



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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By Fax and Mail

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EBR REGISTRY NUMBER AA04E0003
ENVIRONMENTAL ENFORCEMENT STATUTE LAW AMENDMENT ACT, 2004

Dear Mr. Bahaviolos:

The purpose of this brief is to provide comments from the Canadian Environmental Law Association (CELA) on Bill 133, the *Environmental Enforcement Statute Law Amendment Act, 2004*. CELA strongly supports the new legislation, and considers the Environmental Penalties (EPs) regime to be an appropriate administrative tool which supports the polluter pays principle. Given the problem of spills in Ontario such as those in the St. Clair River, and the recommendations of the Industrial Pollution Action Team, it has become clear that a strict liability with due diligence regime is not sufficient to prevent spills. An expansion of the Director's order-making powers within an absolute liability regime will provide yet another essential measure in a range of tools designed to fill the gap where existing civil or criminal remedies are not sufficient.

Background:

CELA is a non-profit organization founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizen's groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. CELA also undertakes public education, community organization, and law reform activities.

Bill 133 was introduced by the provincial Government on October 27, 2004. It was placed on the Environmental Bill of Rights Registry for public notice and comments (EBR Registry

Number AA04E0003), with a 30 day comment period, which was later amended to 71 days. The Bill is proposed to amend the *Environmental Protection Act*, R.S.O. 1990 c. E-19, as amended (EPA) and the *Ontario Water Resources Act*, R.S.O. 1990, c. 0.40 (OWRA).

In April of 2002, CELA made submissions on the proposed regulations for Administrative Monetary Penalties (AMPs). In addition, CELA has undertaken research and published numerous briefs and submissions to government on a great number of proposed environmental enforcement, legislative and policy reforms. CELA is pleased to provide comments on the new legislation.

Since many of the comments we make here will be incomplete until we are able to review the regulations, we would reserve the right to change or further add to our comments when the regulations become available for review. CELA also shortly intends to provide a more detailed, review of the legislation, in an appendix under separate cover.

Our comments are divided into two sections; the first dealing with general comments regarding the new legislation and the second addressing specific proposals.

PART I - GENERAL COMMENTS

CELA supports the overall direction taken in the legislation and the purpose of the Bill in enhancing enforcement mechanisms to strengthen environmental protection, subject to the following comments.

(A) Environmental Penalties Framework

CELA supports the goals of deterrence and compliance through the use of the Environmental Penalties (EPs) framework. The expansion of the duty of directors and officers in respect to any contravention of the legislation is also strongly supported. Based on empirical evidence from other jurisdictions in Canada and the United States, administrative economic disincentives often improve compliance and result in environmental offences being addressed more promptly than through prosecution. It is essential, however, that the use of EPs not be considered a replacement for environmental prosecutions, but rather a supplementary tool in a wide range of measures designed to ensure compliance with environmental laws. As commentators such as John Swaigen and Dianne Saxe have noted, "it is likely that every prosecution has a ripple effect throughout the industry and that a single prosecution has a much greater deterrent effect on other potential offenders than administrative remedies".¹ In addition, "anecdotal experience in Ontario suggests

¹ John Z. Swaigen, "A Case for Strict Enforcement of Environmental Statutes", in L. Duncan, ed., *Environmental Enforcement* (Edmonton: Environmental Law Centre, 1985), as cited in E. Hughes et al., *Environmental Law and Policy* (Toronto: Emond Montgomery Publications Limited, 1998).

that a vigorous prosecution policy, added to a well developed system of administrative controls, can have a notable effect upon corporate behaviour."²

The legislation should clearly prescribe the circumstances under which an environmental penalty will not be used. Obstruction, for example, is one situation where an EP would not be appropriate. If a company submits false information, or if an officer is obstructed in his or her duties, punishment in the form of prosecution will be the most appropriate tool in the range of compliance and enforcement measures. The discretionary and non-discretionary elements to be considered in deciding whether to use EPs and/or to pursue a prosecution must also be set out. This will require a consequential review and amendment of the Compliance Guideline.

Recommendation:

The legislation should prescribe the circumstances under which an environmental penalty will not be used (and discretion as to whether a prosecution should be pursued), and should clearly set out the discretionary and non-discretionary elements to be considered in deciding whether to use Environmental Penalties and/or to pursue a prosecution.

(B) Community Clean-Up Fund and Cost Recovery Orders for Spills

The provisions which allow the Ministry to compensate communities for the costs of clean-up of spills are strongly supported. However, the EP scheme should be modified to allow for discretionary methods of providing compensation to private landowners who undertake clean-ups of spills caused by others (e.g. neighbouring landowners). The legislation should empower the Director, or his or her delegate, the discretion to decide whether to issue an order requiring the persons responsible for a spill to pay compensation directly to spill victims, or requiring spill victims to approach the Ministry of Environment (MoE) to request payment of compensation from the special account. In some situations, where exact amounts have been calculated, and the parties are in substantial agreement as to the costs of remediation, it may be more efficient and cost-effective for compensation to be paid directly to spill victims.

