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CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
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MINISTRY OF ENVIRONMENT'S  
STAKEHOLDER CONSULTATION PAPER: DEVELOPING  
ENVIRONMENTAL PENALTIES FOR ONTARIO

**EBR REGISTRY No. PA05E0036**

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*Prepared by:*

*Ramani Nadarajah  
Counsel  
Canadian Environmental Law  
Association*

*Robert Wright  
Counsel  
Sierra Legal Defence Fund*

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# **Submissions by the Canadian Environmental Law Association and Sierra Legal Defence Fund on the Ministry of Environment's Stakeholder Consultation Paper: Developing Environmental Penalties for Ontario**

**(EBR Registry No. PA05E0036)**

## **I. INTRODUCTION**

The Canadian Environmental Law Association ("CELA") is a public interest group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. CELA is funded as a legal aid clinic and represents individuals and citizen groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to litigation, CELA also undertakes law reform activities, public education and community organizing.

Sierra Legal Defence Fund ("SLDF") is a registered charity funded by public donations and foundation grants that provides free legal and scientific services to environmental groups and concerned citizens in Canada. SLDF's work has included several reports on the lack of enforcement of environmental laws in Ontario, private prosecutions, requests for investigation and review by the Environment Commissioner of Ontario and the Auditor General, and requests for factual records from the Commission for Environmental Cooperation under NAFTA.

CELA and SLDF have a lengthy involvement with the Ministry of Environment's ("MoE") proposal to implement civil administrative penalties in Ontario. CELA was involved in commenting on the MoE's first proposal to introduce an administrative monetary penalty regime in Ontario which was posted on the Environmental Bill of Rights Registry on February 6, 2002 for a two-month comment period.<sup>1</sup> CELA and SLDF provided written comments on Bill 133, the *Environmental Enforcement Statute Law Amendment Act*, 2004 which established the environmental penalty (EP) regime in Ontario.<sup>2</sup> Counsel for CELA and SLDF made presentations to the Standing Committee on the Legislative Assembly in support of Bill 133 and participated in the EP stakeholder consultations held in Toronto on November 15, 2004. Counsel for CELA and SLDF have also attended subsequent meetings with MoE and other stakeholders on the EP regulations.

The MoE sought comments on the EP regulations by posting a paper entitled "Stakeholder Consultation Paper: Developing Environmental Penalties for Ontario" (MoE's Consultation Paper) on the Environmental Bill of Rights Registry with comments due by December 31, 2005. CELA requested additional time to provide comments in order to review the Phase 2 consultation session summaries. The consultation session summaries are the compilation of the comments provided by stakeholders from the consultations held in Toronto, Sudbury and Sarnia. On

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<sup>1</sup> CELA's comments on the Administrative Penalty Proposal, EBR Registry Number PA 02E0001, (April 2002).

<sup>2</sup> CELA's comments on EBR Registry Number AA04E003, *Environmental Enforcement Statute Law Amendment Act*, 2004, (January 7, 2005); SLDF's comments on the *Environmental Enforcement Statute Law Amendment Act*, (January 7, 2005).

January 10, 2006, the MoE provided CELA and SLDF with the consultation summaries and we have taken them into consideration in providing our submissions.

## II. GENERAL COMMENTS

CELA and SLDF support the use of environmental penalties (EPs) to ensure and promote environmental compliance in Ontario. EPs in some respects provide a number of advantages over prosecution by providing a more expeditious, less resource intensive and less costly means of bringing violators into compliance. Therefore, we regard EPs as an important additional tool for achieving compliance with the province's environmental laws.

However, CELA cautioned in its earlier submissions on Bill 133 establishing the EP regime that EPs should not be considered to be a replacement for prosecutions. Legal commentators who have examined the role of prosecutions as a regulatory tool have concluded that an emphasis on prosecutions has served as a powerful catalyst in promoting regulatory compliance.<sup>3</sup> They note that "prosecutions have benefits that are not available from any other administrative remedies."<sup>4</sup> Companies that have been prosecuted, for example, tend to allocate significantly more of their resources towards environmental protection in comparison to those that have not been prosecuted.<sup>5</sup> Given this empirical finding, it is critical that MoE clearly delineate the circumstances when EPs will be utilized and when it will proceed with enforcement action.

