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The Administrative Monetary Penalty System

created under the

***Environmental Violations Administrative Monetary
Penalties Act: Consultation Document***

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I. OVERVIEW AND GOALS OF THE CONSULTATION EXERCISE

The Government of Canada has recently introduced enhanced tools for environmental enforcement. As part of this process, the Government enacted the *Environmental Enforcement Act*, which came into force on December 10, 2010.¹ This Act made a series of amendments to existing legislation; it also laid out an Administrative Monetary Penalty (or AMP) system that will apply to violations under 10 pieces of federal legislation (or acts):

Environment Canada acts

- *Antarctic Environmental Protection Act*
- *Canada Water Act*
- *Canada Wildlife Act*
- *Canadian Environmental Protection Act, 1999, Parts 7 and 9*
- *International River Improvements Act*
- *Migratory Birds Convention Act, 1994*
- *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*

Parks Canada acts

- *Canada National Marine Conservation Areas Act*
- *Canada National Parks Act*
- *Saguenay–St. Lawrence Marine Park Act*

This consultation document addresses the acts and regulations administered by Environment Canada, which we refer to as environmental legislation² in this document. Parks Canada administers the last three acts listed above and may also consider the results of this consultation in the development of regulations.

The purpose of this consultation exercise is to obtain your feedback on the design of the proposed AMP system for violations of environmental legislation. More specifically, we are interested in your comments on the proposed design of regulations that, along with policy, will set out the implementation details of the AMP system. These regulations will be enacted under the legislative authority of the *Environmental Violations Administrative Monetary Penalties Act*, or EVAMPA.³

This consultation document focuses on two main components of the proposed system:

- the violations of environmental legislation that will be subject to an AMP; and
- the methodology for determining an AMP

¹ The *Environmental Enforcement Act* (EEA) was enacted to make changes to other pieces of legislation. Once those changes are made, the EEA will be “spent,” meaning it will not perform any other functions.

² “Legislation” refers to statutes (acts) and regulations.

³ EVAMPA is set out in the EEA.

The results of the consultation will be summarized and shared through the Regulatory Impact Analysis Statement (RIAS) that will be pre-published with the proposed EVAMPA regulations in the *Canada Gazette*, Part I. We expect that a draft of these regulations will be published in the *Canada Gazette*, Part I in the spring of 2012. The final regulations will be published subsequently in the *Canada Gazette*, Part II.

II. BACKGROUND: ADMINISTRATIVE MONETARY PENALTIES IN THE CONTEXT OF ENVIRONMENTAL LEGISLATION

This section of the document offers background information about the purpose of and rationale for the new AMP system. The following section sets out the specific implementation details.

(a) What are AMPs? What is the rationale behind an AMP system?

Legislation is an expression of public priorities, intended to achieve important objectives. The failure to comply with a statute or regulations compromises those objectives. Non-compliance must, therefore, be addressed to ensure that important societal, economic and environmental objectives are met. Stated at a broad level, the objective of federal environmental legislation is to protect the environment, including biodiversity and wildlife, from harm, loss, and degradation.

Failures to comply with legislative requirements must be addressed, but not all failures to comply with legislation — what we also refer to as violations — are similar in nature. Accordingly, it is important to have a range of enforcement responses.

AMPs are one way of responding to a violation. AMPs are sanctions issued in the form of a monetary penalty. Most AMPs are issued directly by a government department to the violator using a simple form that sets out the violation in respect of which the AMP is issued, the amount of the penalty, and the options for payment. We anticipate similar features on our AMP notices.⁴

An AMP is designed to ensure compliance with legislation and can address a range of compliance issues: some relatively minor, and some more severe. An AMP takes away the financial incentives of rule-breaking and thereby removes any financial benefit, advantage, or gain a person or corporation achieved by committing a violation. It helps ensure future compliance and may discourage others from violating legislation.

In the environmental context, an AMP system responds to a gap in existing responses available when someone has violated a provision of environmental legislation. For some violations, enforcement officers may issue a written warning, a direction, an Environmental Protection Compliance Order (EPCO), or they may proceed with a prosecution. In certain circumstances, none of these options would be an appropriate response to bring the violator into compliance. Prosecution might be too heavy-handed, while a written warning might not do enough to encourage compliance with the legislation. An EPCO, which is premised on ordering specific actions, might not be

⁴ Technically speaking, the AMP is the actual amount payable, and the document that is issued is called a Notice of Violation, or NOV. For ease of reference, however, we refer generally to AMPs within this document.

appropriate in some circumstances, and the statutory pre-requisites might not exist, depending on the nature and circumstances of the violation. The possibility of issuing an AMP would fill this gap in enforcement options.

(b) How does an AMP differ from a penal sanction? When should an AMP be imposed rather than a penal sanction?

An AMP is an administrative or civil sanction, as opposed to a criminal or penal one. An individual subject to an AMP will not face the possibility of imprisonment. An individual or corporation subject to an AMP will not be prosecuted, and anyone subject to prosecution will not receive an AMP for that same violation.

