MINISTRY OF ENVIRONMENT AND CLIMATE CHANGE STRATEGY

ADMINISTRATIVE PENALTIES HANDBOOK

ENVIRONMENTAL MANAGEMENT ACT AND *INTEGRATED PEST MANAGEMENT ACT*

UPDATED:
JUNE 2020

Effective date:	June 1, 2020
Replaces:	January 2020 Version
What's new in This version?	Updated guidance for inspectors preparing packages
Amendments:	Suggested amendments to this handbook may be submitted to the Compliance Policy & Planning Section, Strategic Policy Branch, Ministry of Environment and Climate Change Strategy

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Purpose of this Handbook

This handbook provides both an overview of the administrative penalties program within the Environmental Protection Division (EP) of the Ministry of Environment and specific guidance for EP compliance and enforcement staff and EP statutory decision makers in carrying out their duties in relation to the issuance of administrative penalties.

A Note on Nomenclature

The enabling provisions in both the *Environmental Management Act* (*EMA*) and the *Integrated Pest Management Act* (*IPMA*), and the new administrative penalty regulations under each of these statutes, refer to 'Administrative Penalties'. However, the familiar acronym **'AMPs'** (administrative *monetary* penalties) is used throughout this manual.

Definitions

"Contravention" means non-compliance with regulatory requirements in *EMA*, *IPMA* or their regulations. It is used in this manual to distinguish non-compliance that is subject to an administrative penalty from *offences* under the Acts or their regulations that may lead to court prosecution. Further, in this manual the single term *contravention* is used to refer to both a contravention of a regulatory requirement and/or a *failure to comply* with an order or with a term or condition of an authorization (both of which are subject to an AMP). Contraventions are sometimes also referred to as violations.

"Determination" refers to the final decision by a statutory decision maker that a person has contravened a legal requirement under *EMA*, *IPMA*, or their regulations, or failed to comply with an order or an authorization and must pay an administrative penalty.

"Notice Prior to Determination of Administrative Penalty" is the notice issued by a statutory decision maker (SDM), informing a person that the SDM intends to make a Determination about an alleged contravention or failure.

"Opportunity to be Heard" refers to the hearing – written, electronic or oral - that the SDM must offer to a person who has been issued a Notice of Administrative Penalty, prior to making a Determination.

"Person" refers to a regulated individual, company or any other entity to which the regulatory requirement(s) apply.

"Statutory Decision Maker" refers to a person designated as a Director under *EMA* or as an Administrator under *IPMA*, who makes determinations of non-compliance for the purpose of imposing administrative penalties.

Contents of this Document

Chapter 1: describes what administrative penalties are, the theory behind their effectiveness in responding to regulatory non-compliance, and guiding principles for using them effectively.

Chapter 2: lays out the step-by-step administrative penalty process, including the key roles & responsibilities of Ministry staff involved in imposing penalties.

Chapter 3: provides guidance for compliance and enforcement officers who will be recommending an AMP to the SDM, including what information and evidence to include in support of the aggravating and mitigating factors listed in s. 7 of the APR.

Chapter 4: provides guidance for statutory decision makers who will impose AMPs, including a short refresher on the principles of administrative fairness and good statutory decision making, and detailed guidance on how to calculate the penalty quantum using base penalty tables and applying the aggravating and mitigating factors listed in s. 7 of the APR.

Credits

Much of the content of this manual is cribbed from other sources, in particular FLNRO's *Contravention Decision-Making under FRPA for Delegated Decision Makers* (authored by Mike Pankhurst), the BC Oil and Gas Commission's Compliance & Enforcement Manual (October 2014) and the Government of Ontario's *Guideline for Implementing Environmental Penalties* (Ontario Regulations 222/07 and 223/07). The Ministry was grateful to have the benefit of these excellent resources.

Related Resources

This handbook complements the *Statutory Decision-Making Handbook* (*Environmental Management Act and Integrated Pest Management Act*) as well as the *Foundations of Environmental Regulatory Law* manual. Both documents are *required reading* and are excellent resources for staff who will be involved in assessing and imposing administrative penalties.

The *Ministry Compliance & Enforcement Policy and Procedure* prescribes common requirements and procedures for all Ministry staff to ensure consistent and risk-based assessment and response to non-compliance. Specifically, the non-compliance decision matrix guides staff in selecting the most appropriate enforcement tool to restore compliance and deter future violations. Administrative penalties are one of a number of tools available to staff to use in appropriate circumstances, along with advisories, warnings, violation tickets, administrative sanctions (suspending or cancelling an authorization), restorative justice or prosecution.

Chapter 1: Introduction to Administrative Penalties

The Ministry of Environment is responsible for developing and enforcing BC's environmental laws. Administrative penalties are one of an array of enforcement responses designed to encourage regulated parties to comply with environmental laws and to take swift remedial action in the event of an environmental contravention.

The *Environmental Management Act* and the *Integrated Pest Management Act* provide the enabling authorities for the Environmental Protection Division (EP) to impose administrative penalties on those who contravene:

- a prescribed provision of the Acts or their regulation(s); or
- an order issued by a Ministry official; or
- a requirement of an authorization issued or given under the Acts.

An **Administrative Penalties Regulation (APR)** under each Act was brought into force June 23, 2014 to implement these authorities. The regulations have two parts:

Part 1 describes the procedures that must be followed to impose a penalty, including notice requirements, timelines, and the mitigating and aggravating factors that must be considered by the decision maker in assessing the quantum of the penalty.

Part 2 prescribes the provisions (requirements) in each Act and its regulations that if contravened can be subject to an administrative penalty and the maximum penalties that can be imposed.

What are AMPs?

Administrative penalties are monetary penalties (fines) that the Ministry can impose on individuals or companies who do not comply with legal requirements under *EMA* or *IPMA* or their regulations, an order given by a Ministry official under those statutes, or with the terms or conditions of an authorization granted by the Ministry (permit, approval, licence, etc.).

AMPs are one of a number of enforcement responses that staff can use to encourage compliance and to deter future violations. AMPs can be used alone, in conjunction with an order or other administrative sanction (such as suspending or cancelling an authorization) or as part of a progressive enforcement strategy when other remedies (warnings, tickets, etc.) have been ineffective. AMPs are imposed with strict adherence to procedural requirements prescribed in the Administrative Penalties Regulation (APR). These procedures are described in detail in Chapter 2.

AMPs are not a substitute for prosecution. AMPs are intended to be used to address minor to moderate regulatory violations that do not cause significant environmental or human health impacts, or when other efforts have failed to achieve voluntary compliance. The Ministry will

continue to rely on prosecution to deal with more serious violations where there is a broader public interest in addressing the issue in a more public forum, with potentially higher consequences. Prosecution may also be appropriate for less serious cases to motivate behaviour change in repeat offenders who have been undeterred by other enforcement actions including AMPs.

It may be appropriate in some cases to proceed with an AMP when a file has been prepared for prosecution but Crown has not approved charges. In these cases, the report to Crown (RTC) will provide more than sufficient information to meet the lower standard of proof (balance of probabilities) required by administrative penalties, and to enable the SDM to adequately consider mitigating and aggravating factors to arrive at an appropriate penalty amount.

AMPs can be customized to reflect the gravity of the non-compliance as well as to recognize actions taken by the person before, during or after an incident, or the lack thereof. They provide the Ministry with an ability to respond to contraventions in a much more timely way than the courts and to motivate violators to return to compliance and to take practical measures to prevent the contravention from happening again.

Enforcement Theory and AMPs

AMPs are often contrasted with court prosecutions to highlight their defining features, or to rationalize the use of an administrative remedy to address regulatory non-compliance. The differences can be examined in relation to the five conditions that determine the effectiveness of an enforcement strategy[1]:

- ✓ chance of getting caught
- ✓ chance of an enforcement response
- ✓ speed of enforcement response
- ✓ certainty of punishment/ chance of penalty being applied
- ✓ severity of the penalty

Together these factors create effective deterrence.

Chance of getting caught & of an enforcement response: While AMPs do not increase the chances of an offender getting caught, the likelihood of an enforcement response is greater in a system that is easier, less time consuming and less costly to administer than the complex, expensive and slow criminal court system.

[1] Environment Canada, *Administrative Monetary Penalties: Their Potential Use in CEPA.* (Number 14 of the Reviewing CEPA, the Issues Report Series, 1994).

Speed of enforcement response: Low appeal rates associated with AMPs also contribute to a timelier response and greater likelihood of a penalty being applied.

Certainty of punishment: Enforcement theory suggests that *certainty* of a penalty is more important than the amount of the penalty. There is a greater likelihood that a violation will result in a penalty in an AMP system than in the courts due to differences in the rules of evidence, lower standard of proof (balance of probabilities) and the removal of due diligence as a defence against liability.

Severity of penalty: With respect to the *severity* (magnitude), although the upper limit of court-imposed penalties is greater, there is ample scope in the Ministry's AMP regime to impose significant penalties where warranted. Further, the ability to tailor the AMP in consideration of case-specific circumstances should result in a penalty that motivates positive future behaviour, whether that penalty is $1,500 or $50,000.

More specifically, to be an effective enforcement instrument[2], an administrative penalty should:

1. **Aim to deter future non-compliance**
   The first goal of a penalty is to deter people from violating the law. The quantum of the penalty must be sufficient to persuade the violator to take precautions against falling into non-compliance again (specific deterrence) and dissuade others from violating the law (general deterrence).

2. **Aim to eliminate any financial gain or benefit from the non-compliance**
   The cost of non-compliance (the penalty) must be greater than the savings or benefit derived from breaking the law in order to be an effective deterrent. If violating the law is perceived as "cheaper" than complying, some operators will take their chances on being caught.

3. **Be proportionate to the nature of the offence and the harm caused**
   Anything less will send the wrong message – it may be seen as a cost of doing business. Anything more will be perceived as punitive and may encourage the person to appeal, and likely be successful.

Forest Practices Board: Special Investigation - Are Administrative Penalties Being Used Appropriately?

"The Board believes that if penalties are used appropriately, they are more likely to promote compliance. Appropriate use involves being fair, reasonable, and transparent. This means determinations that are made without undue delay, and penalties that are in proportion to the harm caused by the contravention, remove any financial gain, and are made known to all forest and range users.

Appropriateness also involves the government making allegations of contravention that have a substantial likelihood of resulting in a penalty."

[2] *Richard B. Macrory, Final Report, November 2006 "Regulatory Justice: Making Sanctions Effective".*

4. **Be responsive and consider what is appropriate for the offender and regulatory issue**
   The primary goal of AMPs is to encourage quick and effective action on the part of the offender to restore, reduce or prevent future harm to the environment or human health. The flexibility of the assessment process offers parties ways to have the penalty adjusted, based on actions they took before, during and after the incident.