## III. SPECIFIC COMMENTS

### A. SCOPE OF EPs

#### (i) EPs should apply to all facilities

The former Minister of Environment, Leona Dombrowsky, stated that EPs will be limited to Municipal Industrial Strategy for Abatement (MISA) sector facilities.<sup>6</sup> According to Ministry data, in 2003 MISA facilities were responsible for 84% of reported liquid spills from all industrial sources in terms of reported volumes released.<sup>7</sup> In 2004, MISA facilities were responsible for 97.7% of all reported liquid spills.<sup>8</sup> However, the Ministry's findings have been subject to challenge by a number of stakeholders. The Coalition for Sustainable Environment, a coalition of industry and trade associations, has indicated that research shows "the vast majority of spills (greater than 65%) are caused by facilities that are not included in any of the MISA

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<sup>3</sup> John Swaigen, "A Case for Strict Enforcement of Environmental Statutes", in Allan Greenbaum, Alex Wellington & Ron Pushchak, eds., *Environmental Law in Social Context: A Canadian Perspective*, (Concord: Captus Press, 2002), pp. 212-217; Dianne Saxe, *Environmental Offences*, (Aurora: Canada Law Book Inc., 1990) pp. 53-54.

<sup>4</sup> John Swaigen, *supra*, note 3 at p. 216.

<sup>5</sup> Dianne Saxe, *supra*, note 3 at pp. 53-54.

<sup>6</sup> Ontario, Ministry of Environment, (online: Ontario Ministry of Environment: <http://www.ene.gov.on.ca/envision/news/speeches/051205.htm>, accessed 26 January, 2006).

<sup>7</sup> Ontario, Ministry of Environment, *Industrial Spill in Ontario*, (May 2005) at p. 3.

<sup>8</sup> *Ibid.*

facilities.”<sup>9</sup> Furthermore, the Sarnia-Lambton Environmental Association, a group of nineteen refining, petrochemical and associated businesses in the Sarnia area notes that the MoE’s analysis of spill data is "deeply flawed" as it only identifies the "volume of water carrying the spilled contaminant, rather than the mass of the contaminant."<sup>10</sup> Consequently, there is a lack of information about the hazard level and risk associated with spills.<sup>11</sup>

CELA and SLDF have not conducted an independent research on this issue and are not in a position to confirm or challenge the accuracy of any of these findings. However, CELA and SLDF are strongly of the view that the application of EPs should not be limited to MISA facilities. A focus solely on MISA facilities would create an uneven playing field between these facilities and the rest of the regulated community.

The MoE's Compliance Guideline F-2 (“Compliance Guideline”) stipulates that "enforcement will be administered in an even-handed, non-discriminatory and fair manner which advances and protects the public interest."<sup>12</sup> We are of the view that these considerations apply equally with respect to the use of other regulatory instruments such as EPs to ensure compliance by the regulated community. Furthermore, we note that the MoE's Stakeholder Consultation Paper states that one of the purposes for imposing EPs is to "ensure that no company has an unfair economic advantage from non-compliance."<sup>13</sup> Consequently, it is not evident from an environmental or compliance standpoint why only MISA facilities should be subject to the EP regime while non-MISA facilities, which commit identical violations, should be exempt. Restricting the EP regime to only MISA facilities creates a very serious risk that the MoE's compliance policy will be regarded as discriminatory and will undermine public confidence in the Ministry's efforts to ensure and promote regulatory compliance with Ontario's environmental laws.

**Recommendation 1: CELA and SLDF recommend that EPs apply to all facilities in Ontario that are responsible for causing spills.**

**(ii) EPs should apply to spills to water, land and air.**

A number of industry stakeholders have suggested that EPs should be restricted to addressing spills to surface water.<sup>14</sup> There are no valid public policy reasons which would justify such a restriction.

<sup>9</sup> Coalition for a Sustainable Environment [CASE] EBR Submission on Stakeholder Consultation Paper: Developing Environmental Penalties in Ontario, December 23, 2005, at p. 3.

<sup>10</sup> Sarnia-Lambton Environmental Association Comments on EBR # PA05E0036 Stakeholder Consultation Paper Developing Environmental Penalties in Ontario, December 22, 2005, pp.4 -5.

