

Corporate Information

BILL 133

Bill 133 – *Environmental Enforcement Statute Law Amendment Act* – was passed by the Ontario Legislature on June 9, 2005. The Bill became law following extensive consultations with industry stakeholders, environmentalists, health professionals, community leaders and the general public.

What does Bill 133 do?

Bill 133 is legislation that protects the environment. It will encourage companies to take action to prevent spills and allows the Ministry of the Environment to impose environmental penalties on companies responsible for spills.

Why impose environmental penalties (EPs)?

The primary purpose of an environmental penalty is compliance. Through amendments to the *Environmental Protection Act* (EPA) and the *Ontario Water Resources Act* (OWRA), EPs give ministry directors the authority to impose financial penalties within a few days of a spill. EPs allow the ministry to respond quickly and directly to an environmental violation without having to resort to the court process.

EPs are expected to bring about increased compliance and more immediate remediation of harm. EPs will also act as a financial incentive for companies to go beyond compliance.

No impact on most Ontario companies

Ontario recognizes that the vast majority of its companies meet environmental requirements. We encourage them to go beyond current environmental compliance and find new approaches to help protect our environment and the health of our communities.

We also encourage companies who are not yet environmental leaders to see the benefits of environmental innovation to their business.

Environmental penalties send a clear message to companies that are environmental underperformers that there is a cost and consequence for not complying with provincial environmental protection laws.

Bill 133 ensures that no company gets unfair economic advantage from non-compliance.

Ontario joins other major jurisdictions

Civil or administrative penalties are part of the law in the United States, under federal environmental protection laws like the *Clean Air Act* and under state laws, and they exist in other Canadian jurisdictions. In fact, many countries around the world use civil penalties for effective environmental compliance and enforcement.

Key features of EPs

The government intends, by regulation, to apply environmental penalties only to those facilities that are part of the nine industrial sectors regulated by the Municipal-Industrial Strategy for Abatement (MISA) regulations.

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- *Bill 133 allows for due process. Any company or corporation receiving an EP has the right to appeal the order to the Environmental Review Tribunal. Where an appeal is related to an unlawful discharge, Bill 133 places the onus on the appellant to prove that the spill did not cause or could not have caused an adverse effect.*

Imposing reverse onus on appeals of environmental penalties related to spills is justified because if the appellant is responsible for using contaminants at its facility, they are also in the best position to demonstrate to the Tribunal that their discharge did not violate applicable legal requirements.

Each component of the EP framework is designed to put environmental protection front and centre.

- *The proposed maximum environmental penalties for companies is \$100,000 per day.*

In practice, the amount of penalties imposed will vary depending on the seriousness of the incident, whether best efforts had been used to prevent the incident, and what actions have been or will be taken to mitigate the environmental impacts and prevent any recurrences. Whether or not a company has an environmental management system in place will also be a factor. Supporting regulations will ensure that a company's efforts to prevent, minimize or clean up a spill will be taken into account.

Bill 133 requires that the regulations dealing with penalty assessments provide persons with an opportunity to seek and obtain a reduction based on the measures they took to prevent and mitigate the impacts of a spill. The penalty assessment regulations must also ensure that the penalty reflects the seriousness of the contravention.

- *Absolute liability for EP violations*

EPs must be paid whether a pollution incident (such as an unlawful discharge) was deliberate or an unfortunate incident. Allowing due diligence to be considered a factor for a reduction rather than a defense, will help ensure that time and effort is focused on bringing about compliance, mitigating negative impacts, and ensuring that the spill does not happen again.

- *There is no protection from prosecution for the same offence where an EP has been paid.*

Environmental penalties are a compliance tool, intended to induce violators to take swift corrective action when a contravention occurs and to take away any economic benefits of non-compliance. The payment of a penalty or entering into a settlement agreement is not, for the purposes of any prosecution for the same contravention, an admission of guilt.

Under Bill 133 prosecution remains available to deter serious pollution incidents and chronic offenders. But if a person is prosecuted for the same contravention where an environmental has already been imposed and is convicted, Bill 133 requires the court when imposing sentence to consider the payment of a penalty as a mitigating factor.

