

## ONTARIO “AMPs” UP ENVIRONMENTAL ENFORCEMENT WITH ADMINISTRATIVE MONETARY PENALITES

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The draft implementation policy and regulations released by the Ministry of Environment signal a new penalty-intensive focus that should prompt management to ensure that business operations and policies are reviewed to limit potential liability.

On January 16, 2002, the Ontario Ministry of the Environment (MOE) posted a draft implementation policy and draft regulations on the Environmental Bill of Rights Registry for review and public comment. The draft policy and regulations relate to the Ontario *Environmental Protection Act* (EPA), the *Ontario Water Resources Act* (OWRA) and the Ontario *Pesticides Act* (PA). When enacted, the new regulations will permit the use of what are called “Administrative Monetary Penalties” (AMPs) for certain “contraventions” of these acts and their underlying regulations.

### Overview

The stated purposes of the draft regulations are to:

- Encourage the prevention of contraventions;
- Mitigate the effects of contraventions;
- Enable the use of consent orders entered into between the MOE and a person subject to an AMP to rectify the conditions that resulted in a contravention or to remedy the contravention; and
- Promote the quick resolution of disputes related to administrative penalties.

Public submissions on all the drafts can be made until April 16, 2002.

As their name implies, AMPs are financial penalties, which can be imposed by a Director appointed under the EPA, OWRA, or PA for prescribed contraventions. These include violations of certificates of approval, licences, permits or certain orders issued under these three Acts or breaches of prescribed sections of EPA, OWRA or PA regulations.

AMPs have been adopted in certain other provinces in Canada and are automatic penalties for specified contraventions that supplement other enforcement tools, such as the issuing of regulatory orders or pursuing criminal prosecutions for serious offences. AMPs are generally used for less severe or less significant contraventions of regulatory requirements.

The legislative provisions permitting the use of AMPs under the EPA, OWRA and PA were originally established in 1998 but still await final passage into law. It is expected that the 1998 amendments will become law at the same time that the draft AMP regulations are adopted. Under the draft regulations, an AMP would be issued under a notice served on a party allegedly responsible for the contravention. A notice for certain types of AMPs could be issued automatically while other AMPs could only be issued after an “advance notice” of the AMP has been sent out.

Under the draft regulations, if an AMP is paid, the party subject to the AMP is protected from prosecution for the contravention. The draft implementation policy (see below) states that, generally, a person will have 30 days to pay from the date of service of the AMP notice or the date of a decision upholding service of the AMP notice by the Environmental Review Tribunal.

The MOE has developed four categories of contraventions that will be subject to AMPs:

1. Reporting and record-keeping contraventions;
2. Monitoring and sampling contraventions;
3. Operating contraventions (which operates as a “catch-all” category); and
4. Incidents of non-compliance with prescribed limits.

### **Draft AMP Implementation Policy**

The purpose of the draft implementation policy is to set out how the AMPs regulations will be implemented by the MOE and how AMPs will fit within the MOE’s overall compliance/enforcement program. One noteworthy feature of the draft policy is the inclusion of an “Informed Judgement Matrix” which MOE personnel are to use to determine the appropriate response to a violation. These responses can range from voluntary abatement to the laying of charges.

The Matrix lists the severity of the environmental consequence of the violation as one of the scales, ranging from mere administrative consequences to major health consequences. The Matrix also factors in the intent of the violator and the violator’s compliance history (or perhaps, more accurately, the violator’s non-compliance history) to assist MOE staff to determine the appropriate response to the violation.

The Matrix provides for voluntary abatement measures to be implemented when appropriate. However, the MOE’s use of voluntary abatement measures will likely be rare, as the MOE has indicated its preference for seeking mandatory abatement instead (e.g. Section 7.4.1 of the draft policy, which confirms a predilection for this approach that was communicated within the Ministry as early as March 2000).

It is more likely that mandatory abatement measures will be selected. Once selected, the Director appointed under one of the Acts must then consider whether an AMP or control order, or both, are necessary and whether the matter should be referred to the MOE's Investigation and Enforcement Branch for further investigation.

The draft policy makes it clear that an AMP will be issued in conjunction with a control order if it is deemed necessary to remedy a contravention. The draft policy also notes that the MOE's Compliance Guideline (Guideline F-2) will be amended to incorporate the operation of the Informed Judgement Matrix.

