Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

May 30, 2019

Mr. Andre Martin
Compliance, Planning and Spills Action Centre
135 St. Clair Avenue West, 18th floor,
Toronto Ontario
M4V IP5

Via Email Only: andre.martin@ontario.ca

Dear Mr. Martin:

Re: Proposed Amendments to the Environmental Protection Act (ERO 019- 0023)

The Canadian Environmental Law Association (CELA) strongly supports the proposal to amend the *Environmental Protection Act* (*EPA*) as outlined in the above proposal.

The Ministry of Environment, Conservation and Parks (MECP) is proposing to make the following amendments to the EPA in relation to administrative penalties:

(i) Extend administrative penalties for a broad range of environmental violations under the *EPA*;
(ii) Establish $200,000 maximum administrative penalty per contravention, or higher if the economic benefit achieved via the violation was higher (penalty amounts would be set by a regulation);
(iii) Establish an ability to review and/or appeal the administrative penalty;
(iv) Issue an annual report listing the administrative penalties issued in the last year; and
(v) Establish provisions to enable the implementation of administrative penalties in regulation (e.g. how to set administrative penalty amounts, who they can apply to, and how violators can seek reductions in penalty amounts for taking action to prevent or mitigate the contravention).

CELA supports the extension of administrative monetary penalties to environmental penalties beyond those covered under the current regime. However, as CELA has previously noted, administrative penalties should be regarded as a supplement, but not a replacement for environmental prosecutions. The Ministry needs to establish clear guidelines for its staff on when the use of administrative penalties would be appropriate as opposed to a prosecution. CELA recommends that MECP's staff be trained to ensure that the issuance of administrative penalties is implemented appropriately and in a manner that is proportionate to the violation in question.

CELA is pleased that the Ministry will be preparing an annual report listing the administrative penalties issued in the last year. The annual report should include, at a minimum the following information:

- the number of AMPs issued by the MECP annually
- the person to whom AMPs were issued
- the types of violations subject to AMPs
- the time period for issuing an AMP upon discovery of a violation
- the number of violations which were corrected
- the length of time it took for a facility to come into compliance
- the penalties imposed for each violation
- the total amount of annual penalties imposed under AMPs
- the number of AMPs which were not paid within the time specified and the government's collection efforts
- the number of appeals that were made to the Environmental Review Tribunal
- the outcome of these appeals

We are very pleased that the Ministry is proposing to ensure economic benefit is reflected in the calculation of an administrative penalty. CELA had previously recommended that the economic benefit of non-compliance with environmental law should be integrated into the administrative penalty regime. See attached brief titled "Administrate Monetary Penalties – CELA comments on the Administrative Monetary Proposal" dated April 2002.

Under the ERO proposal the Ministry is also proposing the following amendments to the EPA in relation to the seizure of vehicle plates:

(i) Establish a process to seize and dispose of plates from Ontario vehicles and out-of-province vehicles;
(ii) Require that notice of the seizure be provided to the driver of the vehicle, the owner of the vehicle, and the Registrar (Ministry of Transportation);
(iii) Ensure no new plates or permits are issued to the permit holder of the vehicle by the Registrar until a further notice is provided that the matter has been resolved, or until the prescribed prohibition period ends; and
(iv) If convicted of an offence, allow for a court order to prevent the violator from obtaining new plates and permits within a specified time period.

CELA supports the amendments in relation to the seizure of vehicle plates for out-of-province vehicles as it would help the Ministry fulfill its mandate to enforce environmental laws and hold the polluter accountable.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Ramani Nadarajah
Counsel

Encls.

ADMINISTRATIVE MONETARY PENALTIES

CELA'S COMMENTS ON

THE ADMINISTRATIVE MONETARY PENALTY PROPOSAL

Report #418
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PART I - BACKGROUND

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. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA also undertakes law reform on a broad range of environmental issues.

The purpose of this brief is to respond to the regulations for Administrative Monetary Penalties (AMPs) as proposed by the Ministry of Environment (MoE). The proposal was posted on the Environmental Bill of Rights Registry, EBR Registry Number PA 02E0001 on February 6, 2002 with a two-month comment period.

