



**Forest
Practices
Board**

Penalty Determinations under Forest and Range Practices Legislation

Special Report

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Introduction

Forest and range practices on provincial 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, which are issued by government officials, rather than by the courts. They provide an efficient way to enforce legislation, if appropriately used. Compared to the court process, administrative penalties can be faster and are less formal. Also, decisions are made by officials who are familiar with the forestry context, rather than by judges, who may not be.

The decision to issue a penalty is set out in a document known as a determination letter. Officials in the Ministry of Forests, Lands and Natural Resource Operations (MFLNRO) issue about 30 penalty determinations each year under FRPA and the WA.

The Purpose of this Report

The Forest Practices Board has a mandate to examine the appropriateness of government enforcement and has authority to appeal administrative penalty determinations to the Forest Appeals Commission. By agreement, MFLNRO sends the Forest Practices Board copies of all relevant penalty determinations under FRPA and the WA. This report gives an overview of all 344 penalty determinations received by the Board between 2007 and 2013.

The purpose of this report is to provide information to the public, forest and range agreement holders and government officials about 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.

This report looks at penalty determinations made by government officials for contraventions of FRPA, the WA and the *Forest Practices Code of British Columbia Act*, from January 1, 2007, to December 31, 2013 (2007-2013). Table 1 shows the number of penalty determination letters, by year.

Table 1. 2007–2013 Administrative Penalty Determinations by Year

Year	Determinations
2007	92
2008	78
2009	54
2010	30
2011	29
2012	27
2013	34
TOTAL	344

The Board is currently writing a companion report to this one, which will examine the appropriate use of administrative penalties under FRPA and the WA, looking in particular at whether they are made without undue delay; are in proportion to the harm caused by the contravention; remove any financial gain; and are made known to all forest and range users. Other related Board reports include *Remediation Orders: How Effective Are They?*ⁱ (2011) and *Monitoring Licensees' Compliance with Legislation*ⁱⁱ (2013).

Administrative Penalties

Administrative penalties are intended to:

- compensate the government for losses, such as the loss of important wildlife habitat or the cost of repairing damage or carrying out reforestation (under FRPA, compensation for timber value is dealt with through a separate process).
- remove any economic benefit the person may have gained through the contravention, such as costs saved due to cutting corners.
- discourage the person, and others, from contravening the legislation in the future—this is known as deterrence.

The process leading to a penalty determination includes an investigation by government staff. The results of the investigation are presented to a statutory decision maker—a MFLNRO official, 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.’

After the decision maker has considered all the information presented, he or she will prepare a determination rationale setting out the key information and giving reasons for a finding of either a contravention or no contravention. If there is a finding of contravention, the decision maker then determines the appropriate penalty.

Under both FRPA and the WA, the following factors must be considered when setting a penalty:

- previous contraventions by the licensee or person that are of a similar nature
- the gravity and magnitude of the contravention
- whether the contravention was repeated or continuous
- whether the contravention was deliberate
- any economic benefit gained by the licensee or person
- cooperativeness and efforts to correct the contravention.

Under FRPA, a single penalty is set for each contravention, based on a maximum penalty set out in the *Administrative Orders and Remedies Regulation* for that specific contravention. Under the WA, a person who contravenes the act may be required to pay:

- a penalty not exceeding the maximum penalty for the contravention set out in the *Wildfire Regulation*;
- the value of Crown timber or other resources damaged or destroyed by the fire (a formula for determining value is included in the regulation);
- reforestation costs; and
- the government’s fire control costs.

In addition to any penalty, the decision maker may also order a person to do remediation work.

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, along the same lines as a parking ticket. The legislation also provides for court prosecutions for more serious cases.

Penalty Size

Introduction

Under FRPA, the highest administrative penalty that can be levied is \$500,000, for failing to comply with an order or condition established by a government official. The penalty for unauthorized cutting of timber or hay on Crown land is based on the amount of hay or timber cut without authorization. In addition to any administrative penalty, the person responsible for cutting Crown timber without authority must pay stumpage (the fee charged for the right to cut Crown timber) to the government.