<sup>11</sup> *Ibid* at p. 5.

<sup>12</sup> Ontario, Ministry of Environment, *Compliance Guideline F-2*, October 2001, s 9.7 (d) Principles of Enforcement, at p. 24.

<sup>13</sup> Ontario, Ministry of Environment, *Stakeholder Consultation Paper Developing Environmental Penalties for Ontario*, November 10, 2005 at p.1.

<sup>14</sup> Submissions by the Canadian Petroleum Products Institute on EBR # PA050036 Stakeholder Consultation Paper-Developing Environmental Penalties for Ontario, (December 22, 2005) at p. 2.; Coalition for a Sustainable Environment [CASE] EBR Submission MoE Stakeholder Consultation Paper: Developing Environmental Penalties in Ontario, (December 23, 2005) at p. 4; Submission by Ethyl Canada Inc. on EBR # PA050036 Stakeholder

The MoE's reason for implementing EPs was to "provide an immediate response to contraventions" and "promote swift actions to mitigate the effects of a contravention and to resolve non-compliance."<sup>15</sup> These considerations apply to environmental violations which affect the air and land just as equally as they do to water. Furthermore, a spill on land can also result in air emissions and water pollution. Consequently, we fail to see any valid reason why EPs should be restricted to addressing only spills into water. We note that other jurisdictions, such as Alberta, which impose civil administrative penalties for environmental offences, apply them to violations that impact on all media.<sup>16</sup>

CELA and SLDF, therefore, recommend that EPs apply to spills to water, land and air.

**Recommendation 2: CELA and SLDF recommend that EPs apply to spills to water, land and air.**

**(iii) EPs should address environmental violations in addition to spills.**

The MoE should extend the use of EPs to other environmental offences. However, the decision whether to utilize EPs as opposed to enforcement action needs to be made by provincial officers on a case-by-case basis in accordance with principles stipulated in section 10.0 (Informed Judgment) in the MoE's Compliance Guideline. These factors include the seriousness of the violation itself, whether the violation was deliberate, whether the violation has been repeated and is ongoing, whether the violator has disregarded prior warnings and the offender's compliance record.<sup>17</sup> CELA and SLDF are strongly of the view that EPs should never be used to address a violation that currently would be subject to prosecution under the MoE's Compliance Guideline.

Prior to extending EPs to address other types of environmental violations, the MoE should ensure that the violation could, in fact, be addressed through an EP regime. There are certain types of offences in environmental legislation which do not lend themselves to the use of EPs. Subsection 184(2) of Ontario's *Environmental Protection Act* ("*EPA*") for example, which creates an offence to provide false information, should not be addressed through an EP since the offence provision has a *mens rea* component.<sup>18</sup>

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Consultation Paper- Developing Environmental Penalties for Ontario, at p.1; Submission by Nova Chemicals (Canada) Ltd. on EBR # PA050036 Stakeholder Consultation Paper- Developing Environmental Penalties for Ontario, (December 22, 2005) at p.1; Submission by Ontario Mining Industry on EBR # PA050036 Stakeholder Consultation Paper- Developing Environmental Penalties for Ontario, (December 19, 2005) at p.2; Submission by Sarnia Lambton Environmental Association Comments on EBR # PA050036 Stakeholder Consultation Paper- Developing Environmental Penalties for Ontario, (December 22, 2005) at p.6; Submission by Shell Canada Limited on EBR# PA050036 Stakeholder Consultation Paper- Developing Environmental Penalties for Ontario, (December 23, 2005) at p. 2.

<sup>15</sup> Ontario, Ministry of Environment, Stakeholder Consultation on: Developing Environmental Penalties for Ontario, November 10, 2005 at p. 2.

<sup>16</sup> *Environmental Enhancement Protection Act*, R.S.A. 2000, c. E-2.

<sup>17</sup> Ontario, Ministry of Environment, *Compliance Guideline F-2*, s.10.0 Informed Judgement, pp. 24-25.

<sup>18</sup> See, e.g. *R. v. Mac's Liquid Disposal (1982) Ltd.* (1987), 2 C.E.L.R (N.S) 89 (Ont. C.A).

