

NO RESPONSE

A survey of environmental law
enforcement and compliance in BC

en·force·ment (en fôr's'mant) *n.*
Strict enforcement of the laws against
automobile accidents.

en·fran·chise (en fran'chîz) *v.*
to vote: For federal elections, Canada set
the age of 18. 2 set free; release
—*en·fran'chis·er, n.*

en·fran·chise·ment (en fran'chîz'ment) *n.*
the enfranchised

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Executive Summary

For real environmental protection, it's not enough to have good environmental laws. Anyone concerned with protecting BC's environment must ask: How often those laws are followed? And what does the government do when those laws are not followed?

Poor compliance with environmental laws can lead to poor environmental quality and can undermine the legal system itself, if citizens see that laws in place are not working.

This report takes a look at enforcement trends for a number of BC's key environmental laws from 1990 to 2005 and identifies some of the reasons for the trends. It also highlights the existing barriers that prevent a more in-depth analysis, and identifies some of the components that would enhance the BC government's compliance policy toolbox.

Figures from the Ministry of Environment's conservation officer service – the government body responsible for environmental enforcement – are startling: between 1995 and 2005, the number of enforcement actions taken plummeted by more than half. Moreover, there was a shift, during this period, to increased reliance on written warnings – an enforcement tool that does not result in any immediate legal consequences.

While more information is required to state conclusively why levels of enforcement have dropped so dramatically, the decline coincides with major cutbacks to staff between 1995 and 2005. In addition, the most dramatic declines in enforcement levels occurred from 2003 to 2005, during which time many of BC's environmental laws were being replaced or rewritten in ways that made them more difficult to enforce effectively. West Coast Environmental Law believes that these cutbacks and changes in legislation are in large part to blame for the drops in enforcement action by the Conservation Officer Service.

Environmental protection requires strong laws, an effective way to ensure those laws are being followed, and strong sanctions in the event that they are not. Numerous commentators, academics, and law enforcement agency staff have emphasized the importance of enforcement of laws, clear standards and transparency of information to achieve environmental objectives.¹

We hope that the province will turn its attention to determining why levels of enforcement have dropped so sharply in the past decade, and what can be done to ensure that the BC government has a well-funded and effective compliance and enforcement program for its environmental laws.

There have been some recent steps in the right direction in terms of increasing the number of Conservation Officers in the Ministry of Environment and developing new policies on enforcement. However, the budget and staff level dedicated to enforcement initiatives are still significantly less than needed. BC has not yet restored

enforcement staff numbers to historic, optimal levels. Furthermore, the reduced numbers of support staff, such as scientific technicians, biologists and clerks remain unaddressed. Currently, there are Conservation Officers in regional offices who still lack administrative support. That means that they spend less time in the field and are less effective when they are there.

By looking at what criminologists, law enforcement experts and others have identified as the key components of a strong compliance and enforcement regime, this report recommends the following steps that the Ministry of Environment should take to promote more effective compliance with the province's environmental laws:

1. Increase consequences of non-compliance – Environmental criminals must expect to be caught, and to suffer consequences if they are caught.
2. Increase human resources – The Ministry of Environment must have the resources to enforce environmental laws.
3. Make laws enforceable – Environmental laws should be written in such a way that compliance can be easily assessed, with a range of different types of legal tools available to ensure environmental protection.
4. Increase transparency and accountability – Ensure that the public has access to a greater amount of information, including information on individuals and companies that fail to comply with environmental laws.
5. Institute information and auditing systems – Accountability demands that government have in place systems to measure its own effectiveness in promoting compliance with environmental laws.
6. Work with other departments, governments and law enforcement agencies – In a province as large as B.C., the Ministry of Environment needs to coordinate its enforcement efforts with other law enforcement agencies, the federal government, other government departments, local governments, and the public.
7. Allow citizens to enforce the law – Allow the public to pursue enforcement action, where there has been environmental damage, and where it is in the public interest to do so.

If environmental protection is to be achieved, it is critical that companies and citizens alike comply with environmental laws and that the authorities enforce those laws. British Columbians have the right to a clean and healthy environment; they also have the responsibility to care for this environment.

Part 1: Introduction

If one looks only at the number of environmental laws “on the books” in BC, one might assume that the environment is well-protected. And yet, it is often a challenge to ensure these laws are being followed or enforced. If the laws are not followed, then they are not worth the paper they are written on.

Over the past 15 years or so, there have been many changes to BC’s environmental laws and a major shift in the provincial government’s approach to environmental protection. In the early 1990s, there was an expansion of environmental regulations and of staff to achieve public compliance with those new laws. However, beginning in the late 1990s, the emphasis in government policy shifted to “deregulation”: this trend accelerated in 2001 with a government promise to “reduce the regulatory burden” by one-third. The move to reduce legal requirements was accompanied by cuts to staff and resources in different departments dealing with environmental protection.

The gradual shift in responsibilities has led to legislation that relies heavily on self monitoring and voluntary compliance with environmental regulations. These changes reduce or eliminate much of the previous responsibilities of provincial environmental staff in conducting audits, inspections and monitoring tasks.

West Coast Environmental Law has obtained government data from 1990-2005, which lists the number of tickets, charges and warnings issued by the Conservation Officer Service (COS) for a number of key environmental laws in BC. We have also interviewed government officials responsible for enforcing these environmental laws.

This report seeks to take an overarching look at trends in BC enforcement activities over 15 years, and to identify where improvements can be made. It is intended to be a snapshot of the trends rather than an in-depth analysis. For that, additional information, currently unavailable, would be necessary.

Definitions used in this report

Compliance is where an individual, group or other actor follows or obeys laws, regulations, rules and other standards established by the government. The route to compliance can be varied – governments may encourage a wide variety of “carrots or sticks,” i.e., education programs, incentives or punishment, or a combination, to ensure that people act in accordance with the law.

Enforcement is a set of actions taken to correct or punish a failure to comply with a law. Enforcement is only one option open to government to achieve compliance. Enforcement actions can take various forms, such as formal inspections, issuing warnings or tickets and imposing penalties, such as fines or imprisonment.

Indicators are measurements of environmental health used to determine whether environmental laws, and their enforcement and compliance tools, are working.

“Results-based” regulations are regulations that require people to achieve an environmental result. See the “Results-based” regulation box below for a discussion of why this approach to environmental laws can have an impact on compliance and enforcement of environmental laws.

The Ministry of Environment Compliance and Enforcement Policy and Procedure,² which will be referred to in this report, uses the following definitions:

- **Administrative Sanction** – suspension, restriction, or cancellation of ministry authorizations, including approvals, licences or permits.
- **Ticket** – a charging document which may be used instead of “formal charges.” Generally, a ticket refers to minor offences and prescribes a monetary penalty to be paid.
- **Warning** – a document that notifies a party that they are not in compliance with a specific regulatory requirement and warns of an escalating response should non-compliance continue. For the purposes of this report, warnings also include verbal warnings.
- **Inspections** – activities undertaken to verify compliance with a regulatory requirement.
- **Investigations** – activities involved in gathering of information and evidence relevant to a suspected non-compliance where the purpose is to build a case for possible enforcement response.

The Ministry has also released a compliance management framework, and further explains many of the topics referred to in this report. It is our understanding that this document is a vision for compliance, and that many of the objectives have yet to be achieved. It is notable that the document sets out the Ministry’s aim “to achieve high rates of **voluntary compliance**” as an environmental objective, where voluntary compliance is defined as, “the situation whereby regulated parties comply with regulatory requirements of their own accord; the Ministry does not have to compel them to do so through enforcement actions.”³

What are “Results-based” regulations?

A “Results-based” regulation requires people to achieve an environmental result. This means that, instead of the regulations legislating which processes must be followed, or standards met to achieve an environmental objective, the law specifies only the results that must be achieved with the aim that different regulated parties can choose different steps to achieve that environmental result.

To use an analogy from traffic regulations, a “results-based” standard would be: “Every driver must drive with due care and attention so as to avoid causing accidents.” This is the result that the government hopes to achieve. By contrast, a prescriptive (non-results based) standard would be requirements such as “Do not travel faster than the posted speed limit.” Driving at the posted speed limit does not guarantee that one’s driving is safe; but at the same time, we recognize the need for rules of this type.

Properly structured and enforced “results-based” regulations can be immensely powerful tools for environmental protection. At the same time, however, it can be very difficult to even evaluate compliance with a “results-based” law, let alone to enforce it, for several reasons:

- If the “result” is not carefully and specifically identified, it can be difficult to determine whether it has been achieved or not, even by experts;
- Determining if an environmental result has been achieved usually requires considerable information about what the environment was like before the change. If the information is not available, no one can tell if the result was achieved;
- Evaluations of compliance require going into the field and may involve complicated assessments as to whether a result has been achieved. As a result, government inspections require more staff time and expertise. In a geographically large province, such as BC, it also requires considerable travel, with the resulting drain on staff and resources.

In practice, effective environmental laws will involve both “results-based” and prescriptive approaches.

Any environmental law needs to be well constructed to be effective. Unfortunately, the BC government’s drive to deregulation through a “results-based” approach was not always well thought out. In *Cutting Up the Safety Net* (<http://www.wcel.org/wcelpub/2005/14181.pdf>), West Coast Environmental Law identified some key problems with the new legislation. Amongst other problems, the new “results-based” approach:

1. reduced government’s ability to enforce environmental standards;
2. created limits on government’s ability to protect the environment;
3. increased “flexibility” to lower standards; and
4. put the public good in the hands of the private sector.

These and other problems with the new legislation may make it difficult for government to enforce many of BC’s environmental laws.

Part 2: Compliance and Enforcement in British Columbia from 1990 to 2005

The data for this report stems from the Ministry of Environment's (the "Ministry") enforcement records for six key statutes (the "Acts") for the years from 1990 to 2005, as well as interviews with several government staff. While this information allows us to draw certain conclusions about the current state of compliance of BC's environmental laws, it is not possible to get a complete picture of the compliance and enforcement trends from this data alone. We were unable to obtain the information necessary for a more comprehensive review, in part because the government itself does not appear to have analyzed these trends, compiled this data, or made this information available to the public.

In addition to the data provided, we would have liked to be able to obtain further information on:

- changes in budgets for enforcement (i.e., money specifically directed to environmental enforcement) over time;⁴
- the number of all violations of the Acts over time (as opposed to government compliance and enforcement action);
- how frequently violators re-offend;
- how often offences are not responded to; and
- how frequently unannounced inspections were carried out, and what compliance actions resulted.

These and the answers to other questions are necessary to determine if an effective enforcement and compliance regime is in place and to develop more successful compliance and enforcement policies.

