



Ministry of the  
Environment

# **Stakeholder Consultation Paper Developing Environmental Penalties for Ontario**

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# Stakeholder Consultation Paper: Developing Environmental Penalties for Ontario

## **INTRODUCTION**

The Environmental Enforcement Statute Law Amendment Act, 2005 (Act) was passed by the Ontario Legislature on June 9, 2005. The Act allows the Ministry of the Environment (MOE) to impose environmental penalties (EPs) on companies responsible for violations. The purpose of EPs is to protect the environment by impelling companies to comply with environmental regulations and to take swift remedial action in the event of a spill or other environmental contravention.

### **I. Environmental penalties**

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Regulatory agencies throughout North America have been using monetary penalties as an effective abatement tool for many years. Such penalties play a complimentary role to the other tools which agencies use to regulate, including approvals and prosecutions.

The government introduced EPs to bring the ministry's environmental compliance and enforcement authority in line with other leading jurisdictions. EPs are an effective compliance tool that will ensure environmental legislation is enforced in a timely manner.

Companies that take measures to prevent contraventions and protect the environment would be recognized under proposed EPs. While serving as a monetary incentive to prevent violations and to quickly mitigate impacts when violations occur, EPs also ensure that no company has an unfair economic advantage from non-compliance.

EPs are not a prosecution. They are an administrative penalty to be negotiated without presumption of guilt or innocence. EPs allow the ministry to respond quickly to an environmental violation without having to resort to the court process, and therefore will encourage violators to take swift corrective action in the event of an environmental contravention.

### **II. Stakeholder consultations**

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Over the next several months the MOE will be conducting consultations with stakeholders on the development of EP regulations for Ontario. The goal of the consultation will be to seek input from affected industries (primarily MISA sectors), environmental and health organisations, community groups and municipalities so that regulations may be drafted.

In the fall of 2005, the ministry will hold consultation sessions with stakeholders followed by a series of joint ministry-stakeholder working groups early in 2006. This consultation process has been designed to allow for a careful exploration of

the key issues of the regulations. Comments and recommendations from stakeholders will be considered by the ministry in the development of regulations.

This consultation paper is intended to guide stakeholders through the key issues to ensure productive and efficient consultations.

### **III. Regulation objectives**

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Outlined below are the objectives for the development of supporting EP regulations for Ontario.

The objectives of the regulations are to:

- Provide an immediate response to contraventions
- Promote swift action to mitigate the effects of a contravention and to resolve non-compliance
- Recognize companies that act responsibly and provide an incentive to others to strive toward improved environmental performance and prevent future occurrences
- Ensure penalties are appropriate to the seriousness of the violation;
- Be predictable, transparent and consistent in penalty assessments
- Encourage a facility to implement innovative measures to address any harm that may have been caused by a spill or other unlawful discharge
- Promote the development of spills prevention and contingency plans.

### **IV. Legislative framework**

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The Act amends the Environmental Protection Act (EPA), Section 182.1 and the Ontario Water Resources Act (OWRA), Section 106.1 to give ministry directors the authority to impose financial penalties on violators.

EP regulations will set out the contraventions that may be subject to an EP Order. The Act specifies that an EP Order:

- describe the contravention,
- specify the amount of the penalty;
- set the time and manner for paying the penalty; and,
- describe the violator's right to appeal.

In the case of an EP Order for a contravention in relation to an unlawful discharge or the failure to remediate following a spill, the Act specifies that a penalty assessment scheme to be set out in regulations include the following provisions:

1. The regulated person must be provided with the opportunity to obtain a penalty reduction based on the measures they took to prevent the contravention and mitigate its effects.
2. The determination of the penalty amount must reflect the seriousness of the contravention.
3. Where the Director is of the opinion that the violator has financially benefited from the contravention, the Director must consider the benefit in determining the amount of the penalty.

An EP order must be paid whether a pollution incident (such as an unlawful discharge) was deliberate or unintended. Due diligence will be considered as a factor for a reduction in the penalty amount. The amount of an EP may be reduced or eliminated under a settlement agreement. The Act also provides for a reduction in the amount of an EP if, at the time of the contravention, an Environmental Management System (EMS) specified by regulations was in place. The amount of the reduction in the EP will be set out in the regulations. *(See section VII for a discussion of penalty assessment and modifiers)*

The Act specifies that there is no protection from prosecution for the same offence where an EP order has been paid. The Act also specifies some circumstances when an EP Order shall not be issued. The regulations may add to these circumstances.

The Act preserves the existing appeal process which exists from all decisions made by the Director. Where an EP order is issued, a person has a right to appeal the EP order to the Environmental Review Tribunal. The requirement to pay the EP order is stayed pending the outcome of any appeal. Where an EP relates to a discharge contravention, the onus will shift to the appellant to show that their discharge did not contravene the applicable legal requirement.