### **Draft AMP Regulations**

The three draft AMP regulations are very similar even though they apply separately to the EPA, OWRA and PA. Each draft regulation lists the contraventions under the applicable Act and the regulations for each act that give rise to base penalties ranging from \$500 to \$4,000 per contravention. For example, the draft OWRA Regulation contains schedules that single out certain sections under that Act and its regulations, and assigns applicable base penalties to a contravention of any of these prescribed sections.

AMPs may also be applied to contraventions or breaches of orders and the terms and conditions contained in certificates of approval, permits and licences. However, AMPs cannot be used for a breach of an order to pay costs under Section 150 of the EPA and Section 84 of the OWRA, or a stop order under Section 8 of the EPA and Section 27 of the PA.

The draft EPA Regulation is more detailed than the draft OWRA and PA Regulations because two tiers of base penalties are set out for certain contraventions. Where there is a two-tiered base penalty, the standard base penalty would apply unless the contravention relates, in whole or in part, to "subject waste" (as defined in Regulation 347, *General-Waste Management*) or emissions from a "heavy duty vehicle" (one with a gross vehicle rating greater than 4,500 kilograms when fully loaded), in which case that higher base penalty would apply.

To issue an AMP, MOE personnel must be designated as a "Director" pursuant to the applicable enabling sections under the EPA, OWRA and PA and the Director must be of the opinion that a contravention has occurred. No explicit statutory requirement specifies that the Director's opinion must be reasonable or based upon reasonable or probable grounds (for example, see Section 182.1 of the amended EPA). The draft policy makes it clear that the MOE's intention is to designate provincial officers as Directors for the purposes of issuing AMPs automatically in situations where only one contravention occurs for a period equal to or less than 24 hours and where the applicable base penalty does not exceed \$3,000.

## **“Advance Notice” AMPs**

The draft regulations require that an “advance notice” of an AMP be issued prior to service of the actual AMP in circumstances involving multiple contraventions, a contravention spanning more than one day, or where the applicable base penalty exceeds \$3,000. The draft implementation policy notes that the power to issue “advance notice” AMPs is likely to be provided to Regional Directors or other designated Directors. The inference is that provincial officers at the “field” level are unlikely to be designated as Directors for the purpose of issuing “advance notice” AMPs.

Where advance notice is required, the notice must contain:

- A description of the contravention or contraventions to which the notice relates;
- A description of the date or dates on which the contravention occurred or continued;
- The location of the contravention;
- The applicable base penalty;
- Any additional penalty based on previous convictions or the number of previous AMPs issued;
- The total sum of the proposed penalty;
- The time within which payment must be made and the manner of payment;
- A description of the procedure for requesting a reduction in the amount of the AMP;
- A description of the procedure for obtaining a consent order; and
- Information relating to the right to require a hearing on the matter before the Environmental Review Tribunal.

The maximum daily amount of an “advance notice” AMP is \$10,000.

It is noteworthy that no time period for the amount of advance notice is specified. The likely expectation is that the minimum advance notice should be 15 days, given the time specified for submissions and requests.

## **How AMPs are Calculated**

Where advance notice of the AMP is to be issued, the draft regulations set out the procedure a Director must use to calculate the amount of the AMP. It is important to note that there is no discretion granted to the Director in *calculating* the amount of an AMP, although there is discretion granted in *reducing* the amount of an AMP.

First, the Director is required to determine the applicable base penalty listed in the regulation. An additional penalty “multiplier” is calculated and then multiplied by the base penalty to determine the total amount of the AMP. The additional penalty multiplier is calculated by determining the number of convictions or AMPs issued under the EPA, OWRA or PA that occurred within five years of the date of the current AMP. However, only those convictions or AMPs that occur after the date the draft AMP regulations become law are taken into account.

When determining the components used to calculate the additional penalty, previous convictions and AMPs are assessed differently. For previous convictions that resulted in a fine, the Director calculates this component of the additional penalty by including the amount of the previous fine or \$10,000, whichever is less. If the previous violation involved an AMP, the amount of the AMP previously paid (which includes any reductions in the base penalty previously obtained) is noted.

