



275  
**Canadian Environmental Law Association**  
**L'Association canadienne du droit de l'environnement**

517 College Street, Suite 401, Toronto, Ontario M6G 4A2  
Telephone (416) 960-2284  
Fax (416) 960-9392

**REPLY OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
TO THE MINISTRY OF NATURAL RESOURCES'  
DRAFT FOREST COMPLIANCE STRATEGY**

**Publication #275**

**ISBN# 978-1-77189-452-4**

**Prepared by: Richard D. Lindgren  
Counsel**

**December 14, 1995**

VF:  
CANADIAN ENVIRONMENTAL LAW  
ASSOCIATION.  
CELA BRIEF NO. 275; Reply of the  
Canadian Environmental ...RN1785'

REPLY OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
TO THE MINISTRY OF NATURAL RESOURCES'  
DRAFT FOREST COMPLIANCE STRATEGY

PART I - INTRODUCTION

The Canadian Environmental Law Association (CELA) is a non-profit public interest group that was founded in 1970 for the purpose of enforcing and improving environmental legislation. CELA operates as a community legal clinic specializing in environmental law, and CELA lawyers represent individuals and citizens' groups in the courts and before statutory tribunals on a wide range of environmental issues.

CELA has long viewed the conservation of biological diversity as a paramount objective. Accordingly, CELA has, among other things, undertaken substantial casework and law reform activities on various forestry matters. For example, CELA served as counsel for the Forests for Tomorrow (FFT) coalition during the public hearings on the Ministry of Natural Resources' (MNR) Timber Management Class Environmental Assessment (EA). CELA has also been involved in the Megisan Lake EA process; participated in the Forest Policy Panel proceedings; served on the Sectoral Task Force on Forestry for the Ontario Roundtable on Environment and Economy; and provided detailed submissions during the development of the Crown Forest Sustainability Act (CFSA). CELA has also provided summary legal advice to numerous persons across Ontario involved in contentious land use conflicts over forestry operations, particularly access road construction, clearcutting, and pesticide application.

CELA's lengthy experience with various forestry disputes leads to several important conclusions:

- (a) Non-compliance with regulatory requirements is a serious problem within Ontario's forests;
- (b) Despite their frequent use, administrative monetary penalties do not appear to have sufficient deterrent effect to prevent non-compliance;
- (c) Educational efforts (such as the Code of Riparian Practice) are important, but they must not be viewed as an adequate substitute for timely and effective enforcement of regulatory requirements; and
- (d) Compliance monitoring needs to be continued and enhanced in order to ensure adherence to regulatory requirements.

It is from this perspective that CELA has reviewed the draft "Forest Compliance Strategy", and has found it inadequate for the reasons described below. CELA's recommended revisions to the draft Strategy are also outlined below.

At the outset, it should be noted that CELA supports the need for a clear and comprehensive compliance strategy to govern the enforcement of the legislative and regulatory requirements respecting forestry planning and operations. In its present form, however, the draft Strategy falls far short of meeting this need. At best, the draft Strategy amounts to "feel-good" bureaucratic

fluff that will likely have little actual influence on the ground in Ontario's forests.

## PART II - COMMENTS ON THE FOREST COMPLIANCE STRATEGY

1. The Strategy should be driving, not following, compliance policies, procedures and practices.

We assume that the Strategy is intended to provide overriding policy guidance regarding compliance matters. Indeed, the Strategy states that the document will guide policy direction, provide operational direction for compliance, and describe how compliance will be achieved (p.1). Accordingly, one would reasonably expect that the Strategy would be developed first, and that underlying policies and procedures necessary to implement the Strategy under various statutes would be developed next.

However, the Preface of the Strategy indicates that the detailed compliance policies and procedures under the CFSA were developed several months before the draft Strategy was released for public comment. Indeed, CELA received a copy of the CFSA policies and procedures in March 1995. This curious chronology leads us to three inevitable conclusions: first, there is little traceable or credible connection between the Strategy and the CFSA policies and procedures; second, the Strategy appears to be superseded in importance by the CFSA policies and procedures; and third, the

draft Strategy is unlikely to be revised in light of public comments received by the MNR, particularly if such comments would require amendments to the already approved CFSA policies and procedures. We understand that the MNR cannot now reverse the chronology of events, but we remain unclear as to why the MNR elected to effectively put the cart ahead of the horse by finalizing detailed CFSA policies long before the overall strategy has been completed.

