

## Administrative Penalties Public Discussion

### Clean Foundation submission

The Clean Foundation (Clean) thanks Nova Scotia Environment (NSE) for this opportunity to make submissions on the proposed creation of an administrative penalty framework for certain violations under the *Environment Act*. Clean recognizes the many competing pressures on NSE and commends its willingness to review and update its regulatory toolkit to improve efficiencies and reduce costs, which should ultimately benefit the environment by freeing up resources to be devoted to areas of need.

Clean supports the proposed *administrative monetary penalty (AMP)* framework substantially as it is outlined in NSE's discussion paper. Below, we address the major benefits and drawbacks of such a framework, and offer recommendations for improvements. Where we are silent as to particular elements of NSE's proposal, we can be taken to be in agreement with those elements.

#### The Benefits of Administrative Penalties

The implementation of an administrative penalty framework would offer several benefits. Prosecutions are costly and time-consuming for government to pursue and for offenders to defend. Ideally, AMPs will allow regulators to easily and quickly impose financial penalties on those approval holders who commit offences. AMPs:

- Benefit the regulator because they are easier and less costly than prosecutions.
- Are less onerous and costly for the alleged offender, who does not have to undergo a judicial process that may have a cost and duration that is significantly out of proportion to the severity of the violation.
- Pose less risk by avoiding unknown financial, temporal and legal implications, damage to relationships, reputations and other prejudice to offenders associated with criminal records, and the possible inability of offenders to pay and regulators to collect court-ordered fines over and above the (often significant) other costs associated with the formal legal process.

In addition, the decision to issue an AMP is made by Department staff who possess subject-matter expertise that the courts lack.

For these reasons we see the following benefits of AMPs:

1. **Deterrence and Prevention:** Benefit to the environment in that NSE should be able to engage and deter a greater number of offenders before the matter merits prosecution. Given the low rate of both charges laid for compliance investigations and successful prosecutions, offenders may not see the current tools available to regulators as sufficient deterrents. AMPs should encourage offenders to remedy smaller offences before they can cause serious or further damage.

2. Enforcement: Increase in compliance / enforcement (number of interactions with offenders) due to increased efficiencies and reduced processing costs.
3. Revenue: Increase in the number of penalties the government is willing to administer versus its ability to pursue formal prosecutions and a corresponding increase in revenue.

## The Major Drawbacks

We see three major drawbacks to the introduction of AMPs. However, we feel that each drawback can be either avoided or mitigated such that they do not outweigh the benefits of administrative penalties.

### 1. Public Perception

The first drawback is that the introduction of AMPs may lead some to suggest that the new framework creates a “pay to pollute” system. This risk can be mitigated by conducting outreach and education activities on the intended benefits of AMPs, and the new framework to help the public and other stakeholders understand the role that AMPs will play within the larger enforcement framework. If done appropriately, it will simplify but highlight that AMPs allow for directives and other control orders to ensure immediate cessation of conduct that is harming the environment, as well as the opportunity to prosecute offenders where the nature of the violation merits a strong response by the regulator.

### 2. Subjectivity and Transparency

The second drawback relates to the exercise of discretion around the decision to issue an AMP. It is important that inspectors be given sufficient discretion around the decision to issue AMPs to allow them to carry out their duties effectively. However, absent clear criteria governing their issuance, there is a risk of inconsistent application of AMPs.

On a related point, fairness requires that approval holders should be able to know and understand the consequences of a failure to abide by the terms of an approval or directive. For these reasons, we support NSE’s goal of establishing clear and publically accessible criteria to guide consistent decision-making. We advocate taking an approach similar to that used in Nova Scotia’s occupational health and safety administrative penalty regulations, which clearly communicate the criteria for issuing penalties, and details the amounts of can be issued and how these will escalate with repeated infractions. We also commend the commitment to have inspectors confer with senior enforcement staff before deciding whether to issue an AMP.

### 3. Appeals Process

The final drawback relates to procedural fairness for the offender. Despite its expense and duration, a trial guarantees an alleged offender the right to a full hearing in front of an independent decision-maker. NSE has indicated that a party will be able to challenge an AMP to the Minister, but it isn’t clear if a full right of appeal will be permitted. While an internal review by the Minister does not fully address the concern that the regulator is acting as both prosecutor and adjudicator in respect of the AMP, the risk of instituting a full right of appeal to a court is that the time and expense of addressing appeals will negate the efficiencies sought through the introduction of AMPs in the first place. In this case, where:

- there is a progressive compliance / enforcement framework that emphasizes non-punitive measures such as education and warnings before punitive ones;
- other tools such as directives are not appealable;
- the amounts of the AMPs are relatively modest and in line with those in most other provinces;
- the inspector, in determining the amount of the penalty can consider factors such as the severity and duration of the offence, and can only issue a penalty after in accordance with clear criteria and after consultation with senior staff; and
- there is a right to challenge the AMP to the Minister

we feel that the rights of the approval holder are sufficiently protected without the need for a right of appeal. Even where there is not statutory right of appeal, an approval holder always has recourse to the courts by way of a judicial review.

### How Would Clean Change What is Being Proposed?

#### Evaluation

In its consultation document, NSE indicates that AMPs will help increase compliance and strengthen environmental protection. In order to measure whether it is achieving these objectives, we would like to see NSE create a strong evaluation program, with appropriate outcomes and targets that measure and communicate its progress towards achieving these objectives. Such a program should include clear and measurable outcomes in addition to its intended outputs, such as:

- metrics to capture cost efficiencies and the redistribution of funds/resources to further meet objectives;
- the number of repeat violations;
- the overall change in number of infractions; and
- a timeline that outlines when NSE expects to see positive changes in each measure.