Under the WA, the highest administrative penalty that can be levied is \$100,000, though a person who contravenes the legislation may be ordered to pay compensation for damage to resources (stumpage in the case of damaged timber), reforestation costs and fire control costs.

Most penalties range between \$500 and \$10,000. However, there have been a few penalties that were significantly higher, as well as some cases where no penalty was assessed, even though there was a contravention.

The Largest Penalties

Logging Caribou Habitat

The largest penalty issued under FRPA between 2007-2013 was \$35,000. A company clearing Crown land to explore for coal cut down 2600 cubic metres of timber (a cubic metre is about one telephone pole) over an area of 80 hectares, without authorization. Some of the logged area was important habitat for caribou, a blue-listed species in British Columbia. Blue-listed species are of special concern in British Columbia because of characteristics that make them particularly sensitive to human activities or natural events. The company that cleared the land knew that it was operating in sensitive caribou habitat, so the district manager levied a large penalty to discourage the company from similar conduct in the future and to send a message to the regulated community in general that such conduct is not acceptable.

Tree Falling on Power Line Causes Fire

Determinations under the WA often involve significantly larger amounts of money than determinations under FRPA because they include orders to pay for damage to resources and costs of fire suppression. In one case, a dead tree on Crown land fell on a power line supplying electricity to a mobile phone mast. The power line fell to the ground, still carrying electricity. This ignited decaying leaves and vegetation on the forest floor, resulting in a wildfire that burned over 380 hectares.

A fire centre manager concluded that the company that operated the power line had contravened the WA. Anyone who carries out a utility transmission operation—which includes a radio, microwave or telephone service—must maintain equipment, apparatus and materials in a manner that, “reduces the likelihood of producing an ignition source capable of starting a fire on or adjacent to the site.” The fire centre manager ordered the company to pay \$1.3 million in fire suppression costs plus \$870,000 for damage to Crown timber. The contravention finding was appealed to the Forest Appeals Commission, which upheld the decision of the fire centre manager. A subsequent appeal to the BC Supreme Court upheld the decision of the Commission.

Other Large Penalties

Other penalties included:

- \$32,000 for unauthorized road work related to mining activity.
- \$30,000 for pine salvage logging that took too much Douglas fir, after several prior contraventions.
- \$25,000 for causing damage to the environment in the form of excessive soil disturbance.

No Penalty

There are cases where no penalty is assessed, either because the contravention is minor or because a remediation order has been issued. For example:

- A contravention for failing to inspect bridges at least once every three years was determined to be of a minor nature because the bridge in question was not used on a regular basis and the period in question was not long after installation of the bridge. Later inspections found no structural defects.
- Ten contraventions of the seed transfer guidelines did not warrant penalties because the overall anticipated impacts were low, the licensee was cooperative and the cutblocks were likely to achieve required stocking standards.
- In the course of mining exploration, a company cut more timber than it was authorized to cut under its free use permit. The contravention did not warrant a penalty because the company was later issued a forestry licence to cut allowing it to carry out future exploration activity and related logging in compliance with FRPA.
- A licensee harvesting in a visually sensitive area did not achieve the required visual quality objective. However, the cutblock was considered very small and had only a minor impact on the visual condition.

No Contravention

Sometimes a district manager or fire centre manager considers all the evidence and concludes that there has not been a contravention. This happened in 36 cases between 2007-2013. In half of these cases, the district manager or fire centre manager concluded that the proven facts and interpretation of the law did not support a finding of contravention. In the remaining cases, one of the defences of due diligence, mistake of fact or officially induced error (these defences are explained below) was accepted.

In other cases, the decision maker was not able to levy a penalty because the 'limitation date' had already passed. Under FRPA and the WA, an administrative penalty may only be imposed within three years of the date that government officials (e.g., compliance and enforcement staff) become aware of the relevant facts. In nine cases, district managers were not able to impose an administrative penalty because the limitation date had passed. Four of these cases involved reforestation obligations and five were cases of unauthorized logging.