Taking a Principled Approach

From a Ministry perspective, an effective AMP program is one that is also administratively efficient and affordable. For staff to choose AMPs as a viable enforcement response they must have confidence that the time and effort required to impose an AMP is proportionate to the contravention and will have a positive effect on future compliance rates and for environmental protection. For this to happen, the program must operate in a consistent, fair and administratively streamlined manner. Specifically, this means:

- ✓ Strict adherence to the procedures designed to ensure procedural fairness, including the 'opportunity to be heard' hearing
- ✓ Making reasonable assessments based on facts and evidence
- ✓ Using a consistent methodology to assess penalty quantums, including giving due consideration to all the relevant mitigating and aggravating factors in assessing the penalty amount
- ✓ Providing well-reasoned decisions to the affected person

Committing to these principles will help to ensure a successful and satisfactory process for both the Ministry and affected parties, and will reduce the likelihood of unfounded appeals.

Chapter 2: The Administrative Penalty Process

This chapter clarifies the roles and responsibilities associated with the administrative penalties program and presents the key stages in the penalty process. Supplementary information for both compliance officers and SDMs is provided in chapters 3 and 4 respectively.

2.1. Roles and Responsibilities

Duty	Who is responsible?
Conduct inspection(s) to verify compliance and make recommendation on AMP to SDM	Compliance Officer
Conduct investigations in support of EP as required	COS
Make post-investigation decision to recommend an AMP (as required)	Investigation Review Team (COS Sergeant/ EP Compliance Section Head)
Prepare AMP Package: • Draft Penalty Assessment Form (PAF) • assemble supporting materials	Compliance Officer
Review and finalize AMP Package: • make decision to impose AMP • calculate penalty • finalize PAF • prepare Notice Prior to Determination of Administrative Penalty.	SDM
Serve Notice on the person (via BC Registered Mail Service or Process Server)	SDM
Organize and conduct opportunity to be heard (OTBH) hearing	SDM
Prepare and Service Final Determination	SDM
Prepare for and participate in appeals before the Environmental Appeal Board (if required)	SDM
Create penalty in the Authorization Management System (AMS)	B. Ops
Provide regular updates to Business Services on status of file – issuance of Notice; Determination; pre and post appeal status.	SDM
Issue penalty invoices and monthly statements	B.Ops
Initiate collections	CSNR Revenue Staff
Update AMP Tracking Log	CC, SDM, B. Ops

Compliance Officer: refers to EP staff who regularly undertake compliance and enforcement work. Typically this would include Environmental Protection Officers (EPOs) and IPM Officers working in Regional Operations Branch, as well as some staff in the Waste Prevention and Land Remediation programs.

SDM: Statutory Decision Maker. Under *EMA* this is a designated Director under the Act with specific authority to impose administrative penalties. Under *IPMA* this is the Administrator or a person delegated in writing by the Administrator to impose penalties.

Branch Operations (B. Ops): Provides services to all of EPD.

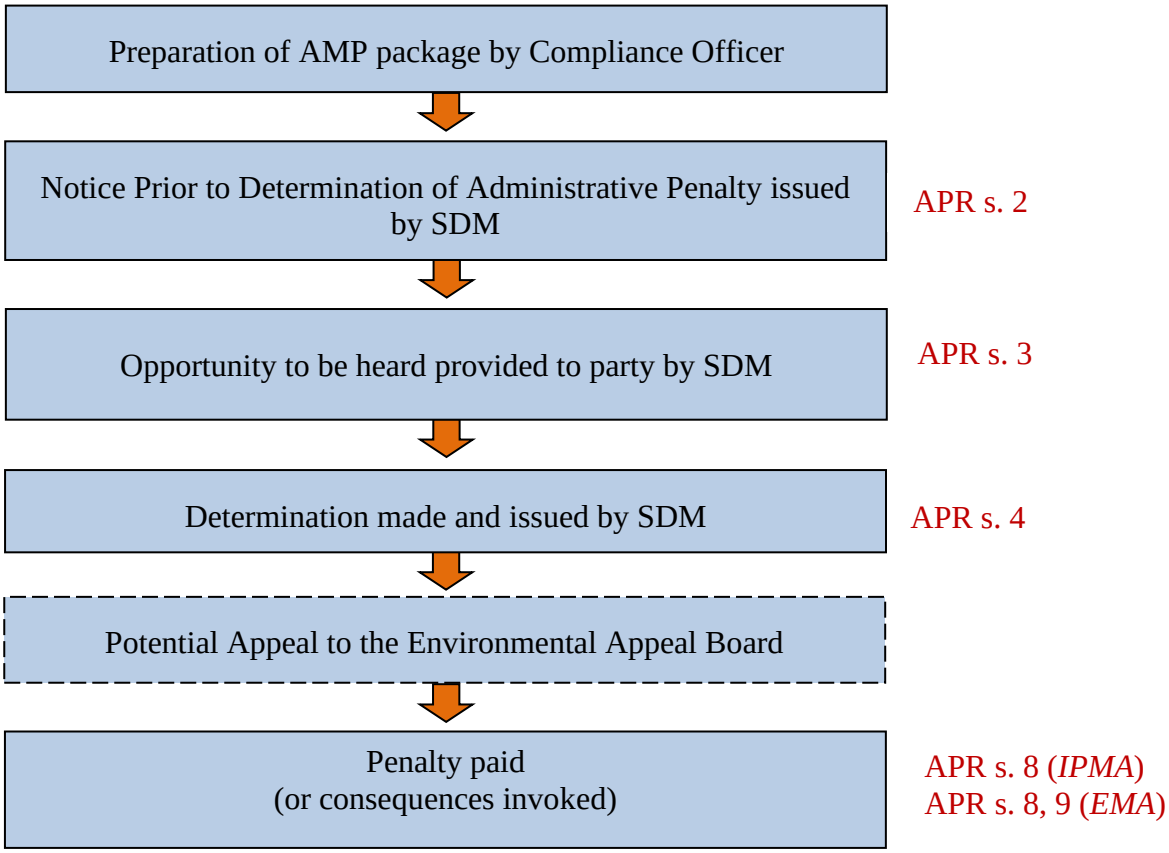
Compliance Coordinator (CC): supports the Regional Operations Branch Compliance Team, tracking and processing AMPs.

2.2. Assessing and Imposing an Administrative Penalty

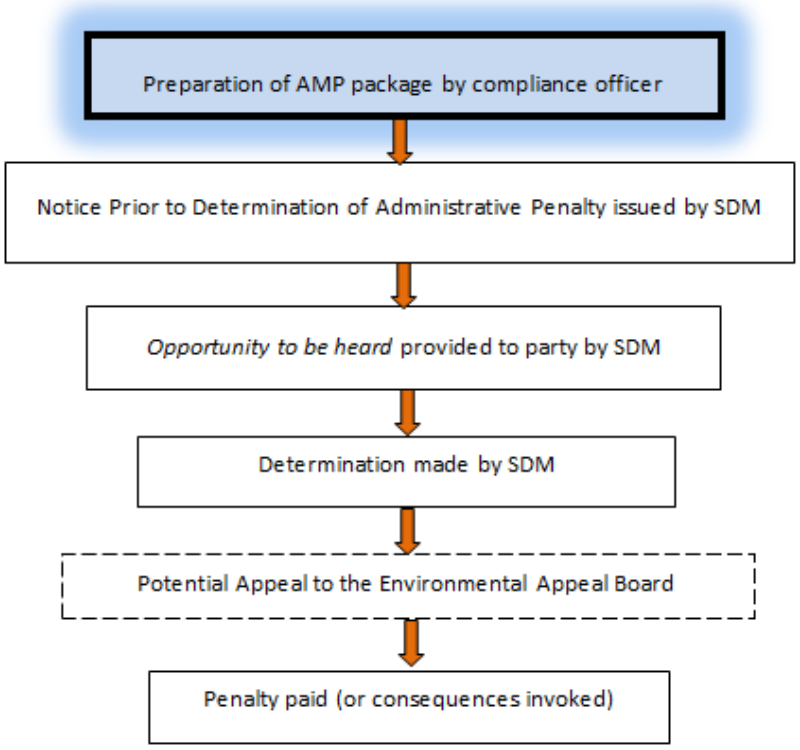
AMPs must be imposed in accordance with procedures that are prescribed in the **Administrative Penalties Regulation (APR)**. These include requirements for giving written notice of the intent to impose an AMP, adhering to prescribed timelines, considering prescribed factors when calculating the quantum of the penalty, and adhering to absolute penalty limits prescribed in the APR. These requirements are designed to ensure the principles of administrative fairness are upheld which reduces the likelihood of appeal or in the event of an appeal, that the AMP decision will be overturned by the Environmental Appeal Board.

There are 6 stages in the administrative penalty process including the potential for appeal and closing the loop at the back-end to ensure payment is collected to achieve the greatest deterrent effect. Related sections of the APR are provided in red.

At a Glance - Six Stages in the Administrative Penalty Process



Stage 1: Compliance Officer prepares Administrative Penalty Package



Who is responsible?
Identifying and assessing non-compliance, selecting the best enforcement response (applying the Non-compliance Decision Matrix) and assembling the AMP package are the responsibility of a **compliance officer**.

Timeline
There is no prescribed timeline for compliance officers to prepare and submit the package to the SDM although there is a **limitation period** for issuing the Notice Prior to Determination of Administrative Penalty ("Notice"): it must be issued by the SDM within three years of the incident, or the date evidence of the incident first came to their attention (see Stage 2).

Relevant sections of Administrative Penalties Regulation
s. 2 - contents of Notice
s. 7 – mitigating and aggravating factors for assessing penalty quantum

General considerations

- Preparing and submitting the AMP package to the SDM constitutes a recommendation only. The decision to impose a penalty rests solely with the SDM.
- The initial recommendation to impose an AMP may be made by the Investigative Review Team following an investigation by the COS. In this case, the package would still be prepared by the compliance officer, with support from the COS.
- Compliance officers should describe the circumstances of the contravention or failure in a manner that will help the SDM assess the circumstances. This information amounts to the regulator's side of the story. The person that may be subject to an AMP will have a subsequent opportunity to tell their side of the story to the SDM.
- The recommendation to impose an AMP may be part of a progressive enforcement response, following the unsuccessful use of other enforcement tools, or it may be the first response to non-compliance when the circumstances warrant it. Staff should continue to be guided by the Non-compliance Decision Matrix.
- An incident may involve multiple contraventions. These may each be subject to a separate penalty or they may be consolidated into one penalty, depending on how overlapping or separate the fact pattern is for each contravention. Further guidance is provided in Chapter 3.

Procedures

1. The compliance officer prepares the AMP package, presenting the rationale and evidence to the SDM in support of their recommendation. This is accomplished by first deciding which type of AMP package to prepare: **expedited** or **standard.**
2. An expedited AMP can be used in very specific circumstances – when the *Nature of the Contravention or Failure (factor A) is* ***Minor*** and the *Actual or Potential for Adverse Effect (factor B)* is **Low to None**, typically for administrative non-compliance.

