansiere-Deschesne's studies show that a survey site (the LIG-MIGH station) near cutblock LIG 066 had the highest numbers of occupied detections of marbled murrelets in her wildlife surveys of the three Husby Group licence areas.

- Mr. Cober's map folio shows that the cutblocks LIG 066, NAD 061 and DAV 037, DIV 430, and TOR 035 have the most notable areas of overlap with suitable marbled murrelet habitat.

- Mr. Cober and Mr. Sharpe indicated that the approval of cutblock LIG 066 prevented later placement of a WHA in this area, which was determined to be one of the best potential marbled murrelet WHA sites in the Eden LU.=

Based on the evidence, the Commission finds that the District Manager was aware of Ms. Mansiere-Deschesne's wildlife inventories and the fact that previous Husby Group forest development plan submissions for the area under the Plan had managed for the draft FENs, which were developed in part to manage and conserve marbled murrelet habitat. The District Manager testified that his staff had briefed

him regarding the wildlife inventories conducted by the Husby Group between 1994 and 1996. The evidence also indicates that the draft FENs were incorporated into three previous forest development plans prepared by the Husby Group that covered the areas in question. Furthermore, the document evidence clearly indicates that the draft FENs, and their importance in providing habitat for marbled murrelets and other identified wildlife such as the Queen Charlotte Goshawk, was an issue that had been discussed and considered by MOF officials in the Queen Charlotte Islands Forest District for many years prior to the approval of the Plan. Based on that information, the District Manager should have given greater consideration to the fact that cutblock LIG 066 contained known marbled murrelet habitat, and the other four cutblocks contained likely marbled murrelet nesting sites, when he approved the Plan. Accordingly, those cutblocks should have been deleted from the Plan.

The Commission has considered the balance of the cutblocks covered by the Plan and agrees with the District Manager that they were properly included in the Plan and will not have a detrimental impact on marbled murrelet habitat and populations. Little or no specific information was provided to the District Manager or the Commission regarding marbled murrelet nesting activity in those cutblocks. The District Manager did a review of all of those areas including a fly over to consider the amount of old growth forest that is available to the marbled murrelet.

The District Manager considered the Queen Charlotte Islands as a whole, including the Duu Guusd and properly concluded that there was significant nesting area available for the marbled murrelet both inside and outside the Eden LU. The District Manager provided evidence of healthy marbled murrelet populations on the Queen Charlotte Islands. He considered this information in concluding that the marbled murrelet were not at a critical threshold that required further protection in the Eden LU. Finally, the District Manager properly considered the significant negative economic impacts that would have resulted if all of the draft FENs were deleted from the Plan.

The Panel agrees that the District Manager properly concluded that the Plan met the requirements of section 41(1)(b) of the *Code* when he considered all forest resources, including marbled murrelets. Accordingly the Commission confirms that the Plan as approved with the exception of the 5 cutblocks noted above will adequately manage and conserve the marbled murrelet population and habitat in the Eden LU.

DECISION

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

For the reasons provided above, the Commission finds that the approvals for cutblocks TOR 035, DIV 430, DAV 037, NAD 061, and LIG 066 should be set aside. The District Manager's decision to approve the Plan is varied to exclude the approvals of those cutblocks. The remainder of the cutblocks that are the subject of this appeal and that were approved under the Plan are confirmed.

Accordingly, the appeal is allowed, in part.

Alan Andison, Chair
Forest Appeals Commission

James Hackett, Panel Member
Forest Appeals Commission

November 20, 2003

MINORITY DECISION OF PANEL MEMBER KRISTEN EIRIKSON

This Dissent concurs in part with the majority decision. It fully agrees with Issue 1, which is not discussed and disagrees with Issue 2, addressed here. It agrees in part with the decision reached in Issue 3, but takes issue with the grounds upon which the decision was reached and reaches a different conclusion.

Issue 2: Whether the Plan was prepared and submitted in accordance with section 10(1)(c)(ii) of the *Code*

The FENs had initially been developed after intensive, if preliminary, wildlife studies carried out in accordance with requirements under the Biodiversity Guidelines. They had been in place, with minor variations, for several years prior to the 1999 Plan. The omission of any mention in the 1999 FDP submission that cutblocks were proposed which seriously encroached upon marbled murrelet habitat protected within the existing FEN network was misleading in the extreme. The District Manager should have required that Husby include this information in the Plan and specify what measures were being carried out to protect marbled murrelets, as required under section 10 of the *Code*.

It makes no sense for the District Manager to have a separate duty under section 41 of the *Code* to be "satisfied that the FDP will adequately manage and conserve forest resources," yet interpret the *Code* to not require that the Plan set forth the measures proposed to protect an endangered forest resource such as the marbled murrelet. The Plan should have specified what measures were being made to protect marbled murrelets, as required by section 10 of the *Code*. Furthermore, the District Manager's FDP Referral and Comment letters should have addressed these matters.

Section 10(1)(c) of the *Code* reads as follows:

Forest development plans: content

10 (1) …a forest development plan must comply with the following:

…

(c) it must specify

…

(ii) measures that will be carried out to protect forest resources;

There is no question that marbled murrelets are "forest resources" within the meaning of the *Code*. Section 10 requires that a Forest Development Plan must specify measures that will be carried out to protect forest resources. Therefore, according to the Supreme Court of British Columbia, in *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District) and Cattermole Timber*, 2003 BCCA 403 (hereinafter *Cattermole*), section 10

(1)(c)(ii) of the *Code* requires that a forest development plan must specify measures that will be carried out to protect forest resources. In that case, the forest resource in issue was spotted owls; in this case it is marbled murrelets. Section 10 therefore very straightforwardly requires that a Plan must specify measures to protect marbled murrelets.

Further, the court in *Cattermole* properly interpreted that section 10 (1)(c)(ii) is a separate requirement than that contained in section 10(1)(d) of the *Code*, which requires that a Forest Development Plan must comply with matters required by regulation. The court held that section (d) does not limit Plan requirements to information that is specifically or mandatorily required in the regulations. Its interpretation is that paragraphs (a), (b), (c) and (d) of section 10(1) are disjunctive and that paragraphs (i) and (ii) of paragraph (c) are themselves disjunctive. The section 10(1)(c)(ii) requirement is therefore separate from the section 10(1)(d) requirement that the Plan must specify matters required by regulation.

The decision also notes that the:

> obvious reason for there to be a requirement that a plan or amendment specify the measures that will be carried out to protect forest resources is to ensure that the issue of the protection of forest resources can be addressed. Section 10 requires the measures that will be carried out to protect forest resources be identified; s. 41 requires that a determination be made as to whether those measures are adequate. (p. 22)

In *Cattermole*, the court held that even though the decision maker had erroneously found that the plan in issue did not need to specify the measures that would be carried out to protect the spotted owl, the Plan in issue in that case did specify the measures that would be carried out to protect the resource. This decision was appealed on other grounds relating to the interpretation of section 41(1)(b) of the *Code* and upheld by the British Columbia Court of Appeal. Nevertheless, the statutory analysis of section 10 and reasoning provided by the court is valid. It is also not necessary that section 17 of the *Code*, which references "General Planning Requirements," be considered in relation to section 10. These are independent, stand-alone provisions and section 10 clearly sets forth a distinct provision that a Plan "must specify…measures that will be carried out to protect the forest resource." The FENs that were in place in the license areas would be a measure carried out to protect marbled murrelets.

The section 10 amendment to the *Code* referred to in the majority decision was not in effect at the time this appeal was brought and was heard. This 2002 amendment, which retroactively deems that all plans approved prior to December 17, 2002 are in compliance with subsection 10(1)(c)(ii), was not argued before the Commission and should not influence this decision. The amendment appears to be an attempt to avoid the questions raised in many plans subsequent to the release of the *Cattermole* decision, and its retroactive legal validity is highly questionable.

This Plan, at the time it was filed and approved, did not comply with section 10 and that is the issue before the Commission.

The Government's argument that the FENs are not "known" is not a legitimate argument. Section 10 does not refer to "known," only the Regulation, which is subordinate to the *Code*. There is no question that the MOF knew of the FENs. As well, though current thinking is that WHA areas set aside in the future to protect habitat should be configured differently than the linear FEN areas that encompassed streamside protection zones and linear FENs are no longer being proposed, these new methods of developing wildlife set aside areas do not invalidate the FEN networks in the interim.

In support of its position, the Government argues that *Forest Practices Board v. Government of British Columbia*, Appeal No. 96/04(b), June 11, 1998 (unreported) (hereinafter *Klashkish*) decision of the Commission holds that the *Regulation* provides a conclusive list of the specific forest resources that must be identified and described in a plan, an interpretation that was adopted in the majority decision. However, the Board correctly argued that *Klashkish* is distinguishable from this situation and that it is the *Code*, not the Regulation that governs what is to be included in the Plan. The Board characterized Section 10 as an independent "catch-all" provision designed to cover forest resources not specified elsewhere in the *Code* or Regulations.

