

Failure to Enforce?

Time for transparent and effective environmental enforcement in Nova Scotia



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Executive Summary

How and to what extent is Nova Scotia's *Environment Act* enforced via prosecution? What information is publically available to assess environmental law enforcement in Nova Scotia?

East Coast Environmental Law (ECELAW) partnered with the Environmental Law Student Society (ELSS) at the Schulich School of Law at Dalhousie University to investigate these questions. We examined the government's prosecution record for violations of the *Environment Act*, and also assessed the information the provincial government makes available regarding environmental enforcement.

We found that Nova Scotia Environment lays 1 charge for every 500 compliance inspections it conducts. The majority of fines issued for successful convictions are \$500 or less. The number of charges laid in recent years is lower than in previous years.

Most of the information we sought for this report is identified in the *Environment Act* as part of the public environmental registry.¹ However, to access the information, we had to rely on formal requests through the *Freedom of Information and Protection of Privacy* (FOIPOP) Act and frequently the information we received was insufficient to provide a full picture of environmental enforcement in Nova Scotia.

The stated purpose of the *Environment Act* is to support and promote the protection, enhancement and prudent use of the environment while recognizing key goals including providing provide "access to information affecting the environment."² The government of Nova Scotia recently changed hands. The new government has an opportunity to honour the purpose of the *Environment Act* by creating a culture of transparency around environmental enforcement in Nova Scotia.

We recommend the new Minister of Environment make environmental information publicly accessible to Nova Scotians by creating an on-line environmental enforcement database that includes:

- Information about inspections undertaken in accordance with the *Environment Act*, including the number of inspections each year, the nature of the inspection and the location of inspections;
- Information on complaints and investigation applications received by NSE each year (s.115);
- Information on the number of charges laid under the *Environment Act* each year, the nature of the offences, the location of the offences and the final outcome (withdrawn, dismissed, acquitted, convicted);
- Copies of directives issued by inspectors (s. 122); and
- Copies of orders issued by the Minister including Ministerial Control Orders, Litter Control Orders and Emergency Orders (s. 126, 127, 128).





1 Report Background

East Coast Environmental Law Association (ECELAW) partnered with the Environmental Law Students' Society (ELSS) to investigate Nova Scotia Environment's enforcement of the *Environment Act*. The *Act* has been in place for 18 years, and we wanted to know how our government is using it to protect Nova Scotia's environment. We also wanted to know how accessible the government makes information on environmental enforcement.

We determined (1) the number of charges Nova Scotia Environment (NSE) has laid against individuals and companies since the *Environment Act* came into force; (2) how often the charges led to convictions; and (3) what penalties were issued for convictions.

However, the information on environmental enforcement that we were able to obtain was limited. For example, we were not able to obtain information on

- The circumstances of the offences;
- Where offences took place; or
- How many violations led to forms of enforcement (such as Ministerial orders and inspector's directives) other than prosecution.

Furthermore, we were required to use the formal and slow *Freedom of Information and Protection of Privacy Act* (FOIPOP) process to obtain the information, despite the requirement in section 10 of the *Environment Act* that the government create an Environmental Registry that includes information with respect to convictions, penalties and other enforcement actions.

This research was inspired in part by the Ecojustice report entitled *Getting Tough on Environmental Crime? Holding the Government of Canada to Account on Environmental Enforcement*.³ The report found that the Government of Canada is not adequately enforcing any of Canada's seven key environmental laws.⁴

Ecojustice found that there are on average 20 convictions per year under the *Canadian Environmental Protection Act (CEPA)*, which is small relative to the number of inspections, warnings and investigations that Environment Canada conducts. Furthermore, Environment Canada has taken consistently fewer enforcement actions per year since 2005. Ecojustice questioned whether the fines levied for successful convictions – an average of \$10,524 under CEPA – are high enough to deter potential violators, or are little more than fees to pollute. Finally, Ecojustice noted that Environment Canada makes very little information publicly available regarding the identity of environmental offenders, the location of violations, and the exact nature of violations, even when violations are successfully prosecuted.