With respect to the CFSA, a far more serious compliance issue has arisen with respect to the various manuals that are supposed to be governing the new forest management planning process. In particular, it is our understanding that not all of the new (and much-hyped) s.68 manuals have been approved by regulations under the CFSA. For example, the Forest Management Planning Manual (FMPM) does not appear to have been approved by regulation. In effect, this means that forest management plans currently in development may not be legally obliged to incorporate or abide by the new FMPM provisions that purport to achieve the sustainability principles outlined in s.2(3) of the CFSA.<sup>1</sup> In CELA's view, this unfortunate situation puts the lie to any suggestion that the draft Strategy "will contribute to establishing confidence that Ontario's forests are being managed in a sustainable fashion consistent with the Ministry's corporate directions and the CFSA" (p.6). If the FMPM is not legally in force, how can the MNR ensure compliance

---

<sup>1</sup> CFSA, s.68(10).

with the new sustainability requirements? In CELA's view, this is a major loophole in the CFSA that substantially undermines the efficacy of the draft Strategy, and that underscores the need for an enforceable forest practices code in Ontario.

2. The goal of the Strategy is too ambiguous.

The stated goal of the Strategy is "to encourage and ensure compliance which contributes to the sustainable management of Ontario's forests" (p.2). In our view, this goal is too vague and weak, and it is not consistent with stated purpose of the CFSA, where ambiguous words such as "encourage" and "contribute" do not appear.<sup>2</sup> The goal must be stated in a more prescriptive or mandatory manner, and CELA suggests the following re-wording:

The goal of the Forest Compliance Strategy is to ensure compliance with legislative and regulatory requirements in order to secure the long-term health of Ontario's forests.

3. The principles of the Strategy are too numerous and vague, and in some instances, are not "principles" at all.

CELA agrees that the Strategy should include a clear and concise set of principles to govern compliance policies, procedures, and

---

<sup>2</sup> CFSA, s.1.

practices. However, the 11 principles that have been expressed in the draft Strategy are far too numerous and vague, and they need to be condensed and restricted to fundamental principles, not self-evident platitudes (i.e. #2: "Compliance actions are primarily used to assist in the achievement of the sustainability of forest ecosystems"), wishful thinking (i.e. #11: "Cooperative agreements... will facilitate an effective and efficient compliance program"), or questionable leaps of faith (i.e. #5: "Increased self-compliance by resource users... will contribute to successful compliance").

CELA therefore recommends a streamlined set of principles that are more responsive to the overall purpose of the Strategy. Our five suggested principles are as follows:

- Compliance with all legislative and regulatory requirements is mandatory;
- Compliance activities shall be conducted in a fair, consistent, timely and effective manner;
- The sustainability of Ontario's forest ecosystems is paramount, and compliance activities shall be undertaken with an emphasis on preventing harm to Ontario's forest ecosystems;
- Ministry officials shall examine every suspected violation of

legislative or regulatory requirements, and shall take action consistent with this Strategy and associated policies and procedures; and

- Ministry officials shall encourage the reporting to them of suspected violations of legislative or regulatory requirements.

In CELA's view, these principles better reflect the underlying policy basis of the draft Strategy.

4. The objective of the Strategy goes beyond compliance issues and involves forest management planning considerations.

CELA agrees with the gist of the first part of the stated objective of the Strategy: "to ensure compliance with rules and requirements" (although this seems to overlap with the stated goal of the Strategy). However, in CELA's view, the remaining language of the objective is mere surplusage that should be deleted. Self-serving comments about "allowing economic development and use which does not compromise the long-term health of the forest ecosystem" have no place in a compliance strategy. Decisions about which economic activities, if any, should be permitted in a given area are made by forest management planners, not compliance officials, in the context of provincial law, policy, plans, manuals, guidelines, and related documents. The forest management planner's job, in



essence, is to interpret law and policy in order to establish the operational rules; the job of compliance officials is to ensure adherence with those rules. Accordingly, comments about "economic development and use" are more appropriate in the Policy Framework for Ontario Forests or the FMPM, not the Forest Compliance Strategy.

