

# BROADENING THE ENVIRONMENTAL ENFORCEMENT TOOLKIT: ONTARIO EXPANDS ADMINISTRATIVE MONETARY PENALTY REGIME FOR ENVIRONMENTAL VIOLATIONS

Posted on February 28, 2023

**Categories:** [Insights](#), [Publications](#)

Ontario will be broadening its existing administrative monetary penalties (“**AMPs**”) regime in order to be able to more easily sanction parties who contravene environmental laws. The expanded AMP scheme will give the Ministry of Environment, Conservation and Parks (the “**Ministry**”) authority to issue a fine against a party in higher amounts and for a wider range of environmental offences than currently in effect. A similar scheme for this type of violation already exists at the federal level.

Traditionally, most fines in respect of environmental violations are not in the form of AMPs but are part of a sentence (fine and/or imprisonment) imposed by a Court upon conviction following a trial in which the defendant would have been able to assert a number of legal defences such as due diligence.<sup>[1]</sup> In contrast, a contravening party can be required to pay an AMP without a trial and regardless of whether it took all reasonable steps to prevent the contravention or, another established legal defence, regardless of whether it had an honest and reasonable belief in a mistaken set of facts which, if true, would have rendered the contravention innocent. In other words, the Ministry will have the authority to impose an AMP against a party in response to a violation solely on the basis that the prohibited act took place.<sup>[2]</sup>

From a regulator’s perspective, AMPs are a useful element in the enforcement toolkit. AMPs can be determined and imposed more efficiently than through laying charges and then obtaining a conviction at trial and they allow a regulator to take stronger and, some argue, more effective action against unlawful activity.<sup>[3]</sup> On the other hand, corporations may view these changes as burdensome and even punitive particularly where the contravention was unintended.

While no draft regulations have been published as of the date of this Bulletin, Ontario has published a [Proposal](#) on what the regulations will entail: expanding the use of AMPs under the [Environmental Protection Act](#) and the [Ontario Water Resources Act](#) (currently regulated as “environmental penalties”)<sup>[4]</sup> and extending the availability of AMPs to violations under the [Nutrient Management Act, 2002](#), the [Pesticides Act](#), and the [Safe Drinking Water Act, 2002](#).<sup>[5]</sup>

## Proposed AMP regime in Ontario

The proposed regulations will allow the Director (for more serious offences) or a provincial officer (for less serious offences) of the Ministry to issue an AMP in response to a contravention of certain designated provisions under any of the above legislation. An AMP can be issued to *any* person, corporation or individual, including an officer, director, employee or agent of a company, who caused or is responsible for the contravention.<sup>[6]</sup> The Ministry has up to one year from the time it becomes aware of the non-compliance to issue the AMP.<sup>[7]</sup>

In deciding whether an alternative penalty is the appropriate compliance tool in a given case, the Ministry will rely on its environmental compliance policy. This policy contains an Informed Judgement Matrix, a tool created by the Ministry to help choose an appropriate penalty. The matrix ranks infractions into tiered compliance categories based on two factors: the entity or individual's compliance history and the anticipated health or environmental consequences of the infraction. Each compliance category is tied to a set of recommended enforcement tools.

Under the [current version](#) of the policy, environmental penalties may issue only for certain types of violations under the *Environmental Protection Act* or the *Ontario Water Resources Act*. In May 2021, the Ministry [proposed revisions to this policy](#) that would update the informed judgement matrix, providing more detailed guidance and recommending the issuance of administrative penalties on a broader scale.<sup>[8]</sup> The Ministry has indicated that its [proposal](#) would facilitate the application of more stringent enforcement tools in cases of repeated offences and build on its "strong approach" to high-risk human-health or environmental incidents as well as incidents from facilities that require a ministry permission and have established requirements (such as landfills and steel manufacturing).

