

Technical Brief

Environmental Enforcement Statute Law Amendment Act (BILL 133) – Immediate Requirements

The Environmental Enforcement Statute Law Amendment Act (EESLAA – Bill 133) was passed by the Ontario Legislature on June 9, 2005 and received Royal Assent June 13, 2005. Some of the provisions contained in the Act became law as of June 13, 2005, while other provisions require regulations and will come into force on a date to be specified by the Lieutenant Governor.

Provisions in Force Immediately

The following provision of the Act came into force on June 13, 2005.

Preventive measure orders

The EESLAA clarifies the authority to issue a preventive measure order under the *Environmental Protection Act* (EPA).

Historically, preventive measure orders have been used by the ministry to prevent or reduce the risk of contaminant discharges into the natural environment from properties or undertakings, or to impose requirements that prevent contaminants already in the natural environment from posing unreasonable environmental or health risks. A director or a provincial officer can issue a preventive measure order.

The provision in the EPA dealing with the grounds for issuing a preventive measure order has been clarified by EESLAA. An order can now be issued (a) to prevent or reduce the risk of a discharge from an undertaking or property into the environment, or (b) to prevent, decrease or eliminate an adverse effect that may result from the discharge of a contaminant from an undertaking or from the presence or discharge of a contaminant in, on or under the property.

The purpose for the change is to remove the *likely* threshold from the preventive measure order provision. An order can now be issued if an adverse effect *may* result from the presence or discharge of a contaminant. Further, the wording of the provision has been updated so that it is consistent with wording used in other parts of the EPA.

In addition, the Act adds to the list of measures that can be required by a preventive measure order, providing the express authority to require the development and implementation of spill prevention plans, spill contingency plans, and pollution reduction plans. This added authority can only be exercised with respect to new or on-going discharges into the natural environment after the EESLAA's Royal Assent (June 13, 2005).

Cost recovery orders

The EPA has been amended to authorize a ministry director and municipalities to issue orders to recover costs incurred by the Province and municipalities in responding to a spill. Up until now, both levels of government had to pursue their costs through court action. The order may be given to the owner of a pollutant or to any person having control of a pollutant. A limited right of appeal to the Environmental Review Tribunal exists.

On an appeal, the only matters the Tribunal may consider are: (1) was there authority to issue the order to the person who has launched the appeal, or (2) were the costs incurred in responding to or dealing with the spill and its effects reasonable.

Each person named in a cost recovery order is jointly and severally liable for the costs specified in the order. If a person to whom an order is issued feels that there are other responsible parties who should be held liable for the costs specified in the order, the Act provides them with the right to seek contribution and indemnification from those persons through a court action.

Notifying the ministry of a spill

Section 92 of the EPA, which sets out the spills notification provision, has been amended.

Section 92 had required certain persons to notify authorities of a spill if the spill caused or was likely to cause an adverse effect. The EESLAA amends section 92 by removing the reference to "causes or is likely to cause an adverse effect." Therefore, if a substance is spilled into the natural environment, which means a discharge that is abnormal in quality and quantity in light of all the circumstances of the discharge, and the substance spilled is a pollutant meaning that it causes or may cause an adverse effect, the spill must be reported to authorities.

Note that there are a number of *minor* spills that do not need to be reported to the ministry. Spills that are considered minor and are exempted from the notification requirements under section 92 of the EPA are outlined in the *Spills Notification Exemption Regulation – Ontario Regulation 675/98*.

Director authority to stay an order

A ministry director now has the authority to stay an order issued by a provincial officer beyond seven days. This provision applies under both the EPA and the *Ontario Water Resources Act* (OWRA). Until now, a decision had to be made within seven days or there would be an

automatic confirmation of the provincial officer order which would force a company to choose whether to appeal the order to the Tribunal.

A director can now issue a written notice within seven days of receiving a request for a review to stay the order and indicate that he or she needs more time to consider the request.

Two-tier penalties

The EESLAA amends the OWRA and the EPA to include sentencing guidelines for courts when a person has been convicted of an offence. Courts are directed to impose a more severe penalty if the court finds that aggravating factors existed in the commission of the offence. These factors include:

- the offence caused an adverse effect
- the offence was committed intentionally or recklessly
- the defendant committed the offence despite having been warned by the ministry
- the defendant attempted to conceal the commission of the offence
- the defendant failed to cooperate with the ministry or other public authorities
- the defendant failed to take prompt action to mitigate the effects of the offence
- the defendant failed to take prompt action to reduce the risk of similar offences being committed in the future
- the defendant previously contravened Ontario or another jurisdiction's legislation that is intended to minimize harm to the natural environment.

The three-tier penalty structure previously contained in the EPA and the OWRA has been replaced by a two-tier system. General offences fall under Tier 1 while some specific and more serious offences are placed in Tier 2.

Tier 1 offences include failure to follow conditions of a Certificate of Approval, but do not include the exceedance of limits. Under Tier 1 maximum fines for corporations will increase to \$250,000 per day and \$500,000 per day for a subsequent conviction.

Tier 2 offences include violations of the general prohibition against pollution, failing to notify the ministry of a spill, obstruction and failing to comply with a discharge standard in a regulation, order or approval.