One comment heard consistently in direct interviews with different members of staff throughout the Ministry, is that inspections and other compliance and enforcement efforts, are limited, and conducted "with the resources available." The conclusion drawn from these statements is that compliance and enforcement efforts could be greatly increased, through an increase in resources. It is clear for example, the Conservation Officer Service (COS) in BC is still, in 2007, considerably smaller in terms of personnel and budget as compared to similar services in other provinces. The COS is the main service used to enforce the majority of environmental statutes, 20 in total.

Despite a recent reversal of cutbacks to the Service, Conservation Officers still have fewer resources available than they have had historically.

A snapshot of a few of the statutes and the enforcement actions taken reveals some disturbing information. A more comprehensive analysis in future should include a greater number of statutes, including those under the jurisdictions of other government departments such as the Ministry of Forestry and the Ministry of Agriculture and Lands.

Reviewing the number of enforcement actions taken from 1990 to 2005

Overview

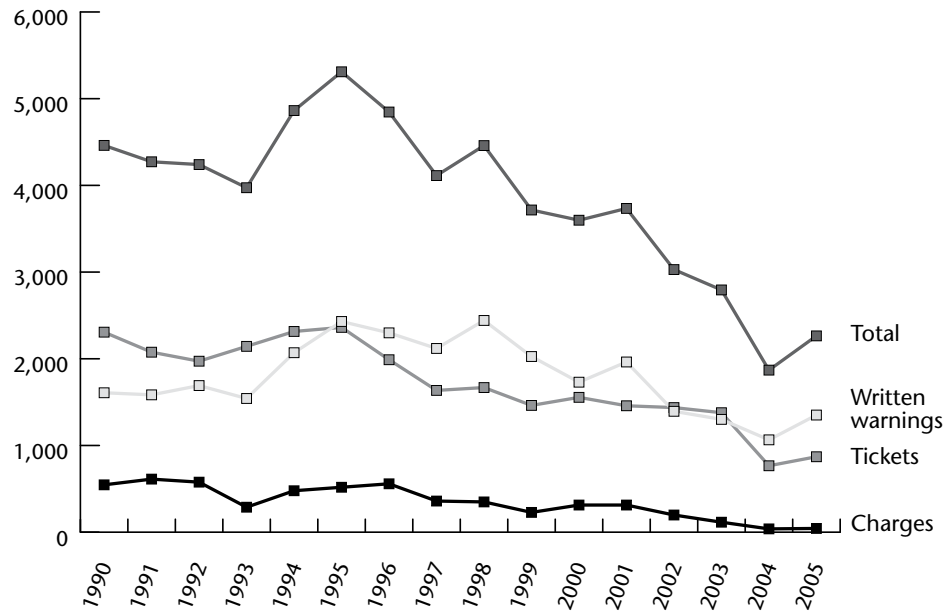
The total number of tickets, written warnings and charges issued by the COS for the following four environmental acts were analyzed: the *Environmental Management Act*; the *Integrated Pest Management Act*; the *Water Act*; and the *Wildlife Act*. We have also included the results for the provincial enforcement statistics for the *Fisheries Act* and the *Migratory Birds Convention Act*. The latter two Acts are federal acts and are enforced by federal authorities; however, some of the enforcement activities under these statutes are shared provincially, and only these provincial enforcement statistics are detailed in the graphs below.

The data has been taken from the Conservation Officer Online Reporting (COOR) database, which is the only centralized and accessible database that records provincial government enforcement activities currently in use in BC. Consequently, the data in government publications, such as the Ministry of Environment's Quarterly Compliance and Enforcement Summaries, is taken from the COOR database. Other compliance and enforcement information, such as records kept by Park Rangers, are not yet available in a central database.

As a result of the difficulty in obtaining data concerning enforcement by Park Rangers, we were unable to provide analysis of enforcement data for a seventh statute: the *Parks Act*. This Act is enforced primarily by the Park Rangers, meaning that the information provided from the COOR database is extremely incomplete – including a mere handful of enforcement actions taken by the COS (never exceeding 10 per year). Since we were unable to draw any meaningful conclusions from such a small number of actions, and given the missing Park Ranger data, we reluctantly removed the *Park Act* from our analysis.

The following graph is a compilation of the total number of charges, written warnings and tickets issued for all seven statutes between 1990 and 2005.

Enforcement actions taken between 1990 & 2005*



Graph 1 – *Fisheries Act, Migratory Birds Convention Act, Environmental Management Act (formerly the Waste Management Act), the Integrated Pest Management Act (formerly the Pesticides Control Act), the Water Act, and the Wildlife Act.

The graph demonstrates that the overall number of charges, tickets and written warnings under all seven statutes taken together peaked in 1995, with 5,310 enforcement actions issued, and then the issuance rate declines consistently over the following decade reaching a low of 1,869 actions in 2004. This number improved slightly in 2005, with a total of 2,264 actions, but is still much lower than any other year prior to 2004.

It is important to note that there are real differences between the types of enforcement action listed on this graph. **Charges** under an act require significant legal and staff resources, and will always be only a small portion of the enforcement actions. Charges laid by the COS have fallen from a high of 607 in 1991 to a low of only 29 in 2004.

Tickets are slightly less onerous, in that they will not usually require court proceedings. The consequences are generally less significant to the offender than would be the case for charges. The total number of tickets issued by the COS has dropped from a high of 5,520 in 1991 to a low of 796 in 2004.

Finally, **written warnings** are just that – a written record that a Conservation Officer (CO) found that a violation occurred and issued a warning to the offender. Since a record exists, the COS may choose to treat the offender more seriously if further violations occur in the future, but other than that, there are no immediate consequences. The total number of written warnings given by the COS has varied widely between years, but reached a high of 2,840 in 1995. The four years from 2002 to 2005, however, were the four years with the lowest number of written warnings on record since 1990, with a low of 954 in 2004.

As a proportion of the number of enforcement actions, the percentage of written warnings has actually risen since 1995. In the early 1990s, written warnings represented approximately one-third of the enforcement actions taken. In 2004 and 2005, they represented half. Since written warnings carry fewer consequences than tickets or charges, this trend may represent a shift in enforcement philosophy to a greater reliance on voluntary compliance. As noted in Part III of this report, an effective compliance and enforcement regime must ensure that there are significant consequences to non-compliance.

There is a clear decline in enforcement actions taken by the COS between 1990 and 2005. As noted, the available data makes it difficult or impossible to say with certainty why this decline occurred (although we discuss some possible reasons, below, at page 24). However, further information can be gained by looking at the Acts which the COS enforces.

Individual statutes – the record

Provincial

Environmental Management Act

The *Environmental Management Act*⁸ came into force on July 8, 2004, replacing a previous statute called the *Waste Management Act*, and contains many of the most important anti-pollution laws in BC.

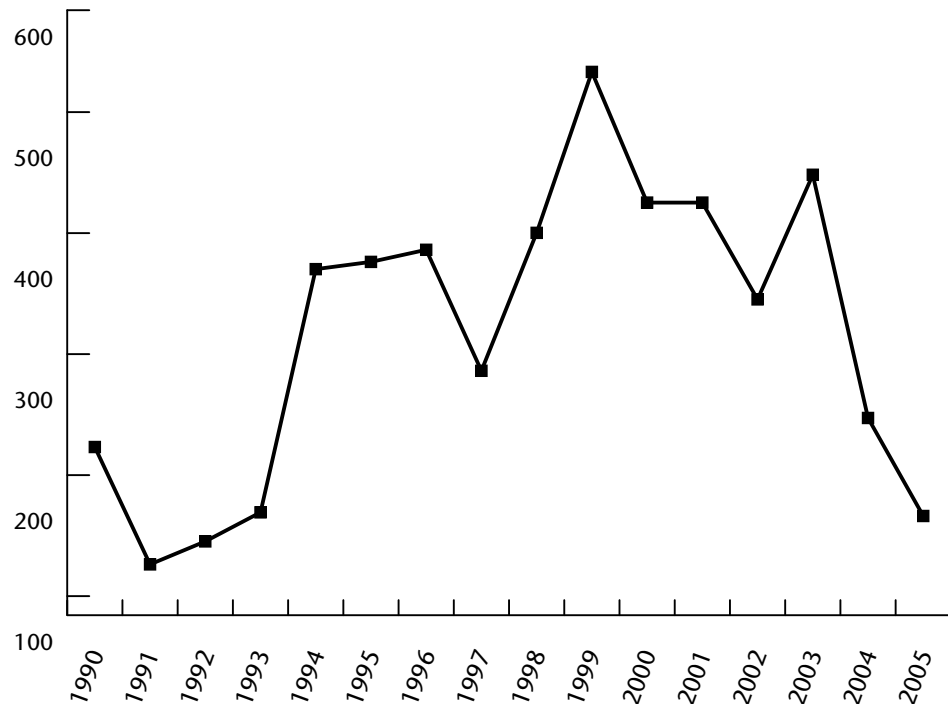
As the key anti-pollution law in BC, the *Environmental Management Act*, like its predecessor, the *Waste Management Act*, is wide ranging, and regulates:

- the release and treatment of all types of pollution;
- the disposal, handling and storage of toxic waste;
- the clean-up procedure of contaminated sites; and,
- emissions affecting air quality.

In addition to regulating pollution, the *Environmental Management Act* sets out the powers of the Conservation Officers. The *Environmental Management Act* also has provisions for more flexible administrative penalties that would expand the compliance and enforcement options available to the COS. However, these provisions have not yet become law, and it is unclear when the government intends to bring them into force.

While the *Waste Management Act* involved a high level of government oversight over all pollution, the *Environmental Management Act* focuses primarily on what the government believes to be high and medium risk polluters. Some types of industrial operations still require permits from government before they can pollute. Others will be governed by Codes of Practice – regulations that say what the polluter can and cannot do. The lowest risk polluters are subject only to a general (and extremely difficult to enforce) requirement not to “impair the usefulness” of the environment.

Total number of charges, tickets and written warnings issued under the WMA/EMA 1990-2005



Graph 2 – Total number of charges, tickets and written warnings issued under the WMA/EMA 1990-2005

Graph 2 shows an increasing trend in the number of tickets, charges and written warnings issued after 1994. The trend reaches a peak number of sanctions in 1999, followed by a decline to levels similar to those seen in the early 1990s in 2005.

The decline in enforcement actions after 2003 could be because of weaker provisions of the *Environmental Management Act* for certain industries. At the time, COS had fewer staff members, and this may also have impacted compliance and enforcement activities.