**Recommendation 3: CELA and SLDF recommend that the EP regime address spills and other environmental violations**

**(iv) MoE should undertake an evaluation study on the effectiveness of EPs**

EPs mark the introduction of a fundamentally new approach by MoE in responding to violations of Ontario's environmental laws. It is important, therefore, that the MoE gain experience and expertise with the new regime before it is permanently adopted as a compliance tool. The regulated community also needs to have an opportunity to gain familiarity with the new regime and to make any necessary modifications to ensure compliance. We recommend that the MoE implement EPs as a pilot project to address only spills for a minimum of three years. During the term of the pilot project, the MoE will have an opportunity to address any weaknesses with the new system.

Prior to extending the use of EPs to other environmental violations, the MoE should conduct an evaluation study to assess whether the use of EPs has resulted in improved environmental compliance and the reduction of spills. This is necessary to ensure that the use of EPs has, in fact, improved compliance and will allow the MoE to make an informed decision about whether EP regime should be implemented to address other types of environmental violations. The MoE should also undertake stakeholder consultations regarding the appropriate criteria to be utilized for evaluating the EP regime.

**Recommendation 4: CELA and SLDF recommend that the MoE conduct an evaluation study on the effectiveness of EPs in reducing and eliminating spills prior to extending the EP regime to other environmental violations.**

**B. BASE PENALTY AND MODIFIERS**

The process of assessing the base penalty should be clear and predictable to MoE staff and the regulated community so that environmental penalties can be assessed in a uniform and consistent manner. However, there also needs to be an appropriate degree of flexibility to ensure that higher penalties are imposed for more egregious violations. We believe the use of modifiers is essential to ensuring that good actors are rewarded for their efforts to prevent and mitigate pollution, while higher penalties are imposed on those with poor compliance records. It is important that EPs not be seen as trivial "costs of doing business" but rather reflect the true environmental costs of contravening environmental laws.<sup>19</sup>

Accordingly, CELA and SLDF support the use of preventative, mitigative and gravity based modifiers. CELA and SLDF also support MoE's proposal to recapture any economic benefit a violator obtains through contravening the law. We believe this would enshrine the "polluter pay"

<sup>19</sup> See, e.g., *British Columbia v. Canadian Forest Products Limited*, [2004] 2 S.C.R. 74 at pars. 132-155.

principle in the EP regime.<sup>20</sup> However, the MoE needs to obtain more information from other government agencies, such as the U.S Environmental Protection Agency, regarding the methods used to calculate the economic benefit from violating the law by avoiding compliance, delaying compliance or achieving an illegal competitive advantage.

A number of stakeholders have stated that the discharge of a substance deemed toxic under the *Canadian Environmental Protection Act*, (“CEPA”) should be a factor in assessing the EP amount.<sup>21</sup> We support this recommendation but note that only 79 substances have been determined to be toxic under CEPA,<sup>22</sup> even though there are approximately 23,000 substances currently in use in Canada which are on the Domestic Substances List.<sup>23</sup> The process for designating substances as toxic under CEPA has been criticized because “only a limited number of toxic substances” have been regulated under the statute.”<sup>24</sup> Furthermore, substances can only be regulated under CEPA if no other federal law regulates the substance.<sup>25</sup> This can result in regulatory gaps regarding the control of toxic substances.<sup>26</sup>

We recommend that in addition to CEPA toxic substances, the MoE should include the list of substances in O. Reg 169/03 (Ontario Drinking Water Quality standards) which was promulgated under the *Safe Drinking Water Act* as gravity modifiers.<sup>27</sup> Similarly, in relation to air pollution offences, the EP regime should include the contaminants listed Schedule 1 of O. Reg 346/90 (General - Air pollution) as gravity modifiers.

Since the base penalty assessment and modifiers will be the cornerstone of the penalty assessment process it is important that the MoE obtain and provide more information on how they have been applied in other jurisdictions. We therefore recommend that the MoE invite government officials from other jurisdictions who have experience in base penalty assessment methodologies as well as the use of modifiers to share their experience with the Working Group on Environmental Penalties. This would allow the MoE and stakeholders to engage in a more informed debate about the strengths and weaknesses of the various models currently under consideration.