5. The wording and implementation of "Strategy One" is unclear.

The nature and scope of "Strategy One" is not readily apparent (p.3). However, we generally agree with Strategy One if it stands for the simple proposition that the more significant violations will trigger the more significant compliance remedies (i.e. prosecution or licence revocation). At the same time, it would be helpful for the Strategy itself to provide more explicit guidance on "compliance priorities". For example, section 1.3 should be expanded to include some factors to consider when determining which compliance measures should be undertaken. CELA would suggest the following factors:

- Nature of the impact upon the forest ecosystem - This would include consideration of the seriousness of actual harm or risk of potential harm to the forest ecosystem.
- Nature of the violation - This would include consideration of: whether the violation was deliberate or resulted from negligence; whether the violation was a repeat occurrence;

whether the violation was a minor, moderate or significant deviation from legislative or regulatory requirements; and whether the violator attempted to conceal information about the non-compliance.

- **Effectiveness in achieving immediate compliance** - This would include consideration of: the violator's compliance record; the violator's attempts to cooperate with government officials; and the violator's attempts to voluntarily take corrective or remedial action.
  
- **Consistency in compliance activities** - This would include consideration of how similar instances of non-compliance were addressed when determining which compliance measure should be undertaken.

Without more explicit direction on such factors, the implementation of section 1.3 of Strategy One will likely be characterized by excessive discretion and inconsistent responses by government officials.

We are also concerned that the "Actions" specified to implement Strategy One (p.3) are completely silent on who undertakes the actions (i.e. the Minister, Regional Directors, District Managers, planning team members, conservation officers?), how the actions are to be undertaken (i.e. through input into the planning process?),

and when the actions are to be undertaken (upon complaints from the public, or during the area inspection program?). Indeed, the entire draft Strategy would greatly benefit from a separate section that generally identifies which government officials are responsible for implementing which parts of the Strategy. Otherwise, the Strategy provides no clear delineation of responsibility, and therefore fails to ensure accountability for government action (or inaction).

We are also unclear as to what is meant by "District Compliance planning" in Action 1.2 (p.3). We presume that this refers to district-level efforts to establish various compliance priorities and implementation programs such as monitoring. If so, CELA submits that there should be opportunities for members of the public to help identify compliance priorities at the local level.

With respect to the public role in compliance monitoring, we find it curious that the draft Strategy does not mention the Applications for Investigation that the MNR will begin receiving under the Environmental Bill of Rights (EBR) in approximately four months' time. Commencing on April 1, 1996, Ontario residents will be able to file formal investigation requests under a wide variety of forestry-related statutes administered by the MNR.<sup>3</sup> Because these EBR investigation requests will undoubtedly affect MNR compliance priorities, it would be prudent for the MNR to develop

---

<sup>3</sup> See section 9, O.Reg.73/94, as amended.

policy direction in the Strategy (or in other documentation) to provide guidance on how MNR staff will respond to and process investigation requests.

6. The implementation of Strategy Two is unclear.

CELA strongly endorses Strategy Two as drafted. However, some of the "Actions" specified to implement Strategy Two are problematic. For example, many of the "Actions" lack the "who", "how", and "when" details described above. Similarly, some of the more significant "Actions", such as enforcing legislation (Action 2.4), are inexplicably devoid of substantive policy direction. In Action 2.4, for example, one would reasonably expect to see a bullet point list of generic remedies (i.e. orders, administrative monetary penalties, prosecutions,<sup>4</sup> licence suspension or cancellation), plus some general discussion as to when each of the remedies would be appropriate. We note that some of this information is provided in the CFSA policies and procedures, but it is CELA's view that these policies should emanate from the Forest Compliance Strategy, not the other way around. CELA further submits that incorporating this policy direction in the Strategy would help ensure that non-CFSA

---

<sup>4</sup> CELA strongly disagrees with suggestion in the CFSA policy that prosecutions should only be pursued as a last resort "in keeping with the spirit and intent with the Act" (COS 14.12.02, p.2). CELA can discern no such "spirit" or "intent" in the CFSA, and CELA submits that prosecution should always be considered as the preferred option for dealing with the very serious offences created in s.64 of the CFSA. Further policy direction is also required to guide prosecutors when determining the quantum of fine to be sought upon conviction.

policies and procedures (i.e. under all the other forestry-related statutes administered by MNR) are consistent and appropriate.