Following research into the enforcement of the Nova Scotia *Environment Act*, our conclusions are similar to those noted by Ecojustice in their report on federal environmental laws.

East Coast Environmental Law (ECELAW) is a non-profit organization with charitable status. We provide public interest environmental law assistance to Atlantic Canadians. ECELAW envisions a future where innovative and effective environmental laws provide Atlantic Canadians with a clean, healthy environment that contributes to the quality of life of present and future inhabitants and visitors.

The Environmental Law Students' Society (ELSS) is student-run organization at the Schulich School of Law, Dalhousie University. The ELSS promotes environmental awareness and advocates for environmental protection in the Halifax area.





Making Polluters Pay: The intention of Nova Scotia's *Environment Act*

Nova Scotia revamped and consolidated more than ten different 'environmental' laws to create the *Environment Act* in 1995. The new Act was designed to move Nova Scotia toward a more sustainable future by reducing pollution, better managing waste, promoting environmental education and encouraging better decision-making by engaging Nova Scotians and providing them with information collected under the Act.

At the time it was passed, the Minister of the Environment, Robert Harrison, stated that the Act embodies,

"...the principle of sustainable development [and] is a recognition that our future will be shaped by the decisions we make today. In other words, development must meet the needs of the present generation without compromising the ability of future generations, to meet their needs."⁵

The Act recognizes the sustainable development principle that polluters should pay for the pollution they cause: it confirms "the responsibility of anyone who creates an adverse effect on the environment... to take remedial action and pay for the costs of that action."⁶ Sections 67 to 71 of the *Environment Act* are designed to meet this goal. Section 67 prohibits any person from releasing substances into the environment that may cause an adverse effect.⁸ Section 68 requires the persons responsible for such a release to report it, and section 71 requires those person(s) to take action to remedy the harm. Harmful substances may be released into the environment only with an approval issued under the Act and subject to specific terms and conditions that ensure environmental protection.

Furthermore, the opening purpose section of the Act includes a goal to provide access to information and facilitate effective public participation in the formulation of decisions affecting the environment.⁷

Enforcing the Act

NSE is the government department responsible for enforcing the *Environment Act*. Sections 110 to 122 of the Act set out the enforcement powers of NSE, in particular the powers related to inspections and investigations of environmental offences. Members of the public may report alleged offences informally by complaint, or formally through a request for an investigation.⁹ Enforcement officers

employed by NSE decide whether to initiate an inspection or investigation based on the Environmental Monitoring and Compliance Model. According to their website, NSE's 60-plus inspectors carry out approximately 18,000 compliance inspections per year. These inspections sometimes result in decisions to lay charges and prosecute the alleged offender in court, possibly leading to a conviction and a penalty for an environmental offence.

Charges under the Act

NSE laid 595 charges between 1995 and 2012. These charges resulted in 244 convictions, 176 dismissals, 113 withdrawals and 20 acquittals. Information on the remaining 42 charges could not be found. Less than half of the charges resulted in convictions (Figure 1).

On average, there have been 35 charges and 14 convictions each year. This number appears low considering that NSE employs over 60 enforcement officers and conducts approximately 18,000 compliance inspections each year. However, it is difficult to know what these numbers mean without information about the compliance inspections. We have no information on the results of each inspection, including whether there was a direction issued by the inspector or an order issued by the Minister. Many violations are addressed by NSE with an inspector's direction or Ministerial order and do not lead to a charge and prosecution. We have no information on the number of inspections that lead to enforcement actions other than charges.