Klashkish was decided in the very early days of the *Code*, in the context of a Plan that was very deficient in referring to any forest resources. The primary issue in that case was whether it was necessary to include information about forest resources only in the areas proposed for cutblocks or resources that may be affected within the larger "area of the plan." This case did not review the section 10(c)(1)(ii) issue in question here or attempt a thorough statutory analysis, but made a variety of general statements concerning Plan content. In addition to referring to the Regulation as providing a detailed account of the specific resources that are to be described in a plan, in various places the decision clarifies that the test is that all "relevant," "substantive," "significant" and "sufficient" information is to be included in a Plan.

At page 27, the decision states that:

> To be satisfied that the plan adequately manages and conserves the forest resources of the area to which the plan applies ((the area under the plan)), all relevant information for the area must be in the plan. Whether the plan "adequately manages and conserves the forest resources" will largely depend on what resources have been identified and described in the plan and the adequacy of the measures specified to protect them with a view to achieving "sustainable use."
>
> ...
>
> Clearly, when making a decision on a plan a district manager must base his or her decision on the contents of the plan. Where additional

> information is required, a district manager may require the information to be provided under section 41(1) of the *Code* prior to approval of a plan, or the plan may be approved subject to a condition under section 41(5). However, it is also clear that his or her personal knowledge of the area and expertise will come into play when evaluating the plan. This is to be expected. **The question is whether any information which is substantive and which is a significant factor in the decision to approve the plan, is not included in the plan.**

At page 29, the decision states:

> As the highest level of operational plan, it is implicit that a FDP should contain sufficient information about the "area under the plan" from which lower level planning regarding cutblocks can be developed. From the plan, one should also be able to assess where various resources are located in the larger areas, to **ensure that the proposed harvesting and road construction locations are appropriate, having regard to protecting those forest resources.**
>
> (emphasis added)

The *Klashkish* decision is also readily distinguishable on the basis that the Plan in issue had been prepared during the "transition phase" of the *Code* and that there had been no inventories or assessments of any of the wildlife forest resources within that plan area. FENs or other habitat set aside areas had not been developed and past plans had not referred to FENs and protection of endangered forest resources. Letters had not been sent to participants stating that these resources would remain protected by the FENs until further consultative planning processes took place. In that case, based on what was contained in the Plan, the District Manager could have been satisfied and the Commission did not have adequate information to decide otherwise. However, here, we are dealing with a situation where several years of past plans have referred to the FENs and the marbled murrelets, yet they have been dropped from the 1999-2003 FDP. In addition, the forest resources referred to in the *Klashkish* plan were not endangered species that had been officially designated as "Identified Wildlife" in need of protection, unlike the marbled murrelet forest resources in this case.

Thus, section 10 of the *Code* independently requires that an FDP must specify measures to protect forest resources, including marbled murrelets. The Regulations, which are subordinate to the *Code*, specify mandatory content but do not contain a conclusive list.

The 1999-2003 Plan submitted by the Husby Group did not make specific reference to marbled murrelets or the FENs. Unlike previous Plans, it did not discuss the draft FENs, include maps depicting the draft FENs or provide reasons for proposing cutting that infringed upon the network of FENs. The Plan submission does refer to the Wildlife Inventories upon which the draft FENs had initially been developed and reference is also made to red and blue listed species. However, marbled murrelets

are not specifically identified or discussed in the submission nor in the MOF Approval, Comment and Rationale letters approving the Plan.

With respect to the section 10 requirement that a Plan "must specify measures that will be carried out to protect forest resources, the FDP only states in the Biodiversity section of the Plan that:

> In order to ensure adequate protection of critical wildlife habitat it is the intention of the licensee to seek direction and input from the agencies regarding current practices and considerations for designation of wildlife habitat areas.

The Plan clearly does not specify the measures that will be carried out to protect the marbled murrelets, as required by section 10.

The then District Manager for the Queen Charlotte Island Forest District, Rory Annett, in his October 22, 1999 and November 2, 1999 Approval, Comment and Rationale letters approving the 1996-2003 FDP for the three license areas also did not refer to marbled murrelets or FENs. Interim protection measures were, however, provided for Queen Charlotte goshawk nests even though WHA areas had not yet been proposed for either goshawks or murrelets.

Past Husby Group FDP submissions in 1996, 1997 and 1998 discussed the FENs and included map overlays of the FENs. These Plans set forth that the District Manager had prohibited development within the FEN boundaries pending completion of an LRMP process within the district that would confirm draft landscape units and objectives established in 1997. The 1997 FDP submission noted that minor changes had been made to the original FEN delineations on the basis of ground reconnaissance.

The wildlife and biodiversity assessments that led to the development of the FENs had been initially required of the Husby Group by MOF, in an FDP rationale letter dated November 20, 1995 and in earlier correspondence. This letter was written by W.R. (Bob) Brash, the managing director for the Husby Group who testified for the Husby Group at this hearing, when he was the MOF District Manager for the Queen Charlottes prior to joining Husby. Very few of the cutblocks proposed in the 1995 FDP were approved; most were deferred "pending the requested analysis of wildlife habitat and biodiversity."

The Board, in its submissions, referred to the following excerpts from past FDPs and correspondence:

- "No harvesting developments are permitted within the draft FEN… Harvesting opportunities (Alternative Silviculture) within the draft FEN will only be explored once FEN boundaries are fine tuned and objectives are set" (from District Manager's Approval letter for the 1996 FDP for FL A16869, p. 4)

- "Fine-tuning of FENS is a process that will evolve over time as LUs are designated and landscape objectives are established…In general, until

objectives of the draft FEN have been reviewed and finalized, harvesting operations are to be planned outside the draft FEN location. Alternative silviculture systems may be an option when FEN objectives are known" (from District Manager's Approval letter for the 1996 FDP for FL A16869, p. 4).

- "Queen Charlotte Islands Forest District policy requires that all proposed cutblock development remain outside of the draft Forest Ecosystem Networks presented with this plan" (from the Husby Group 1997 FDP submission, FLA 16869, Part 2.0).

- "There are a number of proposed operations within the FEN boundary. Alternative silviculture systems may be an option within FEN boundaries when objectives are known or following review and consultation. Subsequent to the completion of LU planning, options may exist to adjust FEN boundaries to incorporate recommendations from the 1997 Wildlife Inventory report and harvest opportunities outside of any critical Marbled Murrelet (MAMU) habitat identified in the report" (from 1997 District Manager approval letter).

- The Husby Group 1998 FDP confirmed that a district directive prohibited development within the FEN boundaries until such time as LU objectives were put in place and the boundaries could be finalized (from the Husby Group 1998 FDP, p. 10).

There had been significant participation in past planning processes by the Haida Nation and other interested parties. The MOF and the Husby Group had on many occasions in correspondence with these parties indicated that development in the FEN was deferred until such time as landscape unit objectives were in place. Because the 1999-2003 FDP did not specify that cutting was now proposed in FEN areas, the Haida and other interested members of the public were unaware that the FENs were now being ignored.

In addition, written comments received with respect to the 1999 FDP by MOF from the Regional Protected Area Team (RPAT) concerning the marbled murrelets, and the Institute for Sustainable Community Issues (ICSI) requesting that the Plan identify efforts being made to protect red and blue species in the Plan were ignored. The District Manager did not refer to these comments in his Plan approval letters or respond to them.

This is not simply a case where a questionable forest resource was not specified or discussed in the Plan. Here, the FENs were developed as a result of an MOF Plan requirement. Intensive, if preliminary wildlife studies concerning an endangered species had been carried out. There was extensive Haida and public involvement in the planning process over several years. Plus, there were numerous statements made by Husby and MOF that the FENs would remain in place until an overall LU plan was developed.

Given all of the above, it was misleading in the extreme for the 1999 Plan submission and MOF Approval, Comment and Rationale letters to not clearly specify

what efforts were being made to protect marbled murrelets in the face of proposed cutting in areas of prime murrelet habitat. It should not be necessary to hear during this appeal what the Husby Group was proposing and what efforts the current District Manager, Rory Annett, had supposedly made to consider the murrelets when evaluating the 1999 FDP. It should be apparent on the face of the Plan, as required by section 10(1)(c) of the *Code*.

