



**Forest
Practices
Board**

Timeliness, Penalty Size and Transparency of Penalty Determinations

Special Investigation

FPB/SIR/41

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Introduction

Forest and range practices on Crown land in BC are regulated by the *Forest and Range Practices Act* (FRPA) and the *Wildfire Act* (WA). One way these laws are enforced is through the use of administrative penalties. Administrative penalties are issued by government officials, rather than by the courts. Compared to court proceedings, the administrative penalty process is less formal and is intended to be faster. Decisions are made by officials who are familiar with the forestry context, rather than by judges, who may not be.

Administrative penalties provide an efficient way to enforce legislation and promote compliance, if appropriately used. The Forest Practices Board has a mandate to examine the appropriateness of government enforcement and this special investigation examines whether administrative penalties are being used appropriately, in the sense that they:

- are timely;
- remove any financial gain and reflect the statutory considerations, such as the gravity and magnitude of the contravention; and
- are made known, so as to promote compliance in the regulated community.

This report looks at penalty determinations made by government officials for contraventions of FRPA, WA and the *Forest Practices Code of British Columbia Act*, during a five-year period from April 1, 2009, to March 31, 2014.

In an April 2014 report, *Penalty Determinations under Forest and Range Practices Legislation*, the Board discussed administrative penalties related to forest and range practices, including the size of penalties, statutory defences such as due diligence, and the types of activity that give rise to penalties. Other related Board reports include: *Government Enforcement and the Due Diligence Defence* (2007); *Remediation Orders: How Effective Are They?* (2011); and *Monitoring Licensees' Compliance with Legislation* (2013).

Not all contraventions are dealt with through the administrative penalty process. Some contraventions may be addressed with just a warning. In many cases, particularly for minor contraventions, a ticket is issued, similar to a traffic ticket. The legislation also provides for court prosecutions for more serious cases. The Ministry of Forests, Lands and Natural Resource Operations states that, historically, about 20 per cent of detected non-compliances have been dealt with by enforcement action, which includes violation tickets, prosecutions and administrative penalties. The remaining 80 percent of non-compliances have been dealt with through warning tickets or compliance notices.¹

Findings and Discussion

Approach

In the five years from April 1, 2009, to March 31, 2014, the Ministry of Forests, Lands and Natural Resource Operations made 146 contravention determinations under FRPA¹ and the WA, averaging 29 per year.² The Board examined all of these determinations and found that most penalty determinations had good rationales and were well written. Some issues were identified that pointed to opportunities for improvement and these are discussed below.

The Board then interviewed four district managers and one fire centre manager to discuss the findings and identify challenges and potential improvements. Compliance and enforcement staff were offered, but did not take up, the opportunity to participate in interviews. A group of district managers reviewed a draft of this report and provided comments.

General Findings

Of the 146 determinations, 37 determinations involved alleged contraventions of the Forest Practices Code and 77 determinations involved alleged contraventions of FRPA. These 114 determinations can be categorized as follows:

- unauthorized harvesting – 30
- reforestation – 34
- fish/riparian/wildlife – 29
- other – 21

There were 32 determinations involving alleged contraventions of the WA.

The companies or individuals who were the subject of the determinations can be described in the following categories:

1. major forest licensee³ – 31
2. other forest licensee⁴ – 63
3. contractor – 9
4. range licensee – 8
5. other permittee⁵ – 8
6. other person – 27

¹ Determinations under FRPA include determinations of contravention of the predecessor Forest Practices Code.

² During the previous five-year period, there were about 96 determinations annually. The reduction in the number of determinations over time corresponds roughly with the reduction in the number of inspections. The Board reported in *Monitoring Licensees' Compliance with Legislation* (2013) that there were 4 993 inspections in 2011/12 compared to 14 772 inspections reported by MFR in 2009. To try to put this in context, the average annual harvest during the 2009-2014 period was 61 million cubic metres. There are about 1300 forestry licences, not including timber sales licences.

³ The holder of a major licence as defined in the *Forest Act*. This includes the holders of tree farm licences, forest licences, timber licences and certain types of timber sale licences and forestry licences to cut.

⁴ Holders of licences that are not major licences, including woodlots, community forest agreements and most licences to cut.

⁵ Other permittee refers to holders of special use permits, licences of occupation, etc.

Figures 1 through 3 summarize the general characteristics of the determinations and the range of penalties.