#### Reporting

We support a regular schedule of reporting on the outcomes of the proposed system to ensure transparency and avoid any potential perceptions of unfairness. Reporting will also ensure accountability and aid in evaluation. For example, the province of Alberta produces quarterly reports on enforcement of the *Environmental Protection and Enhancement Act and Water Act*, and annual compliance assurance reports.<sup>1</sup> British Columbia has a searchable online database

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<sup>1</sup> See <http://esrd.alberta.ca/focus/compliance-assurance-program/environmental-protection-commission-reports/annual-and-quarterly-reports-compliance-assessment-enforcement-reports.aspx>

that contains quarterly summaries of all the enforcement actions and overdue environmental court fines.<sup>2</sup>

### **Different Amounts for Individuals versus Organizations**

Within the penalty range proposed by NSE, we suggest lower first offence limits be applied to individuals versus organizations, such as is the case with Nova Scotia's occupational health and safety administrative penalties. Consideration should also be given to increasing the upper end of the AMP range for major infractions with significant potential adverse effects on the environment. For example, Alberta's Administrative Penalty Regulation under the *Environmental Protection and Enhancement Act* uses a matrix to determine the amount of penalty according to both the nature of the infraction (minor to major) and the size of the potential adverse effect (minor-to-none to major).<sup>3</sup> Similarly, Ontario sets different AMP limits for minor versus major violations (e.g., failing to report a spill is capped at \$100,000 for multi-day violations, while minor violations are capped at \$60,000 or the formula calculation for a 180-day violation, whichever is less.)<sup>4</sup>

### **Unfair Advantage**

There may be cases in which approval holders gain financially by committing offences. In cases where this benefit is easily and reliably quantifiable, we recommend that inspectors be given discretion to increase in the base AMP to include the amount by which the approval holder benefited from the offence.

### **Legal Considerations**

- **Liability:** We support the concept of strict liability in the administration of AMPs. Approval holders face a higher threshold of regulation than the average business. As such, we believe it would be unfair to impose absolute liability which precludes the defense of due diligence.
- **No Double Jeopardy:** We support the concept of avoiding double jeopardy. Offenders who are administered and pay AMPs should not be prosecuted, and conversely, offenders who have been prosecuted should not be administered penalties.
- **Statute of Limitations:** There needs to be consideration of how long after the violation an AMP can be issued, and this information must be clear and transparent. This is essential for efficiency and fairness.

### **The Use of Funds Collected Through Administrative Penalties**

We would like to suggest the funds collected from the fund be used to remediate, educate and raise awareness about environmental harm. For example, the Federal Government directs all penalties collected under federal environmental statutes to the Environmental Damages Fund from where they can be used for restoration and other environmental projects.

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<sup>2</sup> <http://www2.gov.bc.ca/gov/content/environment/research-monitoring-reporting/reporting/environmental-enforcement-reporting/overdue-court-penalty-payment>

<sup>3</sup> *Administrative Penalty Regulation*, Alberta Regulation 23/2003, ss. 3(1). [http://www.gp.alberta.ca/documents/Regs/2003\\_023.pdf](http://www.gp.alberta.ca/documents/Regs/2003_023.pdf)

<sup>4</sup> Ontario Environmental Protection Act, R.S.O. 1990, c. E. 19, Section 182.3. <http://www.ontario.ca/laws/statute/90e19?search=administrative+penalties#BK275>

An administratively simple and transparent use of the funds could be to support the Nova Scotia Youth Conservation Corps (NSYCC), which is administered by Clean. Like Clean, the NSYCC was created by an Act of the Legislature<sup>5</sup> to perform environmental education and awareness in NS. This initiative also feeds the private sector with youth trained in environmental interest, skills and literacy. It has the following benefits:

- projects are delivered province-wide;
- it increases the capacity of projects doing environmental education, innovation and restoration work;
- it increases capacity of community organizations around Nova Scotia by providing administrative, project management and HR support, and 75% of the salary to support the youth; and
- it coaches, trains and employs youth in Nova Scotia, giving them real-world work experience, and valuable transferable skills such as leadership, entrepreneurship, knowledge of environmental techniques and technologies, peer to peer education, project management, communications, and knowledge of environmental science.

In these ways, NSYCC is very much aligned with the call in the OneNS Commission’s report to find ways to retain highly-skilled Nova Scotian youth in the province. It also provides a concrete contribution to the Strategic Priorities identified in the recent draft *Greener Economy Strategy*, which calls for the province to, “Promote greening of the workforce through training, and supporting a culture of ongoing learning. This involves leveraging existing supports, and aligning training efforts to include and incent training that encompasses a ‘greening’ message”.<sup>6</sup>

In addition, allocating the funds collected through AMPs to NSYCC would be an inherently transparent process; Clean is a registered charity, with annually audited, public financial statements and low average administrative costs (9%). The project is scalable, and therefore appropriate for unpredictable revenue sources. Increased funding would result in increased number of youth in the program, and the program is perennially oversubscribed in terms of projects that would like to hire young people.

If you have any questions about any of the comments or suggestions we have made, please feel free to contact:

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<sup>5</sup> Actual wording from The Environment Act: a) promote youth involvement in environmental stewardship and commitment to the conservation and enhancement of the environment; (b) provide youth with opportunities to participate in environmental projects, thereby providing Corps members with leadership skills and training and building community capacity in environmental management; (c) provide summer and longer term employment, including relevant training and education, for youth; and (d) facilitate and encourage movement of participants in the Corps program to private sector employment by linking the program with the private sector through co-operative work programs.

<sup>6</sup> *Greener Economy Strategy*, pp. 27-8.