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<sup>20</sup> J. Libber, *Making the Polluter Pay: EPA’s Experience in Recapturing a Violator’s Economic Benefit from Noncompliance*, U.S. EPA, Washington DC, at p. 1.

<sup>21</sup> See, e.g., Comments by Newalta Corporation on Stakeholder Consultation Paper-Developing Environmental Penalties in Ontario for Ontario EBR Registry No. PA05E0036, December 16, 2005 at p.4; Comments by the Corporation of the Town of Tecumseh, re: Bill 133 Environmental Enforcement Statute Law Amendment Act, dated January 15, 2005, at 1.

<sup>22</sup> Environment Canada, Toxic Substances List, (Online: CEPA Environmental Registry, [http://www.ec.gc.ca/CEPARegistry/subs\\_list/Toxicupdate.cfm](http://www.ec.gc.ca/CEPARegistry/subs_list/Toxicupdate.cfm), accessed 27 January, 2006).

<sup>23</sup> Jamie Benidickson, *Environmental Law*, (Toronto: Irwin Law Inc., 2002) at p. 23.

<sup>24</sup> Commission on Environmental Cooperation, *Indicators of Effective Environmental Enforcement- A North American Dialogue*, (Montreal: Commission for Environmental Cooperation, 1999) at A3-19.

<sup>25</sup> *Canadian Environmental Protection Act 1999*, R.S.C. 1999, c. 33.s. 81(6).

<sup>26</sup> *Indicators of Effective Environmental Enforcement - A North American Dialogue*, *supra*, note 21 at A3-19.

<sup>27</sup> See, Comments by the Ontario Water Works Association and the Ontario Municipal Water Association, Re: Developing Environmental Penalties for Ontario- EBR Registry No. PA050036, December 16, 2005.



**Recommendation 5 (a): CELA and SLDF support the use of preventative, mitigative and gravity modifiers.**

**Recommendation 5 (b): The MoE needs to provide more information to the Working Group on Environmental Penalties regarding the experience in other jurisdictions with base penalty assessments, the use of modifiers and how environmental benefits are calculated.**

### C. SETTLEMENT AGREEMENTS

We do not support the use of settlement agreements which would allow the MoE to reduce or cancel an EP for undertaking additional measures, such as implementing a comprehensive pollution prevention plan or conducting long term clean up and monitoring. We note that the MoE currently can require companies to take these measures under its order provisions in the *EPA*.<sup>28</sup> However, unlike settlement agreements, the MoE has powers to prosecute a violator for failing to comply with an order.<sup>29</sup> The lack of an enforceability mechanism in the *EPA* against violators who fail to comply with the terms and conditions of a settlement agreement is a matter of serious concern.

The use of settlement agreements provides extremely broad discretion to the MoE to reduce or cancel EPs beyond the application of preventative and mitigative modifiers. We are concerned that the MoE may use settlement agreements to preclude an appeal by the violator and avoid committing Ministry resources towards defending its decision to issue an EP before the Environmental Review Tribunal. Furthermore, in our view, expending MoE staff time on protracted negotiations to reach a settlement agreement with violators is not the best use of the MoE's limited human and fiscal resources. Consequently, we do not support the use of settlement agreements.

However, in the event the MoE decides to use settlement agreements, certain preconditions should be established. We are of the view that it is inappropriate to use settlement agreements where the conduct of the violator was wilful, the violator obtained an economic benefit by violating the law, the violator has prior convictions for environmental offences, or where a violator has been uncooperative with government officials.

**Recommendation 6: CELA and SLDF do not support the use of settlement agreements to reduce or eliminate an EP.**

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<sup>28</sup> See, *Environmental Protection Act*, R.S.O. 1990, c.E.19 (*EPA*), ss. 7, 17, 18 and 124.

<sup>29</sup> *EPA*, s 186(2).

