

March 9, 2022

BY EMAIL

Shannon Boland
Divisional Compliance Branch
Ministry of the Environment, Conservation and Parks
135 St. Clair Avenue West, 8th Floor
Toronto, ON
M4V 1P5

Dear Ms. Boland:

RE: ERO 019-4108 (EXPANDING ADMINISTRATIVE PENALTIES FOR ENVIRONMENTAL CONTRAVENTIONS)

These are the comments of Canadian Environmental Law Association (CELA) in relation to the Ministry's regulatory proposal to expand the availability of administrative penalties for various types of contraventions under Ontario's environmental legislation.

(a) CELA's Background and Perspective

Founded in 1970, CELA is a public interest law group that seeks to use and improve laws to protect the environment and human health. Operated as a specialty legal aid clinic, CELA represents low-income individuals and vulnerable communities in the courts and before tribunals in a wide variety of environmental matters. Some of our casework has involved situations where the Ministry has issued – or has refused to issue – administrative penalties against persons or corporations that have contravened Ontario's environmental laws.

Since our inception, CELA has met and corresponded with Ministry representatives regarding the need to strengthen and improve environmental enforcement and compliance activities under the *Environmental Protection Act (EPA)*, *Ontario Water Resources Act (OWRA)*, and other key statutes that are administered by the Ministry. In recent years, CELA has also filed detailed submissions with the Ministry regarding administrative penalty regimes¹ and the relevant legislative amendments in Bill 132.²

¹ See, for example, [Canadian Environmental Law Association \(CELA\) Proposed Administrative Penalties Regulation under the Resource Recovery and Circular Economy Act](#); [Canadian Environmental Law Association \(CELA\) Administrative Monetary Penalties](#); [Canadian Environmental Law Association \(CELA\) Draft Guideline for the Implementation of Administrative Penalties under the Climate Change Mitigation and Low-carbon Economy Act, 2016](#); [Canadian Environmental Law Association \(CELA\) Developing Environmental Penalties for Ontario](#); and [Canadian Environmental Law Association \(CELA\) Administrative Monetary Penalties](#).

² [Canadian Environmental Law Association \(CELA\) CELA Submissions to the Ontario Government on Bill 132](#).
Canadian Environmental Law Association

Given our decades-long experience and public interest perspective, CELA has carefully considered the Ministry's proposal to expand the use of administrative penalties in the environmental context. For the reasons outlined below, CELA is generally supportive of the proposal, but we have identified several instances where the proposal should be modified and enhanced before the forthcoming regulations are finalized.

(b) CELA Comments on the Ministry's Proposal

The ERO notice³ indicates that the intent of the proposal is “to provide a single consistent approach for applying penalties across the Ministry's compliance and enforcement activities.” In principle, CELA supports this objective because implementing a common framework will promote greater certainty, traceability, and accountability when administrative penalties are being contemplated by Ministry staff in case-specific circumstances.

To achieve this objective, the Ministry is proposing to revoke and replace administrative penalty regulations under each of the following laws: *EPA*, *OWRA*, *Pesticides Act*, *Nutrient Management Act*, and *Safe Drinking Water Act*. Consequential amendments to other existing regulations under the *EPA* and *Safe Drinking Water Act* are also being proposed by the Ministry.

However, the ERO notice fails to attach any of the draft regulations that the Ministry proposes to put into place under the foregoing statutes. Although we have reviewed the three discussion documents attached to the ERO notice, CELA submits that the absence of the actual text of the regulatory proposals makes it exceptionally difficult to meaningfully comment on the adequacy of the legal content of the regulations.

On this point, the Ministry's consultation guide in the ERO notice acknowledges that it merely describes the proposed policy considerations that will drive the development of the regulations, but does not actually provide the proposed regulatory language:

This consultation guide describes the proposed policy that would inform the drafting of the administrative penalty regulations under each of the MECP acts; however, the guide is not intended to convey the precise language that would be used in the regulations themselves... The comments received from the postings will be considered by the Ministry when developing the proposed administrative penalty regulations (emphasis added, page 4).

CELA notes that in other recent ERO postings, the Ministry has helpfully provided draft regulations for consultation purposes.⁴ However, we are unaware of any compelling reason why the draft administrative penalty regulations have not been provided for public review and comment, although the above-noted excerpt from the consultation guide suggests that the proposed regulations remain under development behind closed doors at this time.

³ See [Expanding administrative penalties for environmental contraventions | Environmental Registry of Ontario](#).

⁴ See, for example, [Moving to a project list approach under the Environmental Assessment Act | Environmental Registry of Ontario](#).

Unfortunately, the ERO notice contains no firm commitment from the Ministry to solicit public feedback on the draft regulations once they have been completed. To remedy this omission, CELA strongly recommends that the draft regulations themselves must be posted on the Registry in due course and be subject to another 45-day public comment period. This two-stage consultation approach was recently utilized by the Ministry in relation to the proposed designated project list regulation under the *Environmental Assessment Act* (i.e., an initial consultation on a discussion document followed by a second consultation on the actual draft regulations), and CELA urges the Ministry to do so again in relation to the administrative penalty proposals.

In the meantime, CELA has reviewed the comments submitted to the Ministry by Ecojustice on March 8, 2022 in relation to the current ERO posting. Please be advised that CELA hereby adopts and commends Ecojustice's analysis and recommendations. For example, CELA agrees with Ecojustice that:

- Paying an administrative penalty should not prevent prosecution for more serious contraventions or for repeat contraveners, and the option of penalizing and prosecuting should apply to Type 3 offences under all five statutes, rather than just Type 4 and 5 offences.
- In accordance with the “polluter pays” principle, administrative penalties issued by the Ministry should always seek to recover monetary benefits accruing to contraveners because of their unlawful acts or omissions.
- The Ministry should use collected penalties to fund environmental justice initiatives and programs, particularly since low-income individuals and marginalized, racialized, or Indigenous communities often experience disproportionate impacts from polluting facilities or activities.
- Administrative penalties for air pollution from major emitters should be increased, as they remain significantly lower than in comparable jurisdictions.
- To enhance general deterrence and ensure public accountability, the Ministry should more frequently publish comprehensive information about the issuance, reduction, revocation, and appeal of administrative penalties.
- The Ministry should periodically review and increase penalty amounts to account for inflation.

We trust that these comments will be duly considered as the Ministry determines its next steps in relation to administrative penalties for environmental contraventions. Please contact the undersigned if you have any questions arising from this letter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Richard D. Lindgren
Counsel

cc. Ian Miron, Ecojustice