

Proposed Administrative Penalties Regulation under the *Climate Change Mitigation and Low-carbon Economy Act, 2016* (CCMLEA)

Regulatory Proposal

For the purpose of public consultation, this document outlines what is proposed to be included in an administrative penalty regulation established under the CCMLEA, in order to allow the Ministry of the Environment and Climate Change to issue administrative penalties for non-compliance with the CCMLEA and its regulations.

Ministry of the Environment and Climate Change

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Introduction

Legislative and Regulatory Context

On May 18, 2016, the *Climate Change Mitigation and Low-carbon Economy Act, 2016* (CCMLEA) received Royal Assent and came into force. The CCMLEA is landmark climate change legislation that builds on and supports Ontario's Climate Change Strategy. A key purpose of the CCMLEA is to establish a carbon price, through a cap and trade program, that will change behaviour across the Province in order to reduce greenhouse gas emissions; including, driving low-carbon innovation. In addition, a cap and trade program will allow Ontario to link to other regional cap and trade markets as part of the international, national and interprovincial responses to reduce greenhouse gases.

Specifically, the CCMLEA:

- Sets provincial targets for reduction of greenhouse gas (GHG) emissions for 2020, 2030 and 2050
- Establishes reporting and verification requirements for certain emitters of GHGs
- Establishes a framework for the reduction of GHGs through implementation of a cap and trade program

On May 19th 2016, two regulations under the CCMLEA were filed:

- O. Reg. 143/16, Quantification, Reporting and Verification of Greenhouse Gas Emissions, (the Reporting Regulation); and,
- O. Reg. 144/16, The Cap and Trade Program (the Cap and Trade Regulation)

The Reporting Regulation sets out the detailed requirements for the quantification, verification and reporting of GHG emissions for certain emitters of GHGs and incorporates, by reference, the Guideline for Quantification, Reporting and Verification of Greenhouse Gas Emissions. The information obtained through this regulation is foundational to establishing a successful cap and trade program.

The Cap and Trade Regulation sets out the framework and specific legal requirements for implementing the cap and trade program; including, requirements relating to the purchase and sale of allowances.

The Ministry of the Environment and Climate Change (MOECC) has a number of key functions to ensure effective implementation of the cap and trade program, including:

- Management and oversight of the overall program (e.g., establishing a cap, distribution of allowances, establishing the auction of allowances, creation and issuance of credits, market oversight, etc.)
- Development and implementation of processes for the use, management and tracking of auction proceeds and associated reporting
- Preparation of the Climate Change Action Plan and associated public reporting
- Compliance and enforcement of legal requirements

Compliance and Enforcement and Administrative Penalties

Key functions that the MOECC will have to undertake under the CCMLEA are compliance and enforcement – specifically as it relates to implementation of the cap and trade program and the quantification, reporting and verification of GHG emissions that underpin the program. Strong oversight and governance is required to ensure effective implementation and compliance with the CCMLEA and associated regulations.

A range of compliance and enforcement tools have been established under the CCMLEA to ensure MOECC is able to maximize compliance with legal requirements. These tools include inspection and investigation powers and the ability to issue compliance orders and administrative penalty orders. The majority of these compliance and enforcement tools were available for use by MOECC when the CCMLEA came into force. The CCMLEA also includes enabling provisions for the issuance of administrative penalty orders – which require a regulation to enable implementation.

An administrative penalty is a monetary penalty that can be imposed to achieve the following purposes (see s. 57(1) of the CCMLEA):

1. To ensure compliance with legislative or regulatory requirements
2. To prevent a person¹ from deriving economic benefit from non-compliance with legal requirements

In general, the administrative penalties framework established under the CCMLEA includes, among other things, details on the following:

- The scope of the contraventions for which administrative penalties can be issued
- Establishment of an absolute liability regime for the requirement to pay an administrative penalty (i.e., there is no “due diligence” defence)
- The total maximum penalty amount (i.e., an administrative penalty for a contravention cannot exceed \$1 million)
- The limitation on how long after a contravention that an administrative penalty can be issued (i.e., the latter of 1 year after the date the contravention occurred or after evidence of the contravention came to the attention of the ministry)
- That the issuance of an administrative penalty order does not prevent prosecution for the same contravention
- To whom an administrative penalty order can and cannot be issued
- Rights for appeal of a penalty order (i.e., right to seek an appeal within 15 days to the Environmental Review Tribunal)
- Where money paid for administrative penalties goes (i.e., to the Greenhouse Gas Reduction Account)

¹ Under the CCMLEA, a person is defined to include “an individual, corporation, partnership, sole proprietorship, association or any other organization or entity”; but, in the case of a corporation an administrative penalty order cannot be issued to a director, officer, employee or agent of the corporation.

