

# Response to the Administrative Monetary Penalty Consultation, Ministry of Natural Resources and Forests



Submitted online through the MNRF consultation portal.

**May 31, 2021**

The following provides Ontario Pork's responses to questions posed by the Ministry of Natural Resources and Forests (MNRF), regarding proposed changes to Administrative Monetary Penalty.

## **What did you notice in the discussion document? Did anything stand out?**

There appears to be a lack of understanding regarding agricultural operations, or at a minimum, an understanding of the differences between the agri-food sector and the industrial sector.

## **Do you have questions of clarification before we start?**

We also have additional comments that do not fit under the questions posed below:

We strongly recommend that the money collected from agricultural operations under this framework be reinvested into the agricultural community, enhancing existing agricultural environmental cost-share programs.

Please note an error in the Review Process. These documents outline a review process that includes an appeal to the Environmental Review Tribunal. However, Bill 245 - Accelerating Access to Justice Act, 2021 received Royal Assent on April 19, 2021, replaced the Environmental Review Tribunal with Ontario Land Tribunal.

## **Question 1A: Consider the list (showed on the slide again), do these examples cover most contraventions? Yes or no. Are there examples missing from the list, and if so, what are they?**

Ontario Pork believes that any AMP ordered should be proportional to the risk to the environment caused by the infraction.

## **Question 1B: Are there examples you feel should not be on the list? Why?**

Yes, an example of this would be administrative contraventions.

## **Question 2. Do you feel the contraventions should be classified into penalty types (option 1) or should they be assessed on a case-by-case basis (option 2)? Why?**

Ontario Pork supports assessment on a case-by-case basis (Option 2) as this is a more reasonable approach to allow for any extenuating circumstances.

## **Question 3A: Should penalty amounts continue to vary based on the assessed gravity of the contravention i.e. seriousness of the contravention or deviation from the legal limit), as opposed to other approaches such as fixed penalty amounts? Why?**

It is our belief that any AMP ordered be proportional to the risk to environment caused by the infraction. However, as mentioned previously, we believe that issues without a risk to the environment, such as administrative contraventions, should not be assessed an AMP.

## **Question 4. Do you agree with the proposed changes (i.e. reductions would not be provided for not having a history of convictions or penalties; consider only the number of contraventions subject to penalties, not their seriousness)? Why?**

Ontario Pork agrees with the importance of accountability; however, we also believe that there are many different approaches that can be taken. We believe that it is important to consider the history of convictions. This includes consideration of the distinction between repeat offenders versus someone who may have been subject to unanticipated factors or made an unintentional mistake.

We also believe that the consideration of due diligence and/or mitigation measures must be a significant factor in considering if an AMP is even going to be applied to an agricultural operation. Agricultural operations are subject to many external forces (i.e., weather) that are beyond the control of the farmer. Failing to recognize the due diligence a farmer takes to mitigate their risk of these variable factors outside of their control is unacceptable and speaks to our earlier concern of a potential lack of understanding regarding the agri-food sector.

**Question 5. Should the toxicity factor continue to only apply to certain industrial facilities, or should it be expanded to anyone who contravenes these requirements - noting that for other contraventions, only the gravity assessment would apply?**

We believe that the toxicity factor should only apply to certain industrial facilities. However, as previously mentioned, we believe that any AMP ordered be proportional to the risk to environment caused by the infraction (similar to the gravity assessment), but issues without a risk to the environment, such as administrative contraventions, should not be assessed an AMP.

**Question 6A: Do you agree with the proposed approach to penalty reductions? Why?**

While Ontario Pork believes in having penalty reductions, we believe that the reductions proposed are not sufficient for agricultural operations. We believe that contraventions can occur that are completely beyond a farmers' control and could not have been foreseen. Unlike most industrial settings that occur in a very controlled, engineered environment, most agricultural activities are subject to uncontrollable, unpredictable conditions (i.e., weather). Farmers take preventative and mitigation precautions on their operations as a good stewardship practice. These precautions pose an added cost that does not provide any economic return to the farmer and cannot even be cost-recovered through charges for their products, unlike industrial operations. It is for these reasons that we believe that it is imperative that any preventative or mitigation activities taken by farmers be given significant consideration and be eligible for reductions significantly higher than 35% of the penalty amount.