Penal sanctions should be reserved for the most serious violations of environmental legislation, those that warrant denunciation and punishment. An AMP, in contrast, is meant to ensure compliance with legislation and removes any financial incentive to violate legislation.

Some examples help illustrate the difference between an AMP and a penal sanction.

An AMP may be the most appropriate response for a corporation that failed to provide information or importation documentation required under environmental legislation like the *Canadian Environmental Protection Act, 1999*. Providing information is important, because this allows the Minister of the Environment to make important policy and program decisions. In this example, however, we are not concerned with denouncing wrongful conduct, but rather with encouraging the corporation to follow the rules that were designed to achieve the objectives of the regulatory regime.

Similarly, hunting without physically carrying a permit is a failure to comply with a legislative requirement, and is therefore a violation of environmental legislation. In this example, depending on all of the circumstances of the violation, a criminal penalty may be inappropriate. Rather than denouncing this conduct, the enforcement response should encourage the hunter to comply with the legislative requirement to carry his permit in the future. The existence of the AMP as an enforcement response will also encourage compliance with the requirement by others, who might otherwise decide not to comply with the legislative requirement because they believe the risk of prosecution is low.

Compare that example with one in which a person significantly exceeded the bag or possession limit of migratory birds set by regulation for a specific hunting zone, used a firearm and ammunition that are not permitted under the regulations, and then proceeded to sell the birds illegally for profit. This conduct may or may not have been deliberate, but in any event, it resulted in the killing of birds and the hunter profited from selling the birds. This sort of conduct might, depending on all of the circumstances of the violation, be more appropriately addressed through penal sanctions issued by the court.

(c) The process for issuing an AMP

The seven pieces of environmental legislation set out above⁵ designate certain people as enforcement officers. We propose that these same officers issue AMPs.⁶

A separate AMP can be issued for each day that a violation is committed. In other words, separate and additional AMPs can be applied for each successive day that a violation of a legislative requirement occurs. For example, if a person or ship disposes of a substance at sea without a permit over the course of four days and an AMP is an appropriate enforcement response in the circumstances, a separate AMP can be issued for each of those four days.⁷

There is a time limit on issuing an AMP: an AMP can only be issued within two years after the day on which the violation occurs.

An AMP is not issued by a court. If someone wants to challenge the issuance of an AMP, he or she must make a request to have the Chief Review Officer (CRO) review the AMP. The CRO is an independent decision-maker, who derives his or her authority from EVAMPA.

The CRO has the authority to determine (1) whether the alleged violator committed a violation, and (2) whether the AMP was determined in accordance with the regulations. The burden of proof for an AMP is the civil standard of “balance of probabilities” and not the criminal standard of proof “beyond a reasonable doubt.” The CRO does not have the authority to consider the defences of due diligence and mistake of fact.⁸ The CRO’s final determination may be reviewed by a court.⁹

III. ISSUES FOR CONSULTATION

We have set out the proposed implementation details of the AMP system in the pages that follow. Specifically, we are interested in your feedback on the following matters:

- (a) the violations of environmental legislation that will be subject to an AMP; and
- (b) the methodology for determining an AMP

⁵ Reproduced here for ease of reference: the *Antarctic Environmental Protection Act*; the *Canada Water 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*.

⁶ As noted above, the AMP is the actual amount payable, and the document that is issued is called a Notice of Violation, or NOV. We refer to AMPs for ease of reference.

⁷ See sections 125(1)(b) and 276 of the *Canadian Environmental Protection Act, 1999*.

⁸ Due diligence and mistake of fact are common law defences defined and applied by courts.

⁹ Section 23 of EVAMPA indicates that the determination of the CRO is “subject to judicial review under the *Federal Courts Act*.”

(a) Scope of the AMP system: the violations that will be subject to an AMP

We propose that AMPs not be applied to violations that are committed knowingly, or with intention (*mens rea* offences). However, AMPs would be available as a possible response to all other failures to comply with any provision of the seven pieces of environmental legislation, set out above.¹⁰ The decision to issue an AMP in response to a violation, as opposed to using other enforcement options, would be made on a case-by-case basis.

(b) Determining the amount of the AMP

(i) Introduction

We propose that the amount of an AMP vary according to the nature and circumstances of the violation it addresses, and according to whether the violation was committed by an individual or by a corporation. The ability to vary the amount of the AMP will ensure a fair and appropriate response tailored to the type of violator and the circumstances of the violation.

The amount of an AMP may vary, but it will be predictable. The amount of an AMP will be based on a baseline amount, which can be adjusted upwards if additional factors are present. These additional factors are (1) a history of non-compliance with environmental legislation, (2) any environmental harm caused by the violation, and (3) the person or corporation who committed the violation realized an economic gain because of the violation.

Each of these additional factors will be discussed in more detail below.

