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**THE ENVIRONMENTAL ENFORCEMENT STATUTE LAW AMENDMENT ACT, 2005
(FORMERLY BILL 133) AND THE MINISTRY OF THE ENVIRONMENT'S
STAKEHOLDER CONSULTATION PAPER "DEVELOPING ENVIRONMENTAL
PENALTIES FOR ONTARIO"**

The Transportation and Works Committee recommends the adoption of the recommendations contained in the following report, January 4, 2006, from the Regional Solicitor:

1. RECOMMENDATIONS

It is recommended that:

1. The Regional Solicitor report back to Council at such time as formal regulations are enacted for Environmental Penalties (EPs) pursuant to the *Environmental Enforcement Statute Law Amendment Act, 2005*.
2. The Regional Clerk forward this report to the Clerks of the local municipalities.

2. PURPOSE

Significant portions of the *Environmental Enforcement Statute Law Amendment Act, 2005* are now in effect. One important change is the introduction of Environmental Penalties (EPs) as an enforcement tool (pending the development of an enacting regulation). The Ministry of the Environment (MOE) released a stakeholder consultation paper titled "*Developing Environmental Penalties for Ontario*" and sought comments from interested parties on the development of the EP regime. Staff have provided comments to the MOE on various issues raised and to questions posed in the consultation paper.

This report will highlight important changes brought about by the *Environmental Enforcement Statute Law Amendment Act, 2005* and summarize the comments provided by Staff on the MOE consultation paper. A copy of the submission to the MOE is attached to this report.

3. BACKGROUND

Report No. 3 of the Regional Solicitor was considered by Regional Council on December 16, 2004. Report No. 3 discussed the possible implications of Bill 133 (which became the *Environmental Enforcement Statute Law Amendment Act, 2005*) based on the proposed amendments to the *Environmental Protection Act* ("EPA") and *Ontario Water*

Resources Act (“OWRA”) introduced at First Reading in the Provincial Legislature. Significant amendments were subsequently made to Bill 133 before the Bill was passed and received Royal Assent.

The EPA and OWRA are the principal environmental statutes used by the MOE to govern spills and discharges into the natural environment, regulate waste and related activities, impose remediation obligations, administer activities that pose a risk to the natural environment and human health, and establish penalty provisions.

The amendments introduced under the *Environmental Enforcement Statute Law Amendment Act, 2005* (formerly Bill 133) have resulted in several significant changes to the EPA and the OWRA. Generally, the changes to the OWRA are the same as the changes to the EPA.

The amendments enhance the concept of “polluter pays” in both statutes and strengthen enforcement and penalty provisions.

One of the significant changes now in place, but not yet in effect, is the ability of the MOE to issue an order requiring payment of an EP for various offences under the EPA and OWRA. The principles underpinning EPs have been set out in the legislation, but the actual mechanics implementing the use of EPs will be established by regulation.

Currently, the MOE is consulting with various stakeholders about EPs. In conjunction with these activities, the MOE released a consultation paper to obtain comments that would be considered by the MOE when creating a regulation to implement EPs. The consultation paper sought responses to very generic and conceptual questions. It appears that the EP regulation is at a preliminary stage of development.

4. ANALYSIS AND OPTIONS

The following discussion summarizes amendments to the EPA and OWRA that are now in effect or that are in place, but not yet in effect. Following this discussion is a summary of comments provided by Staff in response to the MOE consultation paper regarding principles to be incorporated into an EP regulation.

4.1 Amendments to the EPA and OWRA that are in effect

4.1.1 Preventative Orders

Under the EPA, the preventative order making powers under section 18 have been broadened. Previously, preventative measures could be ordered to reduce the risk of an unlawful discharge that would likely result in an adverse effect. This threshold has been reduced to any unlawful discharge that may result in an adverse effect. In addition, the presence of contamination itself that may pose an adverse effect enables the MOE to issue a preventative order. This aspect veers away from the “polluter pays” concept and imposes liability regardless of whether the property owner or occupant was responsible for presence of the contamination.

4.1.2 Notification of Spills

The notification requirements for spills are now more stringent. Spills are a special category of emissions under section 92 of the EPA. Previously, spills that caused or were likely to cause an adverse effect had to be reported. Now, any spill that causes or may cause an adverse effect must be reported.