   When preparing an expedited AMP, the inspection report replaces the Penalty Assessment Form (used for standard AMPs). When the inspection report is complete, the officer informs Admin (via separate email) that the package is ready, clearly stating what section of legislation or authorization the AMP is recommended for. For example:

   "Please find the attached inspection report for expedited AMP preparation. Section 4.1.1 Annual Report is the only section being recommended for AMP."

   Also, ensure the supporting evidence is adequately documented in the inspection report, specifically the chronology of past non-compliance as this is where the SDM will find the rationale and evidence to support the recommendation.

You'll find the latest templates and AMP guidance in iComply

3. When preparing a standard AMP, use the following steps:

i. Prepare the **Penalty Assessment Form** (PAF) using the latest template and guidance.

- Examples of previous AMPs can be found via links in the Completed AMPs tab in the **AMP tracking document**. There are many different ways to organize your information within the prescribed template. This flexibility is particularly useful when you are including more than one contravention or failure.
- Describe the circumstances of the non-compliance and the evidence in support of it, and provide specific comments for each of the mitigating and aggravating factors listed in section 7(1) of the APR. Also provide evidence in support of section 7(2), a multi-day penalty, if appropriate.
- Include only relevant information and supporting documents in your PAF (see examples below).
  - Use a consistent naming convention for your supporting documents. For example: YYYY-MM-DD Name of Document.

    e.g. 2014-05-15 Response to ENV Info Request
  - Reference your supporting documents in the PAF, below the paragraph where they are mentioned. Align them with the right margin, in square brackets.

    E.g. No feedback was received from the party to the draft order. On May 24, 2016, the Director issued the PAO to Mr. Smith via email as well as registered mail to the site.

    [2016-05-25 EMA Orders Sent by Email]
    [2016-05-25 Registered Mail PPO 108378 (Smirk Industries]
- Leave the dollar adjustment for each adjustment factor blank. The compliance officer does not calculate the penalty quantum. The SDM will determine the relative weight of each factor and how it affects the penalty quantum.
- The file # is the number assigned in the **AMP Tracking Log.** The compliance coordinator will have recorded the AMP when they are copied on the AMP Referral IR].

ii. Assemble supporting information, which may include:

- Information included in the folder for SDM's reference but not included in the final package sent to the person, such as:
  - Information about a parent company (if relevant) and current contact information for officers or staff to whom the AMP should be directed.
  - Land titles search (to confirm location)
  - Current authorization(s) including relevant amendments. Only the relevant requirements (clauses) will be referenced in the Notice.

- More detailed information than is required in the PAF, such as technical information to help the SDM understand industrial processes

- Direct supporting evidence such as:
  - Photos
  - Site plans illustrating complex processes or approved works including authorized bypasses
  - Sampling data: summary and interpretation of results; description of location and/or map of sampling locations
  - Expert or Witness Information (e.g. statements, correspondence, photographs)
- Other supporting documentation:
  - an Agreed Statement of Fact

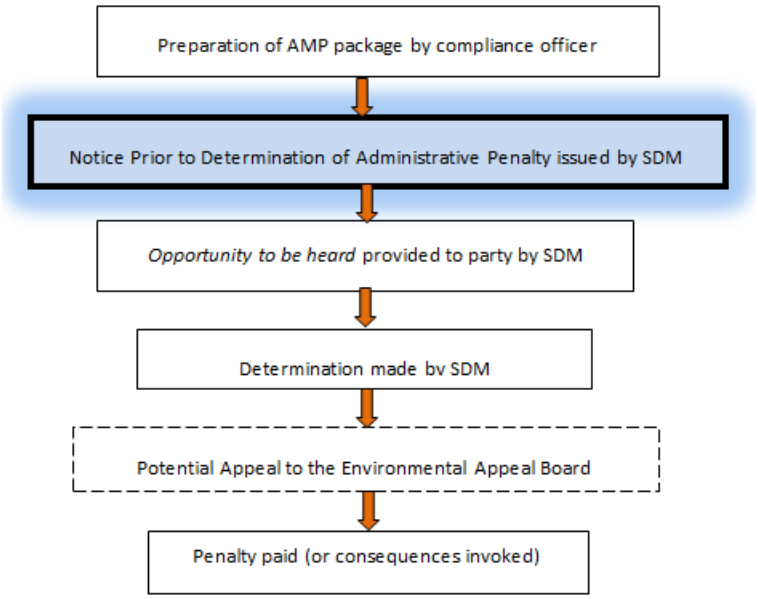
    This is an optional document that is useful in complex files where there are many 'facts' to be proven. It is a way to succinctly list where there is agreement between the ministry and the person, allowing the inspector and SDM to focus their attention on areas where there is not agreement.
  - Inspection records
  - Compliance history (copies of enforcement documents such as advisories, warnings, orders, court orders, etc.)
  - Info related to the industry or contravention such as Haz Waste Manifests;
  - Information that supports or refutes due diligence;
  - Information that supports an assertion of economic benefit from the non-compliance (be as specific as possible);
  - Any other information that assists with the application of the mitigating and aggravating factors.

Note: <u>not all this additional information will be necessary or relevant to each file.</u>

4. The compliance officer saves all components of the AMP package in an AMP folder, in accordance with the business area's e-filing rules (typically with the authorization, or in the location where the contravention occurred).
5. Once the package is complete and ready for SDM review, the compliance officer emails the compliance coordinator who enters a date in the **AMP Tracking Log** ('Date Package Ready for SDM Review') and an SDM is assigned.

Chapter 3 provides guidance for drafting the PAF, including how to organize the document and how to apply the mitigating and aggravating factors.

Stage 2: SDM issues Notice Prior to Determination of Administrative Penalty



Who is responsible?

Although compliance officers make a recommendation to AMP, it is the **Statutory Decision Maker (SDM)** who is responsible for making the decision to impose an AMP by issuing the finalized Notice and Penalty Assessment Form (PAF).

Timeline

The Notice must be issued within 3 years of the latter of:

a) the date the alleged contravention occurred, or

b) the date evidence of the alleged contravention first came to the knowledge of the director.

Relevant sections of Administrative Penalties Regulation

s. 2 - Notices

s. 10 (*IPMA*) / s. 11(*EMA*) – limitation Period

General Considerations

– It is a statutory requirement that the SDM provide written notice to a regulated person before imposing an AMP (references: *EMA* s. 115 and *IPMA* s. 23). Section 2 of the APR requires that the notice must:

  - include the name of the person who is the subject of the notice

- identify what the person is alleged to have contravened and a description of the circumstances that gave rise to the alleged contravention
- advise the person of their right to 'make representations' to the SDM
- provide a preliminary amount of the penalty.

– The SDM receives a package from the compliance officer that describes the alleged contravention and provides evidence in support of a recommendation to AMP, presented in the form of either an expedited AMP notice with IR attached, or as a draft PAF and relevant attachments (e.g. statements, photographs, samples).

> **NOTE:** The package the SDM receives from the C&E officer is a recommendation only. SDMs often act on the advice of field C&E staff but are accountable for 'turning their minds' to all relevant factors and making an unfettered decision. They must consider and weigh the evidence, make findings of fact, and use their professional judgement, discretion and autonomy to decide whether to proceed to issue the penalty notice.

– The SDM finalizes the penalty package, which includes calculating the preliminary penalty (for standard AMP, using part 2 of the PAF). At this stage, the penalty is a *preliminary* assessment because it is what the SDM thinks is an appropriate penalty based on the ministry's evidence, before hearing from the person during their opportunity to be heard.

– The PAF (or IR, for expedited AMPs) is designed to be transparent about the Ministry's case and the methodology used to calculate the quantum of the penalty. This ensures the person has enough information to decide whether they want an *opportunity to be heard* and to prepare for it. Further, a complete, succinct and compelling package can help streamline the OTBH and may reduce the amount of new material the person feels compelled to submit.

Procedures

1. If the SDM reviews the AMP package and decides that the case has not been made and an AMP is not appropriate, they make a notation in the **AMP Tracking Log** and notify the compliance officer. If the SDM's concerns can be addressed, the package may be brought forward again later.

2. If the SDM decides the case has been made, they calculate the preliminary penalty by applying the aggravating and mitigating factors listed in s. 7 of the APR, and adhering to the penalty maximums listed in Part 2 of the APR.

3. Once the penalty has been calculated, the SDM finalizes the PAF (for standard AMP) and prepares the **Notice Prior to Determination of Administrative Penalty ("Notice)** using the template. The Notice must include:

    - the name and address of the person subject to the notice

- a description of the circumstances that gave rise to the contravention or failure (including significant dates and events), and
- the provision of the statute or regulations contravened or the order or authorization that has not been complied with.

4. Insert the maximum penalty amount into the Notice where indicated; date and sign the document.

Guidance for preparing the Notice and finalizing the Penalty Assessment Form, including consideration of the aggravating and mitigating factors, is provided in **Chapter 3 and 4.**

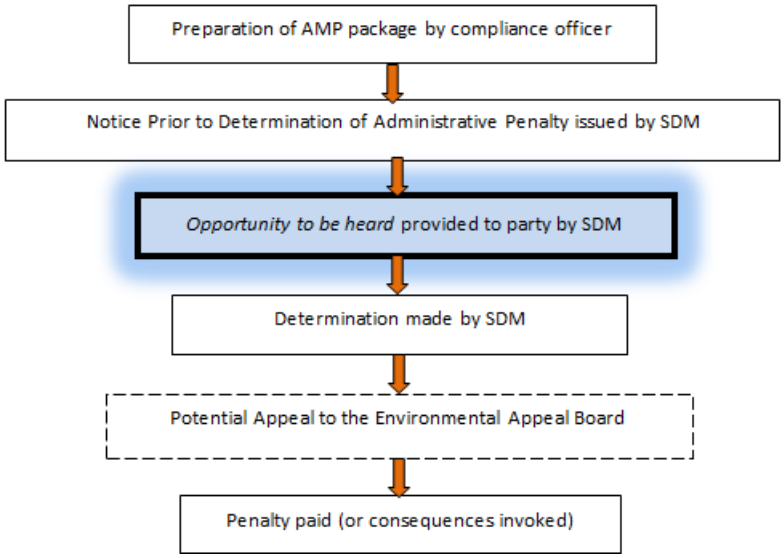
The templates are located here: iComply

5. To ensure full disclosure of the ministry's case, a copy of the finalized package is provided to the person. This includes:
   i. Notice Prior to Determination of Administrative Penalty
   ii. Penalty Assessment Form (for standard AMP)
   iii. Attachments referenced in the Notice and PAF
   iv. A copy of, or link to, the Administrative Penalty Fact Sheet (included in the Notice).