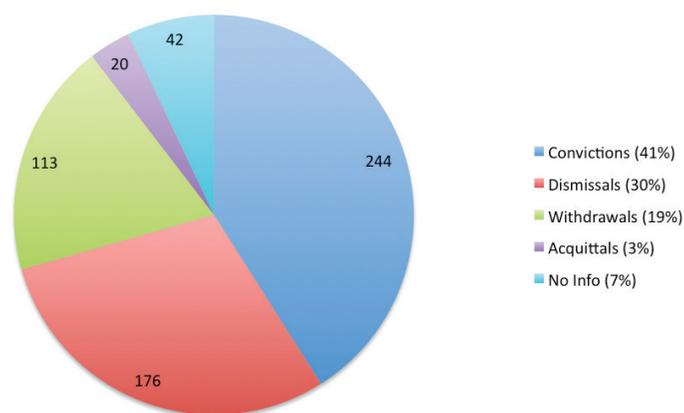


Figure 1. Breakdown of outcomes of charges. Note that "sentenced" refers to convictions.



Section	Number of Charges	Average Fine	Maximum Fine allowed under the act
Section 158 - cooperation with department	149	Average: \$1697 Median: \$641	\$1 million
Section 50 - compliance with approvals	114	Average: \$1090 Median: \$500	\$1 million
Section 71 - duty to minimize impacts	68	Average: \$646 Median: \$500	\$1 million
Section 99 - littering	58	Average: \$272 Median: \$300	\$100,000 for a business and \$10,000 for a person
Section 67 - pollution prevention	47	Average: \$753 Median: \$500	\$1 million

Table 1: The five most-enforced sections of the *Environment Act*.

Section 158: covers a range of offences. The section creates several offences, including: 1) refusing to provide information requested under the *Environment Act*; 2) providing false or misleading information; 3) hindering or impeding an inspector who is trying to carry out their duties under the Act; and 4) violating the terms of an approval given under the Act.

Section 50: prohibits anyone from engaging in certain activities listed under the Act without approval. For example, if a manufacturer is subject to an industrial approval and fails to comply with its terms and conditions, that failure will cause the manufacturer to be in breach of section 50.

Section 71: creates a duty for anyone who releases a harmful substance into the environment to make all reasonable efforts to minimize the impact. It also creates a duty to restore the affected area as directed by NSE.

Section 99: bans littering. This section bans releasing any waste into the environment; however, a person or business (e.g. a waste management company) can apply to the department for permission to deposit waste. Section 99 also imposes some obligations on the Minister to prevent littering such as requiring organizers of public events to provide garbage and recycling receptacles.

Section 67: prohibits anyone from releasing a harmful substance into the environment without approval from NSE.

Change in Charges over Time: Signs of Recent Decline

Over the last decade the number of charges laid per year has varied between 20 and 70. The number of charges per year generally increased from 1995 until peaking in 2007.

For the past three years, the number of charges laid has decreased significantly.