Our comments are divided into two sections, the first dealing with general comments about the Ministry's proposal, and the second addressing specific proposals regarding AMPs.

PART II - GENERAL COMMENTS

Our review of the MoE proposal on AMPs suggests that it may be a useful tool to supplement the MoE's compliance and enforcement activity. AMPs are currently used in the United States to handle the majority of environmental violations and have also been used in a number of enactments in Canada, including the federal *Income Tax Act*, the *Aeronautics Act*, the *Forest Practices Code of British Columbia*, and Alberta's *Environmental and Enhancement Act*.

Some of the benefits of AMPs are that appeals of an AMP notice will be before the Environmental Review Tribunal which means there will be less formal and demanding evidentiary procedures, in comparison to a prosecution in Ontario Court (Provincial Division). The MoE's ability to issue field AMPs under certain circumstances also means that offences of environmental legislation will be addressed more promptly than through

a prosecution scheme. Another advantage of AMPs is that they can offer consistency in penalizing environmental violations, through the use of a formula in calculating the base penalty. By providing a consistent mechanism by which minor violations can be penalized, and providing for flexibility to take into account prior violations and due diligence, AMPs ensures a more uniform application of penalties for enviromental violations.

Accordingly, CELA sees merit in the use of AMPs as an additional enforcement tool to address those offences which pose a minor risk of environmental harm while prosecutions should continue to be utilized for those violations having greater consequences. It is important that the use of AMPs be regarded as a *supplement* but not a replacement for environmental prosecutions. MoE staff should thus be trained in the use of AMPs to ensure that they are used in a manner that is proportionate and appropriate to the violation in question.

Recommendation:

The use of AMPs to respond to those offences which pose minor risk of environmental harm is supported. MoE staff should be trained in the use of AMPs to ensure that they are used in a manner that is proportionate and appropriate to the violation in question.

PART III - SPECIFIC COMMENTS ON AMPS

(a) Transparency and Accountability

In view of the substantial cuts to MoE staff and budget over the past years, CELA has serious concern that MoE may utilize the more expeditious process provided by AMPs in lieu of prosecutions for the even more egregious violations. We are aware that other stakeholders have raised similar concerns. The MoE needs to ensure that it addresses such concerns by developing key performance measures to assess the success of its AMP program. At a minimum this would include providing information to the public on :

- the number of AMPs issued by the MoE annually
- the person to whom AMPs were issued
- the types of violations subject to AMPs
- the time period for issuing an AMP upon discovery of a violation
- the number of violations which were corrected
- the length of time it took for a facility to come into compliance
- the penalties imposed for each violation
- the total amount of annual penalties imposed under AMPs
- the number of AMPs which were not paid within the time specified and the government's collection efforts
- the number of appeals that were made to the Environmental Review Tribunal
- the outcome of these appeals
- how many AMP notices or Environmental Review Tribunal decisions were filed with the Superior Court of Justice to enforce non-payment
- how often the MoE suspends Certificates of Approvals, licenses or Permits for non-payment of an AMP and
- how often the MoE refused to issue a Certificate of Approval, License or Permit for non-payment of an AMP.

Recommendation:

The MoE should provide detailed annual reports regarding the implementation of AMPs which must include at a minimum the information noted in section (a) of this brief.

(b) Characterization of the Offence

The proposed regulations fail to stipulate whether AMPs will be construed as an absolute liability or strict liability. The MoE's background documents on AMPs clearly contemplate that the AMP regime will be one of absolute liability. A MoE document entitled *Administrative Monetary Penalties Implementation Policy* states "... the intent of the regulation is to establish an

absolute liability regime for administrative penalties, where due diligence is not considered a defence, but rather as a factor for seeking a significant penalty reduction."

We are unclear as to why the MoE failed to stipulate in clear legislative language that violations under the AMP regulations would be constructed as absolute liability. This would seem to be crucial task given that the characterization of the offence determines both the range of available defences and the burden and onus of proof to be met by the Crown. Absolute liability offences impose liability without fault and the Crown only has to prove the commission of the *actus reus* beyond a reasonable doubt. The defence of due diligence is not available to the accused. For strict liability offences, however, the defence of due diligence and reasonable mistake of fact will be open to the accused.

