

# Administrative Monetary Penalties: New Federal Environmental Enforcement Measures Underway In Canada

April 20, 2016

On April 9, 2016, the government of Canada published draft regulations (the "Draft AMP Regulations")<sup>1</sup> providing details on the implementation of the Environmental Violations Administrative Monetary Penalties Act<sup>2</sup> ("EVAMPA"), together with a Policy Framework<sup>3</sup>, which outline the basic policy framework of the Administrative Monetary Penalties ("AMP") system at Environment and Climate Change Canada ("Environment Canada"). These draft regulations lead the way to the implementation of a federal AMP regime, more than five years after the enactment of the Environmental Enforcement Act<sup>4</sup> in 2009. As many readers will be aware, the Environmental Enforcement Act introduced a number of significant changes to the federal environmental enforcement scheme, including an increase in maximum penalties, the establishment of minimum penalties, and the creation of an AMP regime<sup>5</sup>.

In this bulletin, we highlight key elements of this new AMP regime, which, if the draft regulations are adopted, would operate in parallel to those already in force at the provincial level in some Canadian provinces.

## What is an Administrative Monetary Penalty?

An AMP is a type of enforcement measure aimed at assuring greater compliance with Canadian environmental laws and regulations. An AMP could be considered as an intermediary measure, between a written warning and prosecution measures, with a larger scope than the ticket regime. In a nutshell, AMPs resemble criminal fines, but are imposed by governmental authorities as opposed to being determined by a court following judicial proceedings. The proposed AMP regime is therefore, an additional compliance tool for Environment Canada.

## Scope of application of the AMP regime

The proposed Draft AMP Regulations provide a list of some 700 provisions from six environmental laws and associated regulations administered by Environment Canada, that would be subject to the AMP regime: the Antarctic Environmental Protection Act;

the Canada Wildlife Act ; the Canadian Environmental Protection Act, 1999 (Parts 7 and 9); the International River Improvements Act; the Migratory Birds Convention Act, 1994; and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act. We note, however, that some important federal environment legislation, i.e. the Fisheries Act and the Species at Risks Act, are not included in the list of acts that would be subject to the AMP regime<sup>6</sup>.

A complete list of the laws and regulations that would be subject to the new AMP regime is provided in Schedule A<sup>7</sup>.

The designated violations that would be subject to the proposed AMP regime include most of the offences provided for in the six applicable laws<sup>8</sup>. Generally speaking, the Draft AMP Regulations apply to the following types of violations<sup>9</sup>:

- the contravention of a specified provision of an environmental act and/or of a regulation made under such act (schedule 1 of the Draft AMP Regulations);
- the contravention of specified direction and order (schedule 2 of the Draft AMP Regulations); and
- the failure to comply with a condition of a permit, licence or other authorization (schedule 3 of the Draft AMP Regulations).

## Types of AMP and associated penalties

The amount of an AMP would range from \$200 to \$25,000 depending on the type of violation in question, the identity of the violator (individual / business, ship, vessel or aircraft), and the existence of aggravating factors<sup>10</sup>. A violation that occurred for a duration of more than one day would be considered a different violation for each subsequent day<sup>11</sup>.

The Draft AMP Regulations classify every violation as either a Type A, B or C violation, depending on the regulatory significance of the violation. Type A violations would typically include administrative violations, like the omission to submit an annual report. Type B violations represent more serious compliance issues that may involve a risk of harm to the environment, like the unauthorized disposal of a substance in sea. Type C violations include the most serious compliance issues that involve harm to the environment, like the failure to withdraw from service a tank system that is leaking<sup>12</sup>.

