

## DELIVERED BY EMAIL

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Re: CELA Comments on the Draft Guideline for the Implementation of Administrative Penalties under the *Climate Change Mitigation and Low-carbon Economy Act, 2016*  
EBR # 013-1818

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Thank you for the opportunity to comment on the Ministry of the Environment and Climate Change's ("MOECC") Draft Guideline for the Implementation of Administrative Penalties under the *Climate Change Mitigation and Low-carbon Economy Act, 2016* ("*Climate Act*"), EBR # 013-1818.

CELA supports the use of administrative monetary penalties ("AMPs") as one tool to enforce the *Climate Act*. However, the AMP regime will only successfully deter violators if administrative violations of the cap and trade regime are understood to be continuous until they are remedied. The AMP regime needs to be strengthened by (1) outlining when agreements with violators will be used and allowing for public comment, (2) allowing individuals associated with corporations to be targeted for penalties in appropriate circumstances, and (3) considering previous violations of other environmental statutes in calculating an appropriate base penalty. Serious violations of the *Climate Act* should be prosecuted.

### A. Background

The Canadian Environmental Law Association ("CELA") is a non-profit, public interest organization established in 1970 for the purpose of using and improving existing laws to protect public health and the environment. As an Ontario legal aid clinic, CELA's top priority is to represent low-income individuals and communities.

## B. Draft Guideline for the Implementation of Administrative Penalties under the *Climate Change Mitigation and Low-carbon Economy Act, 2016*

- (i) Administrative monetary penalties must not replace prosecutions

CELA supports the use of AMPs to enforce the *Climate Act*. However, AMPs are only effective if there is a credible threat of criminal prosecution.<sup>1</sup> We urge the MOECC to ensure that serious cases of non-compliance with the *Climate Act* are addressed through criminal proceedings.

The MOECC relies on its May 2007 *Compliance Policy: Applying Abatement and Enforcement Tools* to guide its response to a contravention of the *Climate Act*.<sup>2</sup> The Compliance Policy emphasizes contraventions that result in health and environmental consequences and categorizes contraventions with administrative consequences as the least severe violations.<sup>3</sup> The Compliance Policy appears to be more applicable to violations of other environmental statutes and should be modified to better account for the nature of the cap and trade regime, which focuses on reporting emissions, pollution allowances and trading, rather than direct regulation of pollution.<sup>4</sup> Decisions about how to enforce the Act should focus on the impact of the violation on the MOECC's ability to administer the cap and trade scheme rather than direct environmental or health harms.

We recommend that the MOECC review criminal prosecutions and administrative penalties under the *Climate Act* every five years to ensure that its enforcement goals are being met. The review should consider why the MOECC decided to use administrative penalties as opposed to criminal prosecutions in each case. Although the MOECC reviews environmental penalties issued under other environmental legislation every five years<sup>5</sup>, its conclusion that administrative penalties have no impact on prosecutions does not explain why the MOECC decided to proceed with an administrative penalty rather than a prosecution in any individual case.

Sufficient funding must be set aside for both the criminal and administrative penalty enforcement regimes. It is insufficient to use Greenhouse Gas Reduction Account ("GGRA") funds for the purpose of enforcing the *Climate Act*.<sup>6</sup> GGRA funds are better spent on programs that reduce

<sup>1</sup> Ramani Nadarajah, "Environmental Penalties: New Enforcement Tool or Demise of Environmental Prosecutions?" in Stanley Berger & Dianne Saxe, eds, *Environmental Law: The Year in Review 2007* (Aurora, Ontario: Canada Law Book 2008) 111 at 122.

<sup>2</sup> Canada, Ministry of Environment and Climate Change, *DRAFT Guideline for the Implementation of Administrative Penalties under the Climate Change Mitigation and Low-carbon Economy Act, 2016 (CCMLEA)* (January 2018) s 1.1 at 1. (Updated November 3, 2017) [*Draft Guideline*]

<sup>3</sup> Canada, Ministry of Environment and Climate Change, *Compliance Policy: Applying Abatement and Enforcement Tools* (December 9, 2016) at s.8.2.1, online: Government of Ontario <<https://www.ontario.ca/page/compliance-policy-applying-abatement-and-enforcement-tools#section-0>>

<sup>4</sup> O Reg 540/17, Schedule I.

