

## *Ontario Clarifies Administrative Penalty Regime Under Climate Change Legislation*

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Ontario recently released its *Draft Guideline for the Implementation of Administrative Penalties under the Climate Change Mitigation and Low-Carbon Economy Act, 2016* (“[Draft Guideline](#)”).<sup>1</sup>

The Draft Guideline clarifies how Administrative Monetary Penalties (“AMPs”) are issued and calculated under the *Climate Change Mitigation and Low-carbon Economy Act, 2016* (“the Act”)<sup>2</sup> and O. Reg. 540/17. The Draft Guideline also describes the factors that the Ministry of the Environment and Climate Change (“MOECC”) will consider when calculating an AMP. The MOECC is receiving comments on the Draft Guideline until February 16, 2018.<sup>3</sup>

AMPs are calculated based on particular formulas set out in O. Reg. 540/17. The Act provides that an AMP cannot exceed \$1M.<sup>4</sup>

### **1 WHAT ARE AMPs AND HOW ARE THEY ISSUED?**

The Act implements Ontario’s Cap and Trade Program, sets provincial targets for greenhouse gas (“GHG”) reduction, and establishes obligations for GHG emitters.<sup>5</sup> See our article on the Act [here](#).

The MOECC may impose AMPs to enforce the Act and prevent financial benefits resulting from non-compliance.<sup>6</sup> Funds collected through AMPs go to the MOECC’s GHG Reduction Account to fund GHG reduction initiatives.<sup>7</sup>

The MOECC can issue AMPs to entities and persons involved in the cap and trade program, including owners and operators of facilities, designated account representatives, sponsors, and accredited verification bodies.<sup>8</sup>

<sup>1</sup> Ministry of the Environment and Climate Change, January, 2018. DRAFT Guideline for the Implementation of Administrative Penalties under the *Climate Change Mitigation and Low-carbon Economy Act, 2016* (Ontario Regulation 540/17), online at: [http://www.downloads.ene.gov.on.ca/envision/env\\_reg/er/documents/2017/013\\_1818\\_DraftGuide.pdf](http://www.downloads.ene.gov.on.ca/envision/env_reg/er/documents/2017/013_1818_DraftGuide.pdf) [Draft Guideline].

<sup>2</sup> SO 2016, c 7 [the Act].

<sup>3</sup> MOECC. January 2, 2018. Guideline for the Implementation of Administrative Penalties under the Climate Change Mitigation and Low-carbon Economy Act, 2016. EBR No. 013-1818, online at: <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTMzOTI4&statusId=MjAzNzEx&language=en>

<sup>4</sup> The Act, s. 57(8); Draft Guideline, pg. 3.

<sup>5</sup> Draft Guideline, pg. 2.

<sup>6</sup> The Act, s. 57(1).

<sup>7</sup> Draft Guideline, pg. 3; The Act, s. 71 and Schedule 1.

The MOECC can issue AMPs for certain contraventions of the Act<sup>9</sup>, including failing to register with the cap and trade program, failing to submit reports or information to the MOECC, providing false or misleading information to the MOECC, and engaging in prohibited transactions with emissions allowances or credits.<sup>10</sup> The MOECC can also issue AMPs for contraventions of regulations under the Act, including the:

- ◆ Reporting Regulation (O. Reg. 143/16)
- ◆ Cap and Trade Regulation (O. Reg. 144/16), and
- ◆ Offsets Regulation (O. Reg. 539/17).<sup>11</sup> See our article on Ontario's Offsets Regulation [here](#).

The Draft Guideline outlines the process and timeline for issuance of an AMP. The process is similar to the process used by the MOECC to issue AMPs under the Ontario *Environmental Protection Act*.<sup>12</sup>

- 1 If the MOECC identifies a potential contravention of the Act or its regulations, the MOECC must issue a Notice of Intent to issue an AMP.<sup>13</sup>
- 2 A party that receives a Notice of Intent can request that the MOECC consider additional information relevant to the contravention (including the duration of the contravention<sup>14</sup>) and steps the party has or is now taking to remedy the contravention or prevent it from reoccurring. The party can request a meeting with the MOECC to discuss any additional information provided.<sup>15</sup> If a party does not request that the MOECC consider additional information, the MOECC may issue an order for an AMP based on available information.<sup>16</sup>
- 3 After considering additional information provided by a party, the MOECC may either issue an order for an AMP or notice of its decision to not issue an AMP.<sup>17</sup>
- 4 A party that has been ordered to pay an AMP can appeal the order to the Environmental Review Tribunal ("ERT").<sup>18</sup> The ERT may confirm, revoke, or vary the amount of the order.<sup>19</sup>

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<sup>8</sup> O. Reg. 540/17, Schedule 1.