4.1.3 Cost Recovery Orders

The MOE and municipalities are now entitled to issue orders under the EPA to a person responsible for the spill of a pollutant to recover costs and expenses incurred by the ministry or the municipality. In general, these costs and expenses must relate to the prevention or clean up any adverse effects or the restoration of the natural environment.

4.1.4 Duty of Officers and Directors

The duty imposed on officers and directors of corporations under the EPA and OWRA has also expanded significantly. At the Region, this duty would apply to Senior Management and require that reasonable care be taken to prevent the occurrence of: an unlawful discharge; the failure to report an unlawful discharge; the unlawful operation of a waste management system, waste disposal site or facility involving liquid industrial waste or hazardous waste; obstruction of a provincial officer performing their duties; failing to properly install or operate equipment in violation of a permit or approval; and contravention of an order (except cost orders).

If an officer or director is charged with failing to meet this duty, there has also been a significant twist in how a trial will proceed. It is no longer left to the prosecutor to make the case conclusively against the accused. The accused must now prove that they carried out their duty in order to avoid a conviction.

4.1.5 New and Revised Penalties

New minimum amounts for fines under the EPA and OWRA have been introduced and maximum fines have increased. Offences have now been grouped into two tiers. Second tier penalties are more severe and will be imposed for more serious offences as determined by the ministry, including: the failure to report a discharge or spill; the unlawful discharge of a contaminant; the unlawful operation of a waste disposal site,

waste management system or facility involving hauled liquid industrial waste or hazardous waste; obstructing a provincial officer from performing their duties; discharging any substance that contravenes a standard set out in a regulation, administrative order, approval, permit or licence.

In addition, new sentencing guidelines have been introduced that are to be used by courts when determining what penalty should be imposed. If a court finds an aggravating factor existed, a higher penalty would be imposed. Aggravating factors include: the occurrence of an adverse effect; the offence was intentional or reckless; failure to take prompt action to mitigate; and prior convictions. These sentencing provisions only apply to offences that have occurred after June 13, 2005.

4.1.6 Deemed Impairment of Water Quality

The threshold for “deemed impairment” of water quality under the OWRA has been revised to make it more consistent with the “deleterious substance” threshold under the federal *Fisheries Act*. The effective result is that if a discharge now occurs into water, water quality will be deemed to be impaired in a larger number of circumstances. This results in a larger number of circumstances that will be chargeable offences under the OWRA.

4.2 Amendments Not In Effect - Environmental Penalties

While not currently in effect, pending the drafting of enacting regulations, a significant amendment to the EPA and OWRA is the introduction of EPs. EPs are a potentially large monetary penalty that may be ordered by a MOE director for violations of the EPA and OWRA. The penalties apply to a “regulated person” that is defined to be the holder of an EPA or OWRA permit or approval designated by future regulations or a class of corporations designated by future regulations. EPs are capped at a maximum of \$100,000 a day for each and every day that the violation occurs. These penalties would be assessed by MOE officials within a few days of a violation. Most of the discussion around EPs has focussed on their use in situations involving unlawful spills and discharges, but EPs may also be issued for any other violation of the EPA or OWRA.

If an EP order is issued, the “due diligence” defence would not be available to nullify the requirement to pay an EP. With EPs, aspects of the due diligence defence would be considered, but only when determining the amount of the EP that must be paid.

There are only limited rights of appeal against an EP order. In particular, if an appeal relates to a discharge or spill, the alleged offender has the onus of proving that they did not violate the applicable provision. An appeal must be brought within 15 days of the director’s decision to issue the EP order.

Even if an EP has been imposed and paid, the MOE still has the option to initiate a prosecution against the alleged offender. Therefore a party could pay the EP and still be prosecuted, convicted and required to pay an additional fine. The payment of an EP

would be considered by the court as a mitigating factor when determining the amount of the fine to be imposed, but would not prevent an additional fine from being imposed.

Monies collected from payment of EPs will be deposited into a special purpose account. It is intended that these monies would be available to a defined class of persons who suffered losses or incurred expenses as a result of a spill, to provide financial assistance for remediation projects and other purposes to be defined in the EP regulation.

