Forest Practices Board

Remediation Orders: How Effective Are They?

Special Investigation

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Executive Summary

British Columbia's *Forest and Range Practices Act* (FRPA) and *Wildfire Act* (WA) are at the core of the provincial government's stewardship framework, setting out rules that must be followed when forest or range activities are undertaken. If an activity results in a breach of these rules, and it is determined that FRPA or the WA has been contravened, government may order a licensee to remedy the harm. A government order, when carried out, can make a positive difference on the ground and may deter future contraventions.

However, to effectively remedy harm and serve as a deterrent, an order needs to be enforceable; routinely inspected for compliance; investigated for non-compliance; and, if necessary, enforced by a penalty determination. It also needs to be fair; consistent with other orders; proportionate to the harm caused by the contravention; and responsive to the licensee and circumstances. In addition, an order should remove any financial gain not already removed by the penalty levied for the contravention, and it should serve to change the future behavior of the licensee.

During the course of this investigation, the Board looked at 55 orders made since 2004 under FRPA and the WA. Most of the orders investigated were in response to contraventions arising from road construction, timber harvesting, silviculture, fire suppression, and range use. The investigation found that some orders raised a concern as to whether or not they were enforceable. It also found that government's response to non-compliance with orders has been weak, and that the consequences for not carrying them out have been minimal.

To improve the effectiveness of orders, the Board recommends that government:

- Develop guidance for decision-makers to consider when making remediation orders, so orders are more enforceable.
- Improve and standardize the way in which information about compliance with orders, and the enforcement of orders, is gathered and recorded.
- Publish information annually on the rate of compliance with orders; the number of investigations and penalty determinations made to enforce orders; and, whether the intended outcomes of orders were achieved.

To encourage voluntary remediation, the Board recommends that government:

- Amend FRPA and the WA to enable government and licensees to cooperatively enter into formal agreements to remediate, as a way to address non-compliance with legislation, when forest or range activities have resulted in harm to Crown resources.

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Introduction

What is a Remediation Order?

The *Forest and Range Practices Act* (FRPA) and *Wildfire Act* (WA) contain a variety of practice requirements that are in place to ensure that forest and range activities are carried out in a sound manner.[1] If a licensee contravenes one of these requirements, government may levy a monetary penalty and order work to be carried out that is considered 'reasonably necessary' to remedy the contravention.[2]

An example, under FRPA, would be an order to restore the integrity of a stream channel following a failure to mitigate a disturbance when building a road crossing. An example under the WA would be an order to rehabilitate land disturbed by the prohibited use of open fire.

If the licensee against whom an order is made does not complete the work within the time specified in the order, government may instead do the work and then order the licensee to pay the costs incurred, as well as levy a penalty against them for not doing the work.

A remediation order is generally made by forest district managers or fire centre managers acting as delegates of the minister responsible for FRPA or the WA (the "minister's delegate").[3] Under FRPA, the minister's authority to make an order is restricted to orders against licensees, with some exceptions,[4] but under the WA the minister may make an order against any person. In this report, licensees should be understood to mean 'licensees' and 'persons' as defined by legislation.

Why Investigate Remediation Orders?

The main purpose of an order is to make a positive difference on the ground and to deter a licensee from contravening the legislation in the future. It may also serve as a general deterrent to other licensees engaged in forest or range activities. However, when a licensee does not follow an order to remedy the harm caused to forest or range resources, it leaves government responsible for remediating the harm and recovering costs from the licensee.

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[1] The transition provisions in Part 11 of FRPA allow some licensees to continue to be bound by the requirements of the *Forest Practices Code of British Columbia Act*. If these requirements are contravened, they are enforced under FRPA.

[2] Unlike section 74 of FRPA, section 28 of the WA also authorizes an order to carry out work that is reasonably necessary to repair any damage caused by a contravention. There does not appear to be any substantive difference between these two sections, since it would appear that section 74 also authorizes an order to repair any damage caused.

[3] The authority to make a remediation order under section 74 of FRPA and section 28 of the WA has been delegated by the minister under section 120.1 of FRPA, and section 58 of the WA, to forest district managers and fire centre managers, among others. Section 120.2 of FRPA authorizes the minister's delegate to sub-delegate their authority to employees. There is no provision for sub-delegation in the WA.

[4] Under section 74 of FRPA, an order may be made against a prescribed category of persons. Section 2 of the *Administrative Orders and Remedies Regulation* prescribes the following categories: (a) persons to whom obligations have been transferred under section 29.1 of the Act; (b) persons who (i) are authorized under section 51 (2) of the Act to maintain range developments, and (ii) are not the holders of agreements under the *Range Act*; (c) persons who, after the expiry, surrender, suspension or cancellation of agreements under the *Forest Act*, remain liable under section 79 of the *Forest Act* to perform obligations referred to in paragraph (c) of that section.

In most cases, a remediation order is government's last resort. Generally a warning is given first, and only when it is shown that a licensee is unable or unwilling to resolve an issue, will the minister's delegate determine whether or not there has been a contravention. If a contravention has occurred, an order may be made. When an order is made, it is critical that the order be effective at ensuring that the harm to forest or range resources is remedied.

How was the Investigation Conducted?

The investigation considered whether 55 of the 60 remediation orders made under FRPA since April 1, 2004, and under the WA since March 31, 2005, have been effective in remedying the contraventions for which they were made (five orders were not provided by the government).[5] Contravention determination letters containing rationales for the orders were also considered. Most orders were made against four licensee types: majors (27), woodlots (14), range (6), and timber sale (3).

To assess whether the remediation orders were effective, investigators looked at the extent to which they were enforceable, and whether enforcement action was taken for non-compliance. Other measures of effectiveness were also considered, including the fairness of orders; whether orders were consistent with other orders; whether orders were proportionate to the harm caused by the contravention; whether orders were responsive to the licensee and circumstances; whether orders removed any financial gain derived from the contravention; and whether orders were likely to change the future behavior of the licensee.[6]

The investigation was based entirely on a review of the orders and records provided by government to the Board. The Board did not make field observations to determine whether orders actually remedied the harm caused by a contravention.