Recommendation:

It is appropriate that the Director or municipalities be able to recover the expense of clean-ups from those responsible for a spill. In addition, methods of providing compensation to private landowners who undertake clean-ups of spills should be at the discretion of the Director or his or her delegate. Compensation could be made from the special account or by an order requiring the persons responsible for a spill to pay compensation directly to spill victims.

² Dianne Saxe, "The Impact of Prosecution of Corporations and Their Officers and Directors upon Regulatory Compliance by Corporations" (1990), vol. 1, no. 1 *Journal of Environmental Law and Practice* 91, as cited in E. Hughes et al., *Environmental Law and Policy* (Toronto: Emond Montgomery Publications Limited, 1998).

(C) New Fine Structure and Strengthened Sentencing Provisions

CELA supports the maximum environmental penalty amounts provided for in the Bill. Although they may be considered substantial, they are in line with maximum penalties for offences contained in the environmental protection legislation of other provinces. CELA also supports the provisions in the legislation that introduce minimum penalties, and allow for the imposition of higher minimum fines for repeat offenders. CELA has advocated minimum penalties since the early 1980s for offences resulting in convictions in environmental cases. The use of minimum penalties does not restrict the exercise of judicial discretion, but instead helps structure the exercise of such discretion within an appropriate range. In addition, the *Provincial Offences Act*³ (POA) empowers a decision-maker to deal with cases of hardship in a separate manner. In our opinion, minimum penalties provide an appropriate tool in achieving the policy objective of zero discharge for certain substances.

(D) Impairment and Adverse Effect Provisions

CELA strongly supports the amendment of the definition of "contaminant" in the EPA and the consequential amendments, which would reduce the threshold from "likely to cause an adverse effect" to "may cause an adverse effect", and the analogous proposed changes to OWRA. These changes will mean that action can be taken by the Ministry of the Environment in situations where a more preventative approach is appropriate. Preventative Orders, for instance, in situations where a substance must be contained in order to prevent a larger spill, could be more easily obtained under a lower "may cause an adverse effect" threshold. It is also highly likely that, as a result of the reduced threshold, persons responsible for the control of pollutants will create or improve systems designed to prevent or reduce the risk of a spill.

PART II - SPECIFIC COMMENTS

CELA is aware that there has been considerable discussion in the environmental community, and some disagreement in the legal bar generally, about the possibility that an order containing a significant environmental penalty and a subsequent prosecution could raise double jeopardy issues. However, in CELA's opinion, EPs are a legitimate extension of the Director's order-making powers, and a subsequent prosecution by the Crown, under the POA will not raise issues of double jeopardy. Penalties which will apply to a broad range of contraventions are required as a system of economic regulation. In CELA's view, a non-judicially administered scheme which is compensatory in nature is completely appropriate. However, as the Bill is currently written, it is not sufficiently clear that the legislative intent with respect to EPs is the expansion of the Director's order-making powers within an absolute liability regime. A declaration clearly explaining the need for an absolute liability regime would be helpful.

³ R.S.O. 1990, c. P. 33

Recommendation:

The Bill should contain a clear statement of legislative intent that the provisions will expand the Director's order-making powers within an absolute liability regime.

Transparency and Accountability:

CELA is concerned that new provisions in the Bill, as currently drafted, raise issues of transparency and accountability. For example, Directors can agree or act unilaterally to revoke orders or reduce penalties under sections 182.1(8) and 182.2. It is our understanding, from discussions with Ministry officials, that discretion in these areas will be governed by criteria set out in the regulations, but it is not known how well the regulations will deal with transparency issues. Sections 182.2 (2) and 182.3 (4) present the same problem. There are no requirements for notice to be given to the public, nor any process suggested for any public input. In section 182.3 (7) (a) there is no requirement for reasons to be given if the Director revokes an order of the provincial officer, but under (b) the Director needs to give reasons if the Order of the provincial officer is amended or confirmed. There are no provisions that will allow for the public to appeal if the Director imposes what is considered to be too low a penalty.

Recommendation:

The Director should be required to give written reasons, to the company or person subject to the order and any other person who provided information or comment, not only when upholding a penalty, but for cancelling a penalty or reducing it to a lower amount.

Recommendation:

At a minimum, EPs and Settlement Agreements should trigger information notices under the *Environmental Bill of Rights* (EBR). Ideally they should be classified instruments and therefore subject to notice and appeal.

Given the reductions to MoE staff and budget over some years, CELA is concerned that EPs may be utilized in lieu of prosecutions even in situations where a prosecution would be the more appropriate tool to address a violation. Key performance measures should be developed in order for the MoE to assess the success of the EP regime. Detailed information should be provided to the public which will indicate, at a minimum, the types and numbers of EPs issued annually, the persons or organizations to whom EPs were issued, the numbers of appeals made to the Environmental Review Tribunal and the outcomes of these appeals.

Recommendation:

The MoE should provide detailed annual reports to Ontarians to verify whether the amendments to the EPA and OWRA improve compliance with environmental laws.

PART IV - CONCLUSION

CELA welcomes the overall direction taken by the legislation and supports Bill 133 in principle, subject to the recommendations and modifications noted in this brief. CELA strongly urges that the Ministry provide detailed annual reports to Ontarians to verify whether the amendments to the EPA and OWRA improve compliance with environmental laws.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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