Table 2. Determinations of No Contravention 2007 – 2013

Total # of determinations	344
Contravention not proven	18
Due diligence, mistake of fact, officially induced error	18
Limitation date passed	9

No Contravention Proven

No Contravention: Road Washout

In one case, a landslide originating from a forestry road deposited about 400 cubic metres of material into a non-fish stream and some sediment into a fish stream. The allegation was that the slide resulted from poor road building practices that left organic and unsuitable material in the sub-grade of the road. The point of origin of the slide was designated as a spoil site—a place used to deposit waste material from road construction.

The district manager had to decide whether the forest licensee contravened legislated requirements for road construction and maintenance. He concluded that the legislation had not been contravened. The original engineered plans for the road indicated that the site in question could be used as a spoil area. The district manager thought that organic material could have been placed along the outer edges of the road prism and then covered by spoil material. The licensee inspected the road routinely and noted no serious problems.

Statutory Defences: Due Diligence, Mistake of Fact and Officially Induced Error

There were 18 cases where the district manager or fire centre manager accepted one of the statutory defences of due diligence, mistake of fact or officially induced error, resulting in there being no contravention. Set out in FRPA and the WA, these defences state that no person may be found in contravention of the legislation if that person establishes that they:

- exercised due diligence to prevent the contravention;
- reasonably believed in the existence of facts that if, true, would establish that the person did not contravene the legislation (mistake of fact); or
- acted as the result of an officially induced error (explained below).

Where a statutory defence is successful, the person is still liable to the government, under FRPA, for any economic gain resulting from their actions.

Due Diligence: Logging Outside Boundary

The due diligence defence requires a person to demonstrate that they took reasonable care to prevent a contravention.

A logging contractor working for a licensee accidentally logged 200 cubic metres of timber outside an approved boundary. There was no environmental damage to the site and the equipment operator admitted to making a series of mistakes. However, the licensee exercised due diligence. It took all reasonable steps to prevent unauthorized harvest by having an environmental management system that was in active use, and by using a trained and experienced logging crew. A forester representing the licensee had walked part of the block boundary with the contractor's bush foreman.

Mistake of Fact: Logging Outside Boundary – Mapping Problem

The mistake of fact defence requires a person to demonstrate that they reasonably, but mistakenly, believed that the facts were such that their actions would not contravene legislation.

An individual who held a licence for small scale salvage cut 170 cubic metres of timber outside an approved area. The map attached to the licence, prepared by a registered professional forester, did not accurately show the areas designated for harvest. Before starting logging, the licensee visited the site with a MFLNRO official and the licensee began logging in the location suggested by the official. The district manager noted that the mapping standards accepted by the ministry at the time were poor and it was not clear to either the ministry official or the professional forester that the area logged was outside the approved area.

Officially Induced Error: Cutting Permit Mixup

The defence of officially induced error requires a person to demonstrate that:

- they made an error of law or of mixed law and fact;
- they considered the legal consequences of their actions;
- they received advice from an appropriate government official;
- the advice was reasonable;
- the advice was wrong; and
- they relied on the advice.

A major licensee had a cutting permit covering six cutblocks. Through administrative error, the licensee believed it had harvested all six blocks and it advised MFLNRO of this. In due course, the district manager issued a letter cancelling the cutting permit. Subsequently, the licensee realized that one block of three hectares had yet to be harvested.

The licensee had discussions with government officials, who changed the status of the cutting permit in the government database to 'open' and advised the licensee that everything was in order for it to proceed with further harvesting. However, the government's files were incomplete, so the official who gave this advice did not realize the cutting permit had already been cancelled. The licensee harvested the block and was subsequently alleged to have harvested without a cutting permit.