## D. ENVIRONMENTAL MANAGEMENT SYSTEM

The amendments to the *EPA* through Bill 133 provide for a reduction in the amount of a penalty if at the time of the contravention an environmental management system (“EMS”) was in place. While CELA and SLDF support the use of an EMS as a means to reduce spills, we are concerned the MoE may be placing undue weight on the existence of an EMS. In fact, many stakeholders who provided submission on MoE’s consultation paper have indicated that MISA facilities already have EMSs in place.<sup>30</sup> Yet, according to the MoE these same facilities are responsible for the majority of the spills in Ontario. This suggests that the existence of a EMS, in and of itself, has not had a sufficient impact in spill reduction.

A study prepared by Industrial Pollution Action Team (“IPAT”) (established by the former Minister of the Environment, Leona Dombrowsky), to examine the causes for industrial spills and dangerous air emissions did not identify EMSs as a necessary measure for spill reduction in Ontario.<sup>31</sup> Instead, the IPAT report notes that the MoE staff had identified the common causes of spill to include:

- (i) leaks from heat exchangers (once-through cooling water systems);
- (ii) leaks from pipes or valves;
- (iii) overflow of products from containers, gaining access to the river via storm sewer systems;
- (iv) capacity problems with treatment and/or containment systems due to storm events;
- (v) contaminated runoff from fires;
- (vi) power outages and other unplanned equipment shut downs; and
- (vii) human error -failure to operate or maintain a system.<sup>32</sup>

The report also states that the “number and training of staff may be important factors in spill prevention and response.” It further states that there was no “requirement for operator or manager training or certification in regulatory requirements (including Certificates of Approval) or in the industry’s Responsible Care Program requirements.”<sup>33</sup>

The MoE should ensure that the selection of modifiers under the EP regulation are not divorced from the underlying causes of spills in Ontario. In this regard, the findings of the IPAT report suggest that modifiers should be based on factors other than whether the violator had a EMS in place. The factors the IPAT report identifies as necessary for spill prevention include:

- (i) regulations and incentives for pollution prevention and life cycle assessment;
- (ii) regulations and incentives to encourage the use of less toxic materials;
- (iii) regulatory requirements for spill prevention plans;

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<sup>30</sup> The Canada’s Chemical Producers *supra* note 14 at p. 2, for example notes that in the case of CCPA, all members are Responsible Care companies and are required to have an EMS to meet the Responsible Care codes of practice. Some CCPA members, like some other companies outside CCPA, are also registered with ISO 14000 or have an EMS’s that their companies apply on a global basis. The Canadian Petroleum Products Institute, *supra* note 14, at p. 2 also notes that “all its members have spent significant resources in developing and using EMSs”.

<sup>31</sup> Ontario, Ministry of Environment, *Industrial Pollution Action Team- Discussion Document*, June 20, 2004.

<sup>32</sup> *Ibid* at p. 12.

<sup>33</sup> *Ibid.* at p. 31.

- (iv) regulatory requirements for multiple barriers between the point of use and point of discharge;
- (v) mechanisms (regulatory and otherwise) to encourage review and updating of technology; and
- (vi) methods for reducing human error in routine operations for spills, especially for repeat offenders.<sup>34</sup>

The report also concludes that although technology and associated practices for spill prevention are well understood, they are not universally employed. Stormwater containment, sewer separation, and effective maintenance programs in particular are also considered critical elements of any spill prevention plan.<sup>35</sup>

Accordingly, the modifiers for the base penalty should take into account the nature of the contaminant which was spilled, the presence of appropriate employee training and instructions, the use of environmentally conscious equipment design to prevent spills, equipment maintenance programs, spill prevention plans and emergency planning. In our view, the mere existence of a EMS warrants only a minimal reduction in the base penalty.

## **E. SPECIAL PURPOSE ACCOUNT**

CELA and SLDF support the creation of a special purpose account to deposit the monies collected from EPs. We believe the MoE should use the funds in the special purpose account for remediating sites in Ontario which have been contaminated by spills and where no person can be held liable for the clean-up through the MoE's order powers under the *EPA*. In addition, the funds in the special purpose account should be used to compensate individuals who have been adversely impacted by spills.

The establishment of a special purpose account should not diminish any civil liability for environmental harm. i.e. insurance claims and damage claims should not be prejudiced.