<sup>5</sup> Canada, Ministry of Environment and Climate Change, *Environmental penalties five year review*, (December 2017), online: Government of Ontario <<https://www.ontario.ca/page/environmental-penalties-five-year-review>>;

Canada, Ministry of Environment and Climate Change, *Environmental penalties five year review*, (December 2017) at Environmental Penalty Program, Five Year Review, online: Government of Ontario <<https://www.ontario.ca/page/environmental-penalties-five-year-review>>. (Updated October 23, 2017).

<sup>6</sup> *Climate Change Mitigation and Low-Carbon Economy Act, 2016*, S.O. 2016, c.7, s 71(2)(1). [*Climate Act*]

greenhouse gas emissions and assist Ontario in meeting its greenhouse gas reduction targets. As well, MOECC staff should not have an incentive to pursue enforcement actions to address any shortfall in the GGRA.

Pursuant to the *Climate Act* and paragraph 4(1)(3) of Ontario Regulation 540/17, the MOECC may fine corporations up to \$1 million or impose a maximum base penalty of \$300,000. Ontario Regulation 540/17 allows the MOECC to reduce a penalty amount if it would be punitive in nature.<sup>7</sup> In our opinion, a violation that results in a penalty close to or exceeding the \$1 million limit, or the \$300,000 base penalty limit, is very serious in nature. In those circumstances, the MOECC's goal to enforce the regime would be better served by pursuing a criminal prosecution rather than reducing the penalty to fit within the AMP regime.

(ii) Administrative violations are continuous until they are remedied

The maximum daily penalty for all offences listed in Schedule 1 of Ontario Regulation 540/17 is only \$10,000, which is not sufficiently high to deter violations. The AMP regime will only effectively deter violators if most contraventions of the *Climate Act* are considered continuous and the amount of the penalty increases with each day of non-compliance. Many of the violations involve reporting, measurement of emissions, dealings with accounts, or purchasing, selling or trading emission allowances or credits. The Guideline should make it clear that those violations are considered continuous until they are remedied.

(iii) Guideline should explain how section 57(12) agreements will be used

The *Climate Act* provides that the Director and a program participant may enter into an agreement to rectify a violation. The Guideline should explain when and how agreements will be reached. We urge the MOECC to allow for public participation in the establishment of agreements pursuant to subsection 57(18) of the *Climate Act*.<sup>8</sup>

(iv) Individuals associated with corporations should be penalized in appropriate circumstances

CELA remains concerned that the *Climate Act* creates an unfair prohibition on issuing an administrative penalty to directors, officers, employees or agents of a corporation, but allows for penalties to be issued to other individuals not associated with corporations.<sup>9</sup> The goals of compliance and effective enforcement are better served by allowing for directors, officers, employees or agents of a corporation to be issued penalties in appropriate circumstances.

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<sup>7</sup> O Reg 540/17, s 8(2).

<sup>8</sup> *Climate Act*, s 57(18)(c).

<sup>9</sup> *Climate Act*, s 57(6).

- (v) The Guideline should allow for consideration of violations under other statutory regimes

The Guideline and Ontario Regulation 540/17 should be amended to allow the MOECC to consider convictions and contraventions of other environmental legislation in determining an appropriate base penalty. Under the proposed Guideline and subsection 4(2) of Ontario Regulation 540/17, the MOECC is limited to considering previous contraventions of the *Climate Act*, its regulations, and Ontario Regulation 452/09.<sup>10</sup> In contrast, pursuant to sections 51 and 52 of the *Climate Act*, contraventions of the *Commodity Futures Act*, the *Environmental Protection Act*, other than for an offence related to Part IX of that Act, the *Nutrient Management Act, 2002*, the *Ontario Water Resources Act*, the *Pesticides Act*, the *Safe Drinking Water Act, 2002*, the *Securities Act*, and the *Toxics Reduction Act, 2009* are all considered in determining the appropriate criminal fine. The history of the violator in complying with all environmental legislation is an important factor to consider in determining how to best deter future violations and enforce the *Climate Act*.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



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<sup>10</sup> O Reg 540/17, s 4(2); *DRAFT Guideline* at 9.