



CANADIAN ENVIRONMENTAL  
LAW ASSOCIATION

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L'ASSOCIATION CANADIENNE DU DROIT DE  
L'ENVIRONNEMENT



SIERRA LEGAL  
DEFENCE FUND



January 10, 2007

The Honourable Laurel C. Broten  
Minister of Environment  
12<sup>th</sup> Floor, 135 St. Clair Avenue  
Toronto, Ontario  
M4V 1P5

Paul Tripodo, Research Policy Analyst  
Land and Water Policy Branch  
Land Use Policy Branch  
Ministry of Environment  
135 St. Clair Avenue. West, 6<sup>th</sup> Floor  
Toronto, Ontario M4V 1P5

*Via Courier*

Dear Minister and Mr. Tripodo:

**Re: MoE Draft Regulations on Environmental Penalties EBR No # RA06E0013**

## **Introduction**

The Canadian Environmental Law Association (CELA), Sierra Legal Defence Fund (SLDF), Canadian Institute of Environmental Law and Policy (CIELAP), and Lake Ontario Waterkeepers (LOK) are members of the Environmental Penalties Regulatory Working Group, and actively participated in the multi-stakeholder consultation leading to the draft environmental penalties (EP) regulations. Our comments on key issues relating to the draft regulations are summarized in the Final Consultation Summary Table, (Revised April 10, 2006), a copy of which is attached.

In this letter we focus on the broader issue regarding the appropriate circumstances under which EPs should be utilized. In our view, this issue is central to ensuring the use of EPs does not result in a weakening of the prosecution of environmental violations in Ontario.

## **General Comments**

We support in principle the use of environmental penalties as a tool for addressing environmental violations. We are aware that environmental penalties have been adopted in a number of other jurisdictions and are increasingly recognized as an important component of the enforcement pyramid model. The enforcement pyramid model emphasizes the importance of utilizing a broad spectrum of increasingly severe sanctions, to ensure that regulators can be flexible and proportionate in their response to a particular violation. However, Law Reform Commission studies, as well as a number of legal commentators, have emphasized the importance of ensuring that environmental penalties are maintained in their proper place within the enforcement pyramid, to ensure that they do not replace the pursuit of serious environmental violations in the criminal courts.

In a brief dated January 31, 2006, CELA and SLDF echoed these concerns and cautioned that, “EPs should not be considered to be a replacement for prosecutions.” We noted that “legal commentators who have examined the role of prosecution as a regulatory tool have concluded that prosecution have served as a powerful catalyst in promoting regulatory compliance. 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.” Moreover, we note that the fines available for a prosecution of an environmental offence are significantly higher than those available for an environmental penalty.

During the multi-stakeholder consultation on the draft regulations we repeatedly cautioned that violations of a serious environmental or health nature should never be dealt with through an EP but should instead be subject to prosecution. It is important to note that there was consensus on this key issue by all the stakeholders of the Working Group.

## **Specific Comments on the draft Regulations**

We are extremely disappointed that the draft regulations authorize the use of EPs for very serious contraventions which cause “widespread injury or damage to plant and animal life, harm or material discomfort to any person, an adverse effect on health of any person or the impairment of the safety of any person.” These are precisely the types of offences which should be subject to a criminal proceeding as opposed to an EP. We are concerned that if EPs are allowed to be used to address very serious contraventions, the MoE would rarely resort to criminal proceedings, opting instead for the less complex administrative process.

In our view, the draft regulations carry a very real risk that the MoE may no longer use the criminal route for the more serious offences, thereby weakening regulatory compliance in the province. We strongly recommend that the draft regulations be amended to ensure that EPs are not utilized to address very serious contraventions.

The MoE’s draft Compliance Policy states on page 16 that “prosecution remains available to deter serious pollution incidents and repeat offenders.” This clause provides insufficient guidance to MoE provincial officers as to when a matter should be addressed through a prosecution as opposed to an EP. We recommend instead, that the draft Compliance Policy expressly stipulate that EPs will not be used to address very serious contraventions which cause “widespread injury or damage to plant or animal life, harm or material discomfort to any person, an adverse effect on the health of any person or the impairment of the safety of any person.”

## **Conclusion**

We support the concept of using EPs as means of addressing environmental non-compliance in Ontario. However in our view the MoE draft regulations are fundamentally flawed in their authorization for the use of EPs for very serious contraventions. We are firmly of the view that egregious environmental violations should be subject to prosecution as opposed to EPs.

We hope that the MoE will address the concerns we have raised, and establish the necessary safeguards to ensure that regulatory compliance will not be jeopardized by the introduction of environmental penalties in Ontario.

Yours truly,

Ramani Nadarajah  
Acting Executive Director  
Canadian Environmental Law Association

Rob Wright  
Counsel  
Sierra Legal Defence Fund

Maureen Carter-Whitney  
Research Director  
Canadian Institute for Environmental Law and Policy

Mark Mattson  
President and Waterkeeper  
Lake Ontario Waterkeeper

cc: The Environmental Commissioner of Ontario

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