The first part of this report describes the hallmarks of an enforceable order and considers whether or not the orders could have been enforced. The report goes on to consider the extent to which the orders were complied with, whether enforcement action was taken for non-compliance, and whether government carried out the work and levied penalties for non-compliance.

The second part of the report considers the extent to which orders were effective. In this regard, the Board looked at the enforceability of orders and whether enforcement action was taken for non-compliance. The effectiveness of orders was also considered, by assessing them against the measures of effectiveness mentioned above.

The report concludes with three recommendations to improve the effectiveness of orders. The Board also recommends an amendment to the legislation to encourage voluntary remediation.

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[5] The Compliance and Enforcement (C&E) Branch of the Ministry of Forests, Lands and Natural Resource Operations (MFLNRO)(formerly the Ministry of Forest and Range) publishes an annual report that includes statistics on the number of contraventions and remediation orders made in each fiscal year ending March 31st. The number of orders identified includes all orders reported by C&E Branch from April 1, 2004, to March 31, 2009, and all orders received by the Forest Practices Board up to and including March 31, 2011.

[6] Adapted from Macrory, R. (2006) *Regulatory Justice: Making Sanctions Effective Final Report*, Macrory Review, Cabinet Office, London. See also: Macrory, R. (2006) *Regulatory Justice: Sanctioning in a Post-Hampton World Consultation Paper*, Macrory Review, Cabinet Office, London.

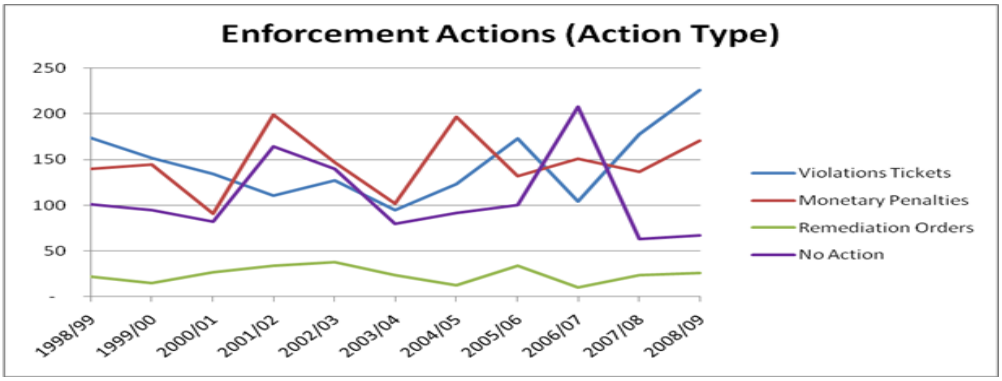
The investigation did not comment on or consider whether a remediation order should have been issued; instead, it only considered the effectiveness of the orders that were made.[7]

Remediation orders made under the *Forest Practices Code of British Columbia Act* were not investigated because the provision under the Act authorizing orders was worded differently than it is under FRPA and the WA.[8]

The authority to make orders is found in section 74 of FRPA and section 28 of the WA (see appendix). There is also authority to make specific orders under sections 51(7), 54(2), and 57(4) of FRPA in relation to range developments, unauthorized structures, and recreation facilities respectively. Every order considered in the investigation was made pursuant to one of these authorities.[9]

Does Remediation Occur Without an Order?

The 52 remediation orders made under FRPA, and the 8 orders made under the WA, are only a small fraction of the enforcement actions taken in response to non-compliance with the legislation.[10] The following graph illustrates the difference in the number and types of enforcement actions over a 10-year period. The types of actions shown are violation tickets, monetary penalties, remediation orders, and "no action," which is an investigation that has not resulted in an enforcement action.



[7] Of the 60 remediation orders investigated, three were appealed to the Forest Appeals Commission. Two orders either were upheld or varied by consent, and one was rescinded. None were subjected to particular scrutiny or were central to the Commission's decisions. The appeals were: *Meadow Creek Cedar Ltd. v. Government of British Columbia*, FAC Appeal No. 2009-FOR-007(a), April 7, 2010; *Canadian Forest Products Ltd. v. Government of British Columbia*, FAC Appeal No. 2008-FOR-002(b), February 10, 2009; and *Rainer Albert Krumsiek and Gertrud Sturm-Krumsiek v. Government of British Columbia*, FAC Appeal No. 2006-FOR-017(a), June 13, 2007.

[8] The *Forest Practices Code of British Columbia Act* (in force June 15, 1995, and repealed January 31, 2004) required work to remedy the contravention. Section 74 of FRPA and section 28 of the WA require work that is "reasonably necessary" to remedy the contravention.

[9] There are also specific remedial authorities under sections 26(6) and 27(2) of FRPA, and section 35(5) of the *Forest Planning and Practices Regulation* that, unlike sections 51(7), 54(2), and 57(4) of FRPA, are not subject to the notice and enforcement provisions of section 74. Also, court ordered remediation is possible under section 98(b) of FRPA following a conviction for an offence. Under section 7(3) of the WA an official (not the minister's delegate) may make an abatement order, and there are remedial obligations imposed under section 6(3)(d) of the WA. Also, court ordered remediation is possible under section 46(d) of the WA following a conviction for an offence.

[10] The C&E Branch published annual reports. The data is derived from the 10 reports for 1998/99 to 2008/09. The total number of remediation orders reported annually is more than the actual number of orders made because the reports record one remediation order per contravention when, in fact, an order may have been made for several contraventions.

There are several reasons why relatively few remediation orders have been made. First, many contraventions do not warrant an order because no work can be done to remedy the contravention. For example, if sediment is introduced into a fish bearing stream from road construction activities, it may be better to let the stream disperse the sediment than to order it removed and risk further disturbing sensitive fish habitat.

