

ADMINISTRATIVE PENALTIES Regulation Information Paper

1.0 Introduction

The British Columbia Ministry of Environment (“the Ministry”) intends to introduce an Administrative Penalty program by regulation as authorized under sections 115-117 and 119 of the *Environmental Management Act* and sections 23-25 and 37 of the *Integrated Pest Management Act*.

The administrative penalties regulation under each of these statutes would establish:

- the statutory and regulatory provisions that can be subject to administrative penalties
- how administrative penalties are calculated
- the maximum penalties that can be imposed
- how an administrative penalty notice would be served
- procedural protections as required by the principles of natural justice and administrative fairness, including an ‘opportunity to be heard’ and the opportunity to appeal
- payment requirements

It is anticipated the regulation would come into effect by March 2014.

This information paper describes the key elements of the proposed administrative penalties program for the purpose of informing stakeholders and the public.

2.0 Background Information

2.1 Ministry commitment to ensuring compliance

The Ministry is committed to ensuring compliance with the suite of regulatory requirements it administers in order to protect the environment and human health and safety. Staff work with regulated parties to help them meet their obligations, conduct inspections and take appropriate enforcement action when compliance is not achieved.

The Ministry’s [Compliance & Enforcement Policy and Procedure](#) applies a risk-based approach to assessing non-compliance. Ministry staff consider the real or potential impacts caused by a contravention and the likelihood of achieving compliance in order to determine the most effective enforcement response to bring the party into compliance and to deter future contraventions. Administrative penalties would be an additional tool in the Ministry’s enforcement tool kit.

2.2 What is an administrative penalty?

An administrative penalty is a financial penalty that can be imposed on individuals or companies who fail to comply with a particular provision of a statute, regulation, an order or a requirement, or the terms of an authorization such as a permit or licence. As an administrative (or civil) rather than criminal type of sanction, administrative penalties are calculated and imposed by designated Ministry officials instead of a court of law.

ADMINISTRATIVE PENALTIES Regulation Information Paper

Administrative penalties are intended to encourage regulatory compliance. They are designed to remove the financial benefit, advantage or gain achieved by breaking the rules or to “make the Crown whole” when non-compliance results in damage to the environment. This helps to ensure future compliance and may discourage other would-be violators.

2.3 Why an administrative penalty program?

Non-compliance occurs when regulatory requirements are not met. Not all contraventions are similar in nature and the circumstances under which they occur vary widely; accordingly, it is important that government have a range of enforcement responses.

Administrative penalties would fill a gap in the Ministry’s existing enforcement tools between warnings and violation tickets issued for minor offences on the one hand, and criminal prosecutions for more serious offences on the other. They can provide an effective enforcement mechanism for a wide range of contraventions between these two extremes. As an administratively efficient and flexible tool, administrative penalties would complement other types of regulatory sanctions currently used by the Ministry such as warnings, orders, licensing sanctions, tickets, restorative justice and prosecution.

Administrative penalties would provide the Ministry with an appropriate response to a range of contraventions for which suitable remedies are not currently available. This would include ‘administrative non-compliance’, such as a failure to submit

monitoring reports, which may not create an environmental impact per se, but is nevertheless important to the integrity of the regulatory regime. As the Ministry increases its reliance on self monitoring and reporting by regulated parties, having the tools in place to ensure compliance is necessary for government and societal objectives to be met.

Reputable individuals and operators also stand to benefit from the use of administrative penalties which can act as a more fair and equitable approach to enforcement. Administrative penalties help to ‘level the playing field’ by imposing transparent penalties that reduce or eliminate the extent to which some regulated parties are able to cut corners to gain a competitive advantage.

Although new to the Ministry, administrative penalties have been adopted widely by regulatory agencies across North America. The success of existing penalty schemes is well documented and a number of provincial and federal programs have guided the Ministry’s thinking on how to structure a program that can be applied in a principled, timely and cost-effective manner. Using administrative penalties to address non-compliance would bring greater consistency to the treatment of contraventions under British Columbia’s natural resource and environmental legislation, bringing the Ministry in line with its regulatory partners including the Ministry of Forests, Lands and Natural Resource Operations and the BC Oil and Gas Commission.

ADMINISTRATIVE PENALTIES Regulation

Information Paper

3.0 Description of the Administrative Penalty Program

3.1 The types of contraventions that administrative penalties would be applied to

The flexible nature of administrative penalties would allow the Ministry to apply them to a broad range of non-compliance, scaling the penalties to reflect the seriousness of the contraventions. The specific legal requirements that would be subject to administrative penalties in the event of non-compliance would be listed in a schedule to the regulation. This includes:

- statutory provisions in the *Environmental Management Act*
- requirements prescribed in *Environmental Management Act* regulations and Codes of Practice
- statutory provisions in the *Integrated Pest Management Act*
- regulatory requirements prescribed in the *Integrated Pest Management Act* Regulation
- terms and conditions associated with a Ministry authorization (e.g. permit, licence)
- orders issued by Ministry officials

3.2 Calculating administrative penalties

Administrative penalties would be calculated by designated Ministry decision makers in accordance with the regulation. During a preliminary assessment of the penalty, the decision maker would consider the nature of the contravention. For example, did the regulated party fail to comply with an administrative requirement

such as providing monitoring data within legislative timeframes, fail to perform a required task or exceed an authorized waste discharge limit?