The range of fines (minimum to maximum) for corporations convicted of a Tier 2 offence would be \$25,000 - \$6,000,000 for a first conviction, \$50,000 - \$10,000,000 for a second conviction and \$100,000 - \$10,000,000 for each subsequent conviction. The range of fines for individuals convicted of a Tier 2 offence would be \$5,000 - \$4,000,000 for a first conviction, \$10,000 - \$6,000,000 for a second conviction and \$20,000 - \$6,000,000 for each subsequent conviction.

The new sentencing provisions are not retroactive. They only apply to offences that occur on or after June 13, 2005.

Duties of corporate officers/directors

The EESLAA amends the corporate officer and director duty provisions in the EPA (s. 194) and the OWRA (s. 116).

Firstly, the scope of the duty has been expanded so that it goes beyond preventing the corporations from unlawfully discharging a contaminant. The duty now requires corporate officers and directors to take all reasonable steps to prevent the corporation from:

- discharging a contaminant in contravention of the Act or the regulations, an order or an approval
- failing to notify the ministry of the discharge of a contaminant in contravention of the Act or the regulations, an order or an approval
- unlawfully disposing or transporting hauled liquid industrial waste or hazardous waste
- contravening the obstruction provisions
- contravening the duty to clean up following a spill
- contravening an order issued under the Act.

Secondly, the corporate officer and director duty has also been amended to clarify that in a prosecution under this section, the onus is on the corporate officer or director to prove they took all reasonable steps to prevent the corporation from committing the contravention.

Deemed impairment

The ministry has strengthened the OWRA's *deemed impairment* clause to ensure that the OWRA is consistent with, and as stringent as, the *deleterious substance* test in the federal *Fisheries Act*. The "deemed impairment" provision of the *Ontario Water Resources Act* (OWRA) identifies the circumstances under which the quality of water is considered or "deemed" impaired by the discharge of a material or its derivative when or if it directly or indirectly enters the water, including:

- a) material causes or may cause injury or interference with any living organism in contact with the water
- b) material causes or may cause injury or interference with any living organism consuming: the water, soil/sediment in contact with the water, or a living organism in contact with the water
- c) material degrades the appearance, taste or odour of the water
- d) a scientific aquatic toxicity test shows the material to be toxic in diluted or undiluted form
- e) peer-reviewed scientific publication indicates that the material or derivative causes injury to or interference with organisms that are dependent on aquatic ecosystems;
- (f) the material or derivative has a prescribed characteristic or is a prescribed material

Administrative amendments

The EESLAA makes a series of administrative amendments that do not involve any substantive changes to the EPA or OWRA. Provisions dealing with appeals to the Environmental Review Tribunal from director decisions were scattered throughout the EPA and OWRA. The EESLAA consolidates these appeal provisions. Also, administrative amendments were made to the inspection powers and to the stay provisions under the EPA to ensure equivalence between both pieces of legislation.

Section 14 of the EPA

Prior to the EESLAA, Section 14 of the EPA prohibited a person from discharging a contaminant into the natural environment that causes or is likely to cause an adverse effect. The Act creates a *may* threshold for specific order proceedings, and retains the *likely* threshold for prosecutions involving contraventions of section 14. Listed below are the specifics of the relevant provisions of the EESLAA. **These provisions do not come into force until they are proclaimed by the Lieutenant Governor.**

1. A control order can be issued by a director under section 7 of the EPA where there is a contravention of section 14. The EESLAA stipulates that the *likely* threshold will apply to the issuance of control orders.
2. Where a person contravenes section 14 of the EPA, they can be prosecuted for an offence. The EESLAA amends the general offence section of the EPA (s.186) to provide that a person is only guilty of an offence under section 14 if the contravention causes or is *likely* to cause an adverse effect.
3. An environmental penalty order can be issued for a contravention of section 14, if the discharge *causes* or *may cause* an adverse effect. Note however that the environmental penalty order provision also provides for specific exceptions: No environmental penalty order can be issued for a section 14 contravention if the discharge is authorized under the EPA or OWRA or if a person is not required to notify the ministry of the discharge either under the EPA or the OWRA. For instance, if a person can demonstrate that a discharge is in accordance with a limit specified in an approval, or that the person was not required to notify the ministry of a discharge because it is exempted by Ontario Regulation 675/98, then no environmental penalty order will be imposed for the discharge, even if the discharge in question contravenes section 14 of the EPA.
4. Another way to enforce section 14 is by a provincial officer order under section 157 of the EPA. The EESLAA provides that a provincial officer order can be issued for a section 14 contravention if the contravention *causes* or is *likely to cause* an adverse effect, or if an environmental penalty could be issued for that discharge. This means in practice that the *may* threshold in section 14 for provincial officer violation-based orders will apply to those facilities which are subject to environmental penalties as specified in regulations (During consultation on Bill 133, the Government announced its intention that by regulation environmental penalties would be applied to facilities that fall within the nine

industrial sectors governed by the Municipal/Industrial Strategy for Abatement - MISA - regulations).

Pending Regulations and Consultation

In order to implement the environmental penalty provisions and a number of other provisions of the EESLAA, a number of regulations need to be developed. Prior to the development of regulations, the ministry will consult with industry stakeholders, environmental organizations as well as other stakeholders that have expressed an interest throughout the development and approval of the EESLAA. It is expected that consultations will begin in the fall of 2005 and continue into the winter.

The following activities will need to be prescribed in regulation:

- Environmental penalties
- Settlement agreements
- Special purpose account
- Spill prevention and contingency plans
- Spill notification

For further information check the Ministry of the Environment's website at www.ene.gov.on.ca/envision/general/penalties/index.htm or contact:

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