According to the Supreme Court of Canada in *R. v Sault Ste. Marie*, the primary considerations in determining legislative intent to create an absolute liability offence are (a) the overall regulatory pattern, (b) the subject matter of the legislation (c) the importance of the penalty and (d) the precision of the language used.

MoE 's failure to characterize in express legislative language that AMP violations are subject to an absolute liability regime makes the proposal vulnerable, should MoE's interpretation be subject to a challenge before the Environmental Review Tribunal or in court. The MoE should ensure that its interpretation of the AMP scheme is strengthened by characterizing in clear legislative language that an AMP violation is subject to an absolute liability regime.

Recommendation:

The MoE should state precisely in legislative language that the commission of an environmental violation, which is subject to AMPs, will be construed as absolute liability.

(c) Failure to Remove Economic Benefit for Non-Compliance.

The draft regulations fail to provide a mechanism to remove the economic benefits for non-compliance, unlike, the AMP system adopted in other jurisdictions. The U.S. EPA, for example, has a specific policy which stipulates that at minimum a civil penalty should remove any economic benefit which resulted from the failure to comply with the law. This amount is referred to as the "benefit component" of the penalty. In general, the U.S. EPA does not settle for less than the economic benefit for non-compliance.

The proposed MoE model, however, lacks the degree of sophistication of its U.S. counterpart. The MoE model's failure to make any effort to calculate and recover the economic benefit from non-compliance is a fundamental weakness because it may result in penalties which are too low to provide effective deterrence and achieve regulatory compliance.

We would recommend that the AMP scheme be modified to take into account the economic value of non-compliance and to ensure that it is reflected in the penalty imposed. This could be done by incorporating a provision similar to section 189 of the *Environmental Protection Act*, to give the Director authority to increase the base penalty by an additional amount equal to the amount of monetary benefit accrued to the person as a result of the commission of the offence. The MoE should also have to ensure that it has the expertise and the resources to devote to ensuring that the economic value of the violation is calculated precisely so that it can devise an economic sanction that would entirely eliminate any incentive to avoid compliance. The MoE must also prepare guidelines for assessing how the economic benefit will be calculated and provide an opportunity for public comment prior to implementation.

Alternatively, another means of ensuring that violators do not incur an economic benefit for non-compliance is to simply stipulate in the MoE's Compliance Guideline that AMPs will not be utilized where a person has accrued economic benefits as a result of non-compliance. In these circumstances, the Provincial Officer should forward the matter on to the MoE's Investigation and Enforcement Branch (IEB) to ensure that the MoE has the option of relying on section 189 of the *Environmental Protection Act*.

Recommendations:

i) The MoE should ensure that the Director has the authority to impose, in addition to the base penalty, an amount equal to the monetary benefit accrued to the person as a result of the commission of the offence.

ii) The MoE should ensure that it prepares guidelines for assessing how the economic benefit will be calculated and that an opportunity for public comment is provided.

iii) In the alternative, the MoE Compliance Guideline should clearly stipulate that AMPs will not be utilized where the non-compliance has resulted in an economic benefit to the violator. Instead the Provincial Officer should forward these cases to IEB.

(d) Additional Factors to Consider in Assessing Due Diligence

We understand that some stakeholders are recommending that the Ministry provide ISO 140001 certified companies with an automatic due diligence reduction. This recommendation is being made on the assumption that it would facilitate administration of AMPs by the MoE, improve certainty and predictability for business and encourage a wide variety of organizations to adopt ISO 140001. Some stakeholders are of the view the use of ISO 140001 may provide an effective way for the MoE to evaluate claims of due diligence as it would allow the MoE to rely on external benchmarks that have been verified by third parities. According to them, this provides for a more certain criteria for establishing due diligence and will also allow the government a more expedient means of verifying due diligence.

