

# ENVIRONMENTAL LAW

## ENVIRONMENTAL PENALTY BILL SHOCKS REGULATED COMMUNITY

Ontario's MOE has threatened to strengthen its environmental enforcement arsenal by increasing spill penalties, broadening director and officer liability, and making it harder for companies and municipalities to defend charges and fines. Proposed new legislation will introduce Environmental Penalties (EP) that will impose absolute liability on those "responsible for spills that damage the environment and compromise the health of Ontarians."

Premier Dalton McGuinty insists that Bill 133 would ensure polluters immediately face consequences for their actions. An EP and associated order could be imposed by a Ministry official within days of a spill. "Our message to polluters is simple," says McGuinty, "You spill, you pay." The stated objective is to encourage companies "to make greater efforts in preventing spills and (to provide) additional incentives to clean them up quickly."

### Absolute Liability Penalties

Bill 133 would put polluters on the hook for EPs of up to \$100K per day, even if they

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Over the past month, Ontario has released a number of proposals, which could have far-reaching impacts on the province's management of environmental issues, including:

- a new system of environmental penalties and duties imposed on corporate officers and directors under the EPA and OWRA
- an expanded greenbelt covering designated areas of the Golden Horseshoe and details of greenbelt protection planning, plus a growth management act that would cover the Greater Golden Horseshoe
- pretreatment standards for hazwastes destined for land disposal, as well as new controls on waste processing and storage
- the designation of a range of waste electrical and electronic products subject to 3R requirements
- proposed drinking water standards for disinfection by-products

"took all reasonable steps to prevent the contravention and even if, at the time of the contravention, the person had an honest and reasonable belief in a mistaken set of facts that, if true, would have rendered the contravention innocent." In other words due diligence would not be a defence to an EP—spillers would be absolutely liable. Due diligence is a defence to strict liability offences—the standard applied to most criminal and regulatory charges.

For serious spills, polluters could be liable to prosecution in addition to a costly EP. This double jeopardy was not a feature of the former Administrative Monetary Penalty (AMP) regime that EPs will replace. Under that scheme, the province intended to forego prosecution in order to efficiently collect penalties and encourage

polluters to consent to compliance orders. Now, it seems Ontario wants it both ways: a heavy administrative fine, potentially followed by punitive prosecution.

The EP penalties collected would not be used to remediate the specific spill. The money would go into a special purpose fund to be used "to compensate persons who suffered losses as a result of a spill of a pollutant, to provide financial assistance to persons who undertake environmental remediation projects, and for other purposes prescribed by the regulations."

### What About the Charter?

Although the potential EP fines are high (up to \$20K per day for an individual and \$100K per day for a company), it is unlikely that the courts will rule that the EP regime will offend the *Charter*. The Ontario Court of Appeal last year decided that absolute liability penalties in Ontario do not violate *Charter* guarantees of security of the person. In the *Transport Robert* decision the Court ruled that offences with money-only penalties (no possibility of jail) do not offend section 7 of the *Charter* (security of the person). The Supreme Court of Canada denied leave to appeal this decision. That is consistent with other SCC decisions that have upheld absolute liability administrative penalties for regulatory offences.

It is less clear whether the potential double jeopardy of an EP plus a prosecution would trigger the *Kienapple* principle that prevents multiple charges for the same offence.

### Director / Officer Liability

The potential liability of directors and officers will be expanded, and the burden of proving due diligence is shifted, under both the EPA and the OWRA. Currently, a director or officer of a company has a duty to take reasonable care to prevent any unlawful discharge. Bill 133 extends the due diligence duty to prevent any breach of the Act, regulations, or any approvals,