## **V. Scope of EPs**

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EPs will apply to MISA (Municipal-Industrial Strategy for Abatement) sector facilities. MISA facilities comprise some of the largest industrial direct dischargers in the province. Spills from these dischargers have resulted in direct impacts to local communities and the environment (e.g. water treatment plant intake closures). The MISA sector includes facilities in the following nine industrial sectors:

- petroleum refining
- iron and steel manufacturing
- mining
- pulp and paper
- metal casting
- organic chemical manufacturing
- industrial minerals
- inorganic chemical manufacturing
- electric power generators

## **VI. Issuance of an EP Order**

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The legislation gives the ministry the authority to implement regulations which will specify contraventions subject to EPs and gives ministry directors the authority to impose EPs on violators.

EP Orders are a new tool in the ministry's compliance and enforcement toolkit. It is not the intent to use the EP tool for every contravention/violation, since incidents reported to the Ministry vary in severity, from minor administrative violations to violations which cause health impacts. Each violation subject to EPs needs to be evaluated by Ministry staff on a case-by-case basis to determine the appropriate response, which may include education and outreach, voluntary abatement, and/or mandatory abatement/compliance tools such as orders and prosecutions. With the implementation of environmental penalty regulations, environmental penalties will complement the existing tools in the Ministry's abatement and compliance toolkit.

Examples of where environmental penalties could be appropriate tools in response to contraventions are:

- Discharges that may cause an adverse effect or impair the quality of water, land or air
- Failure to restore the natural environment forthwith after a spill
- Non-compliance with an order or certificate of approval condition related to a spill
- Significant or repeated exceedance of a discharge limit in a regulation or certificate of approval
- Failure to report a spill forthwith

## **VII. Base penalty assessment and modifiers**

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Many jurisdictions with EPs use a process to calculate a base penalty which, depending on the circumstances of the violation, is then subject to modifiers. Base penalty assessment methodologies used by other jurisdictions include:

- Gravity-based matrices – subjective assessment of impact to human health/environment and degree of deviation from environmental regulations (e.g. Connecticut),
- Volume-based assessment – objective calculation of penalty based on volume of discharge (e.g. New Jersey - spills to water)
- Prescriptive penalties for specific contraventions – typically used for administrative violations (e.g. New Jersey – spills to air)

Once the base penalty amount has been calculated, the following modifiers may be used to assess an increase or decrease in the base penalty:

### ***Settlement agreements***

The Act also allows for a violator to enter into a settlement agreement which can lead to the reduction or cancellation of the EP order. Settlement agreements allowing for penalty reductions encourage violators to engage in an open and constructive dialogue about how to remedy an unlawful discharge and prevent its reoccurrence.

A settlement agreement could include the following:

- An agreement to develop and implement a comprehensive Pollution Prevention plan
- An agreement for long term clean up and monitoring
- Consideration of supplemental environmental projects (the responsible party agrees to fund environmental projects that are beyond or unrelated to the violation for which the penalty is being issued)

### ***Preventive measures***

The Act provides for the violator to seek a reduction to an EP based upon the efforts taken to prevent the contravention. Possible actions that could result in a reduction of an EP and prescribed in regulation include:

- Preventive measures such as the type of containment or controls put in place in relation to a discharge

Regulations may include securing written consent from violators to take preventive measures to eliminate or reduce the risk of a reoccurrence of a contravention. Completing the terms of the written consent could entitle a violator to a penalty reduction.

### ***Mitigative measures***

The Act provides for the violator to seek a reduction in an EP based upon the efforts taken to mitigate the effects of a contravention in relation to an unlawful discharge or the failure to clean up following a spill, such as containing and cleaning up a spill.

Possible actions that could result in a reduction of an EP and prescribed in regulation include:

- Steps taken to promptly eliminate or reduce any risk of damage resulting from the unlawful discharge.
- Steps taken to promptly repair any damage as a result of the unlawful discharge.
- Demonstration of full co-operation with public authorities in responding to the unlawful discharge.
- Prompt, accurate and complete reporting of the spill.

### ***Economic benefit***

Administrative penalties in many other jurisdictions consider economic benefit in the calculation of their penalties. The economic benefit of non-compliance may take into consideration delayed costs, avoided costs and illegal profits. Determining and calculating economic benefit of non-compliance is difficult in many cases. In order to consider economic benefit as a penalty modifier, procedures for assessing economic benefit will need to be developed.



## ***Environmental Management Systems (EMS)***

The Act provides for a reduction in the amount of a penalty if at the time of the contravention an EMS specified by the regulation was in place. The amount of the reduction in the EP will be set out in the regulations.