The set aside of FENs for the protection of marbled murrelets and other species had been required of the Husby Group subsequent to the 1995 passage of the *Code*. These set aside areas were legally required pursuant to the Biodiversity Guidelines as part of the formal FDP process governed by the *Code*. Though they were subject to refinement as further biological studies took place, these were not informal set asides. They were required set asides duly imposed by MOF on many licensees. The Biodiversity Guidelines have not been withdrawn nor have the set asides required under them been withdrawn in the interim pending development of WHA's under the IWMS. The IWMS itself states that it is intended to provide for "fine filter" management of identified wildlife, to complement the "coarse" filter management provided in the Biodiversity Guidelines appropriate for most wildlife.

It is incorrect to characterize WHA's under the IWMS as "legal" set asides and FENs set aside under the Biodiversity Guidelines as informal set asides, as the Government argued, even though the FENs continue to be subject to refinement. Though the *Code* definition refers to a past form of signed-off FENS developed prior to the 1995 *Code*, the FENs in the Husby license areas were developed subsequent to the passage of the *Code* as formal requirements of the licensee pursuant to the 1995 Biodiversity Guidelines.

The protection of biodiversity is an important element of the *Code* and the *Code* is intended to manage and protect biodiversity and endangered species as well as govern forestry operations. While protection of the funny-looking little sea birds that nest in ancient old growth may not seem important in itself, protection of endangered species is an essential element in ensuring the protection of diverse species that inhabit similar ecosystems. Often, endangered species are simply "indicator species" for the diverse species and ecosystems that are being lost to development.

The *Code* initially anticipated that higher-level plans would be developed in each landscape unit at a much faster pace and that the FENs would be incorporated into the higher level landscape unit (LU) Plans. It is apparent from the MOF letters above referenced with respect to past Husby Group Plans that the FENs were intended to be incorporated into a landscape unit Plan and that development within the FENs was prohibited in the interim. The development of LU Plans has, even though the Eden LU was proposed as a pilot project, been a slow process, partly because licensees may have little interest in completing this process. The IWMS policy subsequently has been developed for the creation of Wildlife Habitat Areas (WHA's). The WHA's, when developed and signed off, will undergo a higher level Deputy Minister sign-off and therefore not be readily subject to refinement. The creation of this new policy does not, however, mean that that the existing network

of FENs has no protection and that FDPs can ignore the FENs previously developed. The FENs were created under a valid "legal" process in accordance with the *Code* and Biodiversity Guidelines, which continue to remain in effect.

Regardless of whether these were the type of FENs that existed prior to 1995 or WHA's that had been developed and officially signed off for this area, Section 10 of the *Code* requires that an FDP must specify measures that will be taken to protect marbled murrelets. In this case, that would require specifying the FENs since they were largely developed as set asides for the endangered marbled murrelet. Thus, the development of the FENs was a licensee requirement made under the *Code* in accordance with the Biodiversity Guidelines and in keeping with normal MOF practices. Further, section 10 of the *Code* requires that the FDP specify the FENs as a measure that was put in place to protect marbled murrelet habitat.

The Government and the Husby Group did not provide any law, regulations, policies or guidelines that indicated that legal measures such as FENs that had been set aside pursuant to the Biodiversity Guidelines could be ignored and that there is to be no protection for endangered wildlife until such time as the lengthy process of development of WHA's has taken place under the IWMS. The IWMS was intended to complement, not supplant the Biodiversity Guidelines. The District Manager did, however, erroneously state that future set asides for wildlife protection could only be taken from the non-productive forest land base. This thinking clearly affected his decision, however none of the policy documents and guidelines that were presented supported his position or his decision to simply ignore the FENs created in accordance with the Biodiversity Guidelines. MOF policy did not fetter the District Manager's decision; his own misinterpretation of existing law and policy apparently did.

The Biodiversity Guidelines remain in effect and MOF requirements made pursuant to these guidelines and imposed as part of the FDP process governed by the *Code* continue to remain in legal force and effect. Thus, the FENs remain in effect. In many areas, the setting aside of WHA's can be a lengthy process requiring a minimum of two years of additional study, require significant agency resources in a time of declining budgets, and still need to undergo a lengthy sign-off process. At the time of this hearing only four WHA's had been created in B.C. and none on the Queen Charlotte Islands. WLAP staff testified that despite the Eden LU having been designated as a pilot project for LRMP planning, MOF did not provide them with the necessary mapping with which to identify potential WHA's for over two years. They were therefore unable to propose potential WHA's until January 2000, after the Plan had been approved. The measures that were in place under the Biodiversity Guidelines were not intended to simply "disappear" in the interim prior to WHA development. Nor did the adoption of the IWMS effectively repeal or supplant the Biodiversity Guidelines with respect to existing FENs.

When the Husby Group submitted a Plan that did not specify what measures it intended to use to protect marbled murrelets and proposed logging within the FENs, the District Manager should have determined that it was deficient. He should have requested that the Husby Group provide this information prior to Plan review and

approval. It was not sufficient that the Husby Group referred to the wildlife inventories and indicated that it sought agency input and direction regarding current practices for designation of wildlife habitat areas. Under section 10(1)(c) of the *Code*, the Plan must specify the measures that will be carried out to protect marbled murrelets. The District Manager did not comply with section 41(1)(a) of the *Code*, which requires that the plan must be prepared and submitted in accordance with the *Code*, when he approved a plan that did not meet the requirements of section 10(1)(c)(ii) of the *Code*.

It is also not acceptable that the District Manager acquiesced in the licensee's failure to specify in the Plans that murrelet habitat was intended to be logged. His approval letters do not refer to the FENs or marbled murrelets and do not even attempt to reply to the request for "agency direction" set forth in the Husby Group Plan proposal.

It has not gone unnoted that Bob Brash was the District Manager for the Queen Charlotte Islands at the time that the FEN set asides were required of the Husby Group. Now, as Managing Director for the licensee, he submitted a Plan that significantly encroaches upon the FENs without mentioning either the marbled murrelets or the FENs. The current District Manager ignores this significant omission and does nothing to point this out. The result is a misleading Plan where only the Husby Group and the District Manager are aware that the FENS are being ignored and a significant apprehension of bias.

Particular care should be exercised in situations where a current District Manager is dealing with a former District Manager. Plan approvals should be beyond reproach. Here, the Plan was clearly misleading on its face. It is vital to the legitimacy of B.C. forest practices that forest planning and policy be an open and transparent process and that justice must not only be done but be seen to be done.

The next issue to be addressed is the District Manager's obligation under section 41(1)(b) of the *Code*, accepted in the majority decision as a distinct duty, to be satisfied that the FDP will adequately manage and conserve forest resources. In order to appropriately carry out this duty, it is essential that the Plan set forth the measures that will be carried out to protect forest resources, as required by section 10. Given that the majority decision accepts that the District Manager has this duty, it simply makes no sense to also determine that a Plan does not need to disclose or contain information relevant to determining whether a Plan adequately manages and conserves forest resources.

Issue 3: Whether the Plan was approved in accordance with sections 41(1)(b) and 41(3) of the Code.

The majority decision correctly interprets that marbled murrelets are "forest resources" as defined by the *Code*. It also correctly holds that a District Manager has a separate and distinct duty under section 41(1)(b) of the *Code* to be satisfied that the Plan meets the test of "adequate management and conservation" and on this basis determined that the test was not met with respect to five of the cutblocks approved in the 1999 FDP. The majority decision also appropriately decided that

past MOF knowledge and information concerning the FENs and marbled murrelets was relevant to the District Manager's decision, despite incongruously determining that the information did not need to be included in the Plan, as previously discussed.

However, the majority decision did not properly address the issue of the "area of the plan" in context of the cumulative impacts on marbled murrelet habitat. It was not appropriate for the District Manager to look beyond the Eden LU and determine that there was lots of habitat outside Eden, especially when dealing with endangered species. The majority decision also did not properly consider crucial expert evidence concerning linear declines of the marbled murrelets, the fringe effects of fragmented habitat, and the cumulative impacts of continued logging both inside and outside the Husby Plan areas. Nor did it apply a proper "risk analysis" test to all 51 of the cutblocks in the Plan in keeping with the *Cattermole* decision.

In this case, no information was contained in the Plan and almost no information was provided to the Commission with respect to the 51 cutblocks encroaching into the FENs, apart from expert testimony that these areas had largely been included in the FEN network because they were areas that contained the ancient trees that are indicative of prime murrelet habitat. The District Manager did not carry out a proper risk assessment and the evidence before the Commission shows serious risks to the murrelets.

Unlike the *Cattermole* case, where information was contained in the Plan and sufficient information was available to analyze the risks, this is not the case here. The evidence before the Commission shows serious declines in murrelet populations and serious and continuing declines in habitat. It also shows that not even 30% of the 10-12% IWMS target can be met in Eden LU. While disallowing the approval of the five cutblocks that have the largest encroachments will potentially improve this situation, it will not be sufficient to satisfy the section 41(1)(b) test of "adequate management and conservation", nor will it enable the IWMS target to be met. A proper risk analysis has not been carried out with respect to the remaining 46 areas of FEN encroachment. In the absence of properly considering the risks and properly determining the habitat potential of all 51 cutblocks, none of them should be approved.