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Proposal	Purpose and Description of Proposal
Proposed <i>Environmental Enforcement Statute Law Amendment Act, 2004</i> (Bill 133)	The Bill would amend the <i>Environmental Protection Act</i> and the <i>Ontario Water Resources Act</i> . It establishes environmental penalties (EPs) for companies and municipalities who cause unlawful discharges or spills. It broadens director and officer duties and liability, stiffens fines on conviction, and requires sentencing judges to consider a list of “aggravating factors” The Bill is intended to make it easier for Crown prosecutors to lay charges and get convictions and higher fines. Deadline for submissions is November 27, 2004 .
Proposed <i>Greenbelt Act, 2004</i> (Bill 135 ) and Greenbelt Plan	Bill 135 would establish a Greenbelt Area and a Greenbelt Plan for the Golden Horseshoe. The Bill also addresses the plan amendment process, conformity of planning decisions, transition issues, the implementation of regulations, the appointment of an advisory council, and consequential amendments to other Acts. Deadline for submission is November 27, 2004.
Proposed <i>Places to Grow Act, 2004</i> (Bill 136), and <i>Places to Grow</i> discussion paper	Bill 136 authorizes Cabinet to designate a growth plan area and to establish a growth plan, for the designated area that all planning decisions must conform with. The Act follows up on the <i>Places to Grow: Better Choices, Brighter Future</i> discussion paper released in summer 2004. The Bill’s proposed geographic scope would encompass the Greater Golden Horseshoe—West to Kitchener-Waterloo and north to Lake Simcoe. This planning is intended to accommodate Ontario’s anticipated population growth of 4 million people in the next 30 years.
Draft Regulation — Pre-treatment requirements for Hazardous Wastes Prior to Land Disposal (LDR)	The regulation would provide closer harmony with U.S. pre-treatment standards (adapted to Ontario’s existing hazwaste management regime), and would apply to all hazwastes destined for landfill, land farms, and deep well disposal facilities. Alternate treatment standards are provided for debris, soil, and lab packs. Also amends approval requirements for on-site processing and storage of waste by all generators. Standards would be phased-in over 5 years to permit industry to meet the demand for new or increased hazwaste processing services. The Ministry estimates additional treatment costs could range from \$150-\$1000+/tonne. Deadline for submissions is November 27, 2004.
Draft Regulation — Waste Electronic and Electrical Equipment, under the <i>Waste Diversion Act, 2002</i>	The regulation would designate certain waste electronic equipment under the Act, and permit the Minister to require Waste Diversion Ontario to develop a program to reduce, reuse or recycle such materials. The extensive list of designated equipment includes appliances, IT, AV & telecommunications equipment, electrical tools, assorted toys, and measuring, medical & control instruments. Submission deadline is November 25, 2004.
Revision of the Canadian Drinking Water Guideline for trihalomethanes	The current guideline for total trihalomethanes (THMs) is reaffirmed and a new maximum acceptable concentration (MAC) of 0.016 mg/L is proposed for bromodichloromethane, based on chronic health effects observed in animal studies. BDCM can be an indicator of brominated disinfection by-products (formed by the reaction of naturally-occurring bromide with disinfecting water treatment chemicals), which are more toxic than chlorinated disinfection by-products. Deadline for submissions January 7, 2005. When final, the MAC for BDCM would be adopted as an Ontario Drinking Water Quality Standard.

permits or orders. When charged, a director or officer will have the onus of proving that he or she took “all reasonable care” to prevent the contravention.

**Bill Has Many Sharp Teeth**

The legislation proposes to lower the threshold for laying charges or making orders. Currently the threshold is when a contaminant causes “or is likely to cause” an adverse effect. Bill 133 would change that to “may cause”.

MOE officials and municipalities will be able to issue orders to recover “reasonable costs and expenses” incurred in

responding to spill incidents.

Other key features of Bill 133 include:

- sharp increase ion maximum fines for offences, plus mandatory minimum fines for discharge/spill offences;
- tough “deemed impairment” water pollution definition in OWRA;
- expanded list of offences that will carry stiffer fines;
- new “aggravating factors” that a judge must consider when sentencing a convicted offender;
- broader powers to make clean-up and preventative orders;

- broader rights of property access for MOE staff.

**ENGAGEMENTS OF NOTE**

**Marc McAree** will speak on *Liability on the Environmental Front: Are You Exposed?* at the Canadian Institute Construction Superconference, on November 29, 2004.

**Donna Shier** will speak on *Rescuing the Problem Deal: Contaminated Real Estate* at the Law Society of Upper Canada Continuing Legal Education, on December 8, 2004.

**To Subscribe**

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