A baseline amount corresponds with each type of violation, to which an additional amount may be added if one or more of three aggravating factors is present, namely (i) history of non-compliance<sup>13</sup>, (ii) harm to environment<sup>14</sup> and/or (iii) economic gain that resulted from the violation<sup>15</sup>:

|  |                      |  |
|--|----------------------|--|
|  | <b>Economic Gain</b> |  |
|--|----------------------|--|

| Violator                       | Violation Type | Baseline Penalty Amount(\$) | History of Non-compliance Amount(\$) | Environmental Harm Amount(\$) | Only Avoided Financial Cost of Obtaining a Required Authorization Present(\$) | Other Economic Gain Present(\$) | Maximum Penalty(\$) |
|--------------------------------|----------------|-----------------------------|--------------------------------------|-------------------------------|---|---------------------------------|---------------------|
| Individual                     | A              | 200                         | 600                                  | 300                           | 50  | 200                             | 1,300               |
|                                | B              | 400                         | 1,200                                | 600                           | 100   | 400                             | 2,600               |
|                                | C*             | 1,000                       | 3,000                                | 0                             | 250   | 1,000                           | 5,000               |
| Other person or ship or vessel | A              | 1,000                       | 3,000                                | 1,500                         | 250   | 1,000                           | 6,500               |
|                                | B              | 2,000                       | 6,000                                | 3,000                         | 500   | 2,000                           | 13,000              |
|                                | C*             | 5,000                       | 15,000                               | 0                             | 1,250   | 5,000                           | 25,000              |

Source: Draft AMP Regulations, Schedule 4 and Regulatory Impact Analysis Statement of the Environmental Violations Administrative Monetary Penalties Regulations

\* By their nature, Type C violations involve harm to the environment and, consequently, no additional amount is added to the baseline amount.

## Violators

An AMP could be imposed by Environment Canada against any individual or business that commits any violation falling within the scope of the Draft AMP Regulations.

A violation committed by an employee, an agent or a mandatary of a person would be deemed to have been committed by that person<sup>16</sup>.

Also, any director, officer, agent or mandatary of the corporation that directed, authorized, assented to, acquiesced in or participated in the commission of a violation by a corporation would be considered a party to the violation and would be liable to an AMP, whether or not such corporation has been subject to an AMP<sup>17</sup>.

Specific rules would be applicable to ships, vessels and aircrafts<sup>18</sup>.

## Procedure and enforcement

If Environment Canada believes, on reasonable grounds, that a person has committed a violation subject to the AMP regime, Environment Canada could impose an AMP by issuing a notice of violation<sup>19</sup>. However, no notice of violation may be issued more than two years after the day on which the subject matter of the violation arises<sup>20</sup>. Also, where Environment Canada has elected to treat an act or omission as a violation under the AMP regime, it would be precluded from doing so as an offence under the applicable environmental law<sup>21</sup>. Similarly, treating an act or omission as an offence under the

applicable environmental law would likewise preclude Environment Canada from later electing to proceed by way of the AMP regime.

The notice of violation must name the person who is believed to have committed the violation, set out the relevant facts, set out the AMP, provide details on the right to request a review, specify the manner of paying the AMP, and inform such a person that if the AMP is not paid or if there is no review request, that person will be considered to have committed the violation<sup>22</sup>.

The notice of violation must be served according to standard notification procedures, by person, registered mail, courier, fax, or other electronic means<sup>23</sup>. In the absence of an acknowledgement of service or a certificate of service, service is considered effective on the 10 th day after a registered mail or courier is issued or in the case of service by fax or other electronic means, on the day on which it is sent<sup>24</sup>.

If a person pays the AMP, that person is considered to have committed the violation<sup>25</sup>. Also, a person that neither pays the AMP nor requests a review of such AMP is considered to have committed the violation and is liable for the AMP<sup>26</sup>. Outstanding AMP payments may be recovered by Environment Canada in a Federal Court or any other court of competent jurisdiction, but such proceedings may not be instituted more than five years after the day on which the AMP becomes payable<sup>27</sup>.

