

TRANSITION TO EMISSIONS PERFORMANCE STANDARDS (EPS) PROGRAM UNDERWAY FOR GREENHOUSE GAS EMITTERS IN ONTARIO

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On January 1, 2022, the greenhouse gas (“GHG”) emissions regime in Ontario began transitioning from the federal Output-Based Pricing System (“OBPS”) to Ontario’s Emissions Performance Standards (“EPS”) program. In order to facilitate this transition, on October 22, 2021 Ontario amended the [Greenhouse Gas Emissions Performance Standards](#) regulation (“EPS Regulation”)^[1] and the [Greenhouse Gas Emissions: Quantification, Reporting and Verification](#) regulation (“Reporting Regulation”)^[2] under the Ontario [Environmental Protection Act](#) (“EPA”)^[3] (together, the “Amendments”).

This bulletin reviews the transition process and provides an overview of the registration and GHG emissions quantification, reporting and compliance obligations under the EPS program.

Why are Ontario facilities transitioning from the OBPS to the EPS program?

On June 21, 2018, the federal [Greenhouse Gas Pollution Pricing Act](#) (the “GGPPA”)^[4] came into force and set a minimum national standard on GHG pricing in an attempt to reduce emissions and fulfil Canada’s commitments under the 2015 Paris Agreement. For provinces that did not already have a provincially-regulated carbon pricing scheme that met federal requirements, the GGPPA established a regulatory charge on fossil fuels and a carbon pricing system: the OBPS. For provinces with carbon pricing schemes that met or exceeded federal standards, the regime established under the GGPPA did not apply.

In September 2018, Ontario challenged the constitutionality of the GGPPA taking the position that such legislation was beyond the jurisdiction of the federal government because natural resource regulation under the Constitution falls under provincial jurisdiction. However, despite this ongoing challenge, the OBPS came into effect in Ontario on January 1, 2019 as Ontario did not enact replacement GHG legislation by the federal deadline.

While Ontario did enact the EPS Regulation and the Reporting Regulation in 2019 and 2018, respectively, the

EPS program was not accepted by the federal government as an alternative to the federal OBPS until September 21, 2020.^[5] Various amendments to the Reporting Regulation were enacted in the intervening period in order to meet the federal benchmark requirements for a provincial GHG emissions program.

Up until January 1, 2022, Ontario's industrial GHG emissions were regulated by both the EPS program and the OBPS (under the federal [Greenhouse Gas Pollution Pricing Act](#)) while the two governments worked together to facilitate the transition between programs for Ontario industry.

Despite the federal government's acceptance of the EPS program, Ontario continued to pursue its legal challenge of the federal government's authority to regulate GHG emissions in Ontario in the courts. This challenge, along with similar challenges by Alberta and Saskatchewan, was ultimately unsuccessful. Additional information regarding the Supreme Court of Canada's decision on March 21, 2021 can be found in our bulletin [Supreme Court of Canada Upholds Federal Carbon Pricing Regime](#).^[6]

What is Ontario's plan for transition?

The EPS program has required registration and reporting by regulated Ontario facilities since 2019. As a result, registered facilities have been required to register and report under both the OBPS and the EPS program during that period. However, payments for excess emissions has only been required under the OBPS, which requirement will continue to apply for the 2021 compliance period (to be paid in 2022). The first compliance period under the EPS program for which payment for excess emissions is required is 2022 (to be paid in 2023).

The Amendments were intended to ensure that there is no gap in pricing for emissions during the transition period while also ensuring that Ontario industrial facilities are not charged twice for the same emissions under the EPS program and the OBPS. Simply put, while reporting periods for both programs may overlap, payment obligations under the OBPS will only be with respect to emissions up to December 31, 2021. Payment obligations under the EPS program, on the other hand, commenced on January 1, 2022.

What are the key elements of the EPS program?

The concept of the EPS program is similar to the OBPS in that a facility required to register with the program will need to quantify, report and verify its annual GHG emissions and pay the carbon price per tonne of carbon dioxide equivalent ("CO₂e") above its applicable limit (called "excess emissions units"). Such payment can also take the form of credits earned by a facility for emitting less GHG emissions than its annual limit under the EPS program (called "emissions performance units").

Whether a facility is required to register with the EPS program depends on the nature of its industrial activities and its quantum of annual GHG emissions.^[7] Where registration is not required, facilities meeting prescribed

requirements may have the option to voluntarily register with the EPS program in order to benefit from the fuel charge exemption under the GGPPA.^[8] However, even where a facility is not required to register with the EPS program, it will still be required to quantify and report its annual GHG emissions under the Reporting Regulation if the facility engages in a designated industrial activity and emits 10,000 tonnes or more of CO₂e annually.^[9]

What happens after the transition is complete?

Once all requirements under the OBPS with respect to the 2021 compliance period have been completed, only the EPS program will apply to facilities in Ontario going forward.

Some carbon pricing programs in Canada allow for or are in the process of developing carbon offset systems, which regulate the generation of carbon or emission offset credits through the operation of designated projects that reduce or remove GHG emissions from the atmosphere. For example, the federal GHG Offset Credit System is currently under development (read our bulletin to learn more: [Canada's Federal Greenhouse Gas Offset Credit System Creates Green Incentives for Regulated Facilities](#)).

Unfortunately, at this time, Ontario does not currently have a policy on offset credits, but has advised that it may consider offsets in the future once the transition from the OBPS to the EPS program is complete. It has further advised that it is monitoring what is occurring at the federal level in reference to the federal GHG Offset Credit System.^[10]

We will continue to monitor the progress of the potential development of an offset credit system in Ontario under the EPS program.

For more information on the EPS program and whether your facility may be required to register with or report under the program, or is interested in voluntarily doing so, please contact [Talia Gordner](#).

[1][ps2id id='1' target=''] [Greenhouse Gas Emissions Performance Standards](#), O Reg 241/19 [EPS Regulation].

[2][ps2id id='2' target=''] [Greenhouse Gas Emissions: Quantification, Reporting and Verification](#), O Reg 390/19 [Reporting Regulation].

[3][ps2id id='3' target=''] [Environmental Protection Act](#), RSO 1990, c E.19.

[4][ps2id id='4' target=''] [Greenhouse Gas Pollution Pricing Act](#), SC 2019, c 12, s 186.

[5][ps2id id='5' target=''] T Gordner, [Federal Government accepts Ontario's Emissions Performance Standards \(EPS\) Program for Regulation of Greenhouse Gas Emissions – Transition Dates to Come](#) (21 September 2020).

[6][ps2id id='6' target=''] Gordner, Loney, et al, [Supreme Court of Canada Upholds Federal Carbon Pricing Regime](#) (2021 March 29).

[7][ps2id id='7' target=''] EPS Regulation, s 2.

[8][ps2id id='8' target=''] EPS Regulation, ss 4-4.1.

[9][ps2id id='9' target=''] Reporting Regulation, ss 5 (1), 6, 9.

[10][ps2id id='10' target=''] Ontario Ministry of Environment, Conservation and Parks, [Amendments to support transition and implementation of Ontario's Emissions Performance Standards program](#) (last updated 22 October 2021), Effects of Consultation, s 4 (last accessed 22 March 2022).

by [Talia Gordner](#) and [Mrunal Masurekar](#) (Articling Student)

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.

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