Amounts from Administrative Penalties

The CCMLEA requires that an account, known as the Greenhouse Gas Reduction Account, be established and that any proceeds from the distribution of allowances under the cap and trade program, any amounts from the payment of administrative penalties and any amounts or fees payable under the CCMLEA to the Crown, must be recorded within this account (see s. 71(1) of the CCMLEA).

In addition, the CCMLEA authorizes the use of funds recorded in the GGRA, including amounts from the payment of administrative penalties, for specific purposes – including investments in projects and programs that are reasonably likely to reduce, or support the reduction of, greenhouse gas (see s. 71(2) of the CCMLEA).

Under the CCMLEA, Ontario must establish a 5-year Climate Change Action Plan (CCAP) that sets out the steps Ontario will take to fight climate change. In general, the actions under CCAP that reduce or support the reduction of greenhouse gas emissions will be eligible for funding from the GGRA. Each year, Ontario will be required to report publicly on the progress of CCAP, as well as funds tracked in and out of the GGRA.

Purpose of the Regulatory Proposal

This document is intended to be a consultation paper on what is being proposed to be included in an administrative penalty regulation established under the CCMLEA, in order to allow MOECC to issue administrative penalties for non-compliance with the CCMLEA and its regulations.

Comments received as a result of public consultation on this document will be considered when drafting and finalizing an administrative penalties regulation under the CCMLEA.

Note: To ensure transparent and appropriate application of administrative penalties, the ministry will be developing guidance material to be used by the ministry when applying and calculating administrative penalties. The ministry intends on posting this draft guidance material on the Environmental Registry, for consultation, as part of the process of implementing administrative penalties.

Regulatory Proposal

Overview of the Proposed Process for Issuing an Administrative Penalty

The following table outlines, as a summary, the process for issuing an administrative penalty order. The sections that follow provide a more detailed discussion on each step of the process and what is proposed.

Table 1: Process for Issuing an Administrative Penalty Order

#	Step	Description
1	Notice of Intent	An MOECC director provides a notice of intent to issue an administrative penalty for non-compliance with legal requirements under the CCMLEA. The notice would be issued to the person who is in non-compliance and would include a preliminary calculation of the penalty amount.
2	Submissions	The person receiving the notice of intent would have an opportunity to make submissions to the director regarding the following: <ul style="list-style-type: none">• The facts of the contravention, as stated in the notice of intent• Actions the person took to prevent the contravention• Actions the person has taken or will take to correct the contravention and prevent it in the future
3	Administrative Penalty Order	The MOECC director considers the submissions and decides whether to issue an administrative penalty order. Where a decision is made to issue the order, the director calculates the final penalty amount based on the requirements in the regulation, submissions provided and how long the contravention has continued.

Step 1: Notice of Intent

Upon identification by MOECC of a potential CCMLEA contravention or contraventions, the MOECC director would be required to serve a notice of intent to issue an order to that regulated

person, prior to issuing an administrative penalty order. The notice indicates the intention of the director to issue an administrative penalty order based on the information available to the director regarding a contravention or contraventions. It is proposed that the notice of intent would include the following information:

- The name of the person receiving the notice
- A description of the contravention or contraventions
- The days, or partial days, over which the contravention or contraventions occurred or continue
- The initial assessment of the value of the administrative penalty; including:
 - Amount of the base penalty, as identified in the regulation, and whether it may be increasing on a daily basis if it is a continuing contravention; and,
 - Amount of economic benefit, if any, as a result of the non-compliance
- Any considerations that were taken by the director when determining the initial value of the administrative penalty
- Information about the right of the person to make a written submission to the director in regards to the facts of the contravention, actions that were taken to prevent the contravention, and actions the person has taken or will take to correct the contravention and prevent it in the future
- The date by which a submission must be provided to the director. It is proposed that the person receiving the notice of intention may make a written submission to the director within fifteen (15) days of the notice of intention being served.

Step 2: Submissions

It is proposed that the submission to the issuing director may include one or more of the following:

- Statements in regards to the facts of the contravention
- Statements regarding actions that were taken by the person to prevent the contravention from occurring in the first place
- Statements regarding actions the person has taken or will take to correct the contravention and prevent it in the future

It is proposed that the director may, upon request, provide a written extension to the 15 day submission period.

Any submissions made by the person within the required timeframe would need to be considered by the director when determining the final penalty amount.