The additional penalty multiplier is calculated by adding the amount resulting from the previous convictions and AMPs and then taking the lesser of this value or \$50,000. This number is then divided by 50,000 and multiplied by the base penalty that applies to the current contravention. Therefore, the amount payable for every day or part of a day during which the contravention continued is a combination of the base penalty and the additional penalty, to a maximum of \$10,000.

The inclusion of previous AMPs and convictions in the calculation of the total AMP could have an adverse impact on businesses that operate more than one facility in Ontario. Based on the language of the current draft regulations, it appears that penalties assessed at one facility could be included in the calculation of an AMP issued to a second facility, in spite of the fact that the second facility may have a spotless compliance history. For a business operating several facilities in Ontario, the implications of the additional penalty component involved in the calculation of the AMP penalty could be magnified significantly.

### **How AMPs Can Be Reduced**

Once the AMP has been calculated, the Director is given the discretion to reduce the amount of the AMP. Parties who receive an advance notice of an AMP are entitled to make submissions that, in appropriate circumstances, could reduce the amount of the AMP by up to 75%. A party who receives an AMP that does not require advance notice may only obtain a reduction of up to 50% when the party negotiates a consent order with the MOE.

If an advance notice is issued, the party named in the notice has 15 days to provide written submissions to the Director to reduce the amount of the AMP. The draft regulations list three grounds that can be put forward to justify a reduction of an AMP:

1. That all reasonable steps were taken to prevent the contravention;
2. At the time of the contravention there was an honest and reasonable belief based on erroneous facts that, if true, would have rendered the contravention innocent; and
3. All reasonable steps were taken to mitigate the effects of the contravention.

Items 1 and 2 are mutually exclusive; a reduction based on only one of these grounds can be granted.

In determining whether “all reasonable steps” were taken to prevent the contravention, the Director is required to consider:

- If there was an adequate system in place that would otherwise have prevented the contravention;
- Whether there was compliance with an industry standard that was otherwise adequate to protect the natural environment;
- Whether no other feasible alternatives were available;
- Whether it was reasonable to foresee that the contravention would have occurred;
- Whether the party and its employees and other representatives had sufficient skill and knowledge to engage in activities related to the contravention; and
- If the appropriate degree of control was exercised over employees and agents at the time of the alleged contravention.

In determining whether “all reasonable steps” were taken to mitigate the effects of the contravention, the Director is required to consider:

- What steps the person took to rectify the occurrence promptly after the contravention occurred;
- The measures taken to prevent any continuation or reoccurrence (which may include the prompt submission of an application for an applicable approval, licence or permit);
- Actions taken to eliminate or reduce any damage or risk of damage related to the contravention;
- Steps taken to repair any damage resulting from the contravention (including restoration of the natural environment to its pre-existing state); and
- The extent to which the person co-operated with public authorities.

It is important to note that the reduction that the Director may grant is discretionary given the use of the word “may” in the draft regulations (e.g. see Section 6, paragraphs 7(i), 7(ii) and 11 of the draft EPA Regulation). The implication is that, even if a person took all reasonable steps to prevent or mitigate the violation or even if there was an honest and reasonable belief based on erroneous facts that, if true, would have rendered the contravention innocent, the Director may refuse to grant the reduction.

Submissions for reductions of advance notice AMPs must include the amount of reduction sought and include relevant information to substantiate the request for a reduction. A reduction cannot be obtained if a provincial officer also issued a violation notice<sup>1</sup> with respect to the same contravention, in accordance with the MOE Compliance Guideline (Guideline F-2). In addition, within the same 15- day period within which a submission for reduction must be made, the party who has received the advance notice can write to the Director and propose entering into a “consent order” to remedy the contravention or to take steps to limit its re-occurrence.

If a consent order is issued and once the terms and conditions of the order are complied with, the AMP will be further reduced by an additional 50%. Unlike previous provisions where the issue of reduction was discretionary, in this case the reduction is mandatory. The distinction may be of little significance given that the Director still has the discretion to refuse to issue a consent order, but it does guarantee the reduction where a consent order is entered into and complied with.

It is not clear that a consent order must result from a proposal for one made within 15 days or receipt of the advance notice. This may provide some flexibility if, for instance, no proposal for consent order was made within the 15 day period after the notice was issued, but during discussions for a reduction on other grounds, it becomes apparent that both the Director and the party to whom the notice has been issued would be agreeable to a consent order.