Urban toxic waste dump

Starting in 1998, a company called Canadian Petroleum Corporation (CPC), began depositing thousands of barrels of hazardous waste in leased commercial space in Abbotsford, BC – over 10 million litres in total. CPC was licensed by the Ministry of Environment to transport hazardous waste, but not to store or dispose of the waste. The Ministry had records in its possession which demonstrated that the waste was being transported to the site, but not leaving, but apparently failed to investigate further. When questions were raised about the safety of the waste, Ministry staff visited the site in 2001, noted the absence of an inventory system and other serious safety problems, but took no action to require a clean-up or shut down the illegal facility for two more years, when it finally charged CPC with violating the Act in 2003. In the end, CPC declared bankruptcy, leaving room after room of improperly-labelled barrels of hazardous waste. In the end, the province has had to accept responsibility for cleaning the contaminated site (1,600 drums and containers of toxicity); the cost to the taxpayer was estimated at \$600,000 at the time, but may be much higher. Soon after taking over the responsibility for the site clean-up, the Ministry of Environment discovered explosives amongst the barrels of waste, and was forced to evacuate the site.

Since the *Environmental Management Act* is so central to BC's environmental protection, it is important that there are effective monitoring systems and effective tracking systems in place, and that the data received under the *Environmental Management Act* is not only compiled, but reviewed regularly.

A recent article in the *Georgia Strait* underscores this point. "Untracked toxic waste seeps out of sight," by Ben Parfitt,⁹ analyzes the amount of toxic waste reported to the Ministry of Environment under the *Environmental Management Act*. According to Parfitt's analysis, between 2001 and 2005, there was an unexplained drop of 5 percent in the amount of waste oil being reported to the Ministry. The article suggests that not only are toxic waste handlers taking advantage of the lack of inspections, but that the Ministry of Environment is unable to analyse tens of thousands of forms, known as manifests, detailing the hazardous waste that is transported and stored in BC. In theory, the manifests should allow the province to track the movement of the hazardous waste. However, the manifests are filed as paper copies, and the Ministry lacks the staff to go through each record to know exactly what was stated on each manifest. Ron Dreidger, a former senior civil servant in the Ministry of Environment, explains to Parfitt, that: 'There's very few staff out there to do the checking. That's no surprise. They don't have the resources anymore to do the testing.'

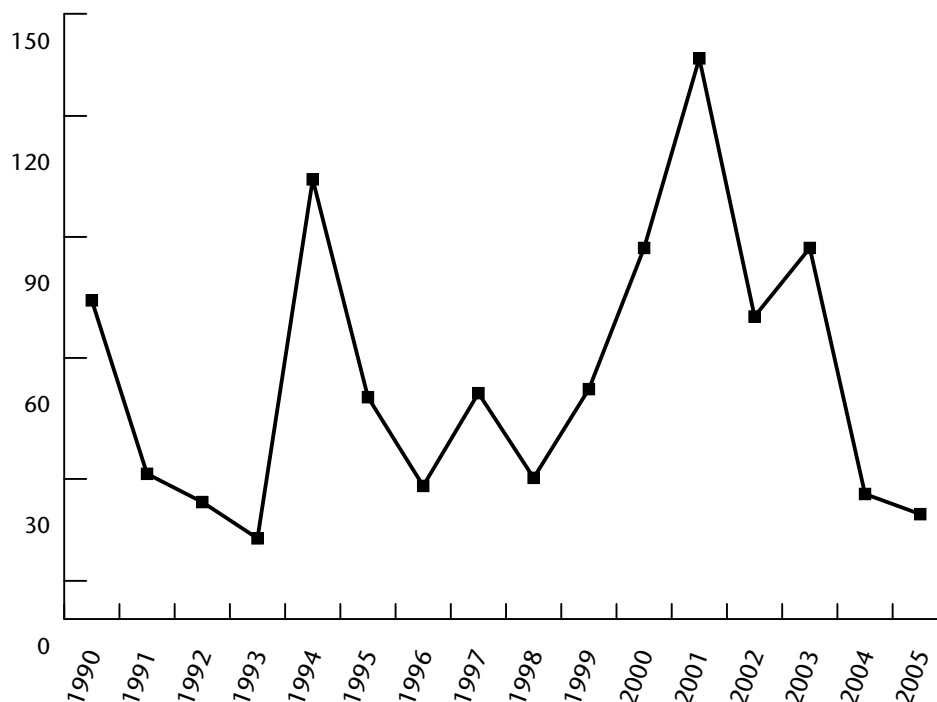
It appears that there is no electronic filing system, and no resulting analysis to see if laws are being obeyed. Without adequate analysis, it is impossible for the Ministry to target its enforcement actions on hazardous waste.

Integrated Pest Management Act

Pesticide legislation in BC has recently undergone a complete overhaul, with the new *Integrated Pest Management Act*⁵ replacing the BC *Pesticides Control Act*. The *Integrated Pest Management Act* came into force on December 31, 2004. The *Integrated Pest Management Act* and its regulations govern the requirements and limitations for the sale and handling of pesticides, and their use on public lands, over water, and on certain types of private land.

The *Integrated Pest Management Act* is an important law, as many pesticides are toxic chemicals, with the potential to harm human health and/or the environment. Pesticides are actively used in BC in a variety of places, including farms, gardens, and in buildings; a 2003 pesticide use survey for BC showed that British Columbians purchased or used commercial pesticide products, which in total contained 4,666,709 kg of 287 different active ingredients (the ingredient that kills or suppresses the pest species).⁶ The introduction of the *Integrated Pest Management Act* substantially reduced government oversight of pesticide use in most cases. We have previously noted that it puts too much control in the hands of pesticide users and is difficult to enforce.

Total number of charges, tickets and written warnings issued under the PCA/IPMA 1990-2005



Graph 3 – Total Number of Charges, Tickets and Written Warnings Issued under the PCA/IPMA, 1990-2005.

Graph 3 shows the total number of charges, tickets and written warnings under both the *Pesticides Control Act* and *Integrated Pest Management Act* between 1990 and 2005, issued by the COS. It is important to note that the total number of enforcement actions is low: the total number of tickets, charges or warnings does not exceed 160 in any year. To determine why there were so few enforcement actions from 1990-2005, more data – currently unavailable – would be required, such as: the number of inspections carried out by COS, the number of complaints received from the public related to pesticide use, and evidence of compliance by pesticide users. However, Ministry staff said that even if there is a strong case to show that there is a lack of compliance with the Act, it may be hard to prove that there has been an “adverse effect” on human health or the environment (a key legal test under the new *Integrated Pest Management Act*).

Until 2004, the *Pesticides Control Act* required government sign-off on most proposals to use pesticides on public lands and some types of private lands. Changes in the new Act mean that government pre-authorization is only required under a very small number of circumstances. As a result, government compliance and enforcement efforts need to focus on how pesticides are actually applied on the ground – which involves much more field work and monitoring than would be the case under the old Act. Given the shortage of resources, it is increasingly left to the public to identify potential problems with the use of a pesticide.

Ministry staff identified education as the biggest compliance tool used in relation to pesticides. They say that information on the proper use of pesticides is available where pesticides are sold, and is intended to educate both consumers and vendors. We were also told that Ministry staff attend industry association meetings to give information about compliance with the law.

This is clearly inadequate. Given the toxicity of pesticides and the impacts they can have on human health and the environment, pesticide use must be actively monitored, with frequent use of unannounced inspections, to ensure that the correct amounts of pesticides are being applied in the right way, and in approved places. In addition, violations, when discovered, must result in at least a written warning if not more stringent enforcement action – it is the responsibility of the pesticide user to ensure that they comply with the law.

Currently, it is regional staff based in Surrey, Penticton and Prince George who are appointed as inspectors in the Integrated Pest Management branch and who perform spot checks or random inspections under the *Integrated Pest Management Act*. At the time of writing, the number of random inspections or spot checks carried out by staff was unavailable.⁷ These records need to be made accessible and incorporated into a centralized database.

Interviewed staff explained that the Ministry's current approach is to focus inspections on particular sectors and key industry groups. Pesticide use that does not fall within a current focus are likely to be inspected only if complaints from the public or in the media bring the issue to the Branch's attention. For example, if the Ministry is focussing its compliance efforts on storage of pesticides in the agricultural sector, another pesticide user, such as forestry, may well get a "free pass," at least until the public complains. In interviews, Ministry staff stated that, generally, conservation officers are only involved where IPM staff identify possible non-compliance and need assistance in collecting evidence and assessing the ministry's enforcement options.

However, since the Integrated Pest Management Branch currently has only nine full-time employees for the entire province focused on compliance, the concern is that there are insufficient resources to ensure effective compliance and enforcement of the *Integrated Pest Management Act*.

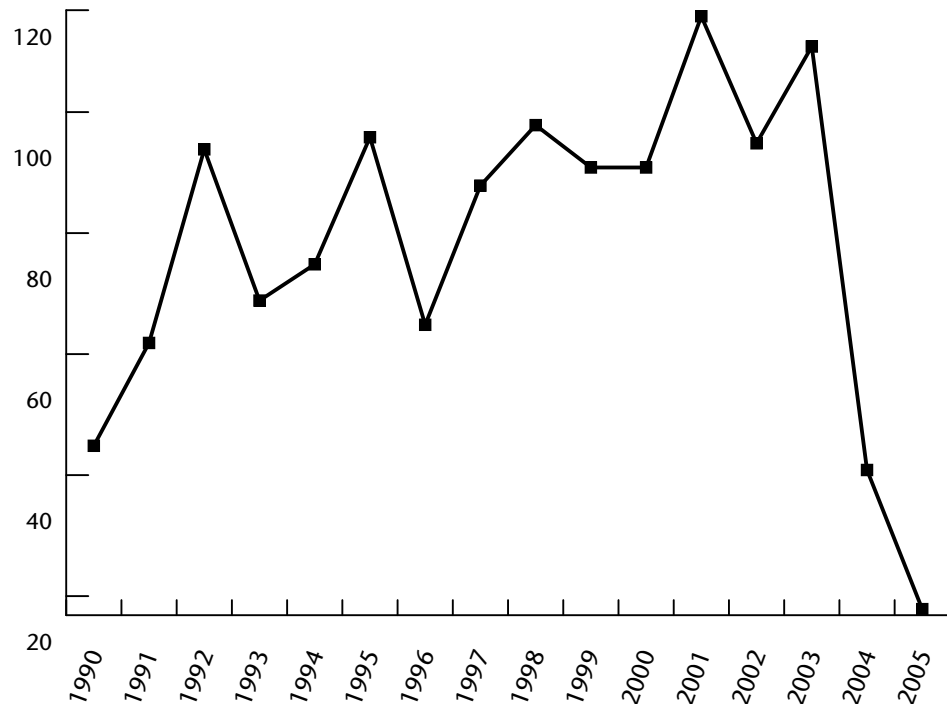
Farmworkers poisoned by pesticides

In 2004, West Coast Environmental Law, working with Progressive Intercultural Community Services, and Abbotsford Community Services, conducted a survey of Punjabi-speaking farmworkers. The survey found that only one quarter of those farmworkers who had applied pesticides reported ever seeing instructions on how to apply the pesticide safely – a requirement under both the PCA and the IPMA. The survey also indicated that there was considerable non-compliance with worker safety requirements related to safety training and availability of safety gear. Sixty-four percent of the farmworkers surveyed reported suffering from symptoms consistent with pesticide poisoning.