- *The amount of the EP may be reduced or eliminated entirely under a settlement agreement entered into by the Ministry and the violator.*

This gives ministry officials the flexibility to work with violators to reach a satisfactory and mutually-agreed upon resolution of the incident. Bill 133 provides the authority to reduce or even cancel a penalty where a director and a regulated person have entered into a settlement agreement.

Responsibilities of corporate directors/officers

Bill 133 broadens the scope of responsibilities for corporate directors and officers so that they are now required to take all reasonable steps to ensure the corporation complies with specific important requirements such as preventing unlawful discharges, notifying the Ministry of spills and cleaning up after a spill.

New fine structure

Bill 133 sets out a fine structure to guide the courts when a person is convicted of an offence.

Bill 133 establishes a new two-tier fine structure for contravention of the EPA or the OWRA. General offences fall under Tier 1 while some specific and more serious offences are placed in Tier 2. Tier 2 offences include violations of the general prohibition against pollution and failing to notify the ministry of a spill.

Tier 1 maximum fines for corporations will increase to \$250,000 a day and \$500,000 a day for a subsequent conviction.

The maximum fines for corporations convicted of a Tier 2 offence would be \$6,000,000 for a first conviction and \$10,000,000 for each subsequent conviction.

Minimum fines and higher fines for repeat offenders

Minimum fines would be set for the more serious, Tier 2 offences so that the court will punish repeat offenders accordingly.

Minimum fines for corporations convicted of a Tier 2 offence would be \$25,000 for a first conviction, \$50,000 for a second conviction, \$100,000 for each subsequent conviction.

Sentencing for environmental offences

Bill 133 sets out sentencing guidelines to provide guidance to the courts and signal that environmental offences are serious and should be treated accordingly.

There is an exception: a court will be required to consider the payment of an EP as a mitigating factor when setting a fine amount.

Changes to impairment threshold

Bill 133 amends existing legislation so that a company would be in contravention of the law if a threat to the environment “may” occur for the purpose of exercising certain order powers, **including EP orders, provincial officer orders where environmental penalties may be issued, and specified preventive measures orders.**

Bill 133 also includes a new “deemed impairment” provision under the OWRA. Recent court decisions have shown that the existing deemed impairment provision under the OWRA was not as protective as the “deleterious substance” test used in the Federal *Fisheries Act*.

New requirements for plans to prevent future pollution:

Spill contingency/prevention plans can now be required from any industry designated by regulation, as well as through the use of order powers.

Revenues from EPs will be placed in a special account to be used for community environmental purposes only.

This could include compensation to those who incurred costs or expenses or suffered other losses as a result of a spill.

Reasonable costs incurred in dealing with a spill may be recovered from polluters.

Bill 133 also gives the Province and municipalities the authority to issue orders directly to the responsible persons so that the Province or municipalities may recover costs incurred in responding to or cleaning up a spill. As Ontarians know, spills can have health, environmental, economic and social impacts on a community.

Key changes to Bill 133 since its introduction in October 2004

In response to concerns from industry associations, environmentalists and others, the government has introduced several changes. But the fundamental elements – environmental penalties and a community cleanup fund – remain intact. Key changes include:

- Only a ministry director, and not a provincial officer, can impose an environmental penalty order.
- Environmental penalties will be issued against companies only, not company officials or ordinary company employees.
- “May cause an adverse effect” has been preserved for an environmental penalty order and specified preventive measures orders, while the “likely to cause” threshold remains in many other cases, such as prosecutions.
- It is now been made clear that a company that receives an environmental penalty will not have that penalty taken as an admission of guilt in a subsequent prosecution for the same contravention.
- The Ministry of the Environment will prepare an annual report on EPs and prepare and publish a report every five years on the operation of the environmental penalty provisions.
- Bill 133 explicitly provides for reductions in environmental penalty amounts where a company took preventive or mitigative measures or had an environmental management system in place.

For further information check the Ministry of the Environment's website at www.ene.gov.on.ca or contact:

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