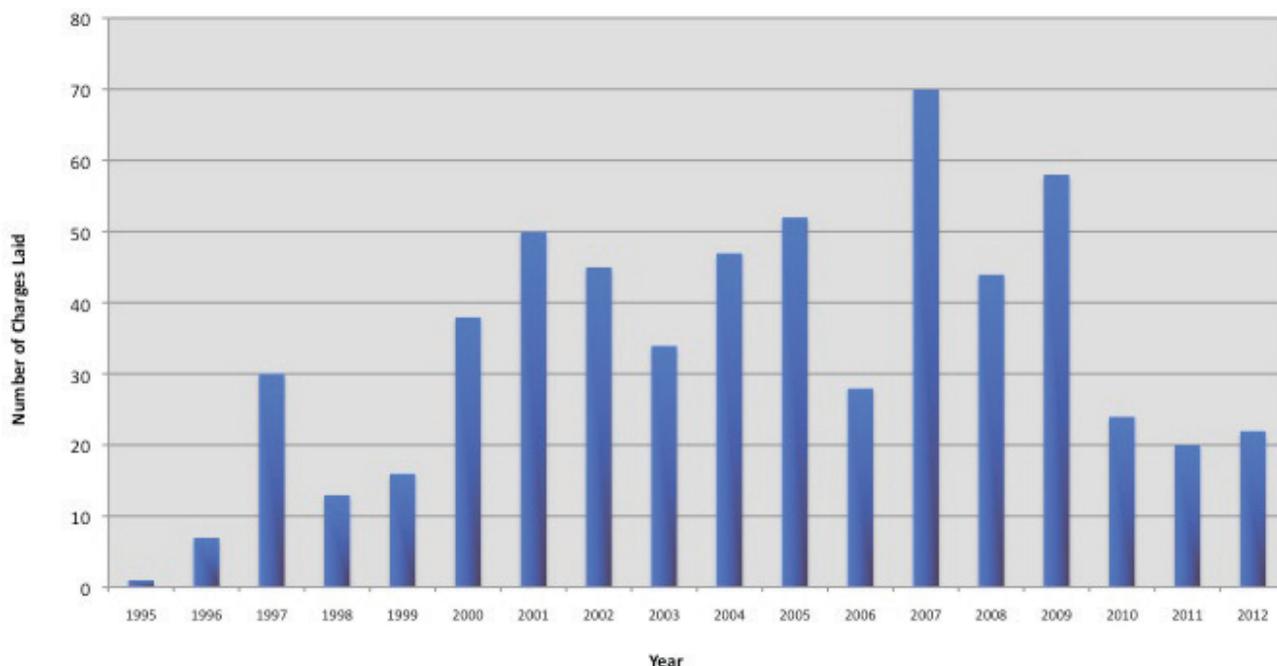


Figure 2: Change in charges over time



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Fines administered under the *Environment Act* have ranged from \$1 to \$30,000. There has never been a fine over \$30,000 despite the Act allowing for a maximum possible fine of one million dollars. The majority of the fines are for \$500 or less, while the average fine amount is \$1,260. The average is higher than the median because of a few high fines, ranging between \$10,000 and \$30,000.

Of the 244 charges laid since 1995, only 90 were against companies, corporate entities, or municipalities. This means that the majority of fines laid under the Act were against individual citizens. The average fine laid against a corporation was \$2,067; however, this average is high due to a handful of large fines (between \$10,000 and \$30,000). Over 50% of all fines against corporations were \$500 or less.

Summary

NSE lays less than 1 charge for every 500 compliance inspections. Of these charges, over half are either dismissed or withdrawn. Fines for successful convictions are modest—50% of all fines are \$500 or less. The modest fines and the small number of charges raise questions about the enforcement of the *Environment Act*.

Do these numbers demonstrate that the government is holding polluters accountable for the true cost of environmental harms?

Enforcement officers have broad powers and discretion under the *Environment Act*. These officers conduct thousands of inspections annually to determine whether individuals and companies are complying with the Act. It seems unlikely that the few dozen charges laid each year represent all of the environmental violations that are uncovered.

Admittedly, laying charges is not the only way to prevent future violations. A purpose of the Act is to work with individuals and companies to achieve environmental protection, rather than focusing on punishment.¹⁰ In some cases, a co-operative approach with offenders may achieve compliance in a more cost effective manner.

However, the importance of a healthy environment to Nova Scotians requires NSE to exercise this discretion responsibly and openly. In many ways the most worrisome finding of this report is the difficulty in acquiring information to confirm whether or not this is the case.

By the Numbers

- 18,000: average annual compliance inspections by NSE
- 35: average annual charges laid by NSE
- 14: average annual convictions resulting from charges
- \$500 or less: value of majority of fines issued for successful convictions





5 Environmental Enforcement: Transparency

Transparency is Vital

Canadians require information to participate meaningfully in our democratic process, and to hold government accountable for its actions. In Nova Scotia, the public should know what the government is doing to protect the environment and yet information collected under the Environment Act is not easily accessible to the public. Without this information, the public cannot evaluate the government's environmental enforcement record. Nor can Nova Scotians monitor the environmental compliance record of industry. Nor do individuals and companies who might inadvertently break environmental laws have the opportunity to learn from the mistakes of others.

The lack of accessible environmental enforcement information is surprising. Section 10 of the *Environment Act* requires the Minister of Environment to create an Environmental Registry and to ensure public access to the information and documents in the Environmental Registry. The *Environment Act* includes a list of information items that must be contained in the Environmental Registry, including orders, directives, convictions, penalties and other enforcement actions issued under the Act.