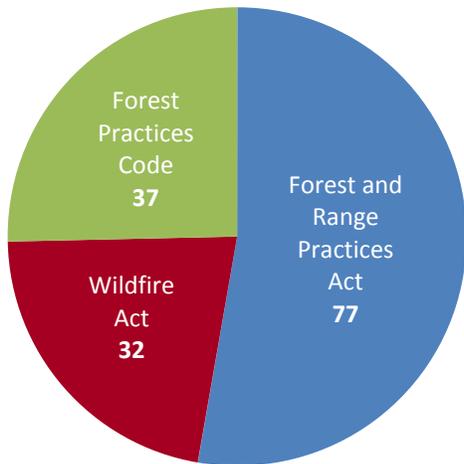


Figure 1. Determinations by statute

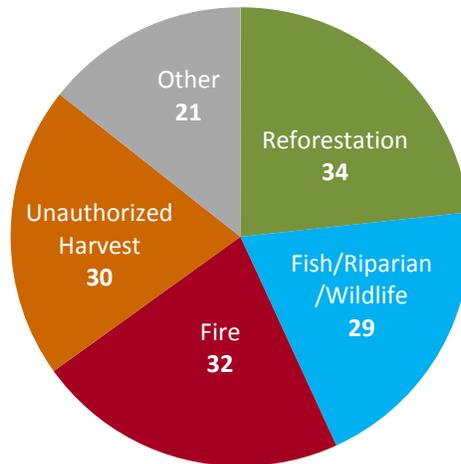


Figure 2. Determinations by activity type

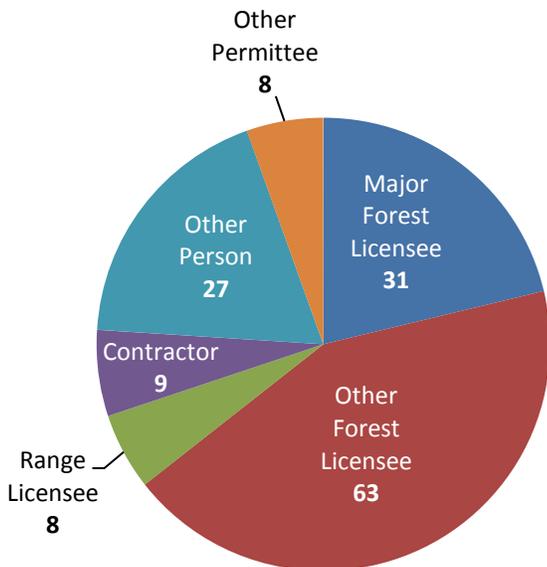


Figure 3. Determinations by category of person

Timeliness

One of the intended benefits of administrative penalties, compared to the court process, is speed. To the extent that administrative penalties are unduly delayed, this benefit is lost. Delay may also signal that enforcement is not seen as important. If an opportunity to be heard is delayed until close to the limitation date, this potentially puts the decision maker in the difficult situation of having to make a hurried decision. Delay in writing a decision after the opportunity to be heard means that it may be harder for the decision maker to recall the evidence.

Delay can be unfair to the person who is alleged to have contravened the legislation, because of the ongoing uncertainty as to the eventual outcome. Delay also leaves open the possibility that evidence needed for a defence will be compromised by the delay and memories may fade.

There are several stages in the process where delay can occur. First, there is an investigation by government compliance and enforcement staff. The results of the investigation are then presented to a statutory decision maker—such as a district manager or fire centre manager—who has been delegated authority by the minister to make penalty determinations. The forest licensee, range licensee or other person who is believed to have contravened the legislation is given an opportunity to present their side of the story to the decision maker. This is known as an “opportunity to be heard.” Delay can occur at the investigation stage, at the opportunity to be heard stage or in the decision writing after the opportunity to be heard.

The limitation date for administrative penalties is three years from the date government officials become aware of the relevant facts (the discovery date). After that, no administrative penalty can be imposed.

Findings

Not enough information was included in 46 determinations to show how much time passed between the discovery date and the date of the determination. Of the 100 determinations that specified dates, all were issued within the 3-year limitation period. Twenty-six were issued more than 24 months after the discovery date.

In terms of investigation time, 32 cases took more than 18 months to investigate and reach the opportunity to be heard. In terms of decision writing, in 43 cases, the decision maker took more than 6 months after the opportunity to be heard to issue a decision.

Discussion

There are opportunities for improvement in timeliness. Compliance and enforcement policy states that investigators will try to complete investigations within six months, and, subject to events beyond their control, will complete investigations within one year of the date of discovery.ⁱⁱ It is evident that this policy is not being met in a substantial number of cases.

Most decision makers interviewed by the Board felt that six months after the opportunity to be heard was too long to issue a determination. Delay in general is recognized as a weak link.

Of course more time is needed to write a decision if the issues are complex and involve multiple allegations of contravention or complex evidence. Advice may also need to be sought on questions of interpretation.

Finally, decision makers often have a heavy workload of other matters and may have to balance priorities.

Wildfire Management Branch is now actively managing the process for investigations and determinations under the WA to improve the timeliness of investigations and decisions.