The District Manager's Decision

It is apparent from the District Manager's testimony that he did not properly consider the murrelets in making his decision to approve the 51 cutblocks that encroach into the FENs. Rather, he incorrectly believed that the planning process no longer needed to recognize FENs or require habitat set asides for the endangered murrelets if these areas had not yet been proposed for WHA's under the IWMS. Based on an incorrect interpretation of MOF policy, he stated on several occasions that there was no AAC budget available for murrelet habitat and that he interpreted the LUPG and OGMA Guidebooks to mean that any habitat protection areas must be taken from the non-contributing land base. His decision was therefore fatally flawed from the outset.

The District Manager's decision was also patently unreasonable in respect of the cutblocks encroaching upon the FENs for the following reasons:

(a) He failed to require the licensee to set forth information in the Plan concerning the marbled murrelets and encroachments into the FENs and furthermore, he failed to include such information in his FDP Approval, Comment and Rationale letters. Since many previous FDP letters and MOF and licensee correspondence to public participants had indicated that the FENs would remain in place, regardless of the section 10 requirement, the District Manager should have been forthright with respect to the FEN encroachment. If he did in fact consider marbled murrelets, the letters accompanying his plan approval should have specified this, and specified the information he relied upon in determining that the murrelets were not at risk.

(b) The District Manager had no expertise with respect to marbled murrelets and he failed to consult experts readily available within government such as WLAP Rare and Endangered Species Specialists or the Marbled Murrelet Recovery Team, or experts outside of government. He stated that he erroneously believed that that the Husby Wildlife Inventories had not been prepared to RIC standards and apparently gave them little attention. However, the studies had been carried out to RIC standards and are highly regarded by other experts working in this field.

(c) The District Manager testified that he conducted a cutblock by cutblock review of the Plan, however he admitted that he failed to look at the proposed cutblocks in relation to the FEN overlay maps that had been or the Wildlife Inventory station data that had been included with past plans. He testified that there was little reason to look at these since he had already determined that there was no AAC budget available for marbled murrelet habitat.

(d) He admitted that he would have made a different decision with respect to LIG 66 (an area of prime habitat centrally situate in the FEN) if he had had more information available to him when he made his decision. This information was readily available from the FEN overlay maps and Wildlife Inventory station data.

(e) The District Manager's position at the Review Panel hearing was that he did not need to consider the marbled murrelets as a "forest resource". His testimony before the Commission that he did give them valid consideration is therefore less than credible.

(f) The District Manager also testified before the Review Panel that he had considered an MOF Old Growth Management Area (OGMA) study before making his decision, which he believed showed that 46% of the non-contributing land base (NCLB) was available in Eden LU, or enough to satisfy the IWMS 10-12% target four times. The Board pointed out, and the District Manager acknowledged, that he misinterpreted the OGMA study and that it

actually shows that only 6% of the NCLB is available, and much of that is in small fragmented patches that are unsuitable for habitat.

(g) The District Manager testified he used a "critical threshold" test and determined that the marbled murrelets were not at a critical threshold on the Queen Charlotte Islands. This is an erroneous test and his use of it is patently wrong. It is a determination he could not have made without expert assistance. It also shows that he ignored the obvious: that marbled murrelets have been designated as "threatened" and "red-listed" because their populations are in serious decline. The term "critical threshold" normal refers to the critical threshold of 1000 pair, below which extinction is a near certainty.

(h) The District Manager took the position that he needed a substantial evidentiary basis in order to not approve the cutblocks. This evidentiary basis was readily available within MOF files and further information and expertise could readily have been sought.

(i) The District Manager also failed to acknowledge public comments concerning marbled murrelets in his Plan Approval letters. He testified that the Regional Protected Area Team (RPAT) had made a written comment stating that the area may contain murrelet habitat. The Board pointed out that the Institute for Community Initiatives (ICSI) had also made a written comment requesting that measures to protect red and blue listed species be detailed in the Plan. Neither of these comment letters were referred to in his Plan approval letters, nor did he respond to them.

(j) He failed to acknowledge that his requests for WLAP comments related only to watershed issues, not marbled murrelet issues. He also failed to properly consider that 20-30 pages of comments concerning marbled murrelets that had been received in respect of past plans from WLAP.

(k) He failed to apply his discretion to the protection of marbled murrelet habitat as interim measures under the IWMS on the basis that Stage 2 of the WHA process had not been reached. However, he did use his discretion to protect goshawk nests even though Stage 2 of the WHA process had not been reached for goshawks.

(l) The District Manager considered extraneous factors such as marbled murrelet habitat outside of the plan area, on the vague assumption that the murrelets could simply nest in the Duu Guusd or elsewhere on the Queen Charlotte Islands, as further discussed below. He was unaware of linear declines in murrelet populations in relation to their habitat and he did not consider the cumulative effects of approving this Plan on habitat for this endangered species. He also did not consider the significant "fringe effects" that the approved cutblocks would have on murrelet habitat.

(m) The District Manager, as further discussed below, also improperly gave too much weight to economic considerations in relation to his s. 41 duty to

be satisfied that the Plan adequately manages and protects marbled murrelets.

It was apparent from the District Manager's incorrect assumptions both in law and in fact, as well as his reliance on invalid information and failure to use relevant information readily available to him or seek expert assistance that a proper decision simply could not have been reached. Very little attention, if any, was given to the issue of marbled murrelet habitat when considering the Plan approval. His credibility is also highly questionable and his own failure to mention the FENs or murrelets in his approval letters or even refer to comments received in this regard, despite past assurances, shows that proper consideration was not given the murrelets. The "critical threshold" test he applied was patently wrong and his decision to approve the cutblocks that encroached upon the FENs was patently wrong.

Marbled murrelet populations and rates of decline

The evidence before the Commission is that marbled murrelets populations are significantly declining as habitat is lost and fragmented. There are not healthy murrelet populations on the Queen Charlotte Islands, as the District Manager erroneously concluded and the majority decision has erroneously accepted. There is not significant habitat available for the murrelets within or outside of Eden LU. Marbled murrelets have been designated as endangered because their populations are declining rapidly and their habitat is being severely impacted.

In 1991, marbled murrelets were designated as threatened species by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) in 1991. Their threatened designation was reconfirmed by COSEWIC in 2001. Marbled murrelets are currently "red-listed" by the B.C. government, the most serious provincial designation for species at risk.

The CHN pointed out that marbled murrelets are listed under the World Conservation Union Red List of threatened animals, which is internationally recognized as the list that categorizes globally threatened species, on the basis of a rapid population reduction of 31-48% in a ten-year period. According to the United National Environment Program World Conservation Monitoring Centre, the rapid decline in population over ten years "will continue until the principal breeding habitat (old growth forest) is adequately protected".

Ms. Mansiere-Deschesne stated that studies show that murrelets have declined to 5,000 in Washington State, where 82% of their old growth habitat has been lost. California declines are related to the loss of 80-95% of their old growth habitat. Ms. Mansiere-Deschesne also referred to recent studies that show that marbled murrelets are estimated to have declined 50% in the last 10-20 years in Alaska and Clayoquot Sound, B.C.

Population declines have been difficult to estimate in B.C. because historical and current overall populations have not been conducted. Various studies have taken place in various areas over time in B.C. The expert evidence of Ms. Mansierre-

Deschesne, which was not contradicted, was that there is strong evidence from all sources that murrelet population declines are tied to old growth habitat declines. She indicated that it is extremely difficult to estimate populations and population declines in the absence of historic studies, but that the best estimate of populations would be contained in a then unpublished Clayoquot study. This study estimates 2600 to 5000 murrelets as of 1991-92, or an average of 3800 murrelets.

Government experts incorrectly estimated that there are 6800 murrelets nesting on the Queen Charlotte Islands. The Board showed that this is not a valid estimate since it is derived from total murrelets assessed in various studies conducted over time which are indexed in the then unpublished Clayoquot study. The study itself cautions that these estimates are not be used as population estimates, and provides the estimate relied upon by Ms. Mansierre-Deschesne. On the basis of this data, government experts also inaccurately stated that the highest levels of habitat occur in the southern Queen Charlotte Islands. This evidence was also contradicted by evidence presented by the Board with respect to a Canadian Wildlife Service study that showed very high sea count levels of murrelets in the area to the north of Graham Island within nesting range of the Eden LU.