The Environmental Registry is described on the NSE website as "a set of records, defined in Nova Scotia Environment Act, S.10, which are considered to be in the public domain and made routinely available to the public upon request."¹¹

A few of the items, including pesticide approvals, boil orders and well logs are available on-line but all other Environmental Registry information can only be obtained through an application process and with a fee. In 2009, NSE published a Routine Access Policy with the intent of enabling public access to certain categories of records without having to submit a FOIPOP application.

The objective of this Policy is

... to provide and maintain routine access to certain departmental records without the need for a formal FOIPOP application. It is also to provide ease of access for those requesting information, in keeping with the spirit of openness, accountability, and the provisions of information access and privacy legislation.¹²

The Routine Access Policy recognizes the need to protect personal information of third parties and indicates that such information may be severed from

the records released in accordance with the Policy. To that end, NSE developed a Privacy Policy in 2009 to ensure that information released routinely or otherwise appropriately protects personal information.¹³

Aside from personal information, which can be severed from a record, the Policy states that all requests made through the Environmental Registry, including orders, directives, convictions and penalties can be made available through the Routine Access Policy. The Policy further states that all routine environmental inspection reports can be accessed through this Policy. FOIPOP information requests tend to be formal and time-consuming.

How the System Currently Works

Contrary to the Routine Access Policy and statements made by NSE regarding routine availability of Environmental Registry records, it appears that members of the public must file FOIPOP requests to access general enforcement information.¹⁴ FOIPOP information requests tend to be formal and time-consuming.

In February 2013 ECELAW contacted NSE to obtain a list of charges made under the Environment Act between 1995 and 2012. Although this information is part of the Environmental Registry, the request had to be made through FOIPOP and to the Department of Justice rather than to NSE. The information requests are formal and time-consuming. The information we received was incomplete: it did not include the name of the offender, the location of the incident, the type of offender (individual or company), or the exact nature of the offence.

In July 2013, ECELAW filed another request to obtain the names of parties for all convictions under the Environment Act between 1995 and 2012. The Department of Justice took two months to respond, and once again the information was not complete; the Department of Justice also deleted any information from the record that they determined was not specifically related to ECELAW's request.

After 9 months of information requests, transfers from NSE to the Department of Justice, and receipt of incomplete documents, it is clear that gathering enforcement data from NSE is difficult. ECELAW is left wondering how often others have the same experience.

Recommendations

Without complete data it is difficult to draw any meaningful conclusions about the effectiveness of enforcement. The



lack of information undermines public participation in environmental enforcement and prevents ECELAW from determining where changes should be made. The bottom line is that Nova Scotians should be given ready access to environmental enforcement information collected by their government.

To that end, we make the following recommendations:

In keeping with the purpose and intent of the *Environment Act*, the Minister of Environment should re-visit how Nova Scotia Environment meets the requirements of section 10 of the Act.

The Minister of Environment should direct NSE staff to make all documents included in section 10 of the Act available to the public in accordance with the Department's Routine Access Policy. This would include, for example:

- Inspection reports (as required by the Routine Access Policy);
- Copies of decisions made by staff following complaints or investigations (s.115);
- Copies of decisions resulting in a conviction.
- Information on enforcement actions including, charges laid under the *Environment Act*, the nature of the offences, the location of the offences, the final outcome (withdrawn, dismissed, acquitted, convicted) and the penalty;

- Copies of directives issued by inspectors (s. 122);
- Copies of orders issued by the Minister including Ministerial Control Orders, Litter Control Orders and Emergency Orders (s. 126, 127, 128).

To further enhance the public's understanding of how the *Environment Act* is enforced and in compliance with section 16 of the Act, which requires the Minister to report to the people of Nova Scotia on the state of the environment, the Minister should include the following in an annual publication:

- Information on inspections undertaken by NSE compliance staff, including the number of inspections, the nature of the inspections, the general location of inspections, and the Department's inspection goals and priorities.
- Information on enforcement actions, including charges laid, the nature of the offences, general location of offences and the outcomes (withdrawn, dismissed, acquitted, convicted).
- Compliance histories for key industry sectors in Nova Scotia.