Size of Penalties

Penalties should be large enough to remove any economic benefit the person may have gained through the contravention. In addition, they should reflect:

- the gravity and magnitude of the contravention;
- any previous, similar contraventions by the person;
- whether the contravention was repeated or continuous;
- whether the contravention was deliberate; and
- the person's cooperativeness and efforts to correct the contravention.

As set out in FRPA, these factors must be considered by statutory decision makers before they levy an administrative penalty.

Findings

About a third of determinations identified that the person had gained an economic benefit by contravening the legislation. Most of these determinations attempted to remove the benefit but sometimes the amount was unclear and, in a few cases, it was not removed. Sometimes the penalty was equal to the economic benefit, but should have been higher given the other penalty considerations.

Determination rationales often did not explain how the various other penalty factors were considered in determining the size of the penalty.

Discussion

There are opportunities for improvement in relation to the size of penalties and the rationales for penalty size. With respect to economic benefit, decision makers have to estimate the benefit based on the evidence presented to them and evidence is not always presented.

Interviewees noted, and the Board agrees, that when remediation orders are issued, or if the person has voluntarily undertaken remedial work, this removes the economic benefit.

Decision makers could do a better job of explaining how factors such as the gravity and magnitude of the contravention, previous similar contraventions, and deliberateness are taken into account in establishing the amount of penalties.

In general, penalties seem low. Seventy nine per cent of penalties were below \$5,000. Ninety-one percent of penalties were less than 10 percent of the maximum authorized penalty prescribed by regulation, suggesting that decision makers are not treating contraventions as seriously as the provincial Cabinet (which enacted the penalties in a regulation) intended (see Figure 4).

Penalties need to be more than just a routine cost of doing business and should contribute to respect for FRPA and the WA.

In the Board’s view, the size of the enterprise should be a factor in setting administrative penalties. A fine of \$1,000 may be significant to an individual, but it will be of minor consequence to a large company. This factor is generally recognized as important in the law of sentencing⁶ but is notably missing from the factors to be considered under FRPA and WA.

Wildfire Management Branch is now actively managing the process under the WA to improve the quality of evidence presented to decision makers and of the decisions themselves.

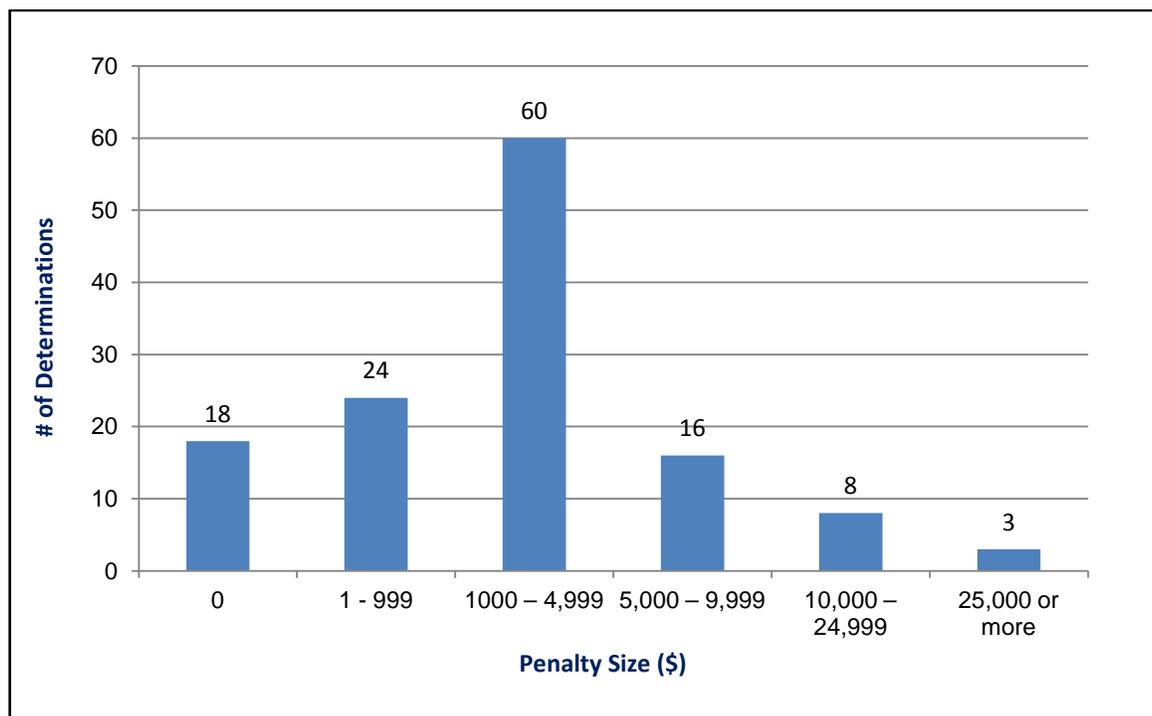


Figure 4. Penalty size (\$) – 129 determinations that found a contravention⁷

Determinations Made Known

Administrative penalty determinations are intended to promote compliance with legislation by the regulated community and foster public confidence in government enforcement. In order to fulfil these purposes, penalty determinations must be made known.