An EMS can help a facility achieve its environmental obligations and performance goals and set a path to work towards continuous improvement. An EMS for an industrial facility typically includes the following:

- A problem identification and problem solving component that provides facilities with a method to systematically manage their environmental activities, products and services.
- Management processes and procedures that will allow a facility to analyze control and reduce the environmental impact of its activities, products and services, and to operate with greater efficiency and control.
- Mitigation and prevention measures

## ***Gravity***

Gravity modifiers assess the severity of the incident by determining if there is a potential for harm to human health and the natural environment. Possible components of gravity-based modifiers include:

- Amount of substance spilled
- Type of substance spilled
- Sensitivity of local environments, including whether or not the area is populated
- Duration of spill
- Impact on local ecosystem / human population

Examples of gravity-based components for exceedances of limits from approved discharges include:

- Chronic nature of exceedance
- Significance of exceedance over limit
- Frequency of exceedances

## ***Compliance history***

Penalty modifiers based on a facility's compliance history are a common feature of administrative penalties in other jurisdictions. Considering the compliance history of a facility in assessing penalties discourages repeat violations and rewards those with good compliance records

## ***Questions for discussion:***

What combination of factors should be considered when determining an environmental penalty amount; for example, the volume of a spill and the potential for harm?

Are there appropriate lists and specific toxic substances that should be referenced when assessing a penalty amount, such as the federal *Canadian Environmental Protection Act* (CEPA) list of toxic substances?

How should an environmental penalty address unlawful spills to air?

When determining the penalty amount, in what circumstances should a director consider a regulated person's economic benefit; for example costs avoided and costs delayed?

Which types of Environmental Management Systems should be recognised in an EP?

What role could third party audits play?

For EP Orders that relate to unlawful discharges and the failure to clean up following a spill, what specific mitigative or preventive measures should qualify for a reduction in the penalty amount?

Under what circumstances should a settlement agreement be considered?

In addition to commitments made by a company to achieve compliance and prevent future occurrences, what types of supplementary environmental projects should qualify under a settlement agreement?

## **VIII. Penalty payment**

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The process and timeline for payment of an EP will be specified in regulation. Once an EP Order is finalized and issued, the responsible party will be required to remit payment within a specified period of time. When the ministry has received the payment and confirmed that the responsible party is in compliance with all other aspects of the order and/or settlement agreement, the EP Order will be closed.

If the payment is not received within the given time period, the Ministry would issue a past due notice. If payment is not received within the period of time specified in the past due notice, the Act sets out provisions for enforcing payment. These provisions include filing the EP Order with the Court Registrar so it can be enforced as an order of the court, and providing a ministry director with the authority to refuse to issue or to suspend environmental approvals, licenses or permits until the EP is paid.

## **IX. Special purpose account**

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The Act stipulates that funds collected from EPs be deposited in a separate account for a special purpose. These funds could be made accessible to Ontario communities that are affected by environmental contraventions and pollution or are undertaking projects which improve the environment.

Funds from a particular penalty payment could be restricted to eligible recipients in the community where the incident occurred, or could be available to eligible recipients throughout the province. Eligible recipients could include individuals, public agencies, community groups, and/or businesses that are affected by unlawful discharges or are involved in activities and projects related to spills and their impact on human health and the environment.

The Special Purpose Account (SPA) could be used for:

- compensating individuals for damages caused by spills;
- funding environmental remediation projects related to spills; and
- such other purposes as prescribed by regulations that could include monitoring, or other initiatives related to spills prevention.

In determining how to allocate funding from the SPA, it will be important to consider need across Ontario communities. Also to be considered is the relationship between the use of settlement agreements and the SPA and how each can provide benefits to the community.

***Questions for Discussion:***

In what circumstances should a person be able to apply for compensation from the special purpose account?

What types of activities and projects should qualify for payments from the special purpose account?

**X. Spills reporting**

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A regulation providing for enhanced spill reporting will enable the ministry to more fully assess the particulars of a spill. In order to formulate an appropriate EP, the ministry must have the best available information at the outset of a spill through its aftermath regarding the circumstances of the spill and the subsequent actions taken by the responsible party.

Enhanced reporting requirements may include information on the:

- contaminant spilled
- quantity spilled
- location of the spill
- actions taken to contain the spill
- actions taken to clean-up the spill
- adverse effects that were observed

The ministry may place requirements on responsible parties to provide regular updates on the ongoing management of a spill.

**Question for Discussion:**

Based on your experience, what reporting requirements are necessary to ensure that decisions regarding whether or not to impose and EP are made fairly and promptly?

**XI. Spill prevention and contingency planning**

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Spill contingency/prevention plans can now be required from any industry designated by regulation, as well as through the use of order powers. Many MISA facilities have spill prevention/contingency plans in place. Existing spill prevention/ contingency plans and key components of such plans, will be helpful in identifying model plans and components that can be used for similar facilities.

**Questions for Discussion:**

How should existing spills prevention and contingency plans be recognized through the regulation?

How should Environmental Emergency Plans submitted under the *Canadian Environmental Protection Act, 2000* relate to spill prevention and contingency planning under an EP?

**XII. Next steps**

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The ministry will engage stakeholders in a meaningful dialogue in order to draft regulations. To this end, the ministry will be taking an adaptive approach to the consultations which includes the following:

Fall 2005	Multi-stakeholder consultations
Winter 2006	Regulatory working groups
Spring 2006	Draft regulation development
Summer 2006	Final regulations