## Issuing and Challenging AMPs

There are five main steps involved in issuing and challenging an AMP:

1. **Notice of Intention issued:** Ministry issues Notice of Intention to contravening party describing the contravention and amount of AMP, including dates, location and severity of occurrence and any aggravating factors considered. The proposed regulations (once published) will also provide for limited circumstances where a Notice of Intention is not required to be issued, such as where there is only one contravention, is a lower severity type or the contravention occurs for only one day.<sup>[9]</sup>
2. **Responding to the Notice of Intention:** A party that receives a Notice of Intention has an opportunity to request that the issuer of the Notice consider additional relevant information with respect to the alleged contravention. This includes the circumstances of the incident or the existence of environmental management systems.<sup>[10]</sup>

3. **Issuing the AMP:** After considering the information provided in Step 2, the Ministry will either proceed to issue the AMP in an amount it considers suitable or it will determine that an AMP is not appropriate or permitted in the circumstances.<sup>[11]</sup>
4. **AMP Review and Appeal Process:** There will be two ways to challenge the imposition of an AMP. First, where the AMP is issued by an officer the contravening party can request the Director to review the AMP which will either be confirmed, altered or revoked. If the Director confirms or alters the AMP, the decision can be appealed to the Ontario Land Tribunal (the “**OLT**”).<sup>[12]</sup> Where the AMP is issued by a Director, the contravening party may appeal the AMP to the OLT. The OLT can only vary the AMP if it finds the Director’s determination of the AMP amount to have been unreasonable. The OLT will have the discretion to substitute its own decision for that of the Director within the limits set by the AMP regulations.<sup>[13]</sup>
5. **Payment of the AMP:** A party has 30 days to pay the AMP from the date of service of the AMP or the date of the decision by the OLT (if appealed). Upon providing the necessary financial and operational information, financial hardship can be addressed through a payment plan or by extending the payment date.<sup>[14]</sup>

### AMP Amount

The minimum (base) and maximum amounts in the proposed AMP regime are set out below.<sup>[15]</sup> Note that where a party derived an *economic benefit* as a result of the contravention, the penalty AMP amount will have an *additional* monetary component reflecting the value of this benefit.

Legislation	Minimum (base) Penalty per Contravention	Maximum Penalty per Contravention
<i>Environmental Protection Act</i>	\$500 to \$60,000	\$200,000 (currently \$100,000 per day, per offence)
<i>Ontario Water Resources Act</i>	\$500 to \$8,000	\$200,000 (currently \$100,000 per day, per offence)
<i>Pesticides Act</i>	\$500 to \$1,500	\$100,000
<i>Safe Drinking Water Act, 2002</i>	\$500 to \$1,500	\$100,000
<i>Nutrient Management Act, 2002</i>	\$500 to \$1,500	\$10,000

In determining the amount of the AMP, the Director or officer issuing the AMP may consider the following six factors:[\[16\]](#)

1. **Base penalty:** A predetermined minimum AMP amount based on both the “type of contravention” and the “gravity of the contravention”. The calculation of the base amount involves a two-step process, (1) determining what “type” of contravention the violation may fall into, and (2) applying criteria to the circumstances of the contravention to determine if it is “less serious”, “serious”, or “very serious”. This predetermined amount takes into account the degree of deviation from the applicable environmental standard (e.g., 10% over legal limit for emission of contaminants to air).[\[17\]](#)
2. **Aggravating factors:** These are based on the compliance history of the contravening party (including all previous administrative penalties and convictions) along with statute-specific aggravating factors (i.e., events likely to endanger human life, adverse effects of a pollutant, incorrect or non-existent reporting, and spills that involve toxic substances);[\[18\]](#)
3. **Continuing offences:** the number of days a contravention occurred.[\[19\]](#)
4. **Prevention/mitigation:** preventive measures, mitigation measures, and environmental management systems in place at the time of the contravention.[\[20\]](#)
5. **Economic benefit:** whether an economic benefit was or will be obtained as a result of the contravention (only a Director can issue a penalty involving an economic benefit factor). The appropriate AMP will be determined based on an administrative penalty framework intended to more severely sanction repeat offenders and/or offenders who have gained an economic benefit as a result of the contravention.[\[21\]](#)
6. **Non-punitive:** the Ministry has indicated that its policy is for AMPs to be non-punitive in nature.[\[22\]](#)

### Some Considerations Going Forward

We can reasonably expect that AMPs will be levied more frequently in no small measure because there are less hurdles for the Ministry doing so when seeking to impose a fine and sanction an offending party. While an AMP may not be regarded as seriously as a fine levied by a Court following a conviction for an offence, it can still have consequences similar to what a Court-imposed fine would have such as reputational damage and substantial administrative and economic costs.

