York Region

Corporate Services Department
Legal Services Branch

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Via Fax 416-326-0461

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**Re: Written Submissions regarding EBR Registry No. PA05E0036
Stakeholder Consultation Paper: Developing Environmental Penalties for Ontario
(the "Consultation Paper")**

This letter incorporates comments obtained from staff at The Regional Municipality of York who have discussed the above-noted proposal. Please note these comments should not be considered to reflect the official position of the Region or Regional Council in respect of the Consultation Paper.

Overall, we note that the Consultation Paper seeks input on very "high level" issues and does not provide significant insight into the details that would be set out in the regulation that would implement Environmental Penalties. We would therefore strongly suggest that the Ministry post a draft of any such regulation on the EBR Registry for public comment before it is published in the Ontario Gazette.

In addition, the Ministry has stated that Environmental Penalties will only apply initially to corporations subject to the MISA regulations. However, the Ministry has not stated its position on whether or not these penalties would be applied to municipalities either unilaterally or in respect of certain instances. With respect, we do not believe that these penalties should be imposed on municipalities for activities that are directly related to the provision of essential services, particularly when the possibility of prosecution may still be an option.

The remainder of the responses contained in this letter appear in the same order as the questions appeared in the Consultation Document. The specific questions have been reproduced for ease of reference.

VII. Base Penalty Assessment and Modifiers

Questions for discussion:

What combination of factors should be considered when determining an environmental penalty amount; for example, the volume of a spill and the potential for harm?

- The factors that are aspects of the defence of due diligence should be considered in the context of the severity of the incident or offence: e.g., the use of preventive measures; the training provided to personnel; the installation and operation of equipment; inspection regimes; mitigation measures employed; the economic benefit, if any, achieved as a result of non-compliance; adherence to industry or institutional standards; the length and duration of the resulting harm; the compliance history of the responsible party; the extent of co-operation between regulatory authorities and the responsible party; and the ability of the party to pay an Environmental Penalty.

- In addition, from a public policy perspective, it would be preferable not to impose Environmental Penalties on municipalities when there is no issue of negligent or wilful misconduct e.g., incidents were sewage works are required to operate in a bypass situation as a result of adverse weather conditions or events over which municipalities do not have control (e.g., blackouts or other significant events).

Are there appropriate lists and specific toxic substances that should be referenced when assessing a penalty amount, such as the federal Canadian Environmental Protection Act (CEPA) list of toxic substances?

- The assessment of the substance in question should be conducted on a case by case basis.

How should an environmental penalty address unlawful spills to air?

- Factors to consider should include the volume spilled, the inherent toxicity of the substance involved, the extent of the harm and the duration of harm.

When determining the penalty amount, in what circumstances should a director consider a regulated person's economic benefit; for example costs avoided and costs delayed?

- When a "for profit" organization is under consideration, the analysis should include a determination of the economic benefit or competitive advantage, if any, derived in the circumstances. For example, if it can be demonstrated that a decision to undertake reasonable measures to avoid the potential for a spill to occur or to initiate measures mitigate the resulting harm was delayed or avoided in order to improve the "bottom line" or achieve an advantage over competitors who were taking such measures, this should factor into the quantum of the Environmental Penalty.

Which types of Environmental Management Systems should be recognised in an EP?

- Recognized Environmental Management Systems such as ISO 14001.

What role could third party audits play?

- Both internal and external audits should be recognized and factor into Environmental Penalties. The degree to which recommendations made by the auditors regarding potential or actual regulatory non-compliance were complied should be included in the analysis. Entities that are commissioning audits are demonstrating a willingness to assess and improve operations in order to maintain a diligent standard of care and keep up with changes to the regulatory landscape. Ministry inspections should be considered as third party audits. However, another factor that should be considered is that if auditors fail to identify issues that subsequently are identified as a root cause of an incident, the audited party should not be disproportionally penalized.

For EP Orders that relate to unlawful discharges and the failure to clean up following a spill, what specific mitigative or preventive measures should qualify for a reduction in the penalty amount?

- Measures that should serve to reduce the penalty amount should include:

  (a) preceding the spill: the use of practices to identify risks; the degree of spill containment and preventative measures employed; the frequency and extent of internal inspections, particularly for aspects of operations that pose the greatest risk should a spill occur; and

  (b) after the spill: the degree of co-operation extended to regulatory authorities and the public; the degree of the response provided; the use of effective mitigation, remediation and restorative measures to minimize the extent of impacts; the weight of resources brought to bear.

Under what circumstances should a settlement agreement be considered?

- When there is not a concern that the incident resulted from the wilful misconduct of the party under consideration, there is not a significant record of convictions involving similar circumstances and no significant economic or competitive advantage was obtained

In addition to commitments made by a company to achieve compliance and prevent future occurrences, what types of supplementary environmental projects should qualify under a settlement agreement?

- Environmental enhancement projects that improve the natural environmental and benefit the public in the immediate area where the party is situated or where a spill occurred.

IX. Special Purpose Account

Questions for Discussion:

In what circumstances should a person be able to apply for compensation from the special purpose account?

- Any person that was directly affected and suffered harm.
- Organizations that seek to implement preventative measures to minimize the extent and harm that may result from future incidents based on "lessons learned" from past incidents or events.
- Municipalities to use for environmental enhancement, enforcement and emergency response programs.

What types of activities and projects should qualify for payments from the special purpose account?

- Mitigation and remediation projects.
- Environmental enhancement, enforcement and emergency response projects.

X. Spills Reporting

Question for Discussion:

Based on your experience, what reporting requirements are necessary to ensure that decisions regarding whether or not to impose an EP are made fairly and promptly?

- Type of contaminant spilled.
- Quantity spilled.
- Location of the spill.
- Prompt reporting of the incident.
- The scope and extent of resulting harm.
- Actions taken to mitigate and remediate the spill.

XI. Spill Prevention and Contingency Planning

Questions for Discussion:

How should existing spills prevention and contingency plans be recognized through the regulation?

- Conformity with regulatory requirements should be required in the preparation of these types of plans, but an appropriate phase-in period should be provided to allow revisions to be undertaken, particularly if a specific format is to be introduced.

How should Environmental Emergency Plans submitted under the Canadian Environmental Protection Act, 2000 relate to spill prevention and contingency planning under an EP?

- These types of plans should be transferable to the extent possible to avoid unnecessary duplication. Appropriate harmonization of the plans required for various regimes would be useful to minimize administrative overlap

Thank you for the opportunity to provide these responses.

Yours truly,

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