## **Defence and revision**

A person who is served with a notice of violation may request a review of the penalty or of the facts of the alleged violation, or both<sup>28</sup>. A review request must be filed with the Chief Review Officer, who is appointed under the Canadian Environmental Protection Act, 1999, within 30 days after the day the notice is served or within any longer period that the Chief Review Officer may allow<sup>29</sup>. At any time before a request for a review is received by the Chief Review Officer, a notice of violation may be cancelled or corrected by Environment Canada<sup>30</sup>.

The review is conducted by the Chief Review Officer, a review officer, or by a panel of three review officers<sup>31</sup> assigned by the Chief Review Officer. Both the person requesting the review and Environment Canada must be given reasonable notice, orally or in writing, of a hearing and be given a reasonable opportunity to make oral representations<sup>32</sup>. The minister has the burden of establishing, on a balance of probabilities, that the person requesting the review committed the violation<sup>33</sup>. The review officer or panel has to render its decision within 30 days<sup>34</sup> after the day on which the review is completed and, without delay, provide copy of the determination and reasons. This decision is final and binding and not subject to appeal or review by any court, except for judicial review under the Federal Courts Act<sup>35</sup>.

The EVAMPA specifically excludes the due diligence and mistake of fact defences<sup>36</sup>. However, other common law principles that would constitute a lawful justification or excuse to the violation are applicable to the extent that they are not inconsistent with the EVAMPA<sup>37</sup>. These principles could include, for example, the officially induced error whereby a violation is the result of the reliance upon an erroneous advice from an appropriate governmental official.

## Coming into force

Interested persons may make representations to Environment Canada concerning the Draft AMP Regulations and the Policy Framework of the Administrative Monetary Penalty System during the 60-day consultation period (April 9, 2016 to June 8, 2016). Following such consultation period, the Governor in Council may adopt the Draft AMP Regulations. The Draft AMP Regulations would come into force on the day on which they are registered.

## Conclusion

More than five years after the adoption of the Environmental Enforcement Act, the government of Canada now seeks to implement an Administrative Monetary Penalties regime. While Environment Canada has not specified how many AMPs could be imposed each year, new enforcement efforts can be expected. For industries, this new regime, if adopted, could represent a new challenge, since Environment Canada would now have a new, easier tool to use to ensure the compliance with many federal environmental laws.

## Schedule A

| Laws  | Regulations   |
|---|---|
| <i>International River Improvements Act</i>   | <i>International River Improvements Regulations</i>                         |
| <i>Canada Wildlife Act</i>  | <i>Wildlife Area Regulations</i>  |
| <i>Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act</i> | <i>Wild Animal and Plant Trade Regulations</i>                              |
| <i>Migratory Birds Convention Act, 1994</i>   | <i>Migratory Birds Regulations</i>  |
|   | <i>Migratory Bird Sanctuary Regulations</i>                                 |
| <i>Canadian Environmental Protection Act, 1999</i>  | <i>Fuels Information Regulations, No. 1</i>                                 |
|   | <i>Concentration of Phosphorus in Certain Cleaning Products Regulations</i> |
|   | <i>Gasoline Regulations</i>   |
|   | <i>Sulphur in Gasoline Regulations</i>                                      |
|   | <i>Sulphur in Diesel Fuel Regulations</i>                                   |
|   | <i>Interprovincial Movement of Hazardous Waste Regulations</i>              |
|   | <i>On-Road Vehicle and Engine Emission Regulations</i>                      |
|   | <i>Federal Halocarbon Regulations, 2003</i>                                 |
|   | <i>Off-Road Small Spark-Ignition Engine Emission Regulations</i>            |

|   |  |
|---|--|
|   | <i>Off-Road Compression-Ignition Engine Emission Regulations</i>                                   |
|   | <i>Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations</i>          |
|   | <i>Storage Tank Systems for Petroleum Products and Allied Petroleum Products Regulations</i>       |
|   | <i>Renewable Fuels Regulations</i>   |
|   | <i>Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations</i>                    |
|   | <i>Marine Spark-Ignition Engine, Vessel and Off-Road Recreational Vehicle Emission Regulations</i> |
|   | <i>Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations</i>                           |
| <i>Antarctic Environmental Protection Act</i> | <i>Antarctic Environmental Protection Regulations</i>  |

1 [Environmental Violations Administrative Monetary Penalties Regulations](#), (2016) C Gaz I, 1021 (proposed regulation), (accessed April 12, 2016) [Draft AMP Regulations].