Water Act

Generally speaking, the *Water Act*¹¹ deals with the allocation of the right to use water from streams and lakes in British Columbia. Some of the rights allocated through water licences issued by the government include the ability for the licence holder to use, store, divert water or alter a stream or lake. From an environmental standpoint, the Act prevents over-use of water resources and regulates direct changes to the channel of a body of fresh water.

Total number of charges, tickets and written warnings issued under the Water Act 1990-2005



Graph 4 – Total number of charges, tickets and written warnings issued under the *Water Act*, 1990-2005.

Graph 4 shows that while there were some drops in enforcement action in 1993 and in 1996, enforcement actions seem to be somewhat consistent and stable with no major deviations. However, in 2004 and 2005, there was a significant drop in enforcement actions, with the total number of charges, tickets and warnings falling from 114 in 2003, to 21 in 2005. There is no clear indication as to why enforcement action levels have been so low in these years. Unlike most of the other statutes reviewed, 2005 is even lower than 2004, despite an increase in the number of COS staff during those two years.

Never Ask But Always Apologize on BC Lakes

In early 2005, a new property owner on Wasa Lake, in the East Kootenays, built a new beach in front of his cabin, in violation of the province's *Water Act*. The tonnes of sand spread over the foreshore followed on a number of other *Water Act* violations around the lake. After years of advocacy on this issue with government, the Wasa Lake Land Improvement District, (which is responsible for water quantity and quality in the lake) asked for the enforcement of the *Water Act* and an order requiring the owner to restore the damaged foreshore.

Susanne Ashmore, chair of the Improvement District, says, "There was and is a perception in this community that the rules are there to be broken or creatively interpreted to suit the situation. There is a climate of non-governance that is now an open secret in our community. We wanted a clear message from government that the *Water Act* was not just words on a piece of paper."

Instead the government asked the property owner to "make an application for the works," after the fact, and to do some remediation. A ticket or charge was avoided and increased water levels in the spring made any further restoration work impossible.

Shortly thereafter, a second new lakefront property owner made an application under the *Water Act* to groom his beach; approval was granted subject to strict restrictions. The end product: a dump truck delivered tonnes of sand across the foreshore and a tracked excavator "groomed" over 100 feet of pristine waterfront. A site inspection by government verified that the conditions had been breached and a letter followed advising the owner, "If this problem arises at any time in the future, charges will be recommended and your file may be transferred to the ... enforcement agency."

In the first example, there was no attempt to abide by the *Water Act* until after the fact. In the second, approval was granted, but the conditions imposed by government were breached. In both cases, the *Water Act* was violated, and in both cases, no charges or tickets were issued. What message does this send to a community with a history of violations of the Act?

The Improvement District has recently hired a lawyer to help them deal with future non-compliance with the *Water Act*. It is trying to convince the government that compliance with the *Water Act* is not only an environmental issue, but an economic one. "Property values on waterfront at Wasa Lake are now approaching 1 million dollars," notes Ashmore. "That's a lot of tax revenue for Victoria, as long as the lake stays healthy."

Wildlife Act

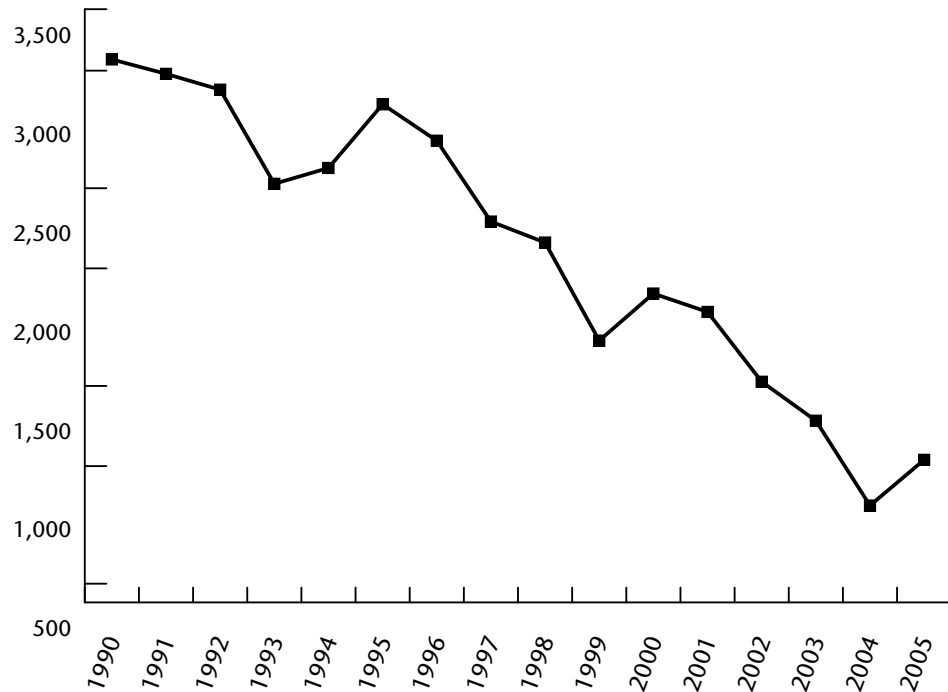
BC's *Wildlife Act* sets out how the government manages wildlife and regulates hunting in the province. The government uses a system of licenses and permits to allow BC residents and non-residents to hunt wildlife in the province. The *Wildlife Act* provisions comprise: hunting and firearm licenses; angling licences; the importing and exporting of wildlife; government powers to manage and protect wildlife and their habitat.

Some of the offences in the Act and its regulations range from:

- altering, destroying or damaging designated wildlife habitat;
- contravening government orders that protect at risk species;
- damaging beaver dams and the nests of certain species of bird; and
- contravening hunting licences or permits issued under the Act.

There are thousands of enforcement activities under the *Wildlife Act* compared to hundreds under pesticide legislation. The protection of wildlife and fish resources has always been core to the COS's mandate.¹⁰ The proportionately high number of enforcement activities could explain where the bulk of enforcement resources by the COS were directed during 1990-2005 as it seems implausible that there are so many more offences committed under the *Wildlife Act* than under other statutes profiled in this report.

Total number of charges, tickets and written warnings issued under the Wildlife Act & Regulations 1990-2005



Graph 5 – Total number of charges, tickets and written warnings issued under the *Wildlife Act* and Regulations, 1990-2005.

Nevertheless, with a few exceptions from 1990 to 2005, there seems to have been a steady decline in the number of enforcement actions taken. For example, information provided by the government shows that in 1990, there were 3,246 enforcement actions taken, compared to the 1,221 in 2005, a decrease of over 2,000 actions. At its low point, in 2004, the level of enforcement action was about one-third of what it had been in each year prior to 1997. Notwithstanding, the enforcement actions under the *Wildlife Act* during this time outnumber the enforcement actions taken under all of the other Acts combined.

Unlike several of the other statutes reviewed here, the *Wildlife Act* has changed little between 1990 and 2005, so decreases in enforcement activity cannot be the result of changes in the legislation. However, the BC government is currently conducting a review of the *Wildlife Act*. It is too early to say whether the proposed changes will affect the enforceability of the Act or not.

Illegal ATV use devastates internationally renowned Columbia Wetlands

The Columbia Wetlands have been designated as a site of international significance, under the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* (also known as the *Ramsar Convention*). The *Ramsar Convention* website states that “the wetlands are the largest wetland of its kind in BC, and is home to endangered species such as the bulltrout, peregrine falcon and the badge, and comprises a regionally unparalleled diversity of 16 habitats...is a nesting and rearing habitat for over 180 species of birds of the 216 species in the area.” (http://www.ramsar.org/wn/w.n.canada_columbia.htm)

In the preamble to the *Ramsar Convention*, member governments stated that wetlands “constitute a resource of great economic, cultural, scientific, and recreational value, the loss of which would be irreparable.”

Ellen Zimmerman, of Wildsight, knows first hand the difficulty in getting a conservation officer to enforce the Act even in an area that has international value for wildlife habitat. She has fought for a number of years to have the Columbia Wetlands protected. The wetlands, stretching some 180 kilometres along the Columbia River, are designated as a Wildlife Management Area – important wildlife habitat protected under the *Wildlife Act*.

The Conservation Officer Service currently has only one enforcement officer responsible for both the Invermere and Golden Timber Supply Areas – a vast area of over 20,000 square kilometers. One very small part of his job is monitoring and addressing *Wildlife Act* violations in the Columbia Wetlands. Ellen notes that prior to 2002, there were four officers responsible for this huge area. However, this number was reduced to two, and, more recently, has dropped to one due to a retirement; the other post has remained vacant for the last nine months. In the meantime, illegal ATV use within the wildlife management area frequently results in environmental degradation of the wetlands. Ellen explains that while public education has helped people to understand the significance of the area, there are a core few who need effective deterrence in the form of tickets, fines and warnings.

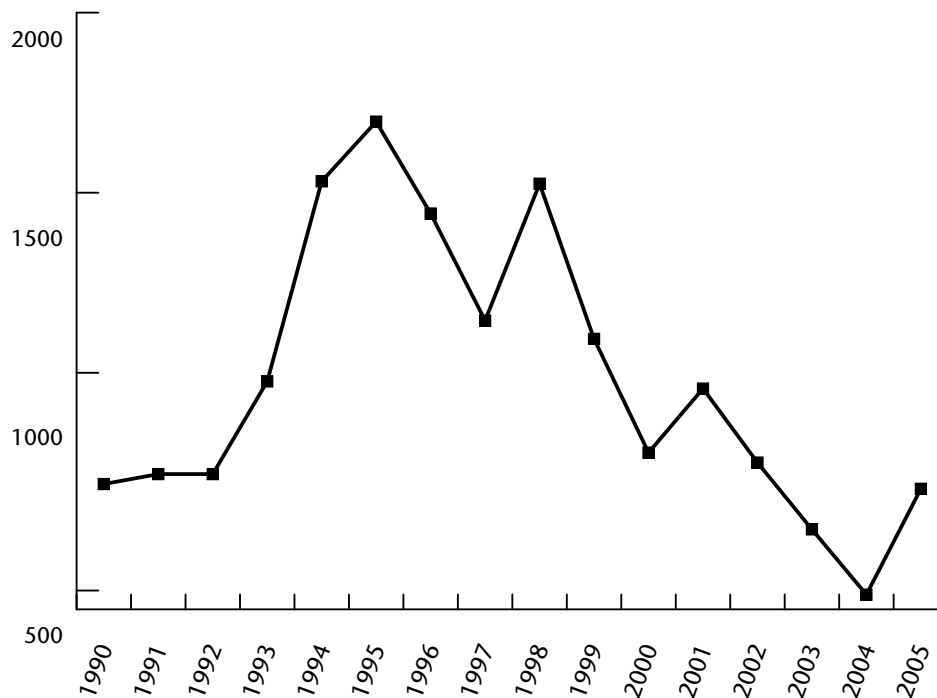
Federal

Fisheries Act

The *Fisheries Act* is a federal act where agreements between the federal authorities and the provinces enable the COS to enforce provisions of the Act. In the case of BC, the *Canada-British Columbia Agreement on the Management of Pacific Salmon Fishery issues* and the *Canada – British Columbia Fish Habitat Management Agreement* are designed to facilitate better federal-provincial relations or cooperation in protecting fish and fish habitats generally. The COOR database contains a number of entries with respect to the federal *Fisheries Act*.