Second, government may decide to remediate instead of having the licensee do it. The licensee may lack the skills to carry out the remediation, or the cost of remediation may exceed what can be reasonably imposed on the licensee for the contravention. Also, if a licensee holds a timber sale licence and contravenes the legislation, the licensee will not be ordered to remediate if the government has previously opted to carry out remediation and recovered its costs from the licensee's security deposit.[11]

Third, a licensee may voluntarily carry out remediation to address harm identified by the licensee or the government. Taking responsibility for the harm may be seen as the most appropriate response, or the licensee's reputation may depend on it. Also, the licensee may benefit from voluntary action because, if the minister's delegate finds a contravention has occurred, the licensee's efforts to correct it may be considered when determining the penalty.

Fourth, a stop work order may be made by a government official. This action will often compel a licensee to carry out remediation so the official will rescind the order, allowing the licensee to resume the activity.[12]

Finally, a licensee may comply with a legislative requirement to remediate. For example, the WA requires a licensee who carries out an industrial activity to rehabilitate the land damaged by fire control carried out by the licensee.[13]

While much remediation occurs without an order by the minister's delegate, an order is the only way under FRPA and the WA that the minister's delegate can hold a licensee accountable for remedying the harm caused by a contravention, and deter the licensee and others from contravening in the future.

[11] The authority for the government to recover its costs of remediation is found in section 21 of the *B.C. Timber Sales Regulation* under the *Forest Act*.

[12] The authority for an official to issue a stop work order is found in section 66 of FRPA and in section 34 of the WA.

[13] Section 6(3)(d) of the WA states that if a fire starts at, or within one kilometre of, the site of the industrial activity, the person carrying out the industrial activity must, in accordance with prescribed requirements, rehabilitate the land damaged by fire control carried out by the person.

Findings

To be effective, a remediation order needs to be enforceable, routinely inspected for compliance, investigated for non-compliance, and, if necessary, enforced by a penalty determination. The investigation has made a number of findings concerning these measures of effectiveness.

The Enforceability of Orders

For an order to be enforceable, it must comply with all legislative and common law requirements. The legislation requires that an order is not to be made before the licensee has an opportunity to be heard, is within the limitation period,[14] specifies work that is reasonably necessary to remedy the contravention, and includes written notice as prescribed.[15] The common law requires adequate notice of a hearing, and an order that is based only on relevant evidence, limited to the purposes intended by the legislature, and accompanied by adequate written reasons.

Summary of Findings

The investigation found that most determination letters had adequate reasons for why orders were made, met the prescribed notice requirements, and orders made were within the limitation period. The investigation did not consider whether orders were based on relevant evidence or made for the purposes intended by the legislature, or whether the licensee was given adequate notice and an opportunity to be heard. The information needed in this regard was not readily available.

The following is an example of an enforceable order. It is clear, understandable, and appears reasonably necessary to remedy the contravention. In the example, the licensee breached a range improvement authorization by not installing a four strand electric fence. The rationale for the order was to reduce the risk to public safety caused by the installation of a single strand electric fence, which increased the risk of injury to snowmobile operators by being less visible than a four strand fence. The order said:

> Remove the wire from the portions of the fence that currently have a single strand of smooth wire by December 15, 2006. The wire is to be completely removed from the site and not simply be dropped on the ground.

While there are other examples of enforceable orders, the investigation found 37 orders raised a concern as to whether or not they could have been enforced. Some of these orders were too vague or unclear to be understood, or were not reasonably necessary to remedy the contravention. The reasons are examined in detail below.

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[14] A contravention determination is made under section 71 of FRPA or section 26 of the WA. For remediation orders under section 74 of FRPA, the limitation period is "3 years beginning on the date on which the facts that lead to the determination that the contravention occurred first came to the knowledge of an official." There is separate authority to make remediation orders under sections 51(7), 54(2), and 57(4) of FRPA in relation to range developments, unauthorized structures, and recreation facilities. However, these authorities are not subject to the three-year limitation period under section 75 of FRPA. For orders under section 28 of the WA, the limitation period is the same as under FRPA, effective June 3, 2010. Prior to this, the limitation period was two years.

[15] Remediation orders must follow the written notice requirements set out in section 74(2) of FRPA and section 28(2) of the WA.

Too Vague or Unclear to be Understood

Investigators looked at six orders under FRPA that were too vague or unclear to be understood, which raised a concern as to whether or not they could have been enforced. For example, one order dealing with road deactivation said:

> Complete all deactivation works to my satisfaction… Prior to carrying out any remedial works, you are to consult with qualified individuals with knowledge of assessment and implementation of road deactivation prescriptions with respect to the road in question. You will carry out either the recommendations of said qualified individual, or address all environmental and safety concerns with respect to the road in question.

This order is unclear because it fails to specify what the environmental safety concerns are; and it makes the work subject to the district manager's satisfaction.

If an order is clear, it should be easy to understand. Otherwise the licensee may not know what is required of them. An order that is too vague or unclear is less likely to be complied with. When an order is not complied with, it may not be enforceable if it cannot be established with reasonable certainty what the licensee has failed to do.

Not Reasonably Necessary to Remedy the Contravention

FRPA and the WA authorize an order that requires a licensee to do work "reasonably necessary" to remedy a contravention.

The investigation found that 23 orders under FRPA and 8 orders under the WA may not have ordered work reasonably necessary to remedy the contravention. For this reason, these orders raised a concern as to whether or not they could have been enforced. The work may not have been reasonably necessary due to requirements to:

a. do work over a long period of time;
b. have a remediation plan approved;
c. do work that the government had no ability to carry out;
d. do work the licensee was already required by legislation to do; and
e. do work that duplicated an official's order.

The requirement to do work over a long period of time

The first concern involves the time and effort needed to comply with an order. One order required a sustained, on-going commitment to do work over a long period of time, instructing a licensee to replant a damaged wetland area and ensure the riparian plant species were not overtaken by invasive plants. The order said:

> Weeds that are found should be controlled manually by hand pulling or removal of flowers to prevent seed set. Invasive plant monitoring should be carried out for the next five years.