We are also concerned with the requirement that farmers must request any reductions to a penalty amount and believe that the Ministry should make the farmer aware of the potential penalty reductions, rather than having the onus being on the farmer.

**Question 7. Should the ministry expand the types of economic benefits that could be included under the economic benefit component of the penalty (e.g. adding profits from illegal activities)?**

We believe that no one should profit from contravention of the laws and obtaining an advantage over those who do not follow the rules.

**Question 8: Should a "notice of intention" always be issued before a penalty is issued? Or should circumstances warrant a penalty being issued without an advance notice (e.g. for minor violations, with the lowest penalty amount)?**

We believe a notice of intention to levy a fine should always be provided. This is both fair and reasonable to expect.

**Question 9. Should director issued penalties be reserved for more serious contraventions, including multi-day contraventions, and provincial officer issued penalties be reserved for less serious contraventions, for one day contraventions?**

Again, we are concerned regarding a potential lack of knowledge of the agri-food sector, and strongly believe that the person who is making a contravention decision on agricultural operations must have knowledge of agricultural practices.

We also question the proposed change that eliminates the per contravention approach, to be replaced with a per day penalty. This fails to recognize the reality that correcting a contravention on an agricultural operation can often take some time and will often rely in part on the schedule of a third party or weather conditions, for example. It is not appropriate to have a per day penalty amount when the implementation of the remedy may be beyond the control of the individual or corporation.

**Question 10. Are these the right components for penalties issued by Provincial Officers (i.e. gravity assessment, conviction/penalty history, number of days, penalty reduction)?**

See response above.

**Question 11. Should provincial officers be able to issue penalties without advance notice, as proposed?**

See response to question 9.

**Question 12A: How should penalties for individuals compare to those for corporations?**

Ontario Pork has significant concerns with this proposal for agricultural operations, which are often structurally significantly different from industrial operations. In the vast majority of agricultural circumstances, the "individual" is the corporation, unlike industrial operations. How would this approach take this structure into account? If an individual farmer is charged under this model, it should be reserved for only the most egregious of contraventions with a significant risk to the environment.

We are also opposed to a per day penalty for agricultural operations. There must be recognition of the reality that correcting a contravention can often take some time and will often rely in part on the schedule of a third party or weather conditions, for example. It is not appropriate to have a per day penalty amount when the implementation of the remedy may be beyond the control of the individual or corporation.

**Question 13. Under what circumstances should the ministry be able to issue penalties to both a corporation and an employee, officer, director or agent of the corporation, for the same contravention?**

If the ministry proceeds with the ability to issue penalties to both a corporation and an individual, we believe there needs to be consideration of the following:

- How to account for the fact that for the vast majority of agricultural circumstances, the "individual" is the corporation, unlike industrial operations. How would this approach take this structure into account, and avoid a "double charging"?
- The charge does not involve a "double charging", it should be limited to issues such as illegal discharge but must also take into account intent. If an individual is going to be charged, there must be a belief of

intent of the individual to disregard impact to the environment. As discussed previously, agricultural operations are subject to many external forces (i.e., weather) that are beyond the control of the farmer. Charging an individual for a contravention that may have occurred as a result of conditions beyond their control, with risk mitigation contingencies in place, is not acceptable.

**Question 14A: Should certain contraventions be protected from prosecution if a penalty has been issued and paid, and the contravention has ended?**

It is our belief that any AMP ordered be proportional to the risk to environment caused by the infraction. Therefore, issues without a risk to the environment, such as administrative contraventions, should not be assessed an AMP, and should not be subject to prosecution. Also, agricultural contraventions that occur despite a farmer completing due diligence and risk mitigation towards prevention of a contravention, should not be subject to prosecution.

**Do you have any suggestions to improve our engagement efforts?**

There was a very short turnaround time between receiving the lengthy and detailed documents and being expected to provide input during the webinar. Please note for future purposes that Ontario Pork, along with many other agri-food organizations, requires an internal discussion and approval process prior to providing input, and that this does not occur on the spot, during a webinar, where responses are expected.

**Thank you for the opportunity to provide input.**