2 L.C. 2009, c. 14, s. 126. [EVAMPA]. This act came into force on December 10, 2010, but was never implemented as it lacked the required implementing regulations.

3 Environment Canada, [Policy Framework of the Administrative Monetary Penalty System at Environment and Climate Change Canada to Implement the Environmental Violations Administrative Monetary Penalties Act](#), (accessed April 12, 2016). See also: Environment Canada, [Compliance and Enforcement Policy for CEPA \(1999\) – March 2001](#), (accessed April 12, 2016).

4 L.C. 2009, c. 14.

5 For more information on the Bill C-16, see: Library of Parliament, Penny Becklumb, [Legislative Summary of Bill C-16: Environmental Enforcement Act Legislative summary](#), June 19 2009, (accessed April 12, 2016).

6 Other acts are subject to the application of the Environmental Violations Administrative Monetary Penalties Act, but were not included in the list of provisions subject to AMP measures: **Canada Water Act, Canada National Parks Act, Canada National Marine Conservation Areas Act, Rouge National Urban Park Act, Saguenay-St. Lawrence Marine Park Act, and to certain sections of the Canadian Environmental Assessment Act, 2012.** However, these regulations could be subject to the AMP regime in the future.

7 The complete list of the provisions subject to the AMP regime is provided in Schedules 1, 2 and 3 of the Draft AMP Regulations.

8 Except for the Canadian Environmental Protection Act, 1999, for which only parts 7 and 9 are covered.

9 Draft AMP Regulations, Section 2.

10 EVAMPA, Section 5 (4); Draft AMP Regulations, Sections 3 to 8.

11 EVAMPA, Section 12.

12 Draft AMP Regulations, Section 3 and Schedule 3; Storage Tank Systems for Petroleum Products and Allied Petroleum Products Regulations, SOR/2008-197, s 3(1).

13 Draft AMP Regulations, Section 6. **The non-compliance relates to the five-year period prior to the occurrence of the violation and refers to violations that were subject to enforcement measures (ex: ticket, penalty, conviction, injunction or environmental protection alternative measures) within such period.**

14 Draft AMP Regulations, Section 7.

15 Draft AMP Regulations, Section 8.

16 EVAMPA, Section 9 (1).

17 EVAMPA, Section 8 (1).

18 EVAMPA, Sections 8(2)(3)3 and 9 (2) (3).

19 EVAMPA, Section 10 (1).

20 EVAMPA, Section 14.

21 Draft AMP Regulations, Section 13.

22 EVAMPA, Section 10 (2).

23 Draft AMP Regulations, Section 9 (1).

24 Draft AMP Regulations, Sections 9 (2) and (3).

25 EVAMPA, Section 25.

26 EVAMPA, Section 26.

27 EVAMPA, Section 27.

28 EVAMPA, Section 15.

29 EVAMPA, Section 15.

30 EVAMPA, Section 16.

31 EVAMPA, Section 17.

32 EVAMPA, Section 20 (1).

33 EVAMPA, Section 20 (2).

34 EVAMPA, Section 21.

35 EVAMPA, Section 23.

36 EVAMPA, Section 11 (1).

37 EVAMPA, Section 11 (2).

By

[Marie-Claude Bellemare](#), [Alexandre Desjardins](#)

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520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

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F 403.266.1395

#### **Ottawa**

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### **Vancouver**

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
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1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

#### **Toronto**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

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