After considering the evidence, the district manager concluded that the licensee had harvested the cut block without authorization. However, the district manager accepted the defence of officially induced error. Due to the advice of the government official, the licensee believed it had a legal right to harvest the block. The advice was reasonable, from the point of view of a licensee dealing with the ministry. All the requirements of the defence of officially induced error were met.

Selected Determinations

This section provides examples of different types of activities that give rise to penalty determinations, including unauthorized harvesting, road-related issues, fire, reforestation, range, individuals carrying out recreational activities and other situations.

Unauthorized Harvesting

There were 136 determinations made between 2007-2013 that involved cutting or damaging trees on Crown land without authorization. Unauthorized harvesting may involve logging outside approved cutting permit boundaries, logging in areas reserved from logging, logging tree species that were not supposed to be logged, logging more than the authorized volume or logging Crown timber in the course of logging private land.

Damage to Wildlife Habitat

In one case, a contractor for a major licensee was salvaging pine killed by mountain pine beetle. The operating area included mule deer winter range, so harvesting of Douglas-fir was restricted; nevertheless, the contractor logged about 2000 cubic metres of Douglas-fir without authorization. The district manager considered evidence from two registered professional biologists and concluded that there had been moderately significant, but unquantifiable, negative impacts to mule deer habitat and populations.

The district manager's decision noted that the value of the trees inside deer winter range was greater than the stumpage value. The winter range was designated as such because the stands of trees, "have a special value to society and to the Crown," and the loss of the trees represented a greater loss than the loss of similar trees outside deer winter range. The district manager assessed a penalty of \$9,000 to compensate the Crown and to provide a deterrent.

Roads

This category consists of determinations related to road construction, maintenance and deactivation. Situations encountered included plugged culverts, poor culvert location and poor sediment control. There were 44 determinations in this category between 2007-2013.

Sedimentation of Cutthroat Trout Stream

In one case, the harvesting contractor for a major licensee failed to adequately manage the flow of water along a skid trail, and a significant volume of debris and sediment entered a fish stream known to contain cutthroat trout. Upon learning of the situation, the licensee responded immediately, stopping work and remediating the site, including hand cleaning debris and vacuuming fine sediment.

The district manager concluded that the licensee had contravened several provisions of the legislation, including the prohibition against damaging the environment. There was harm to fish spawning habitat and the health of invertebrates. He assessed a deterrent penalty of \$2500. While there was no doubt that there was habitat loss, no quantification of this was presented to the district manager and he decided not to impose a compensatory penalty. The district manager commended the licensee's prompt response and noted that the remediation work significantly mitigated the impacts and would hasten stream recovery.

Fire

This category consists of determinations under the WA. There were 56 penalty determinations in this category between 2007-2013. Situations encountered included starting a fire when it was not safe to do so, allowing fire to escape, not having an adequate fire suppression system and failing to keep watch when required to do so.

Burn Piles Re-ignited by Hot Embers

A company held a forestry licence to cut in connection with a site preparation contract. They burned piles of logging debris during February and March. It was safe to burn at this time because there was snow on the ground. However, hot embers survived until May, insulated by large amounts of soil in the piles. These embers re-ignited the piles and a fire broke out that eventually burned 20 hectares. It took three weeks and significant expense to put out the fire and to monitor the area to make sure the fire was out. There was no damage to merchantable timber or other values.

The fire center manager concluded the licensee had contravened a section of the *Wildfire Regulation*, which says that a person who burns piles in these circumstances must ensure the fire doesn't escape. He assessed a penalty of \$7,000, consisting of a \$1,500 deterrent penalty and a \$5,500 penalty to remove economic benefit. The economic benefit arose from the costs saved by not conducting an infra red scan to make sure the burn piles were extinguished (a known standard of practice in the industry) and not deploying people and equipment to monitor the site when the snow melted.

Reforestation

Reforestation determinations involve not achieving regeneration (establishing young trees after logging), not achieving free growing status, not filing required reports and not using seedlings grown from the proper seed.