While this order may have been appropriate in the circumstances, a multi-year commitment to do work may not be reasonably necessary. It would need a careful evaluation of the ability of the

licensee to sustain the commitment, and whether the costs of complying with the order are in proportion to the severity of the contravention. What is reasonable will vary but, in every case, the minister's delegate needs to assess whether the time and effort required by the order is reasonable.

The requirement to have a remediation plan approved

The second concern involves the requirement to have a remediation plan approved. Three orders required the licensee to prepare a plan and have it approved by the minister's delegate. For example, one order said:

> Submission of a remediation plan outlining the actions that will be carried out to repair and properly maintain the range fences in the following areas…The plan will be submitted for district manager approval no later than…All fences identified as part of the approved remediation plan will have the appropriate repair and maintenance completed by…

An order that requires a plan may be reasonably necessary because it is a logical first step to carrying out remediation.[16] In some cases, requiring a plan may encourage the licensee to retain a professional advisor to assess the situation and recommend an appropriate course of action. It may also be reasonably necessary to require the licensee to carry out the professional's recommendations.

However, it may not be reasonably necessary to require a licensee to have their remediation plan approved by the minister's delegate, particularly if the licensee retained a professional advisor to prepare the plan. If the delegate were to refuse to approve the plan, the licensee's ability to carry out the order would be frustrated. If the government were to carry out the necessary remediation, and a determination were made to recover the government's costs, the licensee may disagree with it and appeal.

If a plan is ordered, the outcomes to be achieved should be made clear to the licensee. If the delegate wishes to retain control over how a licensee carries out remediation, the delegate can retain a professional advisor to assess the situation and recommend an appropriate course of action, and incorporate the advisor's recommendations into the order, dispensing with the requirement for a plan.

[16] Remediation plans are used in oil and gas sector. The National Energy Board published a document in 2011 entitled, *Remediation Process Guide*, which describes the content of a remedial action plan for the cleanup and reclamation of a contaminated site. Accessed online < http://www.neb-one.gc.ca/clf-nsi/rsftyndthnvrnmnt/nvrnmnt/rmdtnprcssgd/rmdtnprcssgd-eng.html>

The requirement to do work that the government had no ability to carry out

The third concern involves ordering work that the government had no ability to carry out if the licensee did not comply with the order. Orders of this kind may not be reasonably necessary. For example, eight orders, made in two forest districts, all dealing with seed lot transfer contraventions of six different licensees, attempted to delay the inclusion of non-compliant seed lots in the free growing count, by saying:

> Withhold submitting free growing declarations for areas planted with seed lots having significant seed transfer violations until the late free growing date.

If a licensee had chosen not to submit a free growing declaration, the government could not have submitted one on the licensee's behalf. It was the licensees' decision as to what seed lots to include, and when to submit a free growing declaration, if at all.[17]

Work that is reasonably necessary should be work that government has the ability to carry out to remedy the harm caused by the contravention. Otherwise, government cannot do the work and claim its costs, meaning that no penalty can be levied because—under FRPA and the WA—the maximum penalty that can be levied is costs "reasonably incurred" in carrying out the work. If the costs are zero, the maximum penalty is zero.[18]

The requirement to do work the licensee was already required by legislation to do

The fourth concern involves ordering licensees to do work that legislation already requires of them. Orders that duplicate a legislative requirement may not be reasonably necessary. For example, FRPA says that a licensee must report to government annually regarding their requirement to meet regeneration delay and free growing dates. Four orders required the licensee to submit an annual report that was overdue. One order said:

> Required reporting must be completely entered into the Ministry of Forests and Range RESULTS database, in accordance with legislated requirements…

In another example, the WA says that a licensee must abate a fire hazard that the licensee is aware of, or ought reasonably to be aware of. Eight orders required the licensee to abate a fire hazard that should have been abated. Seven of the orders said:

> Abate all fire hazards, consisting of machine mounded logging debris piles…

In each example, the minister's delegate determined that the licensee did not fulfill the legislative requirement, ordered the licensee to do work that the legislation already required of them and imposed a deadline to do it. The rationales for these orders were either that forest or range management was being compromised, that forest or range values were at risk, or that the licensee had a poor compliance record.

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[17] If a licensee chooses to submit to the district manager a free growing declaration under section 107 of FRPA and section 97 of the *Forest Planning and Practices Regulation*, the government has to decide within 15 months of submission whether the obligation in respect of establishing a free growing stand has been fulfilled.

[18] It is possible under section 112 of FRPA or section 54 of the WA to impose a condition that is considered necessary or desirable in respect of an order. However, a condition could not be used as a means to order work that is not reasonably necessary to remedy the contravention.

An order that duplicates a legislative requirement is different from an order that compels a licensee to remediate the harm caused by the breach of a requirement, because a legislative requirement continues whether or not there has been a contravention. For example, if a forest or range practice results in a material adverse effect on fish passage, an order may be necessary to remedy the harm. However, if a licensee fails to submit an annual report, or abate a fire hazard, an order is not necessary because the licensee is already required by the legislation to do these things.

Orders that duplicate a legislative requirement can have unintended consequences, such as, if the order is reviewed or appealed, FRPA and the WA operate to stay (i.e., suspend) the order until all review and appeal proceedings have concluded, unless the minister's delegate decides it is contrary to the public interest to maintain the stay.[19] Since the order duplicates a legislative requirement, the stay may lead the licensee to believe that the requirement no longer has to be complied with. The result may be that forest or range management is compromised or the risk to forest or range values is increased.

There is no need to make remediation orders that duplicate a legislative requirement because other enforcement options are available. Higher monetary penalties can be used to deter non-compliance with a legislative requirement. Also, proceedings can be commenced under the *Forest Act* or the *Range Act* to suspend and cancel a licence. Finally, the government may do the work and recover its costs from an existing security deposit or in a separate legal proceeding.

The requirement to do work that duplicated an official's order

The final concern involves orders that duplicate an official's order to abate a fire hazard under the WA. As discussed above, an order that duplicates a legislative requirement may not be reasonably necessary. However, if the minister's delegate does make such an order, and that order duplicates an official's order, it may not be reasonably necessary to do so.