However, if a reduction is granted on the basis of a consent order, no reduction is available on the basis that all reasonable steps were taken to mitigate the effects of the contravention. Also note that this reduction is only 50% of the amount that remains after any previous reduction granted on the basis of a submission (as previously described) so the maximum total reduction that can result is 75% of the initial amount of the AMP.

## **Reducing AMPs Without Advance Notice**

In circumstances where an AMP is issued without an advance notice, a reduction in the amount of the penalty may only be obtained on the basis of a consent order to remedy the contravention or to reduce the risk of its reoccurrence. However, with respect to AMPs issued without an advance notice, the eligibility for such a reduction depends on

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1 A “violation notice” is defined under the draft AMPs implementation policy to include a written notice of a violation (including reference to the sections of the legislation in question), an administrative order, an AMP, an Offence Notice (ticket) or Summons Issued under the *Provincial Offences Act*. However, as this definition is much more specific than the existing definition of a “notice of violation” in the Compliance Guideline, it is likely that the Compliance Guideline definition will be amended.

whether the AMP notice itself indicates that such an opportunity exists. The ability of a person to seek a consent order appears to be at the discretion of the Director.

If the AMP notice does provide this opportunity, and if a consent order is issued within seven days, then the penalty will be reduced by 50% once the consent order has been complied with. However, as currently drafted, the draft regulations stipulate that the order must be issued within seven days (not that the submissions or request for a consent order must be made within seven days). The result is that, in circumstances where no advance notice of the AMP is given, a party will have to move very swiftly to take advantage of the potential reduction. It is easy to envision situations in which an order might not be issued within seven days merely because of negotiation and administrative time required for the Director to actually issue the consent order. However, given that AMPs issued without an advance notice would generally be expected to address only uncomplicated matters, the potential difficulties may be theoretical, not practical.

### **Limitation Period**

The 1998 amendments to the EPA, OWRA and PA stipulate that no AMP can be imposed more than two years after the day on which the contravention occurred or the day on which evidence of the violation first came to the attention of the MOE, whichever is later.

### **Appealing AMPs**

Within 15 days after the date the actual notice of the AMP was served, an appeal can be brought before the Environmental Review Tribunal (ERT). Where advance notice of an AMP is given, the right to appeal to the ERT appears to arise not upon the receipt of the advance notice, but only after the Director makes a decision on whether or not to reduce the amount of the penalty imposed and an actual AMP notice is served. The notice of appeal is required to state the grounds on which the person believes that the AMP should be amended or revoked, including any grounds on which it is believed that the amount of the penalty is unreasonable.

Upon delivering a notice of appeal, the requirement to pay the AMP is automatically stayed until the disposition of the appeal.

The ERT can confirm, rescind or amend the AMP but it cannot vary the amount of the AMP set by the Director unless the ERT determines that the Director's assessment was unreasonable. Consider this prohibition in circumstances where the amount may not be unreasonable but the Director refused to reduce it by 50% in circumstances where the Director had the discretion to reduce it, as described above. It is unclear whether the ERT could reverse the Director's refusal and reduce the amount of the AMP.

### **Failing to Pay AMPs**

When a person pays an AMP in respect of a contravention and in accordance with the terms of the notice, the person cannot be charged with an offence in respect of that specific contravention.

However, failure to pay the AMP within the time frame specified in the AMP notice can bring significant consequences. Failing to pay could result in the AMP being filed in court and being enforced as if it were an order of the court. Additionally, any certificates of approval, licences and permits held by the person can be suspended and the MOE can refuse to issue any new approvals, licences and permits until the AMP is paid.

### **Further Consideration**

Once finalized, the draft AMPs regulations and implementation policy will add another enforcement tool to the MOE's toolbox. Contraventions involving "paper infractions" (such as improper record-keeping or the late submission of a report) that were not serious enough to warrant enforcement action from the MOE in the past will now be subject to penalties. Those penalties could be quite significant, especially if the contravention continues over a period of time.

It remains to be seen how rigorously the AMP regime will be enforced once implemented. In any event, the AMP regulations will require careful consideration to ensure that business operations and management policies are sufficient to limit potential AMP liability, particularly in light of the intense scrutiny that can accompany a visit by a businesses targeted by the MOE SWAT team.

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*This memorandum is a general overview of the subject matter and cannot be regarded as legal advice.*  
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