6. When the package is finalized, the SDM sends a brief email to their supervisor (who will notify GCPE) or ADM advising that they intend to issue an AMP notice: include the name of the party, the reasons for the AMP and the amount of the penalty. Briefing the ministry executive ensures there are no surprises if a party receiving an AMP notice contacts the Minister, Deputy or ADM. This in no way interferes with the independence of the statutory decision maker. Rather, it prepares the executive to respond to inquiries in a manner that supports the statutory decision that has been made.
7. The SDM arranges to have the AMP package served on the person, either by a process server or by registered mail.
8. The SDM **updates the AMP Tracking Log once confirmation of service has been received**: insert the date served (or "*not issued*" if that is the case) under "*Date Notice Issued*" column.
9. This date will likely be different from the date on the Notice or the date it is signed by the SDM. For tracking purposes, **the important date to record** in the tracking log is the date the person receives the package. This is when the 30-day time limit for the OTBH commences. If the Notice is sent by registered mail, Canada Post will provide a trace sheet. Go to the Canada Post website to confirm the receipt date and get a copy of the

certificate of delivery; save this in the AMP folder. If no confirmation of receipt is available, **the Notice is deemed to be served on the person on the 14th day after it has been deposited with Canada Post**. Once delivery of the AMP package has been confirmed, the SDM tracks the 30 (calendar) day timeline in which the OTBH may be requested. The SDM should err on the side of ensuring there can be no dispute that a minimum of 30 days has passed since the person received the Notice before concluding no OTBH was requested and proceeding with the next step in the process.

Stage 3: Conducting the opportunity to be heard



Who is responsible?

The opportunity to be heard (OTBH) is arranged and conducted by the **Statutory Decision Maker (SDM)**. The Administrative Penalty Regulation (s. 3) refers to this as the *opportunity* to make representations.

Timeline

A person that receives a Notice must request an OTBH within **30 calendar days**. Once the request has been made there is no prescribed timeline for holding the OTBH but it should be completed as soon as practical to keep the process moving along in a timely fashion. If there is no request for an OTBH within 30 days, the SDM can proceed with the determination (see Stage 4).

Relevant Sections of Administrative Penalty Regulation

s. 3 – opportunity to make representations

General Considerations

- The SDM must provide a person with an opportunity to be heard before making a determination of contravention or failure to comply. This is a fundamental principle of administrative fairness, and is required by the statutes and the APR.
- A person must make the request in writing within 30 days. An email request is sufficient. Requests made over the telephone should be confirmed in writing.
- The SDM has sole discretion to decide the specifics of the OTBH hearing including the format (oral, written or electronic), location, timing and content of materials, and who

attends (for oral hearings). Generally, the circumstances and complexity of the case should dictate what is necessary and appropriate.

- In most circumstances of a minor to moderate contravention where the evidence is compelling and straightforward, providing the person with an opportunity to make a written submission *should be the rule rather than the exception*.
- The SDM should consider granting an in-person hearing if the person requests one.
- Even an oral hearing can be relatively informal. These can take place in the SDM's office or by conference call if that is satisfactory to all parties.

– Regardless of the format, the purpose of the hearing is to allow the person to tell their side of the story and provide any information relevant to the SDM's decision.

– A determination cannot be made until the OTBH has concluded. If no OTBH is requested within 30 days, the SDM may proceed directly to the determination.

– **The SDM must keep good notes** during the OTBH. This includes what was said to the party, and what they said to the SDM. These notes will be a valuable reference for the SDM when crafting their determination, and if the matter goes to appeal. It is very difficult for the EAB to deal with information that is "discussed" but not documented. A copy of these notes should be filed in in the AMP folder.

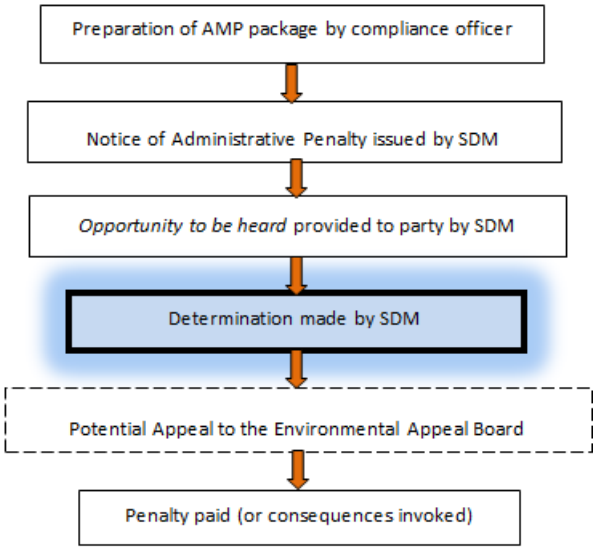
Procedures

1. When a request for an OTBH has been made the SDM should contact the person to discuss the timing, format, and content of hearing. Although there is no prescribed timeline for conducting the OTBH, it should be completed as soon as feasible to keep the process moving along.
2. Once the details of the OTBH have been set the SDM should confirm by email, particularly if the arrangements were made over the phone. This provides a record in the event of a later dispute about the fairness or format of the OTBH.
3. If no request for an OTBH has been made within 30 days, the SDM may attempt to contact the person before assuming that they have declined the opportunity. All communications should be documented.
4. Upon completion of the hearing (or where no hearing was requested within the allowable time) the SDM may, on a balance of probabilities, make a determination of contravention or failure to comply and impose a penalty.
5. SDM **updates the AMP Tracking Log**: in "*Date of OTBH*" column insert the date of the OTBH or "*no OTBH*".

Instruction sheets for both written and oral hearings are available in iComply.

Additional guidance on conducting the OTBH is provided in **Chapter 4,** *as* well as here: iComply (including OTBH instructions for the person and a script and checklist for the SDM).

Stage 4: Making the Determination



Who is responsible?

The **Statutory Decision Maker (SDM)** makes the determination of contravention or failure to comply.

Timeline

There is no prescribed timeline for making the determination but the SDM should strive to have it completed within 4 - 6 weeks of the OTBH while the matter is still top of mind.

Relevant Sections of Administrative Penalties Regulation

s. 4 - determinations
s. 5 - correcting a determination

General Considerations

- The duty of fairness requires that the SDM who makes the decision is independent. Although the Director has received a recommendation to AMP from the compliance officer, and the officer has provided information that informs the decision, the Director must maintain control of the decision-making process and make the final decision.
- After issuing a Notice, the SDM is required to make a determination of contravention or failure to comply or to notify the person that they will not be making a determination and the person is not required to pay the penalty. The SDM cannot decide not to make a decision (for example, after the OTBH).
- When making the determination the SDM must consider and weigh all the relevant evidence provided by the compliance officer and any relevant new information that comes

to light during the OTBH, including that supplied by the person. The final decision *cannot* be based on irrelevant considerations.

- In addition to the final penalty amount, the determination must include *reasons for decision* which should be succinct but sufficiently detailed to reveal how the decision was made and on what basis. The intent is to demonstrate that the decision was made fairly, logically and in accordance with the law. SDMs must be particularly careful that they can articulate and explain the process they used to arrive at the decision – both the finding of contravention or failure, and the penalty amount.
- Well written decisions help the person understand why a decision is made and may allow them to accept the decision as fair, even if they do not agree with the outcome. The person must know that their evidence was properly and fairly considered. The duty to provide reasons is only fulfilled if the reasons provided are *adequate*.
- In the event of an appeal, the failure to provide adequate reasons may result in the decision being overturned and the matter sent back to the SDM with instructions to provide adequate reasons – which is a waste of time for all participants.
- Corrections to a determination are governed by s. 5 of the APR. A correction may be made within 15 days of the determination being issued to correct a typographic, arithmetic or similar error, or an obvious error or omission. No new hearing is required for such a correction, but notice must be given to the affected person.

Procedures

1. The SDM finalizes the determination, which must include:
   i. The name of the liable person
   ii. The contravention or failure for which the AMP is imposed
   iii. The reasons for the decision
   iv. The final amount of the penalty
   v. The date the penalty must be paid by
   vi. Information about the right to appeal, including the address of the appeal board

Guidance for SDMs on the application of the mitigating and aggravating factors in s.7 APR for the purposes of assessing the appropriate penalty quantum are provided in **Chapter 4.**

Guidance on writing a determination is provided in **Chapter 4**

The template for a determination is located here: iComply

2. The SDM may wish to have the determination reviewed by a Legal Services Branch lawyer, particularly when the quantum of the penalty is significant or the case is complex.

3. Once the determination is finalized, the SDM (or in some cases Admin Assistant):

   i. serves the determination to the person via registered mail (if a current email address is available, it can be sent electronically with hard copy to follow).

> Guidance on service is provided in **Chapter 4**

   ii. notifies their executive by email that a final determination is being issued, to whom, a brief description of the reason and the amount. Although they were informed at the Notice stage, a reminder ensures they are prepared for any response from the party.

   iii. emails the Fees Analyst, Business Services with a copy of the determination and confirmation of the due date. This is the date the registered mail is confirmed received, and when the 30-day time limit for payment or appeal commences.

How to determine the due date (as per the *Interpretation Act):*

- the party has 30 calendar days to pay or register an appeal
- the counting of 30 days starts the first day after the party is served the final determination
- the date of service is confirmed by the Canada Post Certificate of Delivery.
- the 30 days is extended by one day only if the last day falls on a statutory holiday. It is not extended by one day if a statutory holiday falls within the 30 days.

   iv. **updates the AMP Tracking Log**: insert the date under "*Date Determination Served*" column. For ease of tracking, temporarily record the due date in the Payment received column.

4. In some cases, partner agencies within the ministry or natural resource sector have an interest in AMPs that are imposed.

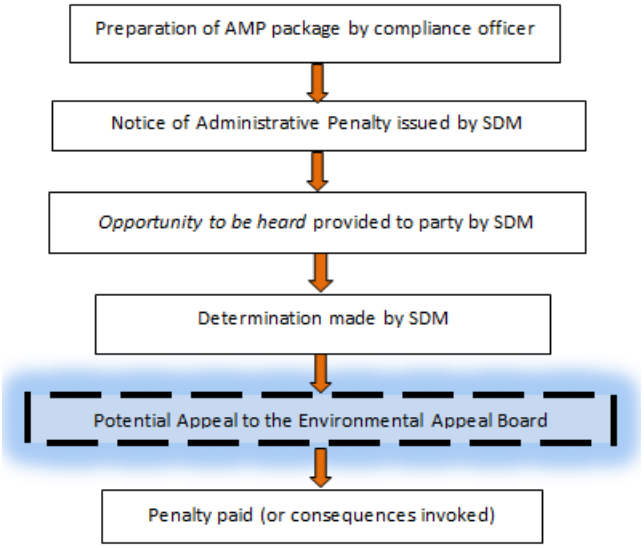
COS: All AMPs should be recorded in COORS (like EP-issued warnings) so that officers are aware of the compliance history of the party. Admin Assistants send a copy of the determination to the local COS zone mailbox (email addresses listed here: iComply). The AMP will be recorded by the COS Regional Admin.