This means that data from other staff, such as federal Fisheries and Oceans Canada staff, has not been included in the analysis. Also, the data does not reveal enforcement and compliance with all the offences under the *Fisheries Act*, only those which can be enforced by the COS.

Total number of charges, tickets and written warnings issued under the Fisheries (Federal) Act 1990-2005



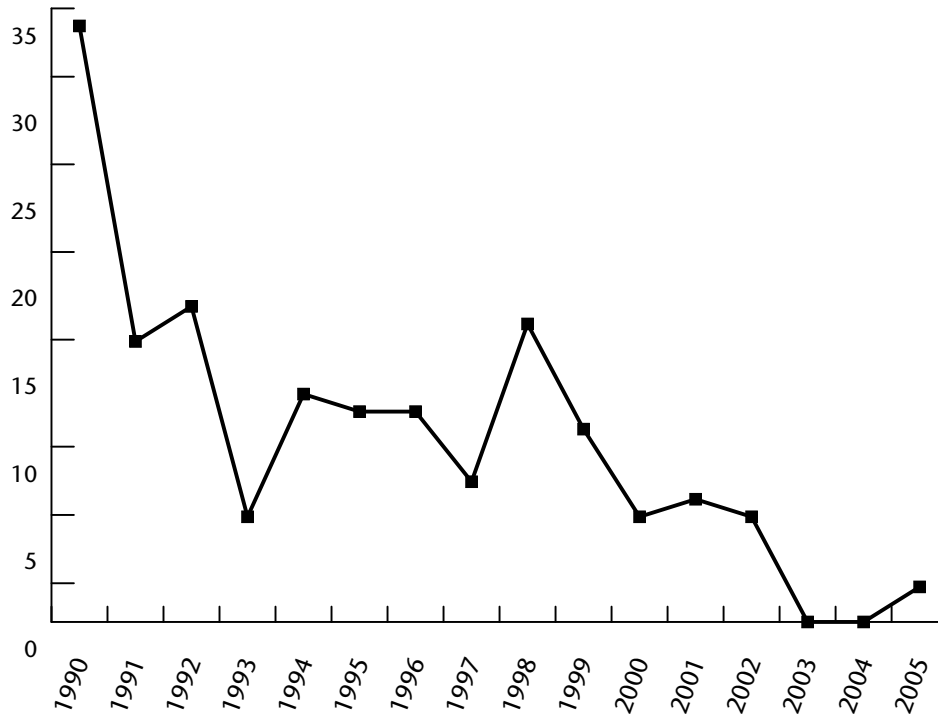
Graph 6 – Total number of charges, tickets and written warnings issued under the *Fisheries (Federal) Act*, 1990-2005.

Graph 6 shows a steady level of enforcement activities from 1990-1995, followed by a sharp increase between 1995 and 1996. Thereafter, there is an overall decline in the total number of enforcement activities until 2005 after which a slight increase in enforcement activities is seen. It is notable that the enforcement activities range in thousands, rather than the lower number of enforcement activities seen for the other statutes.

Migratory Birds Convention Act

The *Migratory Birds Convention Act, 1994* (MBCA) is another federal statute, and its purpose is to protect and conserve migratory birds and their nests. The federal authorities work closely with a number of partners including provincial enforcement officials, to enforce the law.

Total number of charges, tickets and written warnings issued under the Migratory Birds (Federal) Act 1990-2005



Graph 7 – Total number of charges, tickets and written warnings issued under the *Migratory Birds (Federal) Act, 1990-2005.*

The data in Graph 7 shows that the total number of tickets, charges, warnings issued by the COS declined sharply from 1990-2005. Enforcement actions have generally been quite low during this period, from highs of 34 in 1990, to mid-levels of between 13 to 18 from 1991 to 1998, to a recent all time low of 0 to 6 during 2000 and 2005.

It is possible that the federal government, which has primary responsibility for the enforcement of this Act, is playing a more aggressive role in its enforcement. However, when viewed alongside the decline in enforcement activities under the other statutes reviewed, it seems that there is cause for concern.

General comments about the enforcement activity levels

It is clear that, in relation to these six statutes, the numbers of enforcement actions taken by the COS have declined since 1995, and in many cases declined quite sharply from 2003 to 2005.

Environmental laws need effective compliance and enforcement work by government to be effective. We hope that the province will turn its attention to determining why levels of enforcement have dropped so sharply in the past decade, and what can be done to ensure that the BC government has a well-funded and effective compliance and enforcement program in respect of its environmental laws.

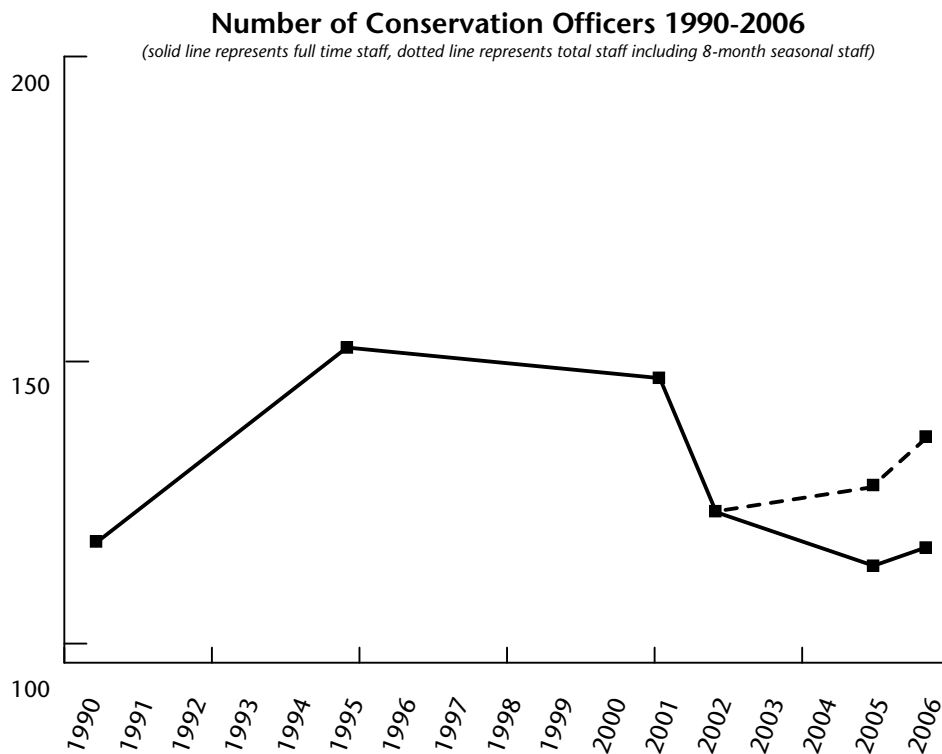
There are two factors that appear to have been major themes in the drop in enforcement action:

- reductions in funding and staff; and
- changes to policy and legislation.

Reductions in funding and staff

Between 1996 and 2005, the ministries governing environmental concerns faced some of the most severe budget cuts when compared to other ministries.¹⁵ These cuts eliminated many compliance and enforcement positions, while programs for monitoring compliance and managing or protecting fish and wildlife habitats faced severe reductions to their already low staff levels.

In July 2001, the then Ministry of Water, Land and Air Protection had 1,317 full-time employees; in February 2004, only 924 full-time employees remained.¹⁶ The number of Conservation Officers peaked in 1995, with 152 full-time staff. In 2004, that number had dropped to 120 (five positions were vacant). Moreover, many of the positions for scientists, field staff and other staff that supported the COS had been eliminated, requiring Conservation Officers to spend more time at their desk, and to manage with less expertise in the field.



The above graph indicates seasonal officers with a dotted line, while the solid line indicates year-round Conservation Officers.

The following extract is from the Ministry of Environment 2002/2003-2004/2005 Service Plan:

The ministry's challenge is to achieve its environmental mandate with substantially fewer ministry staff and funds. Over the next three years, the ministry will be changing its business methods to reduce its own costs, reduce the costs incurred by those who must meet environmental standards, reduce conflicts and litigation, eliminate service backlogs and focus efforts in areas where there is the greatest risk to the environment.

However, since 2004, there has been a steady, and welcome, increase in the compliance budget. In 2005, there were 129 Conservation Officers: 116 full-time and 13 seasonal officers hired for eight months each year. This figure increased to 137 in 2006, with 119 full-time officers and 18 seasonal officers.

This has been accompanied by increases in the numbers of other enforcement staff across the Ministry of Environment, and in the February 2007 budget, the government increased the budget for compliance activities (including the COS) to \$18,482,000 with the equivalent of 152 full-time staff.¹⁷

Although these are steps in the right direction, the budget and staff level dedicated to enforcement initiatives are however, still significantly lower than what is needed. BC has not yet restored enforcement staff numbers to historic levels. Furthermore, the reduced numbers of support staff, such as scientific technicians, biologists and clerks

remains unaddressed. Currently, there are Conservation Officers in regional offices that still lack administrative support, which means that they spend less time in the field and are less effective when they are there. While the COS states that this issue has been identified as a priority, there is no information or timelines available as to when this issue will be resolved.

In addition, it is difficult to tell from the available information what percentage of the compliance budget is spent on actual enforcement activities.

Finally, the number of Ministry staff undertaking focused compliance related activities in each department seems to be very small. For example, there are only nine full-time staff across the Province in the Integrated Pest Management Branch that are able to do inspections and other compliance activities. The newly formed Compliance Policy Planning division responsible for “ministry-wide leadership and service in support of a strategic approach to compliance management”¹⁸ has only a small team (four full-time staff) to advise on compliance policies. Clearly the distribution of compliance resources remains an issue.