**Recommendation 8 (a): The MoE should use the funds in the special purpose account for remediating sites contaminated by spills where no person can be held liable for the clean-up and to compensate individuals who have been adversely impacted by a spill.**

**Recommendation 8(b) The MoE should ensure that the establishment of a special purpose account does not prejudice any civil liability claims by a party who has been harmed by a spill.**

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<sup>34</sup> *Ibid.*, pp. 12-13.

<sup>35</sup> *Ibid.* at p. 16.

## F. SPILL REPORTING

CELA and SLDF support enhanced reporting requirements to allow the MoE to fully assess the particulars of the spill. We note that the IPAT report found that some water users do not feel that they have been informed about spills in a timely fashion.<sup>36</sup> The report recommended that current notification requirements be reviewed “in consultation with local communities and private water users to determine the most appropriate spill notification strategies for different user groups and cultures.”<sup>37</sup> The report notes that it may be necessary to develop different strategies for spills to air versus water.<sup>38</sup> We support these recommendations and urge the MoE to undertake consultations with the local communities and private water users in determining the type of information required for reporting purposes.

**Recommendation 9: CELA and SLDF recommend that the MoE undertake consultation with the local communities and private water users in determining the type of information required in the reporting requirements to allow the MoE to fully assess the particulars of a spill.**

## G. SPILL PREVENTION AND CONTINGENCY PLANNING

CELA and SLDF support the use of spill contingency/prevention plans through the EP regulation. The IPAT report found that while most facilities have a spill contingency plan in place, the recent spills suggest that these plans are not as effective as they could be.<sup>39</sup> The report states that MoE has not developed guidance for the development and review of spill contingency plans for use by industry.<sup>40</sup> The report recommends that this guidance could be made available through arm’s length consultants or professional ISO auditors.<sup>41</sup>

We support this recommendation and suggest the MoE retain a consultant to provide guidance to the working group on how existing spill contingency/prevention plans should be recognized in the EP regulation. The consultant should also be required to assess whether Environmental Emergency Plans submitted under CEPA should be recognized for the purpose of spill contingency/prevention planning under the EP regulation.

**Recommendation 10: CELA and SLDF recommend that the MoE retain a consultant to provide guidance to the Working Group on EPs on how existing spill contingency/prevention plans should be recognized in the EP regulation.**

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<sup>36</sup> *Industrial Pollution Action Team- Discussion Document, supra*, note 27 at p. 43.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* at p. 40.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

## **IV. SUMMARY OF RECOMMENDATIONS**

### **Recommendation 1:**

CELA and SLDF recommend that EPs apply to all facilities in Ontario that are responsible for causing spills.

### **Recommendation 2:**

CELA and SLDF recommend that EPs apply to spills to water, land and air.

### **Recommendation 3:**

CELA and SLDF recommend that the EP regime address spills and other environmental violations.

### **Recommendation 4:**

CELA and SLDF recommend that the MoE conduct an evaluation study on the effectiveness of EPs in reducing and eliminating spills prior to extending the EP regime to other environmental violations.

### **Recommendation 5 (a):**

CELA and SLDF support the use of preventative, mitigative and gravity modifiers.

### **Recommendation 5 (b):**

The MoE needs to provide more information to the Working Group on Environmental Penalties regarding the experience in other jurisdictions with base penalty assessments, the use of modifiers and how environmental benefits are calculated.

### **Recommendation 6:**

CELA and SLDF do not support the use of settlement agreements to reduce or eliminate an EP.

### **Recommendation 7:**

CELA and SLDF recommend that the existence of an EMS warrants only a minimal reduction in penalty.

### **Recommendation 8 (a):**

The MoE should use the funds in the special purpose account for remediating sites contaminated by spills where no person can be held liable for clean-up and to compensate individuals who have been adversely impacted by a spill.

### **Recommendation 8 (b):**

The MoE should ensure that the establishment of a special purpose account does not prejudice any civil liability claims by a party who has been harmed by a spill.

### **Recommendation 9:**

CELA and SLDF recommend that the MoE undertake consultation with the local communities and private water users in determining the type of information required in the reporting requirements to allow the MoE to fully assess the particulars of a spill.

**Recommendation 10:**

CELA and SLDF recommend that the MoE retain a consultant to provide guidance to the Working Group on EPs on how existing spill contingency/prevention plans should be recognized in the EP regulation.