Of 58 determinations in this category, 24 involved woodlots. The majority of the contraventions by woodlot licensees were for not achieving free growing status or regeneration. There were also contraventions for failing to file reports.

Failure to Meet Stocking Standards

In one case, a major licensee failed to meet the required stocking standards on an area of 25 hectares, over three cutblocks. Although it had been told by its forest professional that the stocking requirements would not be met, the licensee was having financial difficulties and chose not to take action. The district manager considered this a serious matter and noted that establishing a healthy forest plantation after leaving the land fallow for several years and allowing herbaceous and deciduous competition to establish, is more difficult and costly than if prompt reforestation has occurred. The district manager imposed a penalty of \$4,000 and issued a remediation order requiring the licensee to replant the areas to achieve the stocking standards.

Failure to File Annual Report

In another case, a woodlot licensee failed to file the required annual reports for 2007 and 2008. In 2007, one of the licensee's previously-harvested cutblocks was required to achieve free growing status, but the licensee had not done the required survey to confirm whether or not the block was indeed free growing. Because the licensee had previous, similar contraventions on the woodlot, the district manager imposed a penalty of \$15,000, noting that the licensee's "extreme reluctance" to engage in dialogue with ministry staff, "blatant refusal" to accept responsibility for management of the woodlot and previous contraventions demonstrated the need for a significant penalty.

Range

There were 12 determinations related to range practices, which included allowing cattle to graze in a wildlife habitat area, overgrazing, grazing cattle without authorization and unlawfully moving a fence.

Unauthorized Grazing

On 14 occasions over a two-year period, cattle grazed in pastures when they should not have been there. The range use plan included specific dates that applied to these pastures, as well as stubble heights for a variety of grass species. The range agreement holder also failed to maintain fencing, resulting in cattle getting onto a major highway.

The district manager noted that there was a risk of cattle escaping and causing a high speed motor vehicle accident and that range use plans are not simply a guideline for range management. Although the range agreement holder was leaving ranching, the district manager assessed a deterrent penalty of \$2,000. This was intended to raise the level of compliance should the agreement holder return to ranching, as well as send a message of general deterrence to others in the ranching world.

Contraventions by Individuals Carrying Out Recreational Activities

Most penalty determinations involve forest licensees, range agreement holders or industrial activities of one kind or another. However, FRPA and the WA also apply in some circumstances to individuals carrying out recreational activities. There were two penalty determinations in this category.

All Terrain Vehicle Use

Two individuals rode their all terrain vehicle (ATV) along a creek and around a lake for six kilometres, leaving tracks and damaging the environment. Due to the elevation and short growing season of the area where this occurred, the damaged ecosystem would be slow to recover. The district manager was also concerned that the tracks created would be viewed by others as an established trail, resulting in continued use by other ATV riders.

The ATV riders were cooperative. They made a proposal for reasonable compensation and created a public information pamphlet to educate the public about ATV use and how it can damage the environment. The district manager noted that it was difficult to establish the value of the damage for compensation purposes and that the only practical remediation was to allow nature to take its course. He issued a deterrent penalty of \$1,900 each.

Failing to Make Sure a Campfire Was Out

In the summer of 2008, a dangerous fire broke out at a campground, destroying campers, trailers and other equipment. Based on the evidence presented by fire investigators, the district manager concluded that the fire originated from a fire pit used by a group of six families. The fire in the pit—which was oversized—had not been extinguished the night before. The families shared responsibility and were assessed a penalty of \$1,000 each, for a total of \$6,000.

Other

This category (consisting of 36 determinations) includes 13 determinations related to soil damage, 6 visual quality, baiting (for insects), damage to roads, operating heavy machinery in streams, failure to notify that harvesting was about to start and failing to achieve results specified in forest stewardship plans. Also, there were contraventions for building a cabin, installing a power line, building a trail, establishing a log sort and building a road, without authorization.