Section 7(3) of the WA authorizes an official to order a licensee to abate a fire hazard by a specified date. Section 7(4) says that a licensee must comply with the order. When a licensee fails to comply by the specified date, the minister's delegate may make a contravention determination. In seven instances discovered during this investigation, the minister's delegate made a determination and again ordered the licensee to abate the fire hazard. The delegate's order specified a new date, but otherwise duplicated the official's order.

The WA is silent as to whether the delegate's order under section 28 replaces the official's order under section 7(3). It may be that both orders are in effect, even though the date specified by the official has expired. If so, two orders to abate a fire hazard create uncertainty and confusion because, should the licensee fail to comply with the delegate's order, the licensee may be found in contravention of either the official's order or the delegate's order. This is significant because the maximum penalty under the *Wildfire Regulation* for contravening an official's order is $100,000, while the maximum penalty under the WA for a contravening a delegate's order cannot exceed the

[19] Section 78 of FRPA and section 36 of the WA authorize the minister to order that a determination or order is not stayed or is stayed subject to conditions, on being satisfied that a stay or a stay with those conditions, as the case may be, would be contrary to the public interest.

government's cost of remediation, which may be substantially less than $100,000.[20] This suggests it may be preferable to enforce the official's order so that the penalty is not limited to the cost of remediation.

The better practice may be for the minister's delegate not to make a remediation order to abate a fire hazard when it is found that the licensee has contravened the WA for not complying with an official's order. Instead, the delegate may want to consider levying a penalty for non-compliance with the official's order and, if the licensee persists in not carrying out the order, let the government carry out the work and possibly take other legal action against the licensee.

The Enforcement of Orders

To be effective, an order should not only be enforceable, but it should be routinely inspected for compliance, investigated for non-compliance and, if necessary, enforced by a penalty determination.

The investigation has considered the extent to which remediation orders were inspected for compliance and whether any enforcement action was taken. This occurs when an official asks the minister's delegate to determine whether or not the licensee has complied with the order. If the delegate finds that the licensee has not complied, the delegate can order the licensee to pay the government's cost of carrying out the work and levy a penalty.

Summary of Findings

The investigation found that the number of orders inspected for compliance, found to be in non-compliance, and enforced by a penalty determination, were as follows:

Legislative Authority	Inspected	Found in Non-Compliance	Enforced
FRPA	25	6	6
Wildfire Act	8	4	3

Of the 52 orders made under FRPA, there was a record of inspection for 25 of them (records for 27 orders were not provided by the government). The records show that 18 were carried out as ordered, 1 was in progress, and 6 were found in non-compliance. All six non-compliances resulted in enforcement action. Of the eight orders under the WA, there was a record of inspection for all of them. The records show that three were carried out as ordered, one was in progress, and four were found in non-compliance. Three non-compliances resulted in enforcement action.

Of the 33 orders inspected, 23 were in compliance, which is a 70 percent compliance rate. However, of the nine orders that resulted in enforcement action, only one resulted in a

[20] Section 33(2) of the *Wildfire Regulation* prescribes a maximum penalty of $100,000 for a contravention of section 7(4) of the WA. Section 28(3)(d) of the WA states an administrative penalty for a contravention of section 28(1) of the WA cannot exceed the sum of all direct and indirect costs the minister determines were reasonably incurred in carrying out the work.

determination that ordered the licensee to pay the government's cost of carrying out the work and levied a penalty.

For the other eight orders that resulted in enforcement action, there was one order for which the government carried out the work and recovered its costs from the licensee's security deposit, and three orders for which the government was planning to carry out the work but it was not done. For one order the licensee did the work once the government said it would do it, and for another order the licensee did the work after the date for completion was extended. For three other orders, one had the date for completion extended, and two had new orders made, but only one order resulted in the licensee doing the work. Of the nine orders that resulted in enforcement action, only five resulted in the licensee doing the work.

This record of enforcement suggests the government's response to non-compliance with orders has been weak, and the consequences for not carrying out an order have been minimal. Several other findings have been made concerning the efforts made to inspect and enforce orders.

Inspections

A number of inspections were carried out before the work had to be completed. The inspections found the work was not done, but it appeared that no steps were taken to discover why the licensee had not done it. If a licensee is having difficulty carrying out an order and needs more time to complete it, the minister's delegate can extend the time under section 113 of FRPA or section 59 of the WA. Of course, once the order's completion date has passed, it is too late to extend the time since the licensee has contravened the order and is subject to enforcement action.

Two orders were found in compliance, even though the inspecting officials considered them not to be fully carried out. An order under FRPA was intended to ensure the functioning of a road drainage system, which included crowning, graveling, and culvert repair. Despite the failure of the licensee to fully carry out the order, no enforcement action was taken because the official concluded that natural surface drainage patterns had been re-established and there was a low risk of environmental harm. An order under the WA to abate a fire hazard was not fully carried out, but the official concluded that it was enough for the licensee to have completed the majority of the hazard abatement.

The investigation found that there was a 70 percent compliance rate for the orders inspected. Yet it is not clear from the inspection records how successful any order was in actually remedying the harm caused by the contravention. It may be assumed, perhaps, that if an order is carried out it has remedied the harm, but this may not be the case. Once orders are carried out, particularly prescriptive ones, they may turn out to be less effective than expected. Therefore, work needs to be inspected, not only to determine compliance, but to determine whether the outcome intended by the order was achieved.

If a licensee lacks the necessary skills, the minister's delegate may find it more effective to levy a monetary penalty for the contravention, and let the government carry out the remediation. While the government may lack the funds to remediate, in some circumstances it may be possible for the

government to recover its costs from an environmental remediation sub-account that is funded by the collection of monetary penalties.[21]

Enforcement

In three instances, the minister's delegate extended the date for completion of the order after it had expired. This action did not actually enforce the order because the extension was made in the hope that the licensee would carry out the order. Once a licensee fails to comply with an order by the completion date, the licensee has contravened the legislation and it is too late to extend the date. Instead, the minister's delegate must consider whether or not to levy a penalty for contravening the order.