Changes to policy and legislation and moving towards “results-based” regulations

Alongside cutbacks in government funding, there were also a number of changes to both policy and legislation, that have had implications on environmental protection. In 2001-2002, the government committed to a reduction in the “regulatory burden,” substantially decreasing the number of regulations that affect industry. This was achieved through new laws that claimed to be “results-based.” As noted previously, (see the box on page 9) “results-based” legislation, if not carefully drafted and accompanied by appropriate compliance and enforcement activities, can undermine environmental protection. The changes to BC’s laws have been criticized as doing just that.

Government processes and procedures currently in place

In 2005, the Ministry of Environment established a new Compliance Division to develop compliance policy and planning and to help implement the compliance goals of the Ministry.

Nevertheless, the interviews conducted and documents reviewed make it clear that the Government has yet to develop many essential compliance tools. In particular, there is an urgent need for more assessment of compliance and enforcement efforts and their effectiveness, and for government to release more information to the public on individuals and corporations that violate BC's environmental legislation.

1. Ministry policies on compliance

In 2005, the Ministry released its *Compliance and Enforcement Policy and Procedure*,¹⁹ which is intended to provide guidance to the COS and other enforcement bodies on how the Ministry will promote compliance with environmental laws.

A publicly available policy is a step forward in terms of transparent decision-making, as well as promoting consistency between different branches of the Ministry and different conservation officers. Some staff felt that the policy, and in particular, the "non-compliance matrix," which sets out what types of compliance and enforcement action is considered appropriate in a particular situation, will help to prioritize enforcement action, making it more effective in future. The actions are prioritized on high risk activities and history of the file.

COS rolls out Commercial Investigations

The most recent enforcement innovation in the COS these days is the Commercial Environmental Investigations Unit (CEIU) – eight investigators and a manager dedicated to undertaking complicated and large scale investigations. The CEIU is touted as allowing the COS to respond to "complex commercial and industrial investigations that may be multi-jurisdictional and have significant potential for harm to the environment and/or public safety."

Launched in 2006, the CEIU has recruited and trained its staff (half of whom were selected from outside the COS), and is now getting down to the business of conducting investigations. As this report went to press, Ministry staff indicated that investigators are writing up reports from the unit's first two investigations, which will be referred to government lawyers who will decide if charges should be laid. As yet the CEIU's work has not resulted in enforcement action, but between four and eight further investigations are underway. The unit's most recent investigation is of the cause of the oil spill in Burnaby, and will involve cooperation with federal government enforcement staff.

Staff explained that the CEIU was an effort to move away from decentralized, independent enforcement to a team approach, with plain clothed officers working together on larger investigations. The CEIU investigators are not required to respond to day-to-day complaints or requests from the public, and can focus their resources on pursuing investigations aggressively.

The CEIU does not, by itself, address many of the concerns identified in this report. It will not restore historic COS staffing levels or solve the short-comings of Ministry enforcement auditing. However, the CEIU represents an important new approach to enforcement by the COS. At this stage, it is too early to tell whether this team approach with a focus on larger, higher-threat investigations will increase the numbers of charges or other enforcement action taken by the COS.

Investigations are undertaken after a Regional Management Compliance Team has reviewed the file to determine the action needed.

That being said, the matrix continues to prioritize written warnings and education over other actions, such as tickets or charges, that have more direct consequences. In light of the findings of Part 3 below, it is appropriate to increase the use of tickets and charges, so as to ensure that violators have a perception of real consequences from non-compliance.

2. Compliance reports

Provincial reports

Until 2001, the Environment Ministry periodically released a detailed non-compliance report, publicly highlighting which individuals and companies were failing to comply with the province's environmental laws. These reports were viewed as effective, as the majority of violators preferred not to be listed on these compliance lists.

After a long hiatus, in 2006, the government finally reinstated a compliance and enforcement summary for the province. For example, the fourth Quarterly Compliance and Enforcement Summary for 2006 (between Oct 1, 2006 and Dec, 31 2006) recently released, states that:

- 7 orders were issued to prevent or stop impacts to the environment, human health or safety
- 95 administrative licensing sanctions were taken against individual or commercial hunters or anglers for committing certain offences
- 887 tickets were issued
- 12 court convictions were obtained
- \$252,840 in fines were sanctioned²⁰

However, while the Summaries provide general figures on the numbers of sanctions, fines, tickets, convictions and orders, very few details of the offenders are released.²¹ The previous non-compliance reports were much more detailed, resulting in a greater public exposure of those who violated environmental laws.

For example, the details recorded for a permit violation for sawmill burner emissions under a non-compliance report identified the offender and then went on to note:

- "Exceeded permit limit for opacity during all six months of report period; based on permittee data.
- A warning letter was sent in December advising company that they must improve emissions from the burner and comply with permit conditions for opacity; company indicated that if they are successful renewing their timber licence, they intend to upgrade the facility by installing a hogger and hog in-

cinerator with heat recovery for the plant; if not successful they will shut down the plant permanently.

- Seventh time on report.”²²

These kind of details give a far better insight into the offence and whether a regulation is working or not, and information on repeat offenders could help target further investigations and inspections, but also work with that company to develop better compliance.

When asked about the difference between the two reports, Ministry staff indicated that the reason for limited information in the new compliance and enforcement summaries was a lack of confirmed data. This would infer that the process or system needs to be improved, so as to allow the previous level of information to be publicly released. Otherwise, there is an appearance that only select or sanitized information is being presented to the public, contrary to transparency and best practice.

Other types of compliance assessment reports

According to Ministry staff, regional offices sometimes develop their own compliance assessment reports on key sectors, independent from more centralized efforts. However, these assessment reports are often infrequent and based on public complaints or media attention, or the concerns of the individual officer.²³ There does not seem to be any procedure for staff to report their information to the main compliance division for monitoring of trends and information or to ensure that future compliance efforts are informed by the assessment. This approach can lead to inconsistent monitoring overall and may not be an effective enforcement tool.

It is not clear how and whether the recommendations of these compliance assessment reports are implemented, or whether the results will be available to other COS staff in future enforcement actions. If these enforcement efforts are not incorporated into the Ministry’s data, then there is no guarantee that violators identified in those reports will be dealt with more severely if there are future breaches of the Acts.

3. Future initiatives

Ministry staff say that the Ministry of Environment has yet to develop indicators to measure whether compliance and enforcement efforts are achieving environmental goals, but that doing so depends upon the available resources. Other than the Compliance and Enforcement summaries, there is little to indicate that effective sharing of compliance information (and other indicator information) occurs with other government departments, different jurisdictions, or different levels of government.

The work of Ministry field staff is typically divided between both regulatory and enforcement roles. The Environmental Protection Officers, and scientific officers in general, are responsible for both monitoring environmental quality and collating compliance information, while the COS is responsible for enforcement activities.

A new database system is currently in development that could eventually include information gathered by the Environmental Protection division. Such a system would be invaluable in guiding COS compliance and enforcement activities. Staff envisage that the system will “eventually include a compliance module that will assist staff in tracking compliance inspection results and non-compliance issues related to authorized activities.”

However, it is unclear when, or if, such a compliance module will be implemented. Although staff claim that it is a “high priority,” they also emphasize the time-consuming nature of such a project, given the need to collate numerous data from different sources. In addition, while the AMS may be a more centralized database than the current system in use by the Ministry, it appears that there is other compliance and monitoring information that needs to be centrally available.

Finally, according to staff, compliance and enforcement data are not systematically evaluated against information about environmental quality to see if the results of the laws, and the government’s efforts to ensure compliance with them, are achieving real, on the ground environmental benefits.

Ministry staff report that, without a formal monitoring system, regional staff rely on their own experiences, insights and individual judgment in undertaking compliance activities. We do not doubt that individual staff may develop their own body of knowledge about how compliance works. However, there is a real risk that compliance efforts may become arbitrary and may vary from officer to officer. In addition, the body of knowledge developed by each officer will leave with them when they retire, and these kinds of informal processes will not help others to do their jobs in the future. There is an urgent need for the Ministry to undertake a more formal assessment of compliance and enforcement trends to better inform future compliance planning.

Part 3: Enforcement and Compliance Policies – 2007 and Beyond

When government adopts “results-based” regulations that allow flexibility in the way that targets and standards are achieved, there is an increased responsibility on that government to ensure that those standards are reached.

A short-sighted and effectively inadequate response is to devolve responsibility and move to “results-based” regulations while simultaneously reducing human resources and budgets – this leads to *less* not more, effective environmental protection. See the discussion in Part 1 on some of the difficulties in enforcing a “results-based” environmental regime.

The key recommendation of this report is that in an era where most Canadians are ranking environmental protection as the top priority for government policy, effective compliance and enforcement with laws that truly protect the environment are required. Poor compliance can lead to poor environmental quality and can undermine the legal system itself, if citizens see that laws in place are not working.

While many people will comply with the law because it is the right thing to do, compliance and enforcement regimes need to deal with the “bad apples” – individuals or companies that hope to get away with breaking the law, and aren’t simply breaking the law because they don’t know any better. If corporate violators are allowed to cut corners and operate illegally, then their competitors may feel that they need to cut corners too in order to compete. Both individuals and corporations may feel tempted to break the law when they see someone else getting away with it. Education on how to comply with the law is important – particularly where the law is complex – but enforcement is crucial.

Effective compliance and enforcement does not just happen. Government must develop systems to promote compliance with laws, and to enforce those laws. To ensure that compliance and enforcement efforts are working, and that existing regulations are protecting the environment, there needs to be effective monitoring of compliance. There is no doubt that proper use of incentives can have a “carrot” effect, inducing potential offenders to achieve compliance, but those initiatives should be in conjunction with effective enforcement.

There are many places to look for lessons on how to set up effective compliance and enforcement programs. For example, in proposing improvements for future compli-

ance and enforcement policies for BC, this report has drawn, in part, on the work of The International Network for Environmental Compliance and Enforcement²⁵ (INECE) – a network of government and non-government enforcement and compliance practitioners around the world.

In addition, over the past few years, academics and law enforcement officials alike have studied environmental enforcement practices. The message is clear: aggressive enforcement strategies need to first be in place to increase compliance with laws, and to better protect the environment.

One recent publication sets out a number of goals for an effective environmental enforcement and compliance system, which include the following:²⁶

- A high probability of detecting violations;
- Serious implications from detection;
- Public disclosure of environmental performance;
- An enforcement framework which involves a number of different groups; and
- Effective indicators to see if enforcement and compliance methods and processes are working to ensure accountability.

While these goals were written with the compliance and enforcement of international environmental laws in mind, they apply equally to BC. Many of the studies of effective compliance and enforcement adopt similar factors, and we will examine each of the factors in more detail.