(ii) Determining the baseline AMP

We propose that the baseline AMP will consist of set amounts, and that these set amounts will be determined by considering the nature of the violation **and** whether the violation was committed by an individual or by a corporation.

In terms of the nature of the violation, we propose the following three categories of “AMP-able” violations:

Type A: Violations that represent less serious compliance issues, such as failing to respect a reporting requirement

Type B: Violations that represent more serious compliance issues, and that create a risk of harm to the environment, such as failing to properly maintain regulated equipment to prevent spills or releases.

¹⁰ Again, these are the *Antarctic Environmental Protection Act*; the *Canada Water 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*. Section 5(2) of EVAMPA provides that only contraventions and failures to comply that are offences under environmental legislation may be designated as violations.

Type C: Violations that represent the most serious compliance issues and that, by their nature, will always result in harm to the environment

In terms of categories of violators, we propose that the AMP system will distinguish among four different types of persons who commit violations:

- (I) individuals not in the course of business
- (II) individuals in the course of business
- (III) small corporations and vessels
- (IV) other persons (such as large corporations and large vessels)

The different categories of violations and persons committing the violations are designed to allow the AMP to be tailored to create the appropriate incentives to comply with the legislation.

(iii) Additional factors that can increase the AMP

We propose that the baseline amount, determined by both the nature of the violation and the type of violator that committed it, may be increased if certain additional factors are present.

These factors are as follows:

(1) *History of non-compliance with environmental legislation:* does the person or corporation who committed the violation have a history of non-compliance with environmental legislation? This history can include, for example, warnings issued or convictions registered in relation to a piece of environmental legislation within the past five years for substantially similar conduct.

(2) *Harm caused by the violation:* did the violation cause harm to the environment? This factor would be applied in the event of the observation or measurement of any of the following:

- alteration, disruption, or degradation of biodiversity, ecosystem, or habitat;
- killing, harming, harassing, capturing, or taking of wildlife species;
- removing, defacing, damaging, or destroying any cultural resource, including an artifact; or
- any adverse effect, such as contamination or degradation and including harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration, or radiation

(3) *The person or corporation who committed the violation realized an economic gain (including an avoided financial cost) because of the violation*

The additional consideration of “harm to the environment” will not apply to Type C violations, which are set out above, because those violations, by their nature, always cause harm. The baseline AMP for those sorts of violations will already reflect this.

In some circumstances, all three of these factors may apply and the baseline amount will be increased accordingly. However, even in those instances when two or three

additional factors apply, EVAMPA sets maximum limits, and therefore, an AMP cannot exceed a specified amount for each type of violation.

The chart below illustrates the system.

INDIVIDUALS				
Individual not in the course of business				
BASELINE	HISTORY OF NON-COMPLIANCE	HARM	ECONOMIC BENEFIT	TOTAL
\$	+30%	+30%	+\$ (up to 5K)	Max 5K
TYPE A				
TYPE B				
TYPE C		N/A		
Individual in the course of business				
BASELINE	HISTORY OF NON-COMPLIANCE	HARM	ECONOMIC BENEFIT	TOTAL
\$	+30%	+30%	+\$ (up to 5K)	Max 5K
TYPE A				
TYPE B				
TYPE C		N/A		
OTHER PERSONS				
Small Corporations or ships				
BASELINE	HISTORY OF NON-COMPLIANCE	HARM	ECONOMIC BENEFIT	TOTAL
\$	+30%	+30%	+\$ (up to 25K)	Max 25K
TYPE A				
TYPE B				
TYPE C		N/A		
Other persons				
BASELINE	HISTORY OF NON-COMPLIANCE	HARM	ECONOMIC BENEFIT	TOTAL
\$	+30%	+30%	+\$ (up to 25K)	Max 25K
TYPE A				
TYPE B				
TYPE C		N/A		

Classifying violations of environmental legislation in this way will provide guidance and flexibility for enforcement officers to determine the most appropriate AMP amount, so that the AMP will ensure compliance with the legislation, compensate for the damage made to the environment, and remove any benefit or gain realized by the violator due to his or her non-compliance.

IV. NEXT STEPS

As noted above, the results of the consultation will be summarized and shared through the Regulatory Impact Analysis Statement (RIAS) that will be pre-published with the proposed EVAMPA regulations in the *Canada Gazette*, Part I. We expect that a draft of these regulations will be published in the *Canada Gazette*, Part I in the spring of 2012. The final regulations will be published subsequently in the *Canada Gazette*, Part II.

V. CONCLUSION

The AMP system created under EVAMPA will allow a greater range of appropriate responses to violations of environmental legislation in order to promote compliance.

This document has set out some of the key implementation details of Environment Canada's AMP system, which will be expressed in forthcoming regulations. We have communicated these details to you as part of Environment Canada's commitment to consultation. We are interested to hear your input on our proposal.

Please direct your comments to:

By e-mail:

legis.gov@ec.gc.ca

By fax:

819-952-9138

By regular mail:

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The deadline for comments is Friday, September 9, 2011.