Comments on Proposed Changes to Part IV, Division 3 - Administrative Remedies in the *Forest Practices Code of British Columbia Act*

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INTRODUCTION

This brief discusses proposed amendments to the administrative remedies provisions of the *Forest Practices Code*. West Coast Environmental Law Association is concerned that the proposed amendments contained in Bill 47, the *Forest Statutes Amendment Act, 1997* will significantly diminish the effectiveness of the current compliance system while at the same time making the compliance system more cumbersome and costly to administer.

West Coast Environmental Law has a number of other significant concerns with regard to Bill 47, but due to time constraints we have been unable to comment on all concerns. Anyone interested in these other environmental concerns regarding Bill 47 should consider briefs being prepared by the BC Environment Network Forest Caucus and other environmental organizations.

EXISTING ADMINISTRATIVE PENALTY SYSTEM

Under section 117 of the *Code,* District Managers and other designated senior officials can levy a penalty against a person who has contravened the *Code*. In levying the penalty, they may consider a number of factors including:

- previous contraventions of a similar nature;
- gravity and magnitude of the contravention;
- whether the violation is repeated or continuous;

- whether the contravention was deliberate;
- any economic benefits derived by the person from the contravention;
- the violator's cooperativeness and efforts to correct the contravention; and
- other considerations prescribed by the Lieutenant Governor in Council.

In addition to these penalties, if the government is required to carry out remediation work, the violator may be penalized for government's expenses in carrying out remedial work.

The current penalty system is an "absolute liability" system. This means that a penalty can be imposed if the government shows that a person committed the prohibited act. Proof of negligence is not necessary. Absolute liability is common in the United States and increasingly common in Canada.

Proposed Amendments

Under Bill 47 the penalty process is divided into two steps. Senior officials first make a determination that a contravention occurred. Second, they make a determination of whether or not a person exercised due diligence to prevent the contravention.

The consequences of non-compliance will depend on whether or not a there is a determination of due diligence. If a violator or its lawyers convince a District Manager or other senior official that the company was not negligent (i.e. that they were duly diligent), the only action that can be taken is penalty under section 116.3. Penalties levied under this section can only consider a few factors such as costs to the government in remedying the contravention, stumpage fees payable for the timber wrongfully damaged or harvested, and profits derived from non-compliance.

Also, the government will only be able to make a record of the contravention in their performance record if there has been a finding that the company did not exercise due diligence.

Analysis

By forcing District Managers to make a determination of due diligence, Bill 47 removes the absolute liability aspect of the current system. According to Lyle Fairbairn, QC, of the Canadian Department of Justice

"the use of absolute liability may be critical to enabling particular regulatory programs with important preventative objectives to be effective with even minor penalties by giving operational effect to the key principles of deterrence swift action and the certainty of outcome"[1]

By forcing enforcement officials to gather evidence on due diligence, forcing District Managers to make a determination of due diligence and allowing companies to

appeal determinations on the basis that they proved due diligence, Bill 47 will bog the enforcement process down. Officials will be more likely to ignore minor offences, the process will take longer and, at the end of the day, there will be less likelihood of a penalty being imposed. Often where penalties are imposed they will be smaller because government will be forbidden from considering factors such as gravity of the offence or past record of non-compliance.

Current System Works

Under the current system the administrative penalties imposed under the *Forest Practices Code* are low, and few offences have been prosecuted using the criminal court system. Nonetheless, the system has been, when compared to other environmental legislation, a relatively effective incentive to compliance. This is because it is fast and efficient.

Why is it fast and efficient. First, absolute liability makes it simpler to prove non-compliance. Investigators do not need to arm themselves with evidence that a violator acted negligently in order to counter the violator's evidence.

Second, adjudication of an absolute liability offences is more straightforward. This is important because administrative penalties are mainly imposed by District Managers. Determination of due diligence is difficult for judges who have extensive familiarity with the concept; it will be extremely difficult for Ministry of Forests staff who will have to sort through the often specious arguments put forward by violators and their lawyers.

Third, because there is less ground for arguing the legal niceties of due diligenceabsolute liability determinations are less likely to be appealed. In the United States, where absolute liability penalties are widely used, less than 1% of the penalties imposed are appealed.