Taking enforcement action for non-compliance with a remediation order can be a time consuming and costly process for both the government and the licensee ordered to do the work. It involves an investigation, an opportunity for the licensee to be heard, and a written determination by the minister's delegate. If a licensee considers the determination to be in error, the licensee may appeal to the Forest Appeals Commission. Given the time and expense involved in enforcing an order, careful consideration needs to be given to whether or not an order should be made. If the licensee cannot be reasonably expected to carry out the work, it may be appropriate for the government carry it out to ensure that it gets done.

Other Measures of Effectiveness

To be effective in remedying the harm caused by a contravention, and to deter future contraventions, an order should be enforceable, routinely inspected for compliance, investigated for non-compliance, and, if necessary, enforced by a penalty determination. An order should also be fair; consistent with other orders, proportionate to the harm caused by the contravention, responsive to the licensee and circumstances, remove any financial gain derived from the contravention, and possibly change the future behavior of the licensee. By assessing the orders against these other measures of effectiveness, some findings and observations can be made.

Being Fair, Consistent, and Ordering Work Proportionate to the Harm

The investigation found that most determination letters had adequate reasons for why orders were made, met the prescribed notice requirements, and orders made were within the limitation period. By these measures it may be concluded that orders were fair for all licensees and were consistent with other orders. The investigation also found that the work ordered appeared to be in proportion to the harm caused by the contravention.

Being Responsive to the Licensee and Circumstances

The investigation found that most remediation orders appeared to have been responsive to the licensee and circumstances, in that they had reasonable completion dates and ordered work that an

[21] Section 73 of FRPA and section 32 of the WA provide that all revenue derived from administrative penalties levied under FRPA or the WA must be paid into the Environmental Remediation Sub-account of the Forest Stand Management Fund established by the *Special Accounts Appropriation and Control Act*.

average licensee could carry out. However, a lengthy delay after the discovery of an incident can diminish the effectiveness of an order.

Of the 18 determination letters that gave the date of discovery, 7 remediation orders were made within one year, 8 were made within two years, and 3 were made within three years. If remediation is not seen as the government's priority, the licensee may not make it their priority. The sooner an order is made after the discovery of a contravention, the more likely the licensee will be motivated to comply and the sooner the harm will be remedied. To increase the effectiveness of an order, efforts should be made to reduce the delay that can occur between when an official discovers an incident and when an order is made.

Removing Any Financial Gain

In most contravention determinations, the minister's delegate made it clear that the licensee's financial gain was considered when a penalty was levied. However, only a few made it clear that the estimated cost of complying with the remediation order was also considered. If the estimated cost is not considered, the penalty levied may be more, or less, than is necessary to remove any financial gain derived from the contravention.

Also, when a licensee has voluntarily carried out remediation prior to the contravention determination, the licensee's actual cost of remediation should be considered when determining the penalty. If the actual cost is not considered, the penalty levied for the contravention may be more than is necessary to remove any financial gain. Consideration of the licensee's actual cost may encourage the licensee to voluntarily remediate in the future.

Changing the Future Behavior of the Licensee

An order should help to change the licensee's future behavior. To achieve this, work needs to be routinely inspected to confirm it has been done and a penalty imposed if it is not done. If a licensee believes the consequences of not doing the work are insignificant, the licensee may be less inclined to do it. While there was a 70 percent compliance rate for the 33 orders inspected, of the 9 orders enforced, only 5 resulted in the licensee doing the work. This suggests it is possible to ignore an order without consequence. To the extent that a licensee believes this, an order is unlikely to change the licensee's future behavior.

Remediation orders are a means of addressing the harm caused by forest or range activities, but they may not be appropriate in every situation. Some harm will be easier to remedy than others, some licensees are more capable of carrying out work than others, and sometimes harm must be remedied before a contravention determination can be made. An added consideration is the cost of inspections and enforcement action if there is non-compliance with the order.

On occasion, it may be more cost-effective for government to carry out the remediation than order the licensee to do it. However, if government does the work before a contravention determination is made, it relieves the responsible licensee from being required to remediate. Although orders are not for every licensee or situation, the licensee responsible for the harm should not be relieved from doing the work without good reason. Otherwise, the future behavior of the licensee may not change.

Conclusions

To improve the effectiveness of orders, their quality could be improved, records of inspections and investigations could be improved, and the outcomes of orders could be published annually.

Create Guidance for Minister's Delegates

The enforceability of orders could be enhanced if guidance for the minister's delegate were developed to address the factors that should be considered when making an order. While the decision to make, or not make, an order will depend on the unique circumstances of each contravention, every determination should have a rationale explaining why an order was made, or not made. A good rationale will demonstrate the appropriateness of the order and may contribute to greater enforceability of orders made.

Improve Records and Publish Annually

The investigation found that the data for compliance inspections was not entered into the MFLNRO databases in a consistent fashion, or distinguished from other inspections. This hampered the government's ability to provide the Board with province-wide reports summarizing the extent to which orders had been carried out. The system used to record inspections and the system used to record investigations could not produce usable reports. As a result, individual inspection records had to be examined, and investigation summaries prepared by officials had to be relied upon to make the findings in this report. Records could be improved and standardized to ensure there is a complete and accessible record of all efforts to inspect for compliance and investigate non-compliance with orders.

If records were improved, it would be possible for the MFLNRO to publish information annually on the rate of compliance with orders, the number of investigations and penalty determinations made to enforce orders, and whether the intended outcomes were achieved. This would raise the profile of orders and signal to licensees and the public that the government considers orders to be an effective means of addressing the harm caused by a contravention.

Amend the Legislation

In some circumstances, it may be preferable for the minister's delegate and a licensee to reach a formal agreement that specifies the remedial action to be taken by the licensee, rather than expend the time and resources needed to determine whether or not a licensee has contravened the legislation and, if so, to order the licensee to take remedial action. An agreement would be another tool to ensure an efficient and appropriate response to the harm caused by a contravention.