However, CELA has serious concerns about using registration with ISO 140001 as a factor in automatically reducing an AMP. Rather, we are of the view that any environmental management system, including ISO 140001, is simply one factor among many that the MoE may want to consider in reducing the base penalty, in appropriate circumstances, with the proviso that the company disclose the environmental management system and all relevant enviromental information to the Director. The Director should consider ISO 140001 certification as a factor in assessing due diligence, *only* after the company has provided disclosure of the environmental management system and all relevant information.

A key concern with ISO 140001 is that it does not require certified companies to disclose environmental information to the public and to government authorities. Rather, this information is regard as company-confidential. Consequently, ISO 140001 lacks transparency and public accountability.

Another major weakness of ISO 140001 is that the drafting of the actual standards did not involve consultations with the public, government and non-governmental organizations. The failure to include diverse stakeholders in the ISO drafting process has resulted in the marginalization of government and non-governmental participation in international standard setting for the environment, health and safety.

Finally, critics of ISO 140001 have stated that it is simply a voluntary scheme that ensures a company conforms to certain industry set standards but provides no guarantee of environmental performance and reduced environmental impacts. Consequently, CELA is of the view that an automatic reduction for ISO 140001 certification is inappropriate.

Recommendation:

ISO 140001 certification is simply one of many factors the Director should have regard to in assessing due diligence. Moreover, ISO 140001 certification should be considered as a factor in assessing due diligence only after a certified company discloses its environmental management system and all relevant environmental information to the Director.

(e) Limitation Period

The MoE's stated rationale for creating an AMP scheme is to undertake a more swift response to environmental violations and induce the violator back into compliance. The limitation period provided for the issuance of an AMP is two years, which is the same limitation period provided in environmental statutes for initiating a prosecution. We fail to see why the issuance of an AMP requires a two-year limitation period given the process for levying an AMP is intended to be a less resource intensive and a more expeditious process. We are concerned a lengthy limitation

period will reduce the likelihood of a swift enforcement response by MoE' s provincial officers, particularly given the substantial reductions made to MoE's staff and budget over the recent years.

The two-year limitation period is of concern since empirical research on the factors which lead to deterrence, suggests that the speed of enforcement response and the certainty of punishment are critical to ensuring deterrence. CELA recommends that the limitation period for AMPs be reduced to six months, similar to that provided for ticketing offences under the *POA*, to ensure the MoE's provincial officers respond expeditiously to environmental violations.

Recommendation:

The limitation period for the issuance of an AMP should be reduced to six months.

PART 1V - CONCLUSION

CELA supports the adoption of AMPs in principle, and subject to the modifications noted in this brief. CELA also strongly urges the Ministry to provide information to verify whether AMPs improves compliance of environmental laws. The provision of detailed annual reports to Ontarians on the AMPs programme would ensure government accountability and transparency of the MoE's compliance and enforcement programme.

RECOMMENDATIONS:

The use of AMPs to respond to those offences which pose minor risk of environmental harm is supported. MoE staff should be trained in the use of AMPs to ensure that they are used in a manner that proportionate and appropriate to the violation in question.

The MoE should provide detailed annual reports regarding the implementation of AMPs and which must include at a minimum the information noted in section (a) of this brief.

The MoE should state precisely in legislative language that the commission of an environmental violation which is subject to AMPs will be construed as absolute liability.

The MoE should ensure that the Director has the authority to impose, in addition to the base penalty, an amount equal to the monetary benefit accrued to the person as a result of the commission of the offence.

The MoE should ensure that it prepares guidelines for assessing how the economic benefit will be calculated and that an opportunity for public comment is provided.

In the alternative, the MoE Compliance Guideline should clearly stipulate that AMPs will not be utilized where the non-compliance has resulted in an economic benefit to the violator. Instead the Provincial Officer should forward these cases to IEB.

ISO 140001 certification is simply one of many factors the Director should have regard to in assessing due diligence. Moreover, ISO 140001 certification should be considered as a factor in assessing due diligence only after a certified company discloses its environmental management system and all relevant environmental information to the Director.

The limitation period for the issuance of an AMP should be reduced to six months.

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