Soil Disturbance

A timber sale licensee exceeded the allowable limits for soil disturbance on two cutblocks totalling 49 hectares. The fine textured soils were susceptible to compaction and surface erosion, so harvesting needed to be restricted to periods of low soil moisture, frozen soils or snow cover. The licensee was ‘pushing the envelope’ in order to finish logging before winter shutdown. The blocks were later planted by BCTS without needing any rehabilitation. The district manager assessed a deterrent penalty of \$3,000.

Visual Quality

A major licensee harvested in an area where there was a visual quality objective of partial retention. This means that evidence of harvesting is visible, but remain visually subordinate to the view. However, the end result was found to be modification, because the cutblocks were visually dominant. The district manager imposed a penalty of \$5,000.

Wildlife Tree Retention

Over a two-year period, a major licensee designated wildlife tree retention areas (WTRA) for several cutblocks that were between 23 and 300 metres away from logged cutblocks. In order to meet the FRPA definition of a WTRA, an area occupied by wildlife trees must be in, or adjacent to, the cutblock, or sufficiently close to the cutblock that the wildlife trees could “directly impact on, or be directly impacted by,” a forest practice carried out on the cutblock.

The ministry and the licensee disagreed as to whether the designated WTRAs met the definition. The district manager accepted the advice of a FRPA guidance document which states that the accepted practice for locating WTRAs is to locate them no more than one tree-length away from a cutblock. As the WTRAs in question were more than one tree-length away, the district manager determined that the licensee contravened FRPA. In this case, the contravention was for failing to ensure the achievement of results and the carrying out of strategies specified in an approved forest stewardship plan. The penalty was \$500 for each cutblock, for a total of \$2,500. In addition, the district manager issued a remediation order requiring the licensee to establish new locations for the WTRAs for the cutblocks in question.

Appeals of Penalty Determinations

Licensees and other persons may appeal penalty determinations to the Forest Appeals Commission. Twenty-nine penalty determinations issued between 2007-2013 were appealed to the Commission. Nine of these appeals were successful and the penalty determination was rescinded. An additional seven were partly successful—either the penalty was reduced or the matter was sent back to the original decision maker for re-consideration. Six appeals were unsuccessful and five were pending at the time of publication of this report.

Table 3. Appeals of 2007 – 2013 Penalty Determinations

Appeal dismissed	6
Appeal allowed – determination rescinded	9
Penalty reduced on appeal	5
Appeal allowed in part and sent back to original decision maker.	2
Appeal pending	7
Total number of appeals	29

Two Commission decisions arising from the determinations were appealed to BC Supreme Court. The Court upheld the Commission decisions. One of these decisions was under appeal to the BC Court of Appeal at the time of publication of this report.

Conclusion

This summary of penalty determinations over a seven-year period, from 2007-2013, illustrates the variety of issues encountered by government officials who make administrative penalty determinations under FRPA and the WA. Of 344 determinations during this period, 136 involved unauthorized harvest of Crown timber, 44 involved forest roads, 58 involved reforestation, 12 involved range activities and 56 involved the WA. A few involved recreation and other activities. Penalties issued were generally between \$500 and \$1000, with a few higher penalties and a few cases with no penalty. In 36 cases there was no contravention found, mainly because a contravention could not be proven or the person was able to prove they exercised due diligence. In 29 cases, the person appealed the determination to the Forest Appeals Commission.

Each of the 344 penalty determinations represents significant effort by compliance and enforcement staff, licensees and statutory decision makers. The accumulated body of penalty determinations could potentially be a useful resource for those interested in improving forest and range practices.

The Board is currently writing a companion report to this one that will examine the appropriate use of administrative penalties under FRPA and the WA, looking in particular at whether they are made without undue delay, are in proportion to the harm caused by the contravention, remove any financial gain and are made known to all forest and range users.

ⁱ <http://www.fpb.gov.bc.ca/SIR32>, Remediation Orders: How Effective Are They?

ⁱⁱ <http://www.fpb.gov.bc.ca/SIR37>, Monitoring Licensees Compliance with Legislation



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