Government experts also calculated that 49 to 70 murrelets would be affected by the approved cutblocks overlapping an estimated 700 ha of FENs. However, this figure was based on estimates derived from other studies in other locations in B.C., not on the very intensive wildlife inventories that had been conducted by Ms. Mansierre-Deschesne in Eden LU, an area known to have high murrelet values. The wildlife inventories show very high numbers of murrelets in wildlife stations situate near prime murrelet habitat. The government estimate also did not take into account significant declines anticipated from “fringe effects”, which are discussed below.

Ms. Mansierre-Deschesne's Wildlife Inventories studies showed that one wildlife station, situate in prime habitat near the LIG 66 cutblock approved in the Plan, showed 26 occupied nesting detections and 183 total detections. Data from this and other wildlife stations that were situate in areas that represent different forest characteristics, elevations and even clearcuts shows that the numbers of murrelets that will be affected by the approved cutblocks will be significantly higher than 70, especially since the approved cutblocks are situate in prime murrelet habitat areas protected by the FENs. However, because the wildlife stations were situate in various habitats, the inventory data cannot be readily extrapolated to provide a specific estimate of the number of murrelets that will be affected by the cutblock approvals that encroach upon the FENs.

Linear relationship to habitat decline

The experts referred to several recent radar tracking surveys, including the then-unpublished Clayoquot Sound study, that show that there is a linear decline in the rate of murrelet populations to a decline in habitat. Based on these studies, there is no evidence that when habitat is lost, the murrelets “pack into” other areas to make up for lost habitat. This means that there will be a 100% loss of the

murrelets nesting in areas that are approved for cutting. As discussed below, if the fringe effects of scattered cutblocks and roads are taken into account, losses will be significantly greater than 100%. As well, the linear losses and fringe effects do not only apply to the area of FEN encroachment approved for cutting; they will also apply to the several thousands of hectares of cutblocks approved for cutting in the Plan, which encompasses the five Husby Group license area.

Ms. Mansierre-Deschesne estimated that 75% of historic logging in the Husby license areas was likely to have occurred in marbled murrelet habitat. This is because it is largely the valley bottoms that have been logged and these are the areas in which high moisture levels support the old growth trees that develop the large platforms used for nesting by the murrelets. Ms. Mansierre-Deschesne also stated that not all old growth habitat provides suitable habitat for the murrelets since the trees only develop the types of large platforms needed by the murrelets in certain areas of old growth.

The Board provided an analysis of habitat loss prepared by the Ministry of Forests that conservatively estimates that 51% of the old growth has been lost in B.C. Mr. Nyberg stated that the COSEWIC designation for threatened species is based upon the loss of more than 20% of a species habitat over three generations. In B.C. 24% of the old growth habitat has been lost in the last three generations (27 years). These figures do not take into account the "fringe effects" of the scattered habitat loss and road building that has taken place throughout B.C. and would be significantly higher if they did. Nor do they take into account that only some of the old growth habitat contains the platform trees needed by the murrelets.

Mr. Sharpe estimated that a minimum of 50% of the old growth habitat has been lost on the Queen Charlotte Islands. He indicated that based on the linear decline evidence this could lead to a 50% reduction in murrelets over time due to nesting failure, however because they are relatively long-lived the effects may not be immediately apparent. Ms. Mansiere-Deschesne stated that based on her research review, murrelets are declining 2-3% per year, and possibly as much as 6-9% per year across their range.

All of the experts acknowledged that murrelets are declining throughout B.C. Mr. Nyberg referred to a number of problems areas in B.C. where there is difficulty locating sufficient habitat to meet the IWMS target set asides, particularly the East Coast of Vancouver Island where there is little old growth left and the Sunshine Coast. He also acknowledged that as of late 2001, only four WHAs protecting approximately 1200 hectares of murrelet habitat have been formalized, and that it may take many years before landscape unit plans are in place in the 1300 landscape units in B.C. He also admitted that, based on his population projections, only 75 murrelets would have been protected in WHAs to date.

Mr. Sharpe and Mr. Cober also indicated that the options for preserving habitat on the Queen Charlotte Islands and throughout B.C. are very limited in many areas. They indicated that the IWMS target of setting aside 10-12% of the land base for murrelet habitat cannot be met in many landscape units, and is significantly

hampered by a policy directive that indicates that only 1% of the THLB may be used for WHA set asides. They further described that only 4 of the 13 landscape units on the Queen Charlotte Islands can meet the IWMS 10-12% target.

Within the Eden LU, they described that the landscape has been very fragmented due to historic logging activities, which makes placement of 200 ha WHAs very difficult. They also described the difficulties they have had attempting to locate suitable WHAs in the Eden LU. Although the Eden LU was designated as a pilot project for the Queen Charlotte Islands at an early stage, Mr. Sharpe indicated that MOF did not provide WLAP with computerized overlay maps that showed the NCLB in Eden LU until October 1999 and was therefore unable to develop WHA proposals until January 2000. Many of the proposals they have subsequently attempted to develop have been eliminated by cutblocks approved in the 1999 and 2000 FDP's or been constrained by the 1% policy.

He indicated that the 4 current WHA proposals put forth encompass habitat outside of the approved cutblock areas, but exceed the THLB budget and may need to be reduced to 3 WHA proposals. He further testified that the current proposals will only achieve about 28% of the 10-12% IWMS target and that marbled murrelet conservation is at a very high risk if further habitat protection measures cannot be implemented. He testified that capturing only 3% of murrelet habitat in areas of highly productive habitat is choosing a very high-risk option.

Fringe effects

Ms. Mansiere-Deschesne and other experts also testified that the "fringe" or "edge effects" from scattered habitat loss can have a very disportionate effect on habitat because of the reduction in interior habitat that results. Murrelet habitat that is adjacent to cutblocks or that is bisected by roads is subject to greater nest predation and microclimatic changes that occur at the edges of old growth habitat. As a result, habitat set asides provide little habitat at their edges and scattered habitat loss, whether within Eden LU or widely dispersed throughout the Queen Charlotte Islands or their entire range, can lead to significant declines.

Mr. Steventon indicated that nest predation occurs largely within the first 50 meters of the edge but that microclimatic changes due to increased temperatures in cut areas which inhibit moss growth may occur up to 50 meters from the edge. He also referred to a recent Washington State study that shows that edge effects can be lowered by having mature second growth buffering the old growth habitat areas. However, he also noted that it can take centuries before second growth becomes old growth habitat that second growth cannot be looked to in the short term for current preservation needs.

Mr. Cober explained that most of the logging has occurred in the Eden LU in the last 25-30 years, and that approximately 20% of the gross and 40% of the Timber Harvesting Land Base (THLB) has been logged in the Eden LU. As a result, he indicated there is little mature second growth that could be considered for WHAs or buffers for WHAs.

Ms. Mansierre-Deschesne explained the avoidance of fringe effects lay behind her reasoning with respect to the widening of the already protected riparian zones when initially developing the network of FENs. The avoidance of fringe effects was also referred to as the reasoning underlying the IWMS goal that WHAs be 200 hectares or larger and as roughly circular as possible. Under the IWMS, if the WHA's are smaller than 200 ha or less than 500 meters in width they are to be buffered by 100 meters of mature second growth over sixty years in age, however very little mature second growth is available for this purpose in the Eden LU.

Cumulative Risks

The evidence presented to the Commission with respect to cumulative risks is critical evidence that was misunderstood or misrepresented in the majority decision. A proper risk analysis cannot consider the loss of a small percentage of species in isolation in order to predict accurate decline rates. The decline rates must be considered in context of the cumulative effects of the declines taking place throughout its habitat.

Many of the expert witnesses indicated that the loss of a small amount of marbled murrelet habitat in the Eden LU would not in itself greatly impact the survival of this threatened species. However, all of the experts, including expert witnesses for the Government, acknowledged that an appropriate risk analysis must look at the loss of murrelets in the Eden LU in context of the cumulative effects of habitat loss in the Queen Charlotte Islands and its range as a whole. In other words, the FEN encroachments cannot be considered in isolation; habitat is also declining as habitat is being lost in the five Husby Group license areas covered by the Plan and in other landscape units on the Queen Charlotte Islands as well as elsewhere throughout its range. If the cumulative effect of the entire AAC being cut on the Queen Charlotte Islands were taken into account, a proper risk analysis would show a dramatic decrease in the probability of long-term murrelet survivability on the Queen Charlotte Islands.

A risk assessment provided by a government expert showed that a loss of 2% of the Queen Charlotte Islands murrelet population would have little impact on overall murrelet survivability. This assessment appears to have been erroneously accepted in the majority decision. Based on very high assumptions of murrelet populations and murrelets protected in parks areas, he arrived at a risk assessment rate for marbled murrelets of 80% over 100 years and 48% over 200 years. In his model, a 2% decline would make little difference to these decline rates. He based his estimate on a risk analysis model he has developed using standards similar to the COSEWIC standards, which uses 1000 pair of a species as a critical minimum threshold below which extinction is a near certainty, and assumed there were 500 nesting pairs permanently protected.