1. High probability of being detected

The first thing that a “bad apple” needs to know is that if they break the law, there’s a good chance that someone will notice. In his 1998 report,²⁷ Peter Krahn, then the acting head of the inspections division for Environment Canada in the Pacific and Yukon Region, documented compliance in three related industries in BC:

- the Anti-sapstain Wood Preservation Industry
- the Pulp and Paper Mills
- Heavy Duty Wood Preservation Mills

Krahn reported that there were low compliance levels and higher levels of pollution, when there was a greater use of a voluntary compliance system. However, an aggressive enforcement plan which introduced more inspections and investigative actions resulted in high levels of compliance. One of the main driving forces in pushing the government to implement a more aggressive enforcement plan was the demands made by the public, including non-profit environmental organizations.

Similarly, when enforcement resources were diverted away from the heavy duty wood preservation industries to the anti-sapstain and pulp and paper industries, the

wood preservation industries were less likely to comply. Once a strategic enforcement initiative was applied to the wood preservation industry, the discharge levels of pollution significantly declined to meet compliance standards. While this is a federal report, the lessons from the report are equally relevant at the provincial level. Krahn's findings underscore the importance of combining regular inspections and legislative support with aggressive and strategic enforcement plans and public support.

Staffing is a key factor. The sheer size of British Columbia poses some difficulties for detecting environmental violators, especially in rural areas. Even with recent budget

Prince George choking on illegal emissions

Prince George, with several industrial plants situated in a bowl-like depression, traps air emissions, making it one of the most polluted cities in BC. One would hope that the Ministry of Environment would make certain that these industrial polluters meet the requirements of the *Environmental Management Act*, but even here it's possible for illegal polluters to go undetected for years.

In 1995, a pellet plant was built in the city by PFI Pellet Flame Incorporated (PFI). The government issued a permit authorizing it to emit about 60 million tonnes of particulate matter per year. Over a period of several years, there were ongoing complaints about the plant from the public. On at least one occasion – in 2002 – Ministry staff investigated. Noting that the permitted emissions levels should not be resulting in “visible discharge ... [and] accumulated dust” the Ministry issued a ticket for \$575. However, there was no testing of actual emissions levels or a requirement that PFI start monitoring the levels of emissions. Ministry staff noted: “The excessive discharge appears to be a blatant disregard for the permit. ... The ticket should be served as soon as possible so that it is viewed as a deterrent to the present operating status of the plant.”

However, at no point did the Ministry actually examine how much particulate matter was being discharged from the plant; nor did they follow up to see whether PFI had started to comply with its permits. When the Ministry staff was asked about the failure to follow up on the problems identified in its investigation, staff acknowledged that staff cutbacks in 2002 had probably played a role in the Ministry's failure to require further monitoring. Given the resources that were available, the Ministry “focused on what the priority issues were at that time.”

In 2005, the plant changed hands. The new owners, Pacific BioEnergy Corporation, decided to replace the old plant, and applied for a new permit. When the Ministry requested that it conduct base-line monitoring of the old plant – as part of the application process for a new permit – Pacific BioEnergy found that the plant was emitting about 380 million tonnes of particulate matter each year – **over six times the levels allowed by its permit**. As far as anyone can tell, this situation of non-compliance had been going on for many years, despite ongoing public complaints.

What was the Ministry of Environment's response? They didn't charge the former owners with violating the terms of their permit. Nor did they make an order requiring the new owner to comply with the permit requirements. Instead, they issued a temporary permit to allow the old facility to operate legally until the new plant is completed. More recently, the Ministry has granted a new permit allowing Pacific BioEnergy Corporation's new plant, once it is operational, to emit about 180 million tonnes of particulate matter per year – or about **three times** the levels allowed by the original permit – and to do so from a new location, closer to the residential areas of the city.

In retrospect, there has been a glaring failure on the part of the Ministry to identify and address chronic non-compliance with the *Waste Management Act/Environmental Manage Act*, despite a history of ongoing complaints from the public in one of the most polluted cities in the province. Ministry staff indicated that once they became aware of the problem, they focused their staff resources on getting real reductions in the actual emissions levels, rather than laying charges or issuing tickets.

increases to the COS, if BC's total area were parceled out equally among the 137 Conservation Officers (18 of whom are seasonal), each would be responsible for about 6,900 square kilometers. Even if other Ministry of Environment staff responsible for some aspect of enforcement are included, each of the 152 staff (based on the 2007 budget) would be responsible for over 6,200 square kilometers. The ratio becomes more absurd, since some Conservation Officers and other staff are in fact responsible for much larger areas. This kind of statistic sends out a message to offenders that there is little chance of being caught.

2. Serious implications from detection

Deterrence has had a central role in the Canadian criminal justice system for decades, although deterrence alone has not proved to be effective in reducing offences – for environmental and traditional crimes alike. However, the joint forces of increased penalties and increased enforcement initiatives have been found to successfully deter companies from committing environmental infractions. As Krahn found in his analysis of several lumber related industries in BC, a strong enforcement strategy along higher fines, led to significant increases in compliance.

In a recent article in the *RCMP Gazette*,²⁸ panelists that included the Vice-Chair of the Ontario Environmental Review Tribunal, the Director of Federal Enforcement Branch, RCMP and the National Executive Director of the Environmental Enforcement Directorate at Environment Canada, discussed their personal views on environmental crime and effective deterrents. Many of the points raised are equally relevant to compliance and enforcement policy in BC:

- An effective deterrent effect is where consequences are certain, relatively swift and severe enough to dissuade criminals from committing the crime in the first place.
- High cost to the government for any associated cleanup and the lasting damage caused to the environment are rarely reflected in the penalties. Appropriate penalties are critical for establishing the necessary deterrence.

3. Public disclosure of environmental performance

If the public knows that violators have broken an environmental law, this embarrasses the violator. They may lose business or be shunned by former friends. Peer pressure, and the financial implications of bad press, can be a powerful tool.

The recent *RCMP Gazette* article on environmental enforcement noted the effectiveness of publicizing the identities of violators as a deterrent.

It is important that compliance information should be publicly accessible. In March 2006, the Sierra Legal Defence Fund (SLDF), an environmental organization, request-

ed a list of BC's major non-compliant companies from the government. In reply, the Ministry of Environment told SLDF that to obtain this list, SLDF would need to pay a prohibitive fee of \$172,947.50. In a letter to news publications, SLDF wrote:

"In Sierra Legal's ongoing dispute with the Ministry of Environment before BC's Information Commissioner, the ministry admitted up to 500 facilities are in such serious non-compliance that they pose a risk to public health. Yet only one conviction for this type of violation is revealed in the ministry's report."²⁹

In a paper examining the need for public disclosure programs to complement traditional enforcement actions (fines and penalties), the authors looked at BC's non-compliance reports and their effect on 15 plants in the pulp and paper industry from 1987-1996. The authors found that the public disclosure strategy had a larger impact on both emissions levels and compliance status than orders, fines and penalties. It concluded that public disclosure of environmental performance did create additional and strong incentives for pollution control.³⁰

While the BC Government has recently released quarterly compliance and enforcement summaries, these summaries do not generally contain the identities of violators (apart from those convicted of an offence) or information about the harm caused by their offences. For public disclosure to act as a deterrent to violators, these and other types of information should be publicly disclosed.

4. Create an enforcement framework which involves a number of different groups

The same RCMP *Gazette* article reports the panel's recommendations that:

- To effectively combat environmental crime, the RCMP needs to work more closely with partners such as Environment Canada. Intelligence at the strategic and tactical levels must be enhanced to determine investigational priorities aimed at the worst offenders.
- A communication strategy must be developed to make the public more aware of how to detect and report these crimes.
- Victim impact statements should be entered into court to ensure that judges hand down significant penalties.

While the comments were directed at the RCMP's activities, these experts clearly recognize the need for more than just a single enforcement body – such as the Conservation Officer Service – to uphold environmental enforcement. Effective enforcement involves coordination across government, between levels of government and with the public.

What this means is the Ministry of Environment should explore coordinating the

monitoring and enforcement of environmental laws with other departments and other law enforcement agencies. In addition, the COOR database and any future information systems containing compliance and enforcement data should be accessible not just to the COS but to other government regulators and law enforcement agencies.

Compliance and enforcement efforts do not need to be limited to the provincial government. These efforts can also be supported by the media, and all levels of government. For example, local municipal efforts can be supported by the provincial efforts.

The public itself can provide valuable support to government enforcement activities. Indeed, in a vast province such as BC, reports from rural residents, hikers, hunters, boaters and other members of the public would provide effective first warning to the government of possible offences. Laws and government programs that enable the public to be involved encourage greater public participation and enforcement.

The Ministry of Environment has a toll free number³¹ that members of the public can use to report violations of the law. However, the government can also work more closely with environmental, community, and industry organizations and others to involve them in compliance work. The Ministry's Compliance Management Framework already recognizes this need, although the involvement of the public in enforcement efforts is not emphasized:

The engagement of partners and stakeholders varies across the Ministry; it ranges from consultation to joint delivery of compliance functions. Some stakeholder groups are instrumental in helping the Ministry to clarify, set, or review regulatory requirements; others develop and deliver promotional materials and undertake public education and training on our behalf; and still others assist the Ministry in verification activities.³²

Just as it is crucial that violators fear getting caught when they break the law, it is also important that the public feels that their concerns and complaints about environmental offences will be effectively and appropriately addressed through compliance and enforcement action. Unless members of the public have confidence in Ministry compliance and enforcement actions, they may be reluctant to report offences to the Ministry.

BC's environmental laws should also give citizens a more central role in enforcing the law. Several jurisdictions allow citizens to prosecute charges against violators where the government is unable or unwilling to do so (with appropriate safeguards for the rights of the alleged offender). Others have laws allowing members of the public to sue a violator for harm suffered as a result of the violation. These and other tools could greatly enhance the role of the public in enforcing BC's environmental laws.

By partnering with anyone who is willing to work together to protect the environment, the COS gains eyes and ears everywhere, and can better direct its own compliance and enforcement activities.

5. Develop effective indicators to see if enforcement and compliance methods and processes are working

Performance indicators can be used as processes to monitor internal and external information. For example, a department can monitor how many inspections it is conducting. There can also be external facts to monitor: for example, how many permits are being monitored for compliance. The Director at the Office of Compliance at the US Environmental Protection Agency, Michael Stahl³³ cautions that performance indicators must be relevant, transparent, credible, functional, feasible and comprehensive.

Indicators and measurement of the effectiveness of compliance and enforcement action has generally not occurred in BC. There needs to be a further development and use of these indicators. Stahl has indicated some of the examples of indicators that could be used for collating data in monthly/quarterly reports and we suggest these should be adapted and used in BC:

- number of inspections conducted;
- number of enforcement actions issued;
- amount of fines/penalties assessed;
- amount of investments in pollution control/beneficial projects;
- enforcement action resulting in pollution reductions;
- regulated entities reached through compliance assistance; and
- increased awareness, improved practices pollution reduction through compliance assistance.³⁴

Stahl also states that data from these indicators should be organized by type of activity, regional/provincial office, statute or program area. In addition, the government should consider comparing regional or provincial data to regional performance, national averages or historical performance.