This approach, which would require a legislative amendment, would enable the minister's delegate to enter into a formal agreement with a licensee to take any action that the delegate and licensee decide is necessary to remedy the contravention. It would encourage licensees to be proactive, and a contravention determination and order might not be needed.

An agreement that specifies the remedial action to be taken by a licensee may be appropriate in situations where the government anticipates it will have difficultly proving that a licensee has

contravened the legislation, or where a licensee anticipates it will have difficulty proving they were duly diligent. An agreement may also be appropriate in situations where the licensee has not voluntarily taken remedial action and the government wants action before an order can be made. An agreement would not be appropriate in every situation, particularly where the need for remedial action is urgent and a licensee would normally be expected to take action voluntarily.

A formal agreement would be an alternative to a contravention determination and penalty. It would not be an admission of a contravention by the licensee, but it would be a matter of public record. If a licensee were to breach the agreement, the government could still pursue a contravention determination and penalty, or seek to enforce the agreement in court.

An agreement would be another tool to ensure an efficient and appropriate response to the harm caused by a contravention. There are many examples of this approach in Australian legislation,[22] and it has recently been introduced in United Kingdom environmental legislation.[23] These jurisdictions use voluntary "enforceable undertakings," which have been described as a quick and effective remedy that provides a non-adversarial solution to regulatory non-compliance.[24] A similar approach is used in the BC *Private Managed Forest Land Act*, which allows a land owner to enter into a "consent agreement" to take remedial measures for non-compliance.[25]

The regulation of forest and range practices in British Columbia could be enhanced by making a formal agreement available to the minister's delegate and a licensee who may have contravened the legislation to enable an early response to the harm caused by the contravention. It would make

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[22] In the State of New South Wales, section 253A of the *Protection of the Environment Operations Act* gives the Environmental Protection Authority the ability to accept a written undertaking by a suspected violator in lieu of issuing a contravention determination or a remediation order.

[23] Schedule 4 of England's *Environmental Civil Sanctions (England) Order 2010* gives the Department for Environment, Food and Rural Affairs (DEFRA) the ability to accept an enforcement undertaking by a suspected violator in lieu of issuing a contravention determination or a remediation order.

[24] First used by the Australian Competition Commission in 1993, an enforceable undertaking is a voluntary agreement by a licensee to take action to remedy a suspected violation in order to come into compliance, restore harm and to compensate those adversely affected. See Richard Johnstone and Christine Parker, "Enforceable Undertakings in Action – Report of a Roundtable Discussion with Australian Regulators," National Research Centre for Occupational Health and Safety Regulation, Working Paper 71 (February 2010), accessed online: <http://ohs.anu.edu.au/publications/index.php> The authors state that this approach has proven popular in Australia as a way to streamline enforcement and to work cooperatively in addressing issues of non-compliance. In England and Wales, using a mechanism called "enforcement undertakings," DEFRA has adopted essentially the same approach as Australia. See DEFRA, "Civil Sanctions for Environmental Offences: Guidance to regulators in England on how the civil sanctions should be applied, and draft guidance for Wales" (January 2010), accessed online: <http://www.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf> To ensure the effective operation of undertakings, a regulatory authority only accepts an undertaking in instances where there are "reasonable grounds" to suspect that the licensee has committed an offence. So long as the regulator accepts the undertaking and the agreement is carried out, no other civil sanction may be imposed. However, if the licensee fails to comply with the agreed upon terms in the undertaking, the regulator may then pursue other civil or criminal action.

[25] Section 25(1) of the *Private Managed Forest Land Act* enables the Private Managed Forest Land Council and a land owner who may have contravened or is contravening the *Act* to enter into a consent agreement under which the owner agrees to carry out remedial measures, including measures to prevent the contravention from continuing or occurring in the future, and to pay a penalty not greater than $5,000. The Council agrees not to make any determinations or orders with respect to the contravention unless the owner does not comply with the terms of the agreement. If the owner does not comply with the agreement, the Council may levy an administrative penalty up to $25,000 or proceed with a prosecution for an offence under the *Act*.

remedial action more timely, efficient and effective, and it could reduce the costs of non-compliance with legislation. If this enhancement were introduced in FRPA and the WA, it could also be introduced in other natural resource statutes to achieve greater consistency in the regulation of industry sectors. Most statutes using remediation orders are the responsibility of the MFLNRO and the Ministry of Environment.[26]

Recommendations

In accordance with section 131 (2) of FRPA, the Board is making the following recommendations.

To improve the effectiveness of orders, the Board recommends that government:

1. Develop guidance for decision-makers to consider when making remediation orders, so orders are more enforceable.
2. Improve and standardize the way in which information about compliance with orders, and the enforcement of orders, is gathered and recorded.
3. Publish information annually on the rate of compliance with orders; the number of investigations and penalty determinations made to enforce orders; and, whether the intended outcomes of orders were achieved.

To encourage voluntary remediation, the legislation could be amended to enable a licensee to reach a formal agreement with government to remediate the harm caused by a contravention. The Board recommends that government:

4. Amend FRPA and the WA to enable government and licensees to cooperatively enter into formal agreements to remediate, as a way to address non-compliance with legislation, when forest or range activities have resulted in harm to Crown resources.

The Board requests government to advise it by November 30, 2012, of the steps taken to implement these recommendations.

[26] Legislation that uses remediation orders for which the MFLNO is responsible includes: *Dike Maintenance Act*, section 2(2)(b); *Drainage, Ditch and Dike Act*, section 158(1); *Water Act*, section 80(1); *Private Managed Forest Land Act*, section 27(2). The Ministry of Environment is also responsible for legislation that authorizes the use of remediation orders: *Environmental Assessment Act*, section 34(1); *Environmental Management Act*, sections 48(1) and (2); *Integrated Pest Management Act*, sections 16 and 20(1)(a); *Park Act*, section 17.