This analysis was, however, misleading because it only considered a 2% decline in murrelets in isolation and did not consider the cumulative impacts of murrelet declines that all of the experts acknowledged must be considered in an appropriate risk analysis. It also does not even consider the murrelet losses from cutblocks

approval in the Eden LU or the five Husby License areas encompassed by the Plan that do not overlap the FENs. The Board also pointed out that it was based on the inaccurate assumptions that significant murrelet habitat existed in park areas which only contain fragmented patches of murrelet habitat as well as low estimates of murrelets in prime Eden LU habitat derived from the inaccurate estimate of a population of 6800 marbled murrelets on the Queen Charlotte Islands.

The government expert acknowledged that even though he had conducted his risk assessment only on the basis of current Husby habitat loss within the 700 ha of FENs affected by the Plan, a proper conservation risk assessment should consider these additive effects across all landscape units, not just the Eden LU. He also acknowledged that his report states that a "conservation impact should consider management effects across all LUs as potentially additive".

This assessment also does not take into account "fringe effects" or the cumulative effects of logging the 7500 ha's authorized to be logged every five years on Husby license areas, which can be very significant.

The Board pointed out that even based on the expert's report, using speculative and favourable assumptions, and considering the FEN murrelets in isolation, there is a 1 in 5 chance of marbled murrelet extinction within a century. The Board also submitted that the cumulative effects of logging the 7500 ha's authorized to be logged every five years on Husby license areas, using the expert's own assumption of one nesting pair per 20 hectares, would drastically decrease the expert's assessment of long term murrelet survivability.

Based on one nesting pair per 20 hectares, this would calculate out to be 375 nesting pair (or 750 murrelets plus juveniles), affected by the cutblocks approved over the life of a 5-year FPD, if the Husby Group met its AAC. When compared to an average of the 2600-5000 murrelet population estimate provided by Ms. Mansierre-Deschese and the then unpublished Clayoquot Study (or 3800 murrelets as of 1991/92), one in every five murrelets of the Queen Charlotte Islands marbled murrelets will not survive, for a loss ratio of 20% over the 5 year FDP. If higher population estimates were assumed in the Husby Group license areas, which Ms. Mansierre-Deschesne's wildlife inventories would lead us to believe, and the 1991 population estimates were reduced to account for population reductions since that time, the loss ratio would climb significantly higher.

Thus, the evidence indicates a potential loss ratio of 20% or higher over the life of a 5 year FDP in the Husby license areas, even in the absence of considering the cumulative effects of declining murrelet habitat on other Queen Charlotte Islands landscape units.

If the cumulative effects from the other 12 landscape units were considered, the loss ratio would be significantly higher. For instance, on the basis of a low estimate of 100 murrelets per landscape unit, these 1200 murrelets plus the 750 Husby murrelets would mean that 1950 murrelets would not survive over five years. This would amount to greater than a 50% reduction in murrelets on the Queen Charlotte Islands based on a population estimate of 3800 murrelets over five years.

Even assuming a ratio of one murrelet per 20 hectares instead of one pair per 20 hectares, for a total of 350 marbled murrelets, and assuming that 200 murrelets did not survive in each of the other 12 landscape units, this would amount to 2750 murrelets that do not survive. Based on the 3800-population estimate, this would mean a reduction of over 72% of the marbled murrelets on the Queen Charlotte Islands over five years.

These estimates of the cumulative effects are based on evidence presented to the Commission and are not unrealistic estimates of the risks associated with declining murrelet habitat. They are presented to highlight the importance of taking cumulative risks into account in conducting a proper risk analysis. They also show that even if there is only one murrelet or one pair of murrelets per 20 hectares on Husby license areas, these are not insignificant numbers in context of the rate at which their habitat is being cut in Husby license areas and on the Queen Charlotte Islands.

These figures show drastic rates of decline within Husby license areas when considered in isolation and extremely drastic rates when cumulative affects are taken into account.

The majority decision failed to properly analyze the evidence or consider that a proper risk analysis requires that the cumulative effects of habitat loss must be taken into account. It ignored the evidence before it with respect to the cumulative impacts and even the government expert's written and oral acknowledgement that a proper risk assessment should consider the cumulative effects across all landscapes. It further ignored Ms. Mansierre-Deschesne's evidence that marbled murrelets are declining 6-9% per year across their range.

Instead it accepted the District Manager's uninformed conclusion that there was significant nesting area available both inside and outside Eden LU and determined that the District Manager had provided evidence of healthy marbled murrelet populations on the Queen Charlotte Islands. The majority decision further accepts the improper "critical threshold" test used by the District Manager in accepting the District Manager's conclusion that marbled murrelets are not at a critical threshold, despite their designation as "endangered" and "red-listed" species, and all of the evidence to the contrary before it.

Area of Plan

In addition to failing to properly consider the evidence concerning population declines and cumulative risks, the majority decision erroneously determined that it was acceptable for the District Manager to look beyond the Eden LU in determining that the Plan adequately protected and conserved marbled murrelets, pursuant to his obligation to do so under section 41 of the *Code*. In determining what is the appropriate "area of the plan", it relied upon the *Klashkish* decision, a decision that does not properly apply to this situation.

The majority decision adopted the *Klashkish* reasoning and found that for the purposes of section 41(1)(b), a forest development plan should address "an area

sufficient in size to include all areas affected by the timber harvesting and road construction or modification operations proposed under the plan". This reasoning was used to justify that the District Manager had properly considered the existence of suitable nesting habitat for marbled murrelets in forest areas outside the boundaries of the operations proposed in the Plan, but adjacent to those areas, such as the Duu Guusd.

This reasoning does not follow from the *Klashkish* decision, since the issue is not whether murrelets in the Duu Guusd would be affected by the Eden LU forestry operations. The Duu Guusd, while adjacent to the huge Eden LU, is also many kilometers away from the proposed cutblocks and the Plan proposes cutting within the Duu Guusd, which is subject to native land claims but is not presently a permanently protected area.

The issue in the *Klashkish* decision is whether an FDP, in terms of the "area of the Plan" must only address adequate management and protection of forest resources within the proposed cutblock and road areas, or whether forest resources outside of but "affected by" the proposed operations must be specified in the Plan. It determines that the Plan should identify resources affected outside of the proposed operations, but the Commission did not have evidence of specific resources affected by the Plan to make a decision in respect of the Plan before it. This reasoning clarifies that affected resources outside of the immediate area of operations comprise the "area of the plan", and would justify inclusion of the "affects" on forest resources in the Duu Guusd that are affected by the operations. This decision does not, however, justify substituting forest resources within the Duu Guusd and elsewhere to make up for habitat destruction within the Eden LU.

It is also unhelpful to attempt to look at other sections of the *Code* in determining this issue, as the *Klashkish* decision attempted to do.

The evidence before the Commission is that there is a virtual linear decline in murrelet populations to decline in forest habitat; they do not "pack in" or go elsewhere. The Duu Guusd murrelets have not been studied, and the District Manager admitted that the Duu Guusd contains only fragmented patches of marbled murrelet habitat. The linear decline evidence shows that if, for instance, the Eden LU murrelets attempted to nest in the Duu Guusd, they would only displace murrelets presently nesting in the Duu Guusd, who would have nowhere to nest and would not survive. Thus, it is not appropriate to consider habitat outside the affected area in determining whether forest operations will impact marbled murrelet habitat.

Based on the *Klashkish* reasoning the Plan should, however, specify and provide adequate management and conservation for murrelets in areas "affected by" the proposed cutblocks and roads. For instance, the impacts of the "fringe effects" caused by proposed harvesting and roads should be considered.

The majority decision determines that on the basis of the *Klashkish* decision, it is appropriate to consider areas "adjacent" to the Plan such as the Duu Guusd. However, it also appears to have accepted that is also legitimate for the District

Manager to have considered "non-adjacent" and suboptimal parks and protected areas in making his determination. In addition to being non-adjacent, a great deal of the 22.4% of the Queen Charlotte Islands that the Government argued is protected and can be considered by the District Manager in making his determination has either been logged in the past or is contained in swampier, lowland ecosystems that do not support the significant stands of old growth trees that are a critical feature of marbled murrelet habitat. It is not legitimate to consider these areas; nor is it legitimate to assume that these suboptimal ecosystems contain significant murrelet habitat.

It is especially not legitimate to determine that it is acceptable to consider suboptimal areas outside of a landscape unit, yet not take into account the cumulative effects of logging in other landscape units. A proper analysis of the cumulative effects associated with all logging on the Queen Charlotte Islands indicates a very serious rate of decline in murrelet habitat. It is not appropriate for each licensee to point to suboptimal protected areas in order to justify murrelet declines within their license areas. This reasoning easily lends itself to all of the Queen Charlotte Islands licensees pointing to suboptimal areas protected with the park system and a form of serious overcounting of these areas when analyzing the risks associated with habitat destruction.