Ministry of Energy, Mines and Petroleum Resources (EMPR): When an AMP has been imposed on a B.C. mine: SDM or Admin Assistant informs the Ministry of Energy, Mines and Petroleum Resources (EMPR) by sending a copy of the determination to the following inboxes:

AMPSInquiries@gov.bc.ca (Compliance & Enforcement)
PERMRECL@gov.bc.ca (Permits and Reclamation)

5. Once they have received the determination and due date, the Fees Analyst:
   i. creates the fee in AMS and generates an invoice
   ii. sends the invoice with a copy of the determination (marked “copy”) to the person through regular mail
   iii. tracks the 30-day time limit within which the person must pay the penalty or register an appeal with the Environmental Appeal Board (EAB). See more on appeals in stage 5, and payment, stage 6.
6. Filing the documents: the final determination is the Ministry’s official written record of the statutory decision and can help inform future decisions to promote consistency. Once the AMP process is complete, a link to copies of the determination, Notice and PAF is embedded in the tracking log for easy reference by other compliance officers and SDMs.

Stage 5: Appeals



Who is responsible?
As an appeal of his/her statutory decision, the **SDM** is responsible for preparing for and participating in an appeal, supported by a Legal Services Branch solicitor. Appeals are heard by the **Environmental Appeal Board (EAB)**.

Timeline
An aggrieved person must deliver a notice of appeal to the EAB **within 30 days** of receiving the determination.

The EAB controls the appeal timeline and scheduling a hearing could take anywhere from a couple of weeks to many months, depending on the type of hearing (written or oral), the complexity of the issue and how busy the EAB is. Within **60 days** of receiving notice of the appeal from the aggrieved person, the EAB determines who will conduct the appeal and whether it will be written or oral.

Relevant sections of the Acts relating to appeals
EMA Part 8, Division 2
IPMA Part 4, Section 14

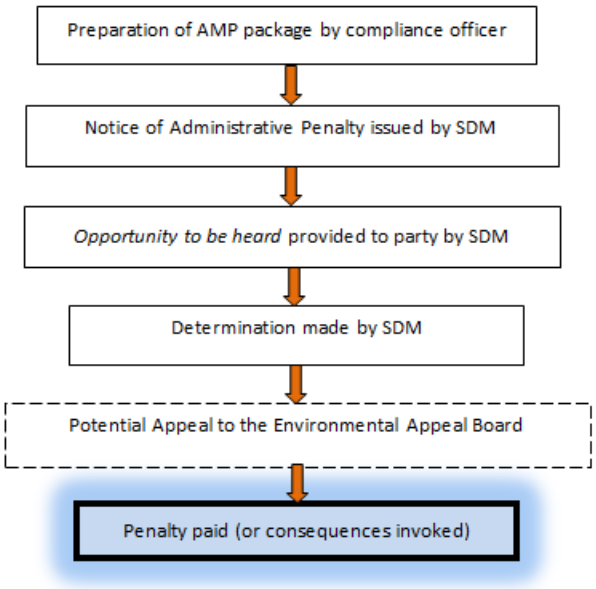
General considerations
- Literature and statistics on administrative penalties point to very low appeal rates. Adherence to ministry policy and process, in particular the principles of administrative fairness and reasonableness, and providing good written reasons as part of a determination will help to reduce unfounded appeals.

- If an appeal is registered, the EAB will provide notice to the SDM as the respondent, including instructions on timing, formal (written or oral) and any other requirements for proceeding with the appeal.
- If an appeal is registered, the SDM's decision to impose an AMP stands but by ministry policy the payment clock stops until the appeal is resolved.
- The hearing is usually *de novo* (a new hearing), allowing the EAB to hear new evidence or argument that was not before the SDM. The EAB also has the discretion to conduct the appeal as an "appeal on record", based solely on the information presented to the SDM, on application by the Appellant.
- In either case, the EAB has the power to confirm, vary or cancel the penalty, or make any decision that the SDM could have made that the EAB thinks is appropriate (that is, come to their own decision). The board will notify the SDM of the decision at the same time it notifies the appellant.
- The EAB can also send the matter back to the SDM with directions for a new determination. If this happens, there is no prescribed time limit for the SDM to issue the new determination, but they should do so as soon as possible. In such cases, a new OTBH does not need to be held.

Procedures

1. The 30-day time limit for registering an appeal with the EAB is tracked by the Fees Analyst so the ministry can take prompt action if the AMP is not paid or appealed. Note the following on how days are counted, in accordance with the *Interpretation Act:*
    - the party has 30 **calendar** days to pay or register an appeal
    - the counting of 30 days starts the first day after the party is served the final Determination
    - the date of service is confirmed by the Canada Post Registered Mail Trace Sheet.
    - the 30 days is extended by one day only if the last day falls on a statutory holiday. It is not extended by one day if a statutory holiday falls within the 30 days.
2. If a notice of appeal is received, the SDM notifies Fees Analyst: this stops the clock for the 30-day payment period and statements of account will be held until the matter is resolved. This can take several months.
3. If no notice of appeal is received, the SDM or Fees Analyst **updates the AMP Tracking Log**: insert the date or "N/A" under Date Appeal Notice Received column.
4. Once the outcome of the appeal is known, the SDM emails the Fees Analyst. This is critical to restart the 30-day payment clock if the penalty is upheld (or varied). A new invoice with due date will be issued, and the "interest exemption" status will be removed from the client profile, thus initiating the 30-60-90 statement schedule.
5. Alternatively, if the SDM is directed by the EAB to issue a new determination, the 30-day timeline for payment will start once the person has received the new determination.

Stage 6: Closing the loop: Ensuring payment of administrative penalties



Who is Responsible?

The **SDM** is responsible for liaising with Business Services, who sets up the penalty in AMS and the triggers for invoicing. When payment is received, Business Services will notify the SDM.

Timeline

The due date of an AMP depends on whether an appeal has been registered. Penalties are required to be paid in full within 30 days after the determination is issued, or in the event of an appeal, after the Environmental Appeal Board makes a decision to vary or uphold the penalty.

Relevant Sections of Administrative Penalties Regulation

s. 8 – payment date
s. 9 (*EMA*) - consequences of non-payment

General Considerations

- For an administrative penalty to be effective, regulated parties must know that when a penalty is imposed, payment will be enforced. The ministry has established a very high standard with respect to follow-through and timely collection of overdue penalties.
- Daily interest is applied each month the penalty is outstanding, and collection action can be initiated after 90 days.
- Section 9 of the APR (*EMA*) specifies that a person is not eligible to apply for an authorization, or an amendment to an authorization, until the penalty is paid in full. Further, section 18 of *EMA* gives the SDM authority to cancel or suspend the current

authorization for non-compliance with the Act or its regulations, which in this case is non-compliance with the requirement to pay the administrative penalty imposed under the APR (*EMA*).

- Section 15 of the *IPMA* grants the Administrator the authority to cancel or suspend an authorization, and to restrict a person from applying for a new authorization, in the event of non-payment.

Procedures

1. Once the 30-day time limit for full payment of the penalty has expired, the Fees Analyst confirms with CSNR whether payment has been received and notifies SDM (as a courtesy).
2. If payment is received, the Fees Analyst will **update the AMP tracking log**: insert the appropriate date under Date Payment Received column.
3. If payment is not received, AMS will trigger statements on the 28th day of each month, with interest applied. Once overdue, interest is charged from the date of the determination (the 30 days interest-free grace period no longer applies).
4. If payment is not received, the Fees Analyst will make a notation in AMS to flag for staff that new or amended authorizations are not permitted until payment is received in full (this does not include amendments initiated by EP to strengthen or add requirements).
5. After 90 days have passed without payment, the Fees Analyst confers with CSNR staff to initiate collection of the outstanding penalty. The Fees Analyst should first confirm with the SDM that there are no extenuating circumstances that would delay this course of action.
6. CSNR is the conduit to Ministry of Finance Receivables Management Office. CSNR will confirm that ministry procedures (i.e. adequately notifying person of the liability) and timelines have been observed and will onboard the debt to the Ministry of Finance collection system.
7. Further, after 90 days have passed, the Fees Analyst and the SDM may consult on whether section 18 (*EMA*) or section 15 (*IPMA*) – cancelling or suspending the current authorization – should be applied. This process would typically start with a warning letter sent by Business Services.
8. If consequences are invoked, the SDM **update the AMP Tracking Log** by making a notation in the AMP tracking log under Notes column.

Chapter 3: Guidance for Compliance Officers and Investigators

The following chapter provides guidance to program compliance officers and COS investigators who would be involved in:

- assessing non-compliance and the appropriateness of imposing an AMP
- preparing the AMP package for recommendation to the SDM for decision, which includes providing information and evidence in support of a finding of contravention or failure to comply, and the imposition of an AMP.

3.1. When might an administrative penalty be an appropriate response to non-compliance?

As one of a number of enforcement tools available to EP to respond to non-compliance, an AMP may be imposed as part of an escalating enforcement response, preceded by unsuccessful efforts by staff to compel compliance using other tools such as advisories, warnings or violation tickets. Or, an AMP may be an appropriate first response to non-compliance such as where a person has clearly fallen below the expected standard of care and demonstrates questionable willingness or capacity to comply.

The **non-compliance decision matrix** guides staff in assessing the gravity of the contravention or failure and the likelihood of achieving compliance to arrive at an array of possible enforcement responses. Choosing between these options requires a closer look at the case-specific circumstances. As examples, an AMP may be appropriate in the following situations:

- An important administrative requirement has not been met, such as submitting monitoring data, and previous warning(s) have not been successful (and the violation is not a ticketable offence)
- A person has a history of minor to moderate non-compliance but suspending or cancelling their authorization at this time is not appropriate or desirable
- The person has realized a financial benefit or other advantage by not complying
- A contravention of a legal requirement is significant but would not meet the public-interest test for prosecution
- A lesser fine – such as a violation ticket – would be insufficient to compel the person to return to compliance or to have a deterrent effect against future contraventions
- No previous enforcement actions have been taken but the person was clearly aware of the requirements and took no action to prevent the contravention or to report it to the ministry when required to do so.

3.2. Who should the Notice of Administrative Penalty be issued to?

1. **When the contravention or failure relates to an authorization**
   When the contravention relates to an authorization (e.g. permits, approval, license), the AMP should be issued in the name of the authorization holder. This is the person or entity responsible for setting and implementing corporate policies and procedures in order to meet regulatory obligations. Further, in these cases the AMP package should be sent to the corporate office, not to the lawyers or to the site location (unless they are the same).

   The exception to this would be when there is compelling evidence that someone other than the authorization holder – such as an employee – operated independently, contrary to company policy and outside of their authority or training. In this rare situation there may be a case to impose an AMP on the employee only, not the company.

2. **When the contravention or failure relates to an order**
   When the contravention is of an order issued by a ministry official, the AMP should be issued in the name of the person(s) to whom the order was issued.

3. **When the contravention or failure relates to a provision prescribed in the APR**
   Where there is no authorization, but rather, the matter involves a contravention of a provision of the Act or regulations that are subject to AMPs (e.g. an entity operating under a regulation fails to comply with a section of a regulation that has been prescribed in the APR) the evidence should point to whom the penalty notice should be issued.

   In most cases employees operate under the direction of company management – either officers of a corporation or owners of unincorporated companies. In these cases the AMP would be issued in the name of the company.

