

Forest Practices Code

Advice to Statutory Decision Makers and Their Staff from Compliance & Enforcement Branch

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The Assessment of Due Diligence In the Context of Administrative Penalty Determinations under the *Forest Practices Code of British Columbia Act*

Introduction

Any person responsible for an activity in which there is a risk of loss or damage to other persons, to property or to the environment is required to anticipate and prepare for foreseeable risks. The extent to which a person may have failed to take adequate measures to prevent a contravention from occurring, that is, the failure to exercise due diligence, must be considered by the statutory decision maker in assessing the appropriate administrative penalty for contraventions of the *Forest Practices Code of British Columbia Act* (the "FPC Act"), the *Forest Act*, the *Range Act* and the respective regulations.

The purpose of this bulletin is to assist statutory decision makers in assessing due diligence.

The Principles of Due Diligence

A person engaging in an inherently risky activity such as forest and range management activities must do so with due diligence. Black's Law Dictionary defines due diligence as

"Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the specific case."

In other words, the standard of care required of a licensee in any given situation will have to be determined by evaluating the circumstances on a case by case basis. There is not an absolute template or checklist that can automatically establish whether the proper standard of care was achieved. A variable standard of care ensures the necessary flexibility to raise or lower the requirements of care in accordance with the special circumstances of each case. There are, however, some general principles which can assist to structure the assessment of due diligence.

Courts of law are frequently required to assess reasonable care and due diligence, and generally consider the following factors:

- 1. Likelihood of Harm**

The greater the likelihood of harm, the higher the duty of care. What particular facts increase or decrease the likelihood of harm will vary in each case.

Assessment of the likelihood of harm is based on what might reasonably be predicted through a risk analysis done by a person knowledgeable in the operational practices involved.

Factors that may affect the likelihood of harm include, but are not limited to:

- the nature of the activity;
- the inherent risks in the activity or in the machinery or materials used;
- the size of the operation;
- remoteness;
- seasonal or climatic conditions;
- terrain;
- past performance or experience of the operator;
- market or economic conditions, and
- the nature or sensitivity of the environment.

2. Magnitude of Potential Harm

The greater the potential damage, the greater the degree of care required.

Factors to consider in assessing the magnitude of harm include, but are not limited to:

- the potential for personal injury or death;
- the presence of an important value or resource - for example a fish stream or a rare or endangered species;
- the potential for property damage or economic loss;
- the long term effects of the damage; and
- whether the damage can be repaired or mitigated.

3. Alternatives and the Degree of Skill Expected

Reasonableness of care is often best measured by comparing what was done against what could have been done. The reasonable alternatives the person knew or ought to have known were available provide a primary measure of due diligence. To be successful in pleading due diligence, the person must establish on a balance of probabilities that no reasonable alternatives could have been employed to avoid or minimize the damage.

Factors to consider in assessing reasonable alternatives include, but are not limited to:

- Practices set out in the legislation, regulations, license document, approved operational plan, or in specific instructions;
- Practices suggested in government publications, or in references from sources other than government;
- Practices commonly used in the industry, by this person as well as by others operating in similar circumstances nearby and elsewhere;
- Whether, in the specific circumstances, the industry standard should have been exceeded;
- Whether a risk analysis, to a standard commensurate with the circumstances, was undertaken by the licensee prior to engaging in the activity;
- Whether the licensee engaged the necessary experts at the appropriate times;
- The level of training and experience provided to field crews by the licensee;
- Whether the field crew was provided with operational plans covering the activity;
- Whether the supervising staff was properly trained and sufficiently experienced to supervise the activity;
- Whether the supervising staff and field staff were briefed before operations were undertaken on the nature of the activities and the risks involved;
- Whether the licensee had a monitoring and inspection system in place (the cost of inspection, opportunity for inspection, the relative expertise of the parties involved, foreseeability of the harm, and the potential magnitude of the harm all define the kind of monitoring and inspections reasonable care warrants);
- The extent to which the training and monitoring efforts were documented;
- Whether the licensee had a contingency plan in place to prevent or minimize the harm in the event of a contravention;
- Whether the contingency plan was adequate in all the circumstances; and
- Whether the contingency plan was put into practice when the alleged contravention occurred.

4. Circumstances Beyond the Control of the Person

The concept of reasonable care requires that damage or loss be foreseeable and preventable. In other words, a person can not be blamed for events which could not reasonably have been predicted through a defensible risk assessment or, having been predicted, were uncontrollable and recognized by government as being an acceptable risk.