Moreover, CELA submits that a new "Action" is required under Strategy Two: "Cooperation with staff from other regulatory agencies and ministries to ensure compliance with non-MNR legislative and regulatory requirements that are applicable to forestry operations". The draft Strategy provides no guidance in circumstances where an act that violates a MNR law or regulation may also trigger investigation and enforcement activities by other officials under other statutes (i.e. Ministry of Environment and Energy officials acting under the Pesticides Act, Environmental Protection Act, Ontario Water Resources Act, or Environmental Assessment Act). Interjurisdictional cooperation in such circumstances should be required by the draft Strategy.

Finally, we are greatly concerned about the cryptic reference to "self-compliance" in Action 2.5 under Strategy Two. We recognize that under the current fiscal climate, there are ever-decreasing resources that may be available for monitoring and enforcement purposes. However, it is imperative that forestry operations be conducted in full accordance with legislative and regulatory requirements, and monitoring and enforcement activities are clearly necessary (and must be funded) in order to ensure full compliance. This has been recognized in the MNR's Statement of Environmental Values, where the MNR commits to "penalize" misuse of Crown land

and resources:

The Ministry has a stewardship responsibility on Crown land and will ensure that... misuse is penalized (SEV, p.9, emphasis added).

The need for effective compliance monitoring by the MNR (rather than by industry) was also recognized by the Environmental Assessment Board in its decision on the Timber Management Class EA:

MNR's responsibility to monitor compliance stems from its statutory mandate under both the Crown Timber Act [now the CFSA] and the Environmental Assessment Act. A compliance monitoring regime is essential to this undertaking because without it, MNR can have no knowledge of how carefully, correctly, or successfully Timber Management Plans are being developed and implemented.

...The existence of a regular programme of monitoring or inspection of timber management activities is an essential mechanism with which to promote compliance with any conditions placed on timber management activities (pp.290-91, emphasis added).

Accordingly, the Board imposed a number of legally enforceable conditions upon the MNR which require various forms of compliance

monitoring and effects/effectiveness monitoring. In CELA's view, the MNR is not at liberty to ignore or contravene these conditions by abdicating its monitoring responsibilities in favour of "self-compliance" by industry.

In light of these legal and policy considerations, an undefined "self-compliance" approach is fundamentally unacceptable, particularly if the MNR intends to use "self-compliance" as one of the primary means to identify and rectify non-compliance. By analogy, the Ontario public would never accept self-policing by landfills or industrial polluters under the Environmental Protection Act; why, then, would self-policing by forestry companies would be any more acceptable to Ontario residents? On this point, CELA also notes that recent opinion polls clearly demonstrate public support (and willingness to pay) for environmental protection activities by government.<sup>5</sup> If "self-compliance" means "self-regulation", CELA is fundamentally opposed to the concept in the forestry context.

7. The implementation of Strategy Three is unclear.

Strategy Three, which is clearly supportable in principle, is marred by a lack of information about "who", "how", and "when". Again, we note that some of this information is provided in the

---

<sup>5</sup> Ideally, the cost of governmental compliance activities should be borne by the regulated industry through appropriate stumpage fees, annual area charges, and similar Crown charges.

CFSA policies and procedures, but the overall policy direction should have been incorporated into the Strategy itself.

### PART III - CONCLUSIONS

In its decision on the Timber Management Class EA, the Environmental Assessment Board strongly endorsed "the need to provide consistent and adequate enforcement and investigation of offences under various statutes administered by the MNR and related to ensuring compliance" (p.293). In CELA's view, the draft Strategy fails to adequately set the policy framework or strategic direction for meeting that need. Accordingly, CELA submits that the Strategy should be amended in accordance with the various recommendations outlined herein.

In addition to CELA's recommended wordsmithing, however, the Strategy must shift its policy focus and articulate a preventative "zero tolerance" approach to non-compliance in the forestry context. The evidence at the Timber Management hearing documented countless instances of non-compliance with legislative and regulatory requirements. Considerable debate ensued at the hearing as to the significance of the non-compliance or its prevalence across Ontario;<sup>6</sup> however, in CELA's view, this debate was somewhat

---

<sup>6</sup> The estimated rate of non-compliance varied from year to year and from district to district, but ranged from 5% to 30% non-compliance: EAB Decision, p.292.



irrelevant -- even a single incident of significant non-compliance is one too many.

Accordingly, the Strategy must clearly state that compliance is mandatory -- every instance of non-compliance will be met with an appropriate response in accordance with the Strategy and related policies and procedures. In summary, the Strategy must require forestry companies to do what we expect of all persons in Ontario: comply fully with the law.

December 14, 1995