<sup>9</sup> O. Reg. 540/17 "Administrative Penalties" under the Act, Schedule 1.

<sup>10</sup> O. Reg. 540/17, Schedule 1.

<sup>11</sup> Draft Guideline, pg. 3.

<sup>12</sup> Environmental Protection Act, RSO 1990, c E.19, ss. 182.3, 182.4, and 182.5.

<sup>13</sup> Draft Guideline, pg. 4; The MOECC must issue the Notice of Intent within 60 days of becoming aware of the potential non-compliance.

<sup>14</sup> Draft Guideline, pg. 12.

<sup>15</sup> Draft Guideline, pg. 5; The individual or corporation must request that the MOECC consider additional information within 15 days of the Notice of Intent being issued. The individual or corporation may request that the MOECC consider the additional information in relation to its calculation of the Initial Base Penalty, the Initial Economic Benefit, or Reductions for Preventative and Mitigative Actions.

<sup>16</sup> Draft Guideline, pg. 5.

<sup>17</sup> Draft Guideline, pg. 6. The MOECC must issue an AMP or issue a notice of decision not to issue an AMP from 15 days to 1 year after it becomes aware of the non-compliance.

The defence of due diligence is not available where AMPs are imposed.<sup>20</sup> Issuance of an order for an AMP does not prevent prosecution for a contravention of the Act.<sup>21</sup>

## 2 HOW ARE AMPs CALCULATED?

The MOECC has developed formulas for calculating AMPs under the Act. The Draft Guideline provides examples of how the MOECC will calculate AMPs in different contexts.<sup>22</sup>

To calculate an AMP, the MOECC:

- 1 Determines a **Daily Base Penalty** from a set of penalty ranges. Daily Base Penalties are set higher for:
  - a) corporations (as opposed to individuals), and
  - b) serious contraventions. Contraventions are considered serious where (i) they impact the environment, the integrity and reputation of the climate change program or other parties, (ii) they are deliberate, or (iii) the contravening party has prior convictions.<sup>23</sup>
- 2 Multiplies the Daily Base Penalty by the number of days or partial days of non-compliance to determine a **Multi-day Base Penalty**.<sup>24</sup> Multi-day Base Penalties are capped to ensure that multi-day offences do not result in unlimited penalties.<sup>25</sup>
- 3 Adjusts the Daily or Multi-day Base Penalty based on additional information provided by the party in non-compliance to determine the **Final Base Penalty**. The MOECC may reduce the Base Penalty if the party demonstrates that it took or is taking significant, well-documented, actions to correct the contravention and prevent the contravention from occurring again.<sup>26</sup>
- 4 Adds the value of any **Economic Benefit** the party gained from non-compliance to the Final Base Penalty to determine the total AMP. Economic Benefit includes the value of any costs avoided or delayed, or revenue gained by non-compliance. Unlike the Final Base Penalty, a party's Economic Benefit value will not be altered based on preventative or mitigative actions the party has taken.<sup>27</sup>

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<sup>18</sup> Draft Guideline, pg. 6; The individual or corporation must appeal the order for an AMP to the ERT within 15 days of the order being served.

<sup>19</sup> Draft Guideline, pg. 6.

<sup>20</sup> Draft Guideline, pg. 3.

<sup>21</sup> Draft Guideline, pg. 3.

<sup>22</sup> Draft Guideline, pgs. 8-15.

<sup>23</sup> Draft Guideline, pg. 8. Prior convictions include convictions under the Act, its regulations, or O. Reg. 452/09 (Greenhouse Gas Emissions Reporting) under the Environmental Protection Act.

<sup>24</sup> Draft Guideline, pg. 7.

<sup>25</sup> Draft Guideline, pg. 7 and 11.

<sup>26</sup> Draft Guideline, pg. 7, and 13-14.

<sup>27</sup> Draft Guideline, pgs. 7, 15-16.

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