Meaning of "Adequate" Management and Conservation

The Section 41(1)(b) requirement that a District Manager must be satisfied that a Plan "adequately" manages and conserves forest resources, including marbled murrelets, has not been properly interpreted and applied in the majority decision.

Adequacy is not defined in the *Code*. The meaning of adequacy, accordingly to Black's Law Dictionary (6th ed.) is:

> Sufficient; commensurate; equally efficient; equal to what is required; Suitable to the case or occasion; satisfactory.

The word "adequate" is used to qualify the District Manager's duty to manage and conserve forest resources under section 41(1)(b) of the *Code*. A correct statutory interpretation of the "adequate management and conservation" would require management of the marbled murrelets in a manner that is sufficient, suitable and equal to what is required. This is the test that an FDP must meet in order to reasonably manage endangered species.

In context of serious declines, continued habitat loss through approved logging, evidence of linear declines of this species, and the cumulative effects of continued logging on other Queen Charlotte Islands landscape units where IWMS targets cannot be met, and continuing fringe affects, "sufficient", "suitable", "equal to what is required" management and conservation of an endangered species requires a high level of management to even potentially prevent serious and continuing declines – let alone attempt population stability or increases. In context of the serious declines in murrelet populations and habitat, adequate management and conservation of the marbled murrelets may even require a higher level of protection

than the 10-12% target provided in the IWMS Guidebook and exceeding the 1% THLB impact.

Relevance of IWMS and related policies

The IWMS Guidebook establishes a target that 10-12% of each landscape unit should be set aside in Wildlife Habitat Areas (WHA's) for protection of identified wildlife, including marbled murrelets. The Government argued that the IWMS only targets, but does not require that 10-12% be set aside, and that the provision that WHAs be a minimum of 200 ha is a goal and not a requirement.

The District Manager further argued that he had no authority to use any part of the Timber Harvesting Land Base (THLB) to protect marbled murrelets. However, this was based on an erroneous interpretation of existing policies. The IWMS Guidebook was issued with an IWMS Policy Direction letter dated February 15, 1999 from the Chief Forester and the Deputy Minister for the Minister of Environment Lands and Parks, which states:

> There is a one percent timber supply impact applied to the strategy as part of the overall six percent impact that was assigned to FPC requirements such as the Biodiversity Guidebook and the Riparian Management Areas Guidebook (See Timber Supply Analysis, February 1996). The one percent impact will be maintained at the district level over the next two years, at which time analysis will be done to determine whether the strategy is having a positive effect on Identified Wildlife species. If it appears that a species requires more efforts to maintain or increase its populations, then adjustment will have to be made such as increasing or re-apportioning the impact, changing the WHA (Wildlife Habitat Area) size or modifying the general wildlife measures.

The Government also argued that since the WHA's had not yet been preliminarily identified in the Eden LU pursuant to Step 2 of the IWMS Interim Policy, the District Manager did not have the authority to apply interim measures. Curiously, however, the District Manager did apply interim measures to goshawk habitat, despite this habitat not having been identified pursuant to Step 2. The majority found, and I concur, that the District Manager did have the authority to use his discretion to set aside areas for murrelet protection. Even more, under section 41 of the *Code*, he has a paramount statutory duty to be satisfied that the Plan adequately managed and conserved the marbled murrelets.

The IWMS Guidebook target of setting aside 10-12% of a landscape unit in wildlife habitat areas, while laudatory, must be recognized as very minimal protection in terms of stabilizing or increasing the population of endangered species such as marbled murrelets. The IWMS, in effect, allows 88% of a LU to be logged. The February 15, 1999 policy directive attributing a 1% timber supply impact to the IWMS in effect allows 99% of a landscape unit to be logged. Though the 88% and 99% figures would include non-harvestable areas, much of the THLB slated for future cutting contains significant levels of murrelet habitat. Thus, by virtue of placing significant "policy limits" on management and conservation efforts, as

further discussed in the next section, these policies tend to significantly favour forest economics over sustaining biological diversity.

The protection of murrelet habitat in FENs and WHAs must therefore be viewed in context of significant levels of ongoing logging being approved in the valley bottoms and lower slopes that also comprise murrelet habitat. In addition, habitat will be lost due to the "fringe effects" of approved cutblocks and roads, which were not considered in the Plan. As well, since approximately 75% of the valley bottoms, including riparian zones, were historically cut in the Eden LU, the non-contributing land base (NCLB) does not contain significant levels of marbled murrelet habitat. It will be many decades or even centuries before these areas will support murrelet habitat.

The IWMS Guidebook and particularly the February 15, 1999 policy direction letter, therefore offer only limited protection for endangered species. Given the evidence before the Commission, accepted by all of the experts, of significant and linear declines of marbled murrelets in relation to their habitat, this species may even need to have nearly all of its habitat protected if their population is to potentially stabilize.

WLAP officials testified that the 1% THLB policy directive would severely hamper the location of WHA's. They further indicated that only 28% of the IWMS 10-12% target could be met in the Eden LU, and that protecting only 3% of murrelet habitat is putting the murrelets at very high risk. Further, the evidence before the Commission is that 9 of the 13 landscape units on the Queen Charlotte Islands will not be able to meet the 10-12% IWMS target. This evidence very simply means that murrelet populations will not be able to stabilize if only 1% of the THLB can be used for WHA's. It further means that even the IWMS target of 10-12% will not likely stabilize murrelet populations.

Given that marbled murrelets are seriously in need of protection, a District Manager must make every effort to attempt to meet, or even exceed, the IWMS goal of 10-12% habitat protection for endangered species in order to provide for "adequate management and conservation" under section 41 of the *Code*.

Policy Direction letters such as the February 15, 1999 IWMS letter are not law and are not even generally known to or accessible by the public. The IWMS Guidebook and IWMS Interim Policy are also policy documents.

In relation to the District Manager's statutory duty under section 41 to "adequately manage and conserve" marbled murrelets, the IWMS Guidebook and particularly the MOF policy directives must be recognized as subordinate to the District Manager's statutory obligation under section 41. A District Manager's paramount duty is to "adequately manage and conserve." Non-binding policies should not fetter a District Manager's discharge of this duty. Adequate management for species in serious decline may well mean that it is necessary to exceed the 10-12% target of the IWMS. Adequate management and conservation undoubtedly also requires exceeding the 1% THLB policy directive since very little murrelet habitat can be found in the NCLB, apart from that contained in the riparian zones

encompassed within the FEN network, a great deal of which has been cut in the past.

The interim protection of the FENs, to the extent that they encompass riparian zones that have not been logged and that been widened for the purpose of providing murrelet habitat, should therefore be preserved until an informed decision as to "adequate management and conservation of the murrelets" can be made under section 41. This decision should not be fettered by non-binding policy direction letters and policies, but be based on a proper risk analysis.

Economic considerations

A District Manager's obligation to be satisfied that a Plan adequately manages and protects forest resources is paramount under the *Code*. The language of this section does not state that adequate management and conservation is to be balanced against the economic factors within the context of that Plan approval. Section 41 is clear on its face and it is not necessary to turn to the Preamble of the *Code* for further interpretation.

The Preamble to the *Code* may be used to aid in interpretation where sections of the *Code* are unclear. The preamble speaks to the entire *Code* as a statute that encompasses sustainable forestry for future generations in a manner that addresses stewardship, the balancing of economic and other values, and the conservation of biological diversity and wildlife. It speaks generally to the effect that all of these measures are to be encompassed by the *Code*. The economic situation of a forest licensee cannot properly be used to limit "adequate" management and conservation, that is, to mean that management and conservation need only be "adequate" where a licensee's economic situation allows that to occur. The qualification is "adequate" management and conservation and that is contained in section 41.

In effect, policies that limit habitat protection to 10-12% of a landscape unit and/or 1% of the NCLB, if strictly applied, already determine that the acceptable economic balance is 88%, or 99% of the THLB in favour of forest economics – despite the fact that the habitat needs of endangered species may be much higher in order to sustain their populations. Thus it is not legitimate, in the interests of balancing economic and environmental interests, to give even further consideration to forest economics.

In the context of managing endangered species, and the evidence before the Commission with respect to serious and continuing murrelet declines, the unfortunate reality is that adequate management and protection efforts cannot simply be balanced against the economics of forest licensees yet constitute adequate and viable management of an endangered species. The result would be that the *Code*'s management of species would be a costly farce. It would simply mean losses all around – murrelet losses due to insufficient habitat protection and licensee losses due to the costs of this ineffective habitat protection. Though every effort must be made to ensure that the costs of habitat protection are minimized to licensees, the costs of properly protecting species must be seen as a legitimate and

ongoing cost of doing business to be absorbed by licensees who have been given the privilege of conducting forest operations on Crown lands.