Note that the fact that an AMP has been imposed will *not* prevent the Ministry from using other enforcement tools in response to a violation even when an AMP has already been paid and the contravention corrected or resolved. The Ministry retains the authority to issue regulatory orders, conduct inspections and investigations, suspend or revoke approvals/permits and lay charges, among other things, with respect to the same violation.[\[23\]](#) Accordingly, an offending party should weigh carefully, and with the benefit of legal advice, the option of providing the required information and simply paying the AMP as part of a quick resolution of the



matter versus challenging the AMP through the review or appeal process (which has tight timelines and is both technical and challenging; as well the grounds on which to base an appeal or review are fairly narrow). Contravening parties should also consider that the AMP process will require them to disclose information to the Ministry that they may later regret having disclosed.

The novelty of AMPs in this area in Ontario means that there is not much of a track record on which to rely when considering an appropriate response to Ministry action of this nature. It also remains unclear how a previously imposed AMP will be taken into account by a Court when imposing a fine upon conviction in a subsequent prosecution of an environmental offence.

The wisdom of having appropriate environmental management systems in place to ensure compliance with environmental laws as well as in support of any due diligence defence has been recognized for years. The proposed AMP regime now creates new and/or different compliance risks for regulated entities. Consequently, this would be an opportune time to review and update a company's environmental management systems to include specific provisions that reflect the existence as well as the different nature of this expanding regulatory enforcement tool in the area of environmental regulation.

by [Talia Gordner](#), [Ralph Cuervo-Lorens](#), [Emily Hush](#) and Ryan Ejim (Summer Student)

[1] Environmental Registry of Ontario, [Expanding administrative penalties for environmental contraventions](#) (11 March 2022) [2022 AMP Proposal].

[2] Legislative Assembly of Ontario, Bill 132, [Better for People, Smarter for Business Act, 2019](#).

[3] [2022 AMP Proposal](#).

[4] O. Reg. 222/07: [Environmental Penalties](#); O. Reg. 223/07: [Environmental Penalties](#).

[5] [2022 AMP Proposal](#).

[6] Ministry of Environment, Conservation and Parks, [Consultation Guide on Proposed Regulations for the Expansion of Administrative Penalties](#) (March 11, 2022) at 8 [Consultation Guide].

[7] [Consultation Guide](#) at 11.

[8] Environmental Registry of Ontario, [Modernizing environmental compliance practices of the Ministry of the Environment, Conservation and Parks](#) (30 August 2022). The proposed compliance policy applies to the [Environmental Assessment Act](#), the Environmental Protection Act, the Nutrient Management Act, the *Ontario Water Resources Act*, the *Pesticides Act*, and the *Safe Drinking Water Act, 2002*.

[9] [Consultation Guide](#) at 9-10.

[10] *ibid* at 10.

[11] *ibid* at 11.

[12] *ibid* at 12.

[13] *ibid* at 13.

[14] *ibid* at 13.

[15] *ibid* at 5, 19, 20.

[16] *ibid* at 14.

[17] *ibid* at 15, 32-36.

[18] *ibid* at 14, 20-23.

[19] *ibid* at 14.

[20] *ibid* at 14.

[21] Ministry of Environment, Conservation and Parks, [Stakeholder Engagement Summary](#) (Spring 2021), at 3; [Consultation Guide](#) at 14.

[22] [Consultation Guide](#) at 29.

[23] *ibid* at 5-6.

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2023