Just as this report could not make definitive findings on the reasons for the trends in enforcement because we did not have enough information, government indicators need to be chosen that will allow the government to make a complete assessment of the effectiveness of compliance and enforcement.

While statistics on the numbers of inspections and success in achieving compliance are important, the government should also develop or better utilize internal indicators to track the on the ground impact of compliance and enforcement efforts, and of BC's environmental laws more generally. Dr. Cary Coglianese, a Harvard Law Professor, notes that

“Regulatory agencies have long publicly reported their activities (e.g., number of inspections or fines collected) as an indication of their success.

Increasingly, however, agencies are looking to evaluate themselves in terms of their performance in solving regulatory problems.”³⁶

This means that indicators can and should be chosen that examine whether compliance activities result in improvements to the environment or public health. At the end of the day, that’s what environmental laws are all about.

Part 4: Closing Remarks and Recommendations

In the last two decades, the level of environmental protection afforded by the province’s laws and policies has risen and fallen dramatically. Government efforts to enforce and ensure compliance with these laws have mirrored these changes.

Since 1995, there has been a significant decline in the number of enforcement activities taken by the Conservation Officer Service; this is true even for enforcement actions that lack an immediate consequence, such as written warnings. Two possible causes for this decline are the loss of staffing resources during the same period, combined with the creation of a number of difficult to enforce “results-based” laws.

It appears that the government has moved towards a potentially difficult to enforce “results-based” regulation system, without implementing an adequate check and balance system. While further research needs to be done, it seems that when easier to enforce, more prescriptive laws were dismantled, and replaced with laws which require more data and effort to enforce effectively, the government failed to ensure that a fully developed and adequately funded monitoring, compliance and enforcement program was in place.

Ministry staff have suggested that the tools necessary to track the effectiveness of compliance and enforcement efforts are being developed, but these accountability systems have yet to be adopted. Meanwhile the dramatic decline in enforcement actions should concern all British Columbians who want to see their laws upheld and the environment protected.

Key recommendations

There are many different ways to ensure compliance and enforcement of laws. However, there are some demonstrated key ingredients for an effective compliance strategy. Based on the research for this report, several key recommendations have emerged:

1. Increase consequences of non-compliance

Prioritize enforcement action that has teeth. While written warnings will always be one tool available to Conservation Officers, violators must have an expectation that if their non-compliance with the law is detected, there will be direct and significant consequences.

2. Increase human resources

Increase the staffing levels to meet the demands of effective and efficient monitoring and enforcement practices. This includes providing administrative support staff for those offices where conservation officers need to be out in the field and conducting inspections rather than doing administrative work.

3. Make laws enforceable

Enact laws that are unambiguous and easily enforceable. Environmental laws should be written in such a way that compliance can be easily assessed, with a range of different types of legal tools available to ensure environmental protection. This type of certainty is better not only for the environment, but also for individuals and companies that want to make certain that they comply with the law.

4. Increase transparency and accountability

Ensure that the public has access to a greater amount of information. In particular, publish information on individuals and companies that fail to comply with environmental laws, together with enough information for the public to understand what law was violated and how.

5. Institute information and auditing systems

Develop information systems, indicators and auditing systems to allow for the effective management and evaluation of compliance efforts. Although efforts have been made to develop centralized information systems, much of the government's information about how enforcement occurs and whether it has been effective has yet to be incorporated into these databases. In addition, indicators need to be set and audits intended to evaluate the success of compliance efforts need to be conducted on a regular basis.

6. Work with other departments, governments and law enforcement agencies

Coordinate the Ministry of Environment's monitoring and enforcement activities with other government departments and other levels of government that work on similar issues. In addition, developing links with law enforcement agencies would expand the intelligence resources available to the Ministry.

7. Allow citizens to enforce the law

Amend BC laws to make it easier for citizens to pursue private prosecutions or litigation, where there has been environmental damage, and where it is in the public interest to do so.

Notes

- ¹ See for example, Jerry V DeMarco, Toby Vigod, *Smarter Regulation: The case for enforcement and transparency*. 17 J.Env.L. & Prac. 85. March 2007.
- ² BC Ministry of Environment, *Compliance and Enforcement Policy and Procedure*, Version 1, June 2005. Available at: http://www.env.gov.bc.ca/main/prgs/docs/ce_policy_and_procedure.pdf.
- ³ Please refer to the Ministry of Environment's *Compliance Management Framework*, dated January 2007. Available at: http://www.env.gov.bc.ca/compliance/mgmt_framework.html.
- ⁴ We requested this information during information interviews and understand that the comparative data for enforcement budget over time was not available. However, we did not make any Freedom of Information requests.
- ⁵ *Integrated Pest Management Act* [SBC 2003] Chapter 58.
- ⁶ ENKON Environmental Limited, "Survey of Pesticide Use in British Columbia: 2003" (Environment Canada and the Ministry of Environment, October 2005), [hereinafter ENKON] at p17-18. Available at: http://www.env.gov.bc.ca/epd/epdpa/ipmp/technical_reports/pesticide_survey2003/pest_survey_03.pdf – last accessed March 14, 2007.
- ⁷ We were told that the files were confidential. No requests under the *Freedom of Information and Protection of Privacy Act* was made for this information.
- ⁸ *Environmental Management Act* [SBC 2003] Chapter 53.
- ⁹ Ben Parfitt, *Untracked toxic waste seeps out of sight*, The Georgia Straight, 18 January 2007. <http://www.straight.com/article/untracked-toxic-waste-seeps-out-of-sight>.
- ¹⁰ See the Conservation Officer Service website: <http://www.env.gov.bc.ca/cos/100years/1905/index.html>.
- ¹¹ *Water Act* [RSBC 1996] Chapter 483.
- ¹² *Park Act* [RSBC 1996] Chapter 344.
- ¹³ BC Parks Attendance Statistics. See <http://www.env.gov.bc.ca/bcparks/facts/attendance.html>. The statistics are said to be based on "recorded visits are those recorded through campground registrations, trail and traffic counters, and visual counts."
- ¹⁴ See Western Canada Wilderness Committee press release, dated February 01, 2007. Available at: <http://media.wildernesscommittee.org/news/2007/02/12393.php>.
- ¹⁵ See the GreenBiz website for further information. Available at: http://www.greenbiz.com/news/news_third.cfm?NewsID=10245 – last accessed April 29, 2007.
- ¹⁶ Please refer to West Coast Environmental Law, *Please Hold, Someone Will Be With You* (2004) for a full discussion on the cutbacks. Available at: <http://www.wcel.org/wcelpub/2004/14099.pdf>.
- ¹⁷ Government of British Columbia, Ministry of Environment Including Environmental Assessment Office: 2007/08-2009/10 Service Plan <http://www.bcbudget.gov.bc.ca>.
- ¹⁸ Taken from BC Ministry of Environment Compliance Division's website – see <http://www.env.gov.bc.ca/compliance/cppb/index.html>.
- ¹⁹ BC Ministry of Environment, *Compliance and Enforcement Policy and Procedure* – see note 2, above.
- ²⁰ Ministry of Environment press release, *BC Government releases compliance summary*, March 27, 2007. Available at: http://www2.news.gov.bc.ca/news_releases_2005-2009/2007ENV0028-000307.htm.

- ²¹ The names of offenders under convictions are listed, and more information is given under the number of orders, but overall only basic information is listed. For example, see the compliance summaries available at: <http://www.env.gov.bc.ca/main/prgs/compliancereport.html>.
- ²² BC Ministry of Environment, Lands and Parks, *Environmental Protection Non-Compliance Report*, October 1, 1997 – March 31, 1998.
- ²³ For an example of a compliance assessment report accessible to the public, see the *Compliance Assessment of Agricultural Practices in the Cloverdale Area, British Columbia: September – December 2004*. Available at: http://wlapwww.gov.bc.ca/sry/p2/compliance_assess/.
- ²⁴ Taken from e-mail correspondence as part of research for this report.
- ²⁵ For example, see environmental law enforcement principles on the INECE website. Available at: <http://www.inece.org/enforcementprinciples.html>.
- ²⁶ See generally: *Making Law Work – Environmental Compliance and Sustainable Development*, Volumes 1 & 2. Edited by Zaelke, Kaniaru, and Kruzikova. 2005. Published by Cameron May Ltd. Further details available at: <http://inece.org/makinglawwork.html>.
- ²⁷ Krahn, P.K. (1998), Environment Canada Pacific and Yukon Region, *Enforcement vs. Voluntary Compliance: An Examination of the Strategic Enforcement Initiatives Implemented By the Pacific And Yukon Regional Office of Environment Canada 1983 to 1998*. Presented at the Fifth International Conference on Environmental Compliance and Enforcement, Monterey, California, USA – November 1998. Available at: <http://www.inece.org/5thvol1/krahn.pdf>.
- ²⁸ RCMP Gazette, *Environmental crime: does deterrence work?*, Vol. 68, Issue 3 2006 http://www.gazette.rcmp.gc.ca/article-en.html?&article_id=283.
- ²⁹ Randy Christensen, Letter to the editor, Tri-City News, June 14, 2006.
- ³⁰ Foulon et al, *Incentives for Pollution Control: Regulation or Information?*, 44 *Journal of Environmental Economics and Management* 169 (2002) in *Making Law Work – Environmental Compliance and Sustainable Development*, Volume 2, page 67-73. See note 24 above.
- ³¹ See the “Report All Poachers and Polluters (RAPP)” webpage on the COS website. Available at: <http://www.env.gov.bc.ca/cos/rapp/form.htm>.
- ³² See note 3 above.
- ³³ M Stahl, *Performance Indicators for Environmental Enforcement and Compliance Programs*, September 2004. Part of a series of published presentations available on the INECE website. Available at: http://www.inece.org/indicators/stahlpresentation_sept04.pdf.
- ³⁴ See note 33 above.
- ³⁵ Dr. Cary Coglianese, was a key note speaker for the BC Deregulation office. His paper appears on Deregulation office’s website: <http://www.regulatoryreform.gov.bc.ca/regulationworkshop/default.htm>.
- ³⁶ Cary Coglianese, Jennifer Nash, & Todd Olmstead, *Performance and Regulation: A Conceptual Overview Presentation for Regulatory Policy Program Workshop: Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, Washington, D.C. May 13, 2002. Available at: <http://www.regulatoryreform.gov.bc.ca/regulationworkshop/PBRconceptualoverview.pdf>.

West Coast Environmental Law is BC's legal champion for the environment. West Coast empowers citizens and organizations to protect our environment and advocates for the innovative solutions that will build a just and sustainable world.

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