EPs are a significant new enforcement tool separate and apart from tickets, administrative orders and prosecutions. Currently, it is expected that EPs will only be used against violations such as spills that involve nine industrial sectors subject to the *Municipal/Industrial Strategy for Abatement* ("MISA") regulations. However, the ministry may broaden the use of EPs in the future to other sectors, possibly including municipalities. The full scope of use has not yet been established.

4.3 Stakeholder Consultation Paper "*Developing Environmental Penalties for Ontario*"

As part of MOE consultations with various stakeholders, the MOE released a consultation paper to obtain comments that would be considered by the MOE when drafting a regulation to implement EPs. The consultation paper sought responses to very generic and conceptual questions. At this point, it appears that the work to develop an EP regulation is at a preliminary stage.

Staff provided comments requesting that a draft of the EP regulation be provided for public comment before it takes effect. This would permit a more beneficial analysis of the structure and content of the EP regime. Among the various comments provided, Staff suggested that:

- It would be preferable not to impose EPs on municipalities when negligence or wilful misconduct is not involved;
- The amount of an EP assessed against a "for profit" organization should consider the economic or competitive advantage, if any, achieved in the circumstances by the responsible party;
- Factors that should be considered when assessing the amount of an EP should include all aspects of the defence of due diligence;
- The amount of an EP assessed when a spill has occurred should consider that actions taken before the spill to prevent the occurrence of the event and what steps were taken after the spill to mitigate and remediate effects of the spill; and
- Monies collected as a result of EPs should be available: to any person directly affected by the incident who suffered harm; organizations that seek to prevent future incidents and limit potential harm; and to municipalities for use to initiate or supplement environmental enhancement, enforcement and emergency response programs.

5. FINANCIAL IMPLICATIONS

Penalties for violations of the EPA and OWRA have been revised into two tiers instead of three tiers. As set out previously, second tier penalties are more severe and will be imposed for more serious offences.

	Revised Penalties
Tier 1 (individual)	Maximum of \$50,000 per day (first conviction)
	Maximum of \$100,000 per day (subsequent conviction) and/or a maximum of 1 year in prison
Tier 1 (corporation)	Maximum of \$250,000 per day (first conviction)
	Maximum of \$500,000 per day (subsequent conviction)
Tier 2 – serious offences (individual)	Minimum of \$5,000 to a maximum of \$4,000,000 per day first conviction)
	Minimum of \$10,000 to a maximum of \$6,000,000 per day (second conviction)
	Minimum of \$20,000 to a maximum of \$6,000,000 per day (subsequent conviction)
	In addition, a maximum prison term of 5 years less one day may also be imposed
Tier 2 – serious offences (corporation)	Minimum of \$25,000 to a maximum of \$6,000,000 per day (first conviction)
	Minimum of \$50,000 to a maximum of \$10,000,000 per day (second conviction)
	Minimum of \$100,000 to a maximum of \$10,000,000 per day (subsequent conviction)

No overall maximum penalty has been established on the total amount of an EP that could be issued to an alleged offender apart from the \$100,000 per day maximum for each and every day that the violation occurs. Theoretically, one could have EPs applied for each day that an offence occurred and then have fines applied for the same number of days if convicted of the offence. Therefore, offenders face the prospect of significant financial penalties.

The introduction of minimum penalties reduces the flexibility courts and lawyers previously had to agree upon and set penalties that were mutually satisfactory. It also sends a signal to courts to increase penalties that may previously have been applied to accord for the shift attributable to the introduction of minimum penalties.

6. LOCAL MUNICIPAL IMPACT

All local municipalities will face the same challenges identified in this report.

7. CONCLUSION

The amendments that have been or are yet to be in effect will pose significant challenges to the Region and its operations, particularly with the construction of infrastructure. The introduction of a stricter set of amendments will require increased diligence to achieve compliance. Development of the EP regulations will need to be monitored along with potential future expansion of the EP regime to track how EPs may affect the Region.

The Senior Management Group has reviewed this report.

(The attachment referred to in this clause is attached to this report.)