The decision maker would also consider the adverse effect the contravention has on the environment or human health and safety, taking into account not only the actual environmental or human health effect, but also, what *could have* resulted from the contravention. This assessment would be specific to the circumstances of the contravention in question, and would consider not only the level of harm, but also factors such as how localized or persistent (short vs. long term) the impacts are, or could be.

Further, the decision maker may also take into consideration additional mitigating or aggravating factors enumerated in the regulation:

- the compliance history of the party
- whether the contravention was repeated or continuous
- whether the contravention was deliberate
- any economic benefit that the party derived either directly or indirectly from the contravention
- whether the party exercised due diligence to prevent the contravention
- efforts the party made to correct the contravention or prevent future occurrences
- other factors the decision maker considers relevant.

The regulation would establish maximum penalties that can be imposed for specific

ADMINISTRATIVE PENALTIES Regulation

Information Paper

contraventions, ranging from \$2,000 to \$75,000 per day.

3.3 Administration of the administrative penalty program

Working closely with field staff, designated Ministry decision makers would be responsible for administering administrative penalties in accordance with the regulation and Ministry enforcement policy.

The key steps in the administrative penalty program are as follows:

1. Preliminary Notice

Once an alleged contravention has occurred, and field staff recommend that an administrative penalty is the most appropriate response, the decision maker would calculate the penalty (described in 3.2 above) and send a Preliminary Notice of an Administrative Penalty to the party that includes:

- a description of the alleged contravention
- the initial assessment of the penalty amount and a copy of the penalty assessment worksheet that describes how the penalty was calculated, including the factors that the decision maker considered
- a timeline and instructions to request an opportunity to be heard (described below)

In accordance with section 133 of the *Environmental Management Act* and section 35 of *Integrated Pest Management Act*, the preliminary notice of an administrative penalty would be served by registered mail to the last known address of the party.

2. Opportunity to be Heard

Once a preliminary notice of an administrative penalty has been served, the party would have 15 working days to request an opportunity to be heard, which offers the party the chance to tell “their side of the story”. There may be extenuating circumstances that the decision maker was not aware of or has not taken into consideration, or specific information related to the aggravating and mitigating factors that the decision maker did not consider when initially calculating the penalty amount. The form of the opportunity to be heard (written or oral) would be determined by the decision maker taking into consideration the complexity of the issues and whether a specific request has been made by the party.

3. Final Determination

Once the decision maker has reviewed the information supplied by the party during the opportunity to be heard, or after the passage of 15 days without a request to be heard from the party, the decision maker would issue a final Determination. The decision maker would:

- decide not to impose the penalty
- confirm the penalty; or
- recalculate the penalty

The final Determination would be sent to the party, providing:

- the final amount of the penalty
- reasons for the decision
- the date by which the penalty must be paid (30 days) and the consequences of not paying
- information about the party’s right to appeal to the Environmental Appeal Board.

ADMINISTRATIVE PENALTIES Regulation Information Paper

4. Appeals

In accordance with the legislation, the party can appeal the decision to impose an administrative penalty to the Environmental Appeal Board. The Board would determine if the appeal has merit, and if so, schedule a hearing and instruct participants on the process. The Board would confirm, vary or cancel the penalty.

5. Payment

The administrative penalty would be due 30 days after the appeal has been waived or an appeal decision has been rendered. If the party fails to pay the penalty, the penalty amount would double on the first day after the due date and the decision maker may do any combination of the following:

- file a certificate in court to recover the amount owing (collections)
- suspend or cancel the authorization (as applicable)
- refuse to issue further authorizations to the party

3.4 Public reporting

As part of its commitment to transparency, the Ministry of Environment maintains the Environmental Violations Database and since 2006 has reported all violations of its legislative requirements in a Quarterly Environmental Enforcement Summary. Consistent with this practice, the Ministry intends to publish the names and particulars of all contraventions for which administrative penalties are issued.

4.0 Summary

Administrative penalties are a well tested and extensively used enforcement tool among regulatory agencies within B.C. and across Canada.

Administrative penalties are efficient for government, predictable and fair for regulated parties and would support the Ministry in its efforts to meet the public expectation that regulated parties in B.C. are held accountable.

5.0 Questions or Comments

Questions or comments about the proposed Administrative Penalty Regulation can be directed to ENVadminpenalties@gov.bc.ca and should be received before March 28, 2014.