Finally, we recommend the Minister take steps to enable on-line access to all of the documents identified in section 10 of the *Environment Act* and the broader information reported annually and described above.

Key Information	Relevance
Location of offence	Facilitates community awareness.
Nature of offence • e.g. Type of pollutant spilled • e.g. Type of industry	Educates Nova Scotians about what constitutes a violation of the Act, and enables Nova Scotians to assess the potential severity of the offence, including possible environmental and/or health impacts Keeps citizens aware of what is happening in their communities. Facilitates educated consumer choices. Deters companies from committing offences.
History of compliance	Keeps citizens aware of what is happening in their communities. Facilitates educated consumer choices. Deters companies from committing offences.
Data on inspections and investigations	Shows how public complaints are being addressed. Shows how discretion within Nova Scotia Environment is being exercised.
Publication of Directives, Orders, and Policy Guidelines	Provides the public with insight into the internal policy within Nova Scotia Environment.

Table 2. Examples of environmental enforcement information to be included in a complete on-line environmental registry

The Ontario Environmental Registry is one example of information presented to the public in an accessible manner. This online registry contains information on new laws, regulations and policies that may impact the environment as well as information on court cases brought under Ontario's Environmental Bill of Rights.

Another example is the Federal Government's National Pollution Release Inventory (NPRI). The inventory was established under the Canadian Environmental Protection Act and is an online database that includes yearly data on the release of over 300 harmful chemicals. The database allows users to look up companies across the country and access information on the quantity and type of chemicals that they are permitted to release, dispose, transfer and recycle.

Endnotes

- 1 Nova Scotia's *Environment Act*, SNS 1994-1995, s 10. Section 10 of the Act requires government to establish an environmental registry with information about environmental enforcement actions.
- 2 Nova Scotia's *Environment Act*, SNS 1994-1995, s 2(h).
- 3 William Amos, John Lammey, Meredith Cairns & Ceyda Turan, 2011, Ecojustice. <<http://www.ecojjustice.ca/publications/reports/getting-tough-on-environmental-crime>>
- 4 *Canadian Environmental Protection Act; Fisheries Act; Species at Risk Act; Canada Shipping Act; Canada Wildlife Act; Migratory Birds Convention Act; and Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act.*
- 5 Nova Scotia, Legislative Assembly, Hansard, 56th Assembly, 2nd Session, 4 November 2000, (Hon Paul MacEwan).
- 6 Nova Scotia's *Environment Act*, SNS 1994-1995, s 2(c).
- 7 'adverse effect' means an effect that impairs or damages the environment or changes the environment in a manner that negatively affects aspects of human health; *Nova Scotia Environment Act*, SNS 1994-1995, s 3(c).
- 8 Nova Scotia's *Environment Act*, s2(h).
- 9 Nova Scotia's *Environment Act*, SNS 1994-1995, s 115.
- 10 Nova Scotia's *Environment Act*, SNS 1994-1995, s 2(j).
- 11 Nova Scotia Environmental Registry page at <http://www.novascotia.ca/nse/dept/envregistry.asp>, accessed 25 April 2014.
- 12 Nova Scotia Environment, Routine Access Policy, Effective February 1, 2009, at p3 Accessed at http://www.novascotia.ca/nse/dept/docs/NSE-RoutineAccessPolicy_v_0_1.pdf on 25 April 2014.
- 13 Nova Scotia Environment, Privacy Policy, Effective June 25, 2009. Accessed at <http://www.novascotia.ca/nse/dept/docs/NSE.Privacy.Policy.pdf> on 25 April 2014.
- 14 One can apply to access information in the Environmental Registry through an on-line application form. However, the form must include a specific civic address; it cannot be used to access general enforcement information on orders, directives, convictions, penalties and other enforcement actions undertaken by NSE.