4. **Where more than one party is liable for the contravention**
   Where more than one person is responsible for a contravention, direction from the Forest Appeals Commission (appeal 2000-FA-001, *Brekkas* and *Carter*) is to calculate the quantum of the penalty as a whole, and then apportion it amongst those responsible based on their role, economic benefit and cooperativeness during the investigation. The SDM may alternatively find the parties jointly and severally liable. Legal advice is advised in these situations.

5. **Other considerations**
   In a situation where an AMP is going to be imposed on a company of questionable solvency or there is reason to believe the company may be sold or otherwise dissolve before payment of the AMP, a good strategy would be to issue the penalty in the name of an individual as well as the company to facilitate future collection. Advice from Legal Services Branch should be sought in these situations.

3.3. Should one or multiple penalties be recommended?

Where a person has multiple contraventions or failures, each may be subject to a separate penalty or they may be consolidated into one penalty. As a parallel, in a court prosecution, these are referred to as the number of charges or 'counts'. A single PAF can have multiple penalty calculations (part 2), or a single penalty calculation could include multiple contraventions. The decision of which contraventions to include and how to organize the AMP package(s) depends on the circumstances. If in doubt, discuss the options with the SDM before starting.

Some things to consider:

- The source of the authorization: when there are multiple contraventions, involving more than one authorization source – such as the Act, a regulation and/or a permit – a separate PAF for each is the recommended approach.
- The requirement type – where there are distinct contraventions such as discharge exceedances, failure to maintain works, monitoring or reporting violations, separate PAFs would be appropriate.
- How related the chronology or fact pattern is: where the chronology and relevant facts are the same, leading to different contraventions (for example, failure to maintain works which causes an exceedance or unauthorized discharge), a single PAF with two separate penalty calculations (PAF, part 2) would be appropriate.
- Where there are multiple contraventions relating to the same requirement (e.g. subsections of the same section), such as late reporting + missing content of a report, one penalty would be appropriate with justification for a higher amount.
- When multiple related contraventions or failures are included in a single PAF, take care to provide sufficient evidence to support all asserted facts, and address the factors in s. 7 of the APR in relation to each contravention or failure.
- Where an AMP is being imposed on an individual, calculating separate penalties for multiple contraventions could make the total penalty amount prohibitively (and unnecessarily) high. If this is the case, pick the most significant contravention as the basis for the penalty, and reference the related contraventions 'for the record' but recommend they not be included in the penalty calculation.
- Where the maximum penalty for the contravention specified in Part 2 of the APR is likely inadequate to be a deterrent for the totality of the person's non-compliance, imposing separate penalties for repetitive contraventions would be an option for increasing the quantum. Using an example of multiple exceedance of a permitted discharge limit, on different dates, a penalty could be applied per discharge, each up to the maximum penalty prescribed in the APR.
- When multiple penalties are being applied to either distinct or repetitive contraventions or failures, there must be evidence to support each one. Exclude any grey areas; include only

non-compliance with compelling, clear evidence to support it. To assist the SDM with their review, be specific about which piece(s) of information in the relevant facts section supports which non-compliance.

- Where multiple penalties are appropriate, consider the ease with which the supporting information and evidence can be organized clearly and concisely. There is no single right answer. In some cases, it may be less work for the compliance officer to prepare multiple separate AMP packages, than to try to organize into a coherent single package. This may also make it easier for the SDM to consider the mitigating and aggravating factors and calculate the penalty in relation to each separate non-compliance.

If the contravention or failure occurs for more than one day, the AMP can be calculated and then imposed for each day the contravention or failure continues (as per s. 7(2) of the APR, described in the next section).

3.4. Continuous vs. single contraventions

The APR, section 7(2) allows for separate administrative penalties to be imposed for each day a contravention or failure continues.

The circumstances will dictate when it is appropriate to apply this factor, and it must be applied with care to avoid resulting in a penalty that is unreasonably high. There are legal principles and case law that distinguish between "single" offences, where the conduct giving rise to the offence occurs in a distinct point in time, and "continuing offences", where the non-compliant conduct occurs over a period of time. Arguably the same principles can apply to contraventions or failures resulting in an AMP.

Generally speaking, when a person fails to perform a duty imposed by law, and that obligation (and the failure) continues for a period of time, the non-compliance is considered continuing until the obligation is performed and a daily penalty may be considered. Examples typical to ENV include requirements to:

- construct or install works, signage, or fencing
- maintain something, such as equipment, physical works or financial security
- have a recycling plan or sign on with a steward
- submit an annual report by a specified date

When a requirement is time-sensitive, such as the requirement to report an emergency event within a prescribed timeframe, a daily penalty is very appropriate to encourage timelier reporting in the future.

Conversely, obligations that apply at a single point in time, such as a requirement to conduct a month-end stack sample, or to notify the Director *before* bypassing authorized works or *before* starting construction of new works, are considered single violations. The commission of the act was complete on the date the person failed to act or acted without prior authorization.

In any event, applying a 'per day' penalty may not be appropriate for continuing contraventions that continue over weeks or months, such as a landfill not being covered, a plan not being submitted, or staff not being adequately trained, where the result would be a penalty unjustifiably high in relation to the harm caused. In these cases, a single increase using factor 7(d) in the APR (contraventions of a continuous nature) would be more appropriate.

When contemplating the use of a daily penalty, consultation with Legal Services Branch is advised.

3.5. Meeting the burden of proof

The burden is on C&E staff to prove that the person contravened a legal requirement or failed to comply with an order or a requirement of an authorization. If staff fail to provide satisfactory evidence to the SDM to support the allegations, the burden is not met and the SDM cannot find the person to be in contravention (liable) and cannot impose an AMP.

The standard of proof that is required to prove liability is on a *balance of probabilities*. If after considering all the relevant evidence the SDM concludes that the alleged events probably occurred, the case has been proven. In other words, if it was 'more likely than not' or 'more probable than not' that the events occurred, the case has been proven. This standard is less onerous than the *beyond a reasonable doubt* standard required to be met by Crown when prosecuting an offender in court for a statutory offence. The type and amount of evidence required to prove the contravention on a balance of probabilities can vary depending on the circumstances.

Proving the contravention requires a meticulous job of identifying the essential elements of the contravention – the *who, when, where* and *what*. For example, it is relatively easier to prove the *who* and *where* of a contravention when it involves a permittee conducting business at an authorized industrial site versus an unauthorized individual operating a transient business.

Being familiar with the legislation and/or the authorization you are dealing with, knowing your powers and authorities and following good inspection practices including taking thorough notes, photographs and samples will help ensure you acquire the right evidence. The *Inspector's Training Manual for Environmental Protection Staff* is a good resource. When in doubt, complete your inspection and assess your findings back at the office. If you suspect non-compliance but more evidence is required to confirm it, refer the file to the COS for investigation.

3.6. Providing the SDM with details on the mitigating and aggravating factors listed in s.7 of the APR – Standard AMP Packages

The compliance officer is not responsible for calculating the amount of an AMP; this will be done by the SDM when they review and finalize the AMP package. However, it is the

responsibility of the compliance officer to present as much relevant information as possible on each of the factors listed in s. 7 to assist the SDM to arrive at a reasonable and appropriate penalty. The SDM will consider all the factors listed in s.7 of the APR to ensure the penalty:

- reflects the gravity and magnitude of the contravention
- acknowledges the actions the person took before, during or after the incident
- creates an effective deterrence against future non-compliance without being excessively punitive.

The compliance officer communicates this information by providing comments on the **Penalty Assessment Form** in relation to each factor and supplying supporting evidence.

The factors that must be considered by the SDM are:

1. the nature of the contravention or failure
2. the real or potential adverse effect of the contravention or failure
3. any previous contraventions or failures, administrative penalties, or orders issued to the person (compliance history)
4. whether the contravention or failure was repeated or continuous
5. whether the contravention or failure was deliberate
6. any economic benefit derived by the person from the contravention or failure
7. whether the person exercised due diligence to prevent the contravention or failure
8. the person's efforts to correct the contravention or failure
9. the person's efforts to prevent recurrence of the contravention or failure
10. any other factors that, in the opinion or the director, are relevant

3.6.1. Factors that contribute to a base penalty

These first two of the mitigating and aggravating factors listed in s. 7 make up the `gravity` component of the penalty: they relate to the nature (or type) and seriousness of the contravention.

SDMs will use these two factors to establish a reasonable starting place (a base penalty) which will be adjusted up or down in consideration of the remaining factors in s.7. The SDM may be guided through this benchmark assessment by the base penalty tables found in Chapter 4 of this manual.

The task of the compliance officer is not to use the base penalty tables, but rather, to provide the SDM with their best assessment of how to categorize the nature or type of the contravention (major, moderate, minor) and how serious its real or potential impacts are (high, medium, low to none). These factors are described below.

APR s. 7(a): Nature of the contravention or failure

This factor refers to the type of contravention, which relates to *how important* compliance with the requirement is to the Ministry's regulatory goals. In categorizing the nature of the contravention as 'major' 'moderate' or 'minor' the focus should be on the question: *what is the regulatory importance of compliance for the protection of the environment and/or human health*?

Minor: generally, refers to non-compliance with administrative requirements such as not providing reports within legislated timeframes; not supplying information at the request of the Ministry; keeping inadequate records. Minor could also refer to contraventions of operational requirements that relate to low-risk activities or wastes where an AMP is appropriate to motivate operators to quickly restore compliance and change their future behaviour (for example, chronic offenders).

> *Note*: Consider administrative requirements carefully: if a late or missing report is the only insight to the performance of a facility or its pollution abatement equipment, then a late submission would be considered more than of minor interest to the Ministry.

Moderate: generally, this category refers to a failure to comply with operational requirements that at a minimum create a risk of harm to the environment or human health and safety. It includes failure to perform required tasks or actions such as obtaining approval prior to a bypass, properly installing or maintaining equipment, constructing works or meeting operational standards or requirements; failure to conduct required sampling or studies; failure to undertake required monitoring; failure to develop or follow plans; not adequately consulting with FN or other stakeholders. Low to moderate exceedance of a discharge limit (for example, 50% or less of the authorized limit) with no sustained impact to the environment or human health may also fall in this category.

Major: In contrast to creating the potential for harm, this category includes the most serious compliance issues that by their nature can result in an actual significant impact or very serious threat to the environment or to human health or where non-compliance undermines the basic integrity of the overarching regulatory regime and significantly interferes with the Ministry's capacity to regulate. Examples include an unauthorized discharge, exceeding a discharge limit by a significant magnitude (50-100%+), operating a high-risk activity without proper authorization, failing to meet key thresholds or values, actions that result in significant pollution, contamination or spills, failing to take emergency response measures.

Major can also include administrative requirements that form the basis of a regulatory regime and government's only way to ensure that regulatory objectives will be met. Examples include failure of a person to provide information (such as a stewardship or operational plan, or a monitoring report) or provide/replenish security that is required for long term care and maintenance of a high-risk site.