Step 3: Administrative Penalty Order

It is proposed that after submissions have been received, or the period to provide submissions has ended, the director may choose to do one of the following:

1. Not issue the administrative penalty order
2. Issue the administrative penalty order without changing the initial penalty value described in the notice of intent
3. Issue the administrative penalty order with an adjusted penalty value based on one or more of the following:

- Revise the initial penalty that was in the notice of intent (i.e. adjust one or both of the base penalty or economic benefit components) based on updated facts relating to the contravention (e.g., duration of the contravention, nature of the contravention, etc.)
- Reduce the initial or revised base penalty based on actions taken by the person to prevent the contravention
- Reduce the initial or revised base penalty based on actions the person has taken or will take to correct the contravention and prevent it in the future

When making the above decision, the director must take into consideration submissions, if any, that were provided by the person receiving the notice of intent.

Where the regulated person has made a submission stating actions taken to prevent the contravention, it is proposed that, based on the submission, the director would have the discretion to maintain the base penalty value or reduce it by either 15% or 30%.

Where the person has made a submission stating actions taken to come back into compliance and/or prevent future contraventions, it is proposed that, based on the submission, the director have the discretion to maintain the base penalty value or reduce it by 10% or 20%.

It is proposed that the administrative penalty order, if issued, must have the following information:

- Description of the contravention, or contraventions; including, the name of the person receiving the order and the dates of the contravention or contraventions
- Value of the penalty
- Description of the considerations that went into determining the final penalty amount
- Details on how and when the penalty amount must be paid
- Details on the person's right to appeal the administrative penalty order to the Environmental Review Tribunal under s. 60 of the CCMLEA – and the date by which such an appeal must be made

It is proposed that, the director will notify the person to whom a notice of intent was given, if the director decides not to issue the administrative penalty order.

Determining the Penalty Value

Penalty Value Calculation

It is proposed that the penalty amount be calculated using the following formula:

$$\text{Penalty Value} = \text{Base Penalty} + \text{Economic Benefit}$$

where,

- “**Base Penalty**” is proposed to be calculated using the following formula:

The daily penalty is a range set out in the regulation for the contravention. The exact value of the daily penalty is determined by the director based on specific considerations set out in the regulation.

$$\text{Base Penalty} = (\text{Daily Penalty}) \times (\# \text{ of Days Contravention Continues})$$

The director may increase the base penalty for each day, or partial day the contravention continues, up to a maximum cap set in the regulation for the contravention.

As a result of the submissions provided, the base penalty value may be adjusted based on a clarification of facts or reduced for preventive and mitigative actions taken by the regulated person.

- “**Economic Benefit**” is the monetary benefit that the person gained as a result of the non-compliance. This may include costs that were avoided or deferred, or may include revenue/profit that was gained as a result of the non-compliance. It is proposed that the economic benefit amount may only be adjusted based on clarification of facts provided by the regulated persons. The economic benefit portion of the penalty would not be subject to reductions as a result of preventive and mitigative actions taken by the regulated person.

Base Penalty Determination

It is proposed that all contraventions that are subject to an administrative penalty order be classified in one of two penalty categories based on the relative seriousness of the contraventions. The more serious contraventions would have a penalty range with higher values. For example, record keeping contraventions may be classified in the category with lower penalty range values versus a contravention that relates to protecting the market from manipulation. When determining the base penalty, the MOECC director would have the discretion to set the base penalty value, up to a maximum amount in the range. In addition, the

applicable penalty range would differ depending on whether the person subject to the penalty is an individual or a corporation.²

When setting the daily penalty value in the range, it is proposed that the director consider the following factors:

- Impact of the contravention on the integrity and delivery of the program, the environment or other persons
- Compliance history of the regulated person in relation to relevant provincial legislation and their respective regulations; including, any orders issued or convictions
- Whether the contravention was deliberate

The following table identifies the proposed base penalty ranges for individuals and corporations, and for illustrative purposes provides an example of the type of contravention that would be subject to this penalty category.

Table 2: Base Penalty Ranges

Category	Daily Base Penalty Range (Individuals)	Daily Base Penalty Range (Corporations)	Example Contravention
1	Up to \$1,000	Up to \$5,000	Failing to retain records, as required, for seven years (O. Reg. 143/16, s. 37)
2	Between \$1,000 to \$2,000	Between \$5,000 to \$10,000	Conducting a trade/transaction with insider knowledge. (CCMLEA, s. 29(5))

It is proposed that, where the director determines the contravention is occurring over multiple days, the above base penalty may be applied to each day it continues up to a maximum base penalty cap.

The following table identifies the base penalty caps for the above categories.