The efficiency of absolute liability is why the *Forest Practices Code* administrative penalty system is relatively effective. In 1995-96, there were 691 investigations under the BC *Forest Practices Code* and 437 confirmed contraventions. Penalties were levied in 128 cases. In addition, non-monetary administrative penalties were issued in many cases: 32 remediation orders, 9 forfeitures and 97 stop work orders. In comparison, the *Canadian Environmental Protection Act* does not impose absolute liability and is thus more cumbersome. In 1993-94, of 55 investigations under *CEPA* there were only 3 prosecutions. For British Columbia occupational safety and health legislation,[2] where absolute liability is used, the probability of a penalty being assessed is twice as high as the probability of a penalty under Ontario's occupational health and safety legislation where the absolute liability is not used.[3]

Proposed Changes Cumbersome and Ineffective Deterrent

For the reasons discussed above, we believe the proposed system will, by requiring a determination of due diligence, be much more cumbersome than the current system. It will be a less effective deterrent because fewer investigations will lead to the determination stage.

It will also be a less effective deterrent because, in the absence of proof of negligence, most contraventions will not be penalized. Except in cases where government has incurred remedial expenses or where timber has been wrongfully taken there is little or no possibility of a penalty. Penalties imposed under section 116.3 are likely to be limited to recovery of stumpage fees or timber value, and possibly recovery of profits. Empirical analysis shows that the chances of penalties being imposed for non-compliance is the most important factor in ensuring compliance.[4]

If government cannot disprove due diligence, there will be no possibility of considering factors such as gravity and magnitude of the contravention, the company's past compliance record, whether or not the contravention was a repeat offence, and whether the company cooperated in correcting the contravention. Moreover, so long as a company can convince senior officials that they were duly diligent, a history of contraventions will become irrelevant to future penalties imposed under section 117. Under the proposed system, compliance will become less important than proving due diligence.

Current System is Fair

Courts have consistently distinguished between fines that are punitive in nature, where it is would be unfair to convict an accused who has proven due diligence, and penalties which are aimed at compensation and encouraging compliance, where absolute liability is appropriate. The *Forest Practice Code* clearly falls into the latter category. The penalties levied under the *Code* are not punitive. Indeed the Forest Appeals Commission has specifically considered this point and found that, under the current system, penalties are set in order to

- compensate for government losses (e.g.. recovering stumpage fees or timber value in cases of timber trespass)
- encourage compliance.[5]

The portion of penalties which is aimed at encouraging compliance is very low in most cases. In 1995/1996, 40 of the 128 penalties imposed were for less than $500. The higher penalties under the *Code* generally involve significant compensatory elements (e.g. they simply recover stumpage or revenue from unauthorized harvesting). Where the government cannot disprove due diligence, the current system still allows penalties which encourage compliance without being unfairly punitive.

We note that many administrative penalty systems (for instance, the United States *Resource Recovery and Conservation Act*) impose absolute liability, but they

consider due diligence (along with matters such as previous compliance record, the gravity of the offence and environmental harm) in assessing the penalty. This recognizes that larger penalties are appropriate where there is moral culpability, but in the absence of proof of negligence this allows imposition of a fine that deters future non-compliance. Unlike the proposed changes to the *Forest Practices Code* these systems do not require enforcement staff to gather evidence on due diligence in every case. Due diligence is only relevant as a secondary issue. This means that it is less of a barrier to investigation and adjudication. Under these systems, government can consider negligence in assessing a fine, but it can choose to not prove due diligence and still impose a penalty that reflects environmental damage, gravity of the contravention and past record.

Recommendations

We recommend that sections 105 to 110 of the *Forest Statutes Amendment Act, 1997* be deleted.

As an alternative, If the government believes that due diligence cannot currently be considered amendments could be introduced whereby consideration of due diligence is only one of many factors relevant to setting fines. This could be accomplished by adding a new paragraph to s. 117(4)(b) that says "the absence or degree of negligence" is a factor in setting the quantum of a fine.

Endnotes

1. L.S. Fairbairn, QC, Crime? or Regulatory Offence? (Ottawa: Department of Justice, February 16, 1995) at 24.
2. Section 73 *Workers' Compensation Act*
3. Rick Brown, "Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation" (1992), 30 *Osgoode Hall Law Journal* 691.
4. Environment Canada, *Administrative Monetary Penalties: Their Potential Use in CEPA*. (Number 14 of the Reviewing CEPA report series, 1994).
5. *MacMillan Bloedel Ltd. v. Government of British Columbia* Forest Appeals Commission Appeal 96/05(b)