It has become too easy of a generalization for forest managers to interpret that any and all measures under the *Code* may be balanced against a licensee's economic situation, with the result that conservation measures consistently lose out to more pressing economic needs. Any conservation measures limit a licensee's ability to cut in that area and can always be seen as costly and cost jobs, particularly in a situation where a licensee proposes cutting in a previously protected area such as here. However, much of the negative economic impacts can be avoided if licensees properly develop their 5-year FDPs and propose cutting in areas that have the least impact on identified species and vulnerable habitat. The onus is on the licensee to maintain jobs and revenue within their operation. The appropriate way to do that under the *Code* is to properly plan their operation, not make contentious cutting proposals in previously protected areas.

In situations where economics must be considered, a thorough analysis of the actual economic situation is required. The evidence presented to the Commission by the Husby Group consisted of a vague generalization that 50 jobs would be lost if the Plan were not approved. However, this remark spoke to the entire Plan which encompasses hundreds of hectares under cutting permits in the Eden LU and thousands of hectares of cutblocks in the five Husby Group license areas, not just the 243 ha's of FEN overlaps proposed in the Eden LU in the 1999 Plan. It must also be acknowledged that the Husby Group, at its peril, proposed cutting in previously protected areas with no assurance of planning approval and that it is common for at least some cutblocks not to be approved in a Plan.

Other evidence presented by the Husby Group is that it is only cutting 60% of its AAC. However, this figure largely reflects that AAC's have not been updated on the Queen Charlotte Islands for many years. Because 1/3rd of the their AAC is derived from the Duu Guusd, an area which has been restricted from logging for many years due to unresolved native land claims, the Husby Group can be seen to be cutting at close to 100% of their actual AAC. As such, they would be one of the few coastal logging operations to be cutting at 100%, and probably the only operation on the Queen Charlotte Islands that is cutting at these high rates. In addition, the Husby Group acknowledged that it has hardly been impacted by the Softwood Lumber Dispute and that it is doing well from its exports of raw logs. Vague generalizations were made with respect to economic costs, but legitimate evidence of serious economic impacts was not presented.

It is also routine for some cutblocks to be turned down or reconfigured during the Plan approval process. If the 51 cutblocks in the Plan were turned down or required to be reconfigured to avoid FEN areas with significant marbled murrelet habitat, the Husby Group could have substituted other cutblocks in the Plan. Thus, their current costs would have consisted largely of routine operational costs associated with reconfiguring the cutblocks or proposing new ones.

The Husby Group has also continued to cut under the 1999 FDP during the course of this appeal, with 22 of the cutblocks having been logged at the time of hearing and many more since.

Therefore, it is not proper for the District Manager or the majority decision to have considered the economic situation of the licensee in approving the Plan pursuant to section 41, nor should the vague generalizations made by the Husby Group with respect to lost revenues have been considered to be proper evidence of economic losses.

Conclusion

The District Manager's decision to approve the 51 cutblocks that encroach upon the FENs was patently unreasonable. As previously described, he did not properly use information he had before him or consult with expertise available to him within or outside of government. He applied an improper "critical limits" test. He incorrectly interpreted an OGMA study to show that a great deal of habitat was available, which wasn't the case. He incorrectly interpreted MOF policy to mean that no habitat protection could be taken from the THLB, and improperly fettered his discretion in the process. He was unaware of linear declines in populations and assumed the murrelets could simply nest in the Duu Guusd or elsewhere, even though these areas do not offer significant habitat, and the linear decline evidence indicates that there would simply be displacement of murrelets nesting within available habitat. He did not consider the cumulative effects of cutting within both the Eden LU and the other landscape units on the Queen Charlotte Islands.

He also did not apply any interim measures, despite the drastic impacts this will have on the murrelets until such time as WHAs have been set aside and did not consider that this will foreclose valuable WHA options. He also did not refer to the marbled murrelets or FENS in his approval letters or require the licensee to do so, despite the reliance that would have been placed on past assurances that the FENs would remain in place. Given the inaccuracies, improper assumptions and lack of information that underlay his decision, the District Manager could not possibly have conducted a proper risk analysis or properly discharged his duty that he be satisfied that marbled murrelets were adequately managed and protected under section 41 of the *Code*. His decision to approve the cutblocks encroaching the FENs is patently unreasonable.

The District Manager's decision was not just unreasonable with respect to the 5 cutblocks with the largest intrusions in the FENs but with respect to all of the cutbocks that encroached upon the FENs. There simply was not proper evidence before him with which to make a reasonable decision to approve these cutblocks and satisfy his duty under section 41 of the *Code*. In the face of the overwhelming evidence of significant declines, there is also not sufficient information before the Commission to determine that any of the 51 cutblocks should properly be approved for cutting.

The Court of Appeal decision in *Cattermole*, adopted in the majority decision, sets forth that the issue of whether an FDP would adequately manage and conserve

forest resources involves a risk-based analysis, which is ultimately a fact-driven judgment call. The court further sets forth that this does not mean that there be no risk, but that the risk be acceptable on the basis of a properly conducted risk-based analysis.

In that case, the District Manager had significant information before her. The Plan itself specified the management considerations for endangered owls. Only one of several cutblocks was approved for cutting, and the District Manager had a policy document before her that indicated there was a 60% risk to spotted owls. Her decision approved a type of logging in that cutblock that had the potential of creating positive effects on the owls. In that case, the risks to the spotted owls were considered and a rationale decision made on the evidence.

Here, the evidence before the Commission is that there have been significant declines in murrelets on the Queen Charlotte Islands and throughout the range of their habitat. The cumulative effects of continued logging across all landscape units will lead to further declines. Within the Eden LU and the five license areas encompassed by the Husby Plan there will be a linear decline in murrelets in relation to the destruction of their habitat, that is a 100% decline in the murrelets affected by the logging. In addition the losses may significantly exceed 100% due to the fringe effects of cutting and road building in areas adjacent to habitat, which were not considered in the Plan. The losses would also not just be restricted to those murrelets nesting within the existing FENs, but would include murrelets nesting within the thousands of hectares of cutblocks approved in the FDP outside of the FENs. In addition, it is only possible to locate potential WHA's that will meet 28% of the IWMS goal of 10-12%, or 3% of the marbled murrelet's habitat needs in the Eden LU and very few of the other Queen Charlotte Islands landscape units will be able to meet the IWMS target.

Despite hearing overwhelming evidence of the substantial risks and substantially declining murrelet populations on the Queen Charlotte Islands, the Commission heard very little evidence with respect to the 51 cutblocks approved in the Plan. We know that the FENS were created largely to protect murrelet habitat.

We know that two of the 51 cutblocks have extensive overlaps of 31-40 ha, 11 have significant overlaps of 5-30 ha and most of the cutblocks have minor overlaps of 0-5 ha with typical murrelet habitat.

We also know that in many instances, protected riparian zones were widened to provide the larger habitat areas required by murrelets and to reduce the fringe effects of the narrow, linear riparian zones. The effects of cutting these widened riparian zones, even in cutblocks that have minor overlaps into the FENs will therefore be significant and the fringe effects will be extremely significant since it may render many of the narrow riparian zones to be ineffective for marbled murrelet habitat.

We do not have sufficient information before us to properly assess the risks of approving cutblocks on any of the areas where the cutblocks overlap the FENs. The information before us with respect to the serious declines in marbled murrelet

habitat would indicate that none of these areas should be cut. Certainly none of them should be approved for cutting in the absence of thorough analysis.

The majority decision erroneously misinterprets the evidence and analysis of murrelet declines and cumulative risks and does not properly consider the impact of linear declines and fringe effects on murrelet populations. As a result it determines that there will be little impact from the approval of most of the cutblocks proposed in the Plan. The five cutblocks that were determined to not be properly approved will enable better future placement of WHA's but will not be sufficient to enable the 10-12% IWMS Guidebook target to be attained. They most certainly will not be sufficient to stabilize murrelet populations within the Eden LU and are insufficient to "adequately manage and conserve" marbled murrelets pursuant to section 41 of the *Code*.

Because so little of even the 10-12% WHA target can be met, it will be necessary for some or all of the FEN areas to remain protected in order to realize or exceed the IWMS goal and to manage and conserve marbled murrelets in a manner that is adequate, that is "sufficient; commensurate; equally efficient; equal to what is required; suitable to the case or occasion; or satisfactory".

Kristen Eirikson, Panel Member
Forest Appeals Commission

November 20, 2003