² The “individual” category would include all persons that are not corporations

Table 3: Multi-day Base Penalty Maximum Caps

Category	Multi-day Base Penalty Cap (Individuals)	Multi-day Base Penalty Cap (Corporations)
1	\$30,000	\$150,000
2	\$60,000	\$300,000

Economic Benefit

It is proposed that the economic benefit portion of the penalty value is calculated in addition to the base penalty. The director would have the discretion to determine any monetary benefit that a regulated person gained as a result of non-compliance. For example, the director may consider one or more of the following economic factors when determining the value to apply to an administrative penalty:

- Increased revenue or profit that is directly or indirectly gained by the regulated entity as a result of the non-compliance
- Costs that are avoided, and as a result not incurred at all, by being in non-compliance
- Costs that are deferred to a later date as a result of a non-compliance

It is proposed that no specific cap for the economic benefit portion of the penalty value be specified in the regulation. However, under the CCMLEA, an administrative penalty cannot exceed \$1 million in total (see s. 57(8) of the CCMLEA).

Illustrative Example

The following example is provided for illustrative purposes only, and reflects the proposed approach outlined in the “Regulatory Proposal” section of this document.

#	Step	Description
1	Notice of Intent	<p>An MOECC director determines that a corporation is contravening a Category 2 contravention. The contravention has been going on for 8 days and has not been corrected.</p> <p>The director estimates that there was approximately \$100,000 in economic benefit gained from the contravention.</p> <p>Category 2 contraventions have a daily penalty value range of between \$5,000 to \$10,000 for corporations. Due to a poor compliance history and the fact that the contravention had an impact on the integrity of the program and other participants in the program, the director decides to calculate the penalty using the maximum daily value in the range (i.e., \$10,000).</p> <p>The director determines the initial value of the penalty as follows:</p> <p>Initial Penalty Value = Intial Base Penalty + Initial Economic Benefit Initial Penalty Value = \$10,000/day x 8 days + \$100,000 Initial Penalty Value = \$180,000</p> <p>Prior to issuing the notice of intent, the director makes sure the base penalty is below the cap of \$300,000 for a Category 2 contravention for a corporation, which it is. The director also confirms that the penalty value is below the absolute cap of \$1 million, which it is.</p> <p>In the notice of intent, the director includes the initial penalty value, details of who is receiving the penalty, the details of the contravention, the fact that the penalty is increasing daily as the contravention continues and the right of the person to provide a submission to the director within 15 days.</p>
2	Submissions	<p>The person receiving the notice of intent decides to make a submission to the director that includes:</p> <ul style="list-style-type: none"> • A statement that the contravention was remedied after 10 days • Clarification of facts around the economic benefit that was gained • The fact that the person took actions to prevent the contravention, but factors took place that were out of its control • Some actions the person has taken to prevent the contravention from happening again <p>The submission was provided within the 15 day submission period.</p>

#	Step	Description
3	Administrative Penalty Order	<p>After considering the submission, the director decides to issue the administrative penalty order and calculates the final penalty amount.</p> <p>First, the director considers the facts related to the economic benefit and determines that the economic benefit estimate should be revised to \$75,000.</p> <p style="padding-left: 40px;">Revised Economic Benefit = \$75,000</p> <p>Second, the director considers the revised facts related to the contravention – which in this case is an adjustment on how long it continued:</p> <p style="padding-left: 40px;">Revised Base Penalty Value = \$10,000/day x 10 days Revised Base Penalty Value = \$100,000</p> <p>Third, the director decides to give a full reduction for actions that were taken to prevent the contravention – the reduction only applies to the base penalty portion:</p> <p style="padding-left: 40px;">Preventive Measures Reduction = \$100,000 x 30% Preventive Measures Reduction = \$30,000</p> <p>Fourth, the director decides to give a partial reduction of 10% for actions that were taken to mitigate and prevent a future contravention – the reduction only applies to the base penalty portion:</p> <p style="padding-left: 40px;">Mitigative Measures Reduction = \$100,000 x 10% Mitigative Measures Reduction = \$10,000</p> <p>Next, the director calculates the base penalty as a result of the reductions determined above:</p> <p style="padding-left: 40px;">Revised Base Penalty Value = \$100,000 – \$30,000 - \$10,000 Revised Base Penalty Value = \$60,000</p> <p>The director then determines the penalty value based on the previous calculations:</p> <p style="padding-left: 40px;">Penalty Value = Revised Base Penalty + Revised Economic Benefit Penalty Value = \$60,000 + \$75,000 Penalty Value = \$135,000</p> <p>Prior to issuing the administrative penalty order, the director again makes sure the base penalty is below the cap of \$300,000 and the overall penalty value is below to \$1 million absolute maximum, which it is in both cases.</p> <p>The director issues a final penalty order for \$135,000, detailing the considerations that were taken in determining the value and the right of the person to appeal the order to the Environmental Review Tribunal.</p>