APR s. 7(b): Real or potential adverse effect of the contravention or failure

The compliance officer must also make a preliminary assessment about whether the real or potential adverse effects are very high or high, medium or low. These categories relate to the real or potential harm the contravention has on the environment, human health or safety.

Potential effects are an important consideration to factor into the gravity of the contravention although may not be given the same weight as actual adverse effects. The Ministry's mandate is to prevent harm to the environment and human health – not wait to act until something has happened. As such, harm that *might* have occurred but for fortuitous circumstances must be considered.

Questions one might ask when considering which category applies include:

- Is the effect real, or only a potential threat?
- If the effect is real, is it temporary in nature or likely to persist or irreversible?
- Can it be cleaned up?
- Is the effect localized or widespread?
- If a contaminated area, is it in a public space or within the person's controlled area?
- What was the duration of the violation? Did the violation continue after the person was aware of it, or after the Ministry intervened?
- If there is a potential for a negative effect, how likely is it? Does it depend on other factors? Do we know or understand those other factors?
- Is the potential effect imminent or something that might happen in the distant future?
- Might serious impacts have occurred if not for fortuitous circumstances (i.e. they got lucky)?
- If the violation is an exceedance of an environmental limit, how toxic is the pollutant and by what magnitude was the authorization exceeded? How sensitive is the receiving environment?

Low to None: the contravention does not result in an immediate adverse effect or interfere with the Ministry's capacity to protect the environment or human health, or the potential to do so is low. Generally, administrative requirements fall into this category – providing security; not signing a stewardship plan; or it could include an unauthorized discharge or permit exceedance with no discernable environmental or human health impact.

Medium: the contravention interferes with the Ministry's capacity to protect the environment or human health, or has the potential to do so, but does not result in a significant adverse effect or the potential to do so is moderate. Any effect is localized, short-term and can be mitigated or damage repaired within a reasonable timeframe.

High: the contravention causes an adverse effect that is, or has the potential to be, widespread, persistent, threatening to property or plant or animal health and cannot be restored easily or within a reasonable time.

The following category only applies to contraventions subject to $75,000 maximum:

Very High: the contravention has the potential to cause significant and widespread injury or damage to animal or plant life, harm or material discomfort to any person, an adverse or potentially fatal effect on the health of any person or impairs the safety of any person. This category would only be used to assess potential risks; if a contravention caused an actual very serious adverse impact on the environment or human health, the Ministry would most likely pursue prosecution.

3.6.2. Penalty Adjustment Factors

The purpose of AMPs is to encourage quick and effective action to restore, reduce or prevent harm to the environment or human health. The remaining factors in section 7 are used to adjust the base penalty upwards or downwards in relation to considerations such as monetary benefit received by the person, or actions taken before, during or after the incident.
The compliance officer's job is to document the facts and contextual information for each of the relevant mitigating and aggravating factors in part 2 of the Penalty Assessment Form. This will allow the SDM to consider not just what happened, but also why it happened, whether it has happened before and the person's past and current actions and attitude towards being complaint.

APR s. 7(c): Previous contraventions or failures, AMP's imposed or orders issued (+/-)

- This factor could increase or decrease the penalty.
- This factor considers the person's compliance history. This can include 'determined contraventions' - tickets, previous administrative penalties, administrative sanctions and prosecutions - as well as advisories and warnings (although be aware there are conflicting appeal decisions on including these). Where a person may not have had an opportunity to respond to the alleged non-compliance, they may challenge its use as an aggravating factor. Orders issued for reasons similar or related to the contravention should also be considered.
- Contraventions under appeal should not be considered.
- When considering the relevance of previous contraventions, consider the degree of similarity and extent to which the previous enforcement action should have deterred the person from doing the same type of thing again.
- Evidence to support this factor does not include prior enforcement responses to the current contravention. (e.g. an advisory or warning that preceded the AMP). Those provide evidence in support of factor (d) or (e).

- The relevance of a positive compliance history (i.e. no past contraventions) in reducing a penalty may be influenced by how long the person has been operating and how many inspections they've had.
- The time elapsed since prior contraventions or the person's response to prior contraventions (e.g. promptness and completeness of corrective action) may also be relevant.
- Include a list of all non-compliances found in COORS for the company, even those relating to their other operations. This is information the SDM may wish to consider.

APR s. 7(d): Whether contravention or failure was repeated or continuous (+)

- This factor could **increase** the penalty.
- This factor should be considered differently than the authority granted in section 7(2) of the APR to impose separate penalties for each day a contravention or failure continues. Guidance for the application of 7(2) is provided in section 3.4 of this chapter.
- A contravention could be considered repeated if the same incident or behaviour occurs at two or more separate times. For example, a person has failed to conduct a monthly stack test three times in the past twelve months or failed to report non-compliance to the Ministry on multiple occasions. The events are separate, but the contravention is the same.
- Contraventions may be considered *continuous* from the day the non-compliance is confirmed until the day the person demonstrates compliance; unless the person has evidence that the violation was not continuous (e.g. they have continuous emission monitoring data).
- If the evidence indicates that the repeated or continuing nature of the contravention should have alerted the person to the contravention and the need to take action, but the person failed to, a higher penalty would be justified.

APR s. 7(e): Whether contravention or failure was deliberate (+)

- This factor could **increase** the penalty.
- Knowledge, willfulness and intent are indicators of deliberateness.
- Questions the compliance officer might ask include:
  - Does the Ministry have evidence that the person was aware of the requirements (conversations, inspections) or that they took deliberate actions that caused or failed to prevent the contravention?
  - Did the contravention or failure continue despite warning(s) or order(s) by the Ministry?
  - How far did the person depart from a reasonable standard of care?

- Actual intent may be difficult to prove (and may only be possible through an investigation) but the conduct may be so poor as to indicate that the person was willfully blind to the potential for the contravention and just didn't seem to care. How much control did the person have over the events that constituted the violation? How predictable were those events?
- Suspicions about the integrity of the person or their motives are not a sound basis for a finding of deliberateness. Evidence is required.

APR s. 7(f): Economic benefit derived by the person from the contravention or failure (+)

- This factor could increase the penalty, potentially by a significant amount.
- Removing economic benefit is one of the most important objectives of an AMP. It sends the message to operators as well as the public that it is not ok to profit from breaking the law; the intent is to deter individuals and companies from 'taking their chances' of getting caught by ensuring the consequence (penalty) is equal or greater than the benefit of not complying.
- There are a number of ways the alleged offender can obtain an economic benefit from non-compliance: by avoiding compliance (avoided costs), delaying compliance (delayed costs), or direct profit obtained by selling products or services or by achieving an illegal competitive advantage.

This material is adapted from *Determination and Application of Administrative Fines for Environmental Offences: Guidance for Environmental Enforcement Authorities in EECCA Countries. OECD (2009).*

Avoided costs are costs that the regulated person avoided incurring by failing to comply with a requirement. Avoided costs may apply when there is a requirement that must be complied with on or by a certain date and once that date passes, cannot be complied with on a future date. Examples of violations that enable a person to permanently avoid certain compliance-related costs are:

- Costs savings related to the operation and maintenance of pollution control equipment;
- Failure to employ sufficient number of adequately training staff;
- Failure to establish or follow management practices (including self-monitoring) required by regulation or their authorization;
- Laboratory analysis costs saved by not doing sampling over a period of time;
- Improper treatment or disposal of waste.

Delayed costs are costs that the person delayed incurring, allowing them the use of the money that should have been spent on achieving compliance. Although they eventually comply, there is an economic advantage associated with delaying the expenditures until the Ministry takes enforcement action. Examples of violations that result in a savings from delayed costs are:

  - Delaying capital investments such the installation of equipment
  - Delaying process changes needed to eliminate pollutants from products for waste streams
  - Delaying test that is required to demonstrate compliance;
  - Improper storage of waste
  - Failure to seek an authorization (saving including conducting studies, preparing application, application fee)
  - Delaying the preparation of spill prevention or contingency plans.

- Actual dollar amounts, such as the savings from not complying with regulatory requirements, are the best evidence. When this direct evidence is not available, the compliance officer may estimate the values using the best information available. If unable to provide a reasonable estimate, a description of the most likely economic benefit is acceptable.
- While under-estimating economic benefit is counter-productive, over- estimating will likely result in an appeal. The test for estimating economic benefit is one of **reasonableness**. Provide a best estimate based on a sound reasoning.

APR s. 7(g): Exercise of due diligence to prevent the contravention or failure (-)

- This factor could **decrease** the penalty.
- The Ministry's AMP regulation creates an absolute liability penalty regime. This means that due diligence is not an outright defence as it may be in a court of law when a person is charged with a statutory offence. Section 6 of APR makes it clear that regardless of whether a person exercised due diligence, they may still be held liable for a contravention.
- There is considerable case law relating to what constitutes due diligence. It is generally accepted there are two parts (based on Supreme court of Canada decision in Regina v. city of Sault Ste. Marie, 1978):
  - Did the accused have an honest and reasonable belief in a mistaken set of facts, which if true, would render the act or omission innocent, or
  - Did the accused person take all reasonable steps to avoid the particular event, based on what a prudent person would have known or done?
- The SDM must consider due diligence in deliberations on the quantum of the penalty and reduce the penalty if the person provides persuasive testimony or evidence that they exercised due diligence. The extent of the reduction would depend on how compelling their evidence is and its weight relative to other factors the SDM must consider.
- The compliance officer should provide the SDM with as much information as possible on the Penalty Assessment Form as to whether there is any evidence of an exercise of due

diligence. Much of this evidence may not come out until the OTBH, so the compliance officer may have only limited insight into how this factor may apply.

- If the contravention resulted from a lack of due diligence – for example, failure to conduct routine maintenance – this would be noted by the compliance officer in the Penalty Assessment Form, but it would not be grounds for the SDM increasing the penalty (it would only justify no reduction for due diligence).
- Some questions that the compliance officer might ask to determine if the person exercised due diligence include:
  - What studies or examinations, if any, would a prudent person have done?
  - What qualified professionals would have been engaged by a prudent person?
  - What kind of training and guidance would have been provided on the ground by a prudent person?
  - What level of monitoring would have been carried out by a prudent person?
  - What are the industry standards in this kind of situation?
  - How foreseeable was the risk? A greater degree of care can reasonably be expected when work is done near a sensitive habitat or a source of human water consumption, for example.
  - 'Reasonable foreseeability' does not require foresight of an *exact* sequence of events, but rather enough to generally foresee a potential danger.
- The question of whether a company can argue due diligence when the contravention was the result of actions of an *employee* depends on whether the company exercised all reasonable care, such as providing adequate training for its employees and establishing adequate systems to prevent the contravention. The courts have said that employee negligence is foreseeable (i.e. employee error is not a defence to a contravention) but *flagrant* breaches of basic rules might not be reasonably foreseeable, and could therefore suggest due diligence was exercised.