For example, a licensee who builds a road across a steep hillside should reasonably be expected to foresee the possibility of a landslide resulting from the road construction. If no reasonable alternative route is available, the road should otherwise be designed to minimize the likelihood of a slide occurring. If a slide results in spite of adequate road design and despite the licensee following the design and taking all reasonable precautions (in other words, the licensee exercised due diligence) the licensee can not be held blameworthy for the slide.

In determining liability for loss or damage, however, it is necessary to understand the difference between the allocation of risk (deciding who bears the risk when something goes wrong) from the allocation of blame (deciding whether there has been poor performance). This concept will be explained in more detail in a subsequent Determination Policy.

Examples

The following examples are suggestions only. They are not templates to be rigorously applied in all situations. The determination of due diligence must be assessed in the circumstances of each case. The examples illustrate, however, that many of the basic elements of due diligence are common to most situations involving forestry and forest industry activities.

a. Assessment of Due Diligence with Respect to Unauthorized Harvesting

1. Had the licensee trained all of its employees and contractors on the requirements of the FPC Act ?
2. Did the licensee have a process to track legislative changes, and to immediately inform all appropriate employees or contractors of the changes ?
3. Did the licensee have procedures in place covering off how the legal requirements for each cutblock would be communicated to each worker, and were those procedures followed ?
4. Did the licensee have procedures in place to ensure that, if the employee or contractor came upon any previously unidentified resource feature, or there was confusion of any kind, the employee/contractor would

immediately shut down the activity, contact the licensee and not continue the activity until all confusion was removed ?

5. Did the licensee communicate its procedures to all workers and adhere to those procedures ?
6. Had the licensee adequately marked the falling boundaries, riparian management zones, wildlife tree patches etc. considering all the circumstances ?
7. Were the marked boundaries and the operational plan maps consistent, with any necessary changes being:
 - noted on the map;
 - amended in the field with old boundary marking being painted out and old flagging removed ?
8. Did the licensee's representative walk the boundaries with the fallers, or with the contractor, and have in place some quality assurance measures to ensure that the contractor then walked the boundaries with the fallers ?
9. Did the licensee ensure that any new employees were fully briefed on the legal requirements and, if appropriate, the boundaries of the cutblock ?
10. Did the licensee have a monitoring plan in place to ensure that each cutblock was inspected, to a frequency consistent with the risk levels of the activities being undertaken ?
11. Did the licensee conduct inspections consistent with its monitoring plans ?
12. Did the licensee's employees or contractor shut down the activity immediately when it was discovered to be unauthorized ?

b. Assessment of Due Diligence with Respect to Road Construction

1. Had the licensee trained all of its employees and contractors on the requirements of the FPC Act ?
2. Did the licensee have a process to track legislative changes, and to immediately inform all appropriate employees or contractors of the changes ?
3. Did the licensee have procedures in place to ensure the legal requirements for each road would be communicated to each worker, and were those procedures followed ?
4. Was the person who designed the road qualified to do so ?

5. Was the road location and design adequate in all the circumstances ?
6. Were the appropriate terrain stability field assessments conducted ?
7. Was the road built in accordance with the design standards ?
8. Were the various phases of the road construction kept reasonably concurrent with each other in the circumstances, particularly with respect to drainage structures ?
9. Did the licensee have procedures in place to ensure that, if the right-of-way fallers or road crew came upon any previously unidentified resource feature, or there was confusion of any kind, the crew would immediately shut down the activity, contact the licensee and not continue the activity until all confusion was removed ?
10. Did the licensee communicate its procedures to all workers and adhere to those procedures ?
11. Had the licensee adequately marked the centreline and staked the cut and fill slopes if required ?
12. Was the marked location consistent with the road plans and profiles, with any necessary changes being marked on the documents and in the field ?
13. Did the licensee's representative walk the road location with the fallers and the road foreman ?
14. Did the licensee have a monitoring plan in place to ensure that each road was inspected to a frequency consistent with the risk levels of the activities being undertaken ?
15. Did the licensee conduct inspections consistent with its monitoring plans ?
16. Did the licensee have a contingency plan in place in the event of slide, erosion or sedimentation hazards ?
17. Did the licensee have emergency materials on site or nearby, for example straw bales, filter cloth etc. ?
18. Was the construction activity shut down immediately when it became apparent that a contravention or unacceptable environmental damage was imminent or actually occurring ?
19. Were steps taken immediately to mitigate any slide, erosion or sedimentation hazard?

Conclusion

The key to assessing due diligence is "What is reasonable considering all the circumstances?" As one judge put it:

"Reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt, and continuing action. To demand more would, in my view, move a strict liability [standard] dangerously close to one of absolute liability."

Note: Please note that this bulletin does not constitute legal advice. It is offered as guidance only by Compliance & Enforcement Branch for consideration by statutory decision makers.

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