Findings

Government does not publish determination letters. Annual compliance and enforcement reports have been published,⁸ but these reports do not provide information on the circumstances of the contraventions.

⁶ See *R. v. United Keno Hills Mines Ltd.* (1980), 10 C.E.L.R. 43 and the *Canadian Environmental Protection Act*, which establishes different penalty maximums for individuals and corporations.

⁷ In 17 determinations, the decision maker concluded there had been no contravention. The three largest penalties were \$25,000, \$35,000 and \$42,000.

⁸ The last published report is for the year ending March 31, 2012.

Discussion

Determinations that are not published are not effective in promoting compliance in the regulated community or in contributing to public confidence in enforcement. Interviewees felt that general deterrence is important and publication would help. In the Board's view, government should establish an online database of all administrative penalty determinations under FRPA and WA.

Other Comments

Finally, it should be noted that, during interviews, decision makers commented on the value of agreed statements of facts in focussing issues for the opportunity to be heard, and of de-briefing with decision makers and enforcement staff after a determination is issued.

District managers who reviewed a draft of this report noted that new decision-makers are fairly frequently invited to attend opportunities to be heard and are often mentored in the determination-making process. Decision makers also have access to advice and training on how to make contravention determinations, which contributes to consistency among decision makers. District managers note that de-briefing with compliance and enforcement staff after a determination has been made to discuss opportunities for improvement is fairly widespread.

Conclusions

The Board examined all 146 penalty determinations issued from April 1, 2009, to March 31, 2014, and found that most penalty determinations had good rationales and were well written.

There are opportunities for improvement in timeliness. Of the 100 determinations the Board was able to examine for timeliness, 32 took more than 18 months to investigate and bring to an opportunity to be heard, while 43 took more than 6 months for the decision to be written, after the opportunity to be heard.

There are opportunities for improvement in relation to the size of penalties. It is not always clear that penalties remove any economic benefit gained from the contravention. Penalty amounts seem low, with 91 percent being less than 10 percent of the maximum authorized penalty and 79 percent being less than \$5,000.

With respect to transparency, government does not publish determination letters, which means penalties are not effective in promoting compliance in the wider regulated community or contributing to public confidence in enforcement.

The Board makes seven recommendations in relation to these issues.

Recommendations

Based on the Board's review of penalty determinations and interviews with statutory decision makers, the Board sees opportunities for improvement and makes the following recommendations to government.

Recommendation 1: Government should establish a publicly-accessible, online database of all penalty determinations under FRPA and WA.

Comment – If there are concerns related to the *Freedom of Information and Protection of Privacy Act*, these could be addressed through a regulation or statute similar to section 6.1 of the *Ministry of Environment Act*.

Recommendation 2: Government should, by regulation, include the size of the enterprise as a required consideration for decision makers.

Comment – This could be done relatively quickly, using the regulation-making authority under section 71(5)(g) of FRPA and section 71 of WA.

Recommendation 3: To promote sound decision-making and consistency, government should consider reducing the number of delegated decision makers for penalty determinations, so that decision makers would gain more experience.

The Board requests a response to Recommendations 1 to 3 no later than March 31, 2015.

Recommendation 4: Decision makers should consider levying larger penalty amounts, particularly where the gravity and magnitude of the contravention is more than minimal, the person has previous similar contraventions or the contravention is deliberate.

Comment – This consideration would be in addition to removing any economic benefit.

Recommendation 5: Compliance and enforcement staff should:

- (a) examine the reasons why so many investigations exceed the policy guidance of one year maximum and take steps to reduce investigation time;
- (b) where possible, present evidence to decision makers to enable them to address the issue of economic benefit from contraventions; and
- (c) consider making more use of agreed statements of facts.

Recommendation 6: Decision makers should complete determinations promptly after the opportunity to be heard, and should include the incident or discovery date in their determinations so that timeliness can be monitored.

Recommendation 7: Decision makers and compliance and enforcement staff should continue the practice of “de-briefing” after a penalty determination has been made, to discuss opportunities for improvement.

The Board is not requesting a response to Recommendations 4 to 7, but will continue to monitor these issues.

Endnotes

ⁱ Ministry of Forests, Lands and Natural Resource Operations, Compliance and Enforcement Branch website, “The Role of Compliance & Enforcement” at <http://www.for.gov.bc.ca/hen/program/job.htm>.

ⁱⁱ Ministry of Forests, Lands and Natural Resource Operations, Volume 1 - Resource Management, Chapter 16 – Enforcement, Policy 16.6 – Investigations, Effective Date: 13-April-2005.



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