Appendix 1

Section 74 - *Forest and Range Practices Act*

74 (1) If the minister determines under section 71 that a person who

(a) is the holder of an agreement under the *Forest Act* or the *Range Act*, or

(b) is in a prescribed category of persons

has contravened a provision of this Act or a regulation or standard, the minister may order the person to do work reasonably necessary to remedy the contravention.

(2) If the minister makes an order under subsection (1) of this section or under section 51 (7), 54 (2) or 57 (4), the minister or official, as the case may be, must give written notice, accompanied by the order, to the holder or person, specifying

(a) the provision contravened,

(b) the work to be done to remedy the contravention,

(c) the date by which the work must be completed,

(d) the person's right to a review under section 80 or to an appeal under section 82,

(e) the right under subsection (3) (b) of the minister to carry out the work, and

(f) the right under subsection (3) (d) of the minister to levy an administrative penalty for the contravention.

(3) If a person, by the date specified in a notice given under subsection (2), does not comply with an order of the minister under subsection (1) of this section or under section 51 (7), 54 (2) or 57 (4), the minister may do one or more of the following:

(a) by order restrict or prohibit the person from carrying out the work referred to in the order;

(b) carry out the work;

(c) by order require the person to pay to the government the amount of all direct and indirect costs the minister determines were reasonably incurred in carrying out the work referred to in paragraph (b);

(d) by order levy an administrative penalty not exceeding an amount that is the sum of the costs referred to in paragraph (c);

(e) for the purpose of recovering the costs referred to in paragraph (c) or the administrative penalty referred to in paragraph (d), realize any security provided by the person under the regulations.

(4) The minister must give written notice of the completion of work carried out under subsection (3) (b) and of any order under subsection (3) (a) or (c) to the person to whom the notice under subsection (2) was given,

(a) informing the person of

(i) the restrictions or the prohibition under an order under subsection (3) (a), and

(ii) the amount payable by the person to the government under an order under subsection (3) (c) and the person's liability under section 130 of the *Forest Act* to pay that amount,

(b) providing the person with a copy of the order under subsection (3) (a), and

(c) providing the person with a copy of the order under subsection (3) (c) and with an accounting of the expenditures relating to the work.

(5) The minister must give written notice to the person, who is the subject of an order under subsection (3) (d), providing the person with a copy of the order and informing the person of

(a) the amount of the administrative penalty and the person's liability under section 130 of the *Forest Act* to pay that amount,

(b) the reasons for the administrative penalty, and

(c) the person's right to a review under section 80 or to an appeal under section 82, including an address to which a request for a review or appeal may be delivered.

(6) The person immediately must replace security realized under subsection (3) (e).

(7) The minister must refund to the person any surplus of funds remaining from the realization of a security under subsection (3) (e), after payment of

(a) the amount of the costs referred to in subsection (3) (c), and

(b) any administrative penalty levied under subsection (3) (d).

(8) If the holder of an agreement or another person who receives an order under subsection (1)

(a) carries out work specified in the order, and

(b) incurs expenses in excess of the expenses that the person would have incurred if the order had not been made,

and the order is rescinded on review or appeal, then, to the extent provided in the regulations, the excess expenses of the work are to be paid by the government.

Section 28 - *Wildfire Act*

28 (1) If the minister determines by order under section 26 that a person has contravened a provision of this Act or the regulations, the minister may order the person to do work, at the person's own expense, that is reasonably necessary to remedy the contravention and to repair any damage caused by the contravention.

(2) If the minister, under subsection (1), orders a person to do work, the minister must give written notice, accompanied by the order, to the person, specifying

(a) the provision contravened,

(b) the work to be done to remedy the contravention,

(c) the date by which the work must be completed,

(d) the person's right to a review under section 37 or to an appeal under section 39, including an address to which a request for a review or appeal may be delivered,

(e) the right under subsection (3) (b) of the minister to carry out the work, and

(f) the right under subsection (3) (d) of the minister to levy an administrative penalty for the contravention.

(3) If a person, by the date specified in a written notice given under subsection (2), does not comply with the order of the minister under subsection (1), the minister may do one or more of the following:

(a) by order restrict or prohibit the person from carrying out the work referred to in the order;

(b) carry out the work;

(c) by order require the person to pay to the government the amount of all direct and indirect costs the minister determines were reasonably incurred in carrying out the work referred to in paragraph (b);

(d) by order levy an administrative penalty not exceeding an amount that is the sum of the costs referred to in paragraph (c);

(e) for the purpose of recovering the amount referred to in paragraph (c) or the administrative penalty referred to in paragraph (d), realize any security provided under the regulations by the person.

(4) The minister must give written notice of the completion of work carried out under subsection (3) (b) and of any order under subsection (3) (a) or (c) to the person to whom the notice under subsection (2) was given,

(a) informing the person of

(i) the restrictions or the prohibition under an order under subsection (3) (a), and

(ii) the amount payable by the person to the government under an order under subsection (3) (c) and the person's liability under section 130 of the *Forest Act* to pay that amount,

(b) providing the person with a copy of the order under subsection (3) (a), and

(c) providing the person with a copy of the order under subsection (3) (c) and with an accounting of the expenditures relating to the work.

(5) The minister must give written notice to the person, who is the subject of an order under subsection (3) (d), providing the person with a copy of the order and informing the person of

(a) the amount of the administrative penalty and the person's liability under section 130 of the *Forest Act* to pay that amount,

(b) the reasons for the administrative penalty, and

(c) the person's right to a review under section 37 or to an appeal under section 39, including an address to which a request for a review or appeal may be delivered.

(6) The person immediately must replace security realized under subsection (3) (e).

(7) The minister must refund to the person any surplus of funds remaining from the realization of a security under subsection (3) (e), after payment of

(a) the amount of the costs referred to in subsection (3) (c), and

(b) any administrative penalty levied under subsection (3) (d).

(8) If a person who receives an order under subsection (1)

(a) carries out work specified in the order, and

(b) incurs expenses in excess of the expenses that the person would have incurred if the order had not been made,

and the order is rescinded on review or appeal, then, to the extent provided in the regulations, the excess expenses of the work are to be paid by the government.

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