APR s. 7(h): Efforts to correct the contravention or failure (-)

- This factor would **decrease** the penalty.
- This factor considers what the person did *after* the contravention or failure to restore compliance or reverse or mitigate the impacts.
- If the person has taken some action to correct the contravention it should be recognized. This does not have to include an expenditure of funds, but it must be an honest attempt to take corrective action.
- The compliance officer should consider the following when providing comments on this factor in the Penalty Assessment Form:

- Did the regulated person do *everything practical* to prevent, eliminate and ameliorate the adverse effects and to repair any damage; or
- Did the regulated person take *some steps* that had some effect in preventing, eliminating and ameliorating the adverse effects or in restoring the environment; or
- Did the regulated person *fail to take any effective steps* to prevent, eliminate or ameliorate the adverse effects or to restore the environment?

APR s. 7(i): Efforts to prevent reoccurrence of the contravention or failure (-)

- This factor could **decrease** the penalty.
- This factor considers whether the person has taken any action to avoid the contravention or failure happening again in the future.
- The compliance officer should consider the following types of things when providing comments on this factor in the Penalty Assessment Form:
  - Has the person addressed the failure to ensure it won't happen again?
    - If so, how adequate is the action they have taken? For example, did they repair equipment or works, put in place supporting policies, provide training, etc.
- If the person has not yet taken any action but has demonstrated that they have a solid plan and the capacity to follow-through, the compliance officer should note this in the Penalty Assessment Form.

APR s. 7(j): Any additional factors that are relevant (+/-)

- Additional factors could increase or decrease the penalty.
- This is an opportunity for the compliance officer to provide other relevant information that they think the SDM should be aware of. These factors may contribute to the SDMs assessment of what magnitude of penalty is necessary to promote future compliance. Some examples:

  Self-reporting: Did the person self-report the violation?

  Cost to government: Did the contravention result in damage to the environment that government had to pay (for example, emergency response was required rather than ordering the person to do the remediation)?

  Cooperation: How cooperative has the person been? Examples of being uncooperative include actively evading contact with the inspector, refusing to answer questions or attempting to hide evidence or obstruct an officer. Cooperative behaviour may be recognized by the SDM by reducing the penalty; an uncooperative attitude may signal that a higher deterrent is required to deter future uncooperative behaviour.

  Remorse and accountability: what is the attitude of the offender and are they accountable for their actions (or lack of)? How has this been demonstrated?

Ability to pay. Although this is not one of the factors that must be considered, it is reasonable and appropriate for the Ministry to be sensitive to this when imposing a penalty. The penalty must be sufficient to motivate future compliance (remove economic incentives to break the law) but not be so high as to be considered excessively punitive. Penalties for individuals and small operators should be lower than for companies (many AMP regimes prescribe different penalty levels to recognize this). Penalties that are large compared to a facility's resources could put an otherwise sound operation at risk. Any comments the compliance officer can provide on their sense of the ability to pay may be helpful to the SDM in assessing penalty quantum.

Financial impact of other obligations: Related to ability to pay, the SDM may consider the financial impact other administrative remedies have had on the person related to the contravention (such as a stop work order or preventative measures required by a pollution abatement order) as these may impose significant financial obligations, such that the additional imposition of an AMP may have undo consequences. Any comments the compliance officer can provide may be helpful to the SDM is assessing penalty quantum.

3.7. Summary –Best practices for preparing an AMP Package

A more detailed list of best practices is available here: iComply

1. The purpose of the PAF is to communication the circumstances of the non-compliance, very succinctly. Only include information relevant to the current contravention or failure, apart from a short context piece (see #3) and information on the person's compliance history (factor 7c).
2. Include only non-compliances that you can prove – leave out the grey areas. Be very explicit about linking your relevant facts to each contravention or failure.
3. Begin the descriptive section of the PAF (part one) with a background – a short overview that describes the person, the type of operation and a lay-person description of the non-compliance(s) being recommended for AMP, including parameters of concern. This could be one or two paragraphs, or a small number of bullet points.
4. Organize the Summary of Relevant Facts as a chronology, using short paragraphs or bullet points. Readability is important! Keep this section crisp and focused on the evidence that proves the contravention or failure.
5. Use a professional writing style – proper names (Mr. Smith) and titles (EPO Brown). Use clear descriptive language rather than adjectives. "Frequent" and "repeatedly" are not as informative as "four times in six months" or simply "3 times". Keep your language neutral and describe the facts, don't try to be persuasive.
6. For multiple, repetitive contraventions or failures, use a summary statement - *the party exceeded their permitted discharge limit X times between January and August,* supported by a table or a bulleted list. This could be included in the body of the PAF, if short, or as an appendix. Here is a template for a basic but effective table that shows the contraventions as well as enforcement responses taken:

Date of non-compliance	Permit limit	Sample result	% exceedance
Warning issued on xx date (IR#)			
Referral for admin penalty issued on xx date (IR#)			

Chapter 4: Guidance for Statutory Decision Makers[3]

4.1. Powers, duties and obligations of an SDM in relation to AMPs

1. Mandatory duties/obligations

   i. The SDM must give notice to the person of the intent to impose a penalty by issuing a Notice Prior to Determination of Administrative Penalty (APR s. 2).

   ii. The SDM must provide the person with an opportunity to make representations prior to imposing the penalty (APR s. 3). If the person does not request this opportunity the SDM does not have to provide a hearing and can proceed to make a determination.

   iii. Once the SDM has issued a Notice Prior to Determination of Administrative Penalty they must make a determination (APR s. 4) or inform the person, by way of written notice, that they do not need to pay a penalty (APR s. 3(5)). The SDM`s decision might be not to impose a penalty, but they cannot choose to simply let the matter drop.

   iv. In establishing the amount of an administrative penalty, the SDM must consider the mitigating and aggravating factors enumerated in APR s. 7.

   v. The SDM must give notice to the person subject to a determination if any amendments are made to correct typographic or arithmetic errors in that Determination (APR s. 5).

   vi. If an SDM intends to impose a penalty they must do so within 3 years of the contravention or becoming aware of the contravention, whichever is later (APR s. 11 (*EMA*); APR s. 10 (*IPMA*)).

2. Discretionary powers

   i. Within 15 days of making a determination, the SDM may correct an arithmetic, typographical or similar error, or correct an obvious error or omission in the determination (APR s. 5).

   ii. The SDM may impose separate administrative penalties for each day if a contravention or failure continues for more than one day (APR s. 7).

   iii. The SDM may determine the circumstances, place and process by which OTBH is conducted and specify form, content and timing of the materials submitted, as well as whether the submissions are to be written, oral or electronic (APR s.3(3)).

[3] Much of this chapter is taken from *Contravention Decision-Making under FRPA for Delegated Decision Makers*, Ministry of Forest, Lands and Natural Resource Operations, October 2014. Authored by Mike Pankhurst.

4.2. Principles of Good Statutory Decision Making

Administrative processes are intended to be less formal than prosecutorial ones - they are not intended to mimic a court process. Statutory decision makers (SDMs) are not held to the same standard as judges in court, nor is the burden of proof as high for proving a contravention when using an administrative remedy compared with proving an offence in court because the consequences are deemed to be less severe (no criminal record, less social stigma). As a result, administrative processes can be more flexible and timelier to conduct.

However, SDMs must make their decisions fairly and in accordance with the law. SDMs have a duty to ensure the principles of administrative fairness are upheld whenever they exercise discretion to make a statutory decision that impacts someone's rights or interests. If these principles are not upheld, the decision is likely to be overturned on appeal. The statutory decision to impose an administrative penalty is an appealable decision under both *EMA* and *IPMA*.

Generally speaking, the more significant the potential consequences of a decision are for the affected person, the greater the procedural protections that are required. With respect to administrative penalties, the higher the penalty or the greater the impact it will have on the violator, the more process may be required. Respecting and discharging these principles to the best of the SDMs ability is the best way to ensure that the person's rights will be protected, and decisions will withstand scrutiny.

The following are the rights and duties associated with procedural fairness, summarized and in the context of administrative penalties. More complete information can be found here in the EPD's *Statutory Decision-Making Handbook* or the *Ministry Foundations of Environmental Law* manual.

The rights of the affected person include:

1. **The right to know the case against them** which means they must be given sufficient information in the Notice Prior to Determination of Administrative Penalty to know precisely what rules they are alleged to have contravened and what evidence the Ministry must prove. It also means that the process must allow them adequate time to comprehend the allegations and the evidence.
2. **The right to respond** which means they are given an opportunity to prepare a response and to be listened to by the decision maker before a final decision is made. This is the *opportunity to make representations* provided for in section 3 of the Administrative Penalty Regulation.
3. **The right to be heard by an unbiased decision-maker** which means the SDM must have no interest in the case other than to arrive at a defensible decision. Even the perception of bias can taint an otherwise sound process and decision.

In exercising discretion when making the statutory decision to impose an AMP, the SDM has the duty to:

1. **Be independent** – not be fettered by superiors or policy or other constraints. Further the SDM who hears the evidence and argument must be the one to make the statutory decision ('he who hears decides').
2. **Exercise the discretion for the proper purpose** – consider the overall purpose of the legislation and only exercise discretion in a manner that is consistent with the intent of the law.
3. **Be reasonable** – ensure the decision flows logically from and is supported by the available evidence, situation and circumstances. The decision must be fair.
4. **Provide adequate reasons** – in order to demonstrate these other duties have been met. Having clearly documented reasons will also be extremely useful if the decision is appealed.

Additionally, there are **two common law doctrines** that apply to statutory decisions:

1. The **doctrine of legitimate expectations** arises when a person expects that a practice that readily applies to others should apply, or where promises or representations were made to the person regarding how the matter will be dealt with. This doctrine creates procedural rights only (i.e. it could be used by the person to argue for a different procedure); it cannot be used to require a certain outcome, which would fetter the SDM. "Legitimate" means that the expectation must not conflict with what the statute allows (i.e. the 'expectation' must be reasonable).
2. The ***functus officio* doctrine** which means that once an SDM has rendered a final decision, it cannot be changed. Section 5 of the Administrative Penalties Regulation creates a statutory exception to this – the SDM has 15 days after their determination to correct any minor errors such as a typographical, arithmetical or other obvious errors or omissions. The SDM can do this without another hearing and must give notice in writing to the affected person.

4.3. Previous administrative decisions inform but are not binding

It is a principle of administrative law that each decision must be made on its own merits, unlike in a court of law where higher court decisions may be binding on lower courts. While previous administrative penalty determinations may be relevant and informative - and in general like files should be treated consistently - it is the duty of the SDM to make a decision based on the unique facts of each case and all relevant factors. Further, while previous EAB decisions may inform the SDM as to the outcome of a decision if it is appealed, this also is not binding on the SDM.

4.4. Who should the Notice Prior to Determination of Administrative Penalty be issued to?

1. When the contravention or failure relates to an authorization

When the contravention relates to an authorization (e.g. permits, approval, license), the AMP should be issued in the name of the authorization holder. This is the person or entity responsible for setting and implementing corporate policies and procedures to meet regulatory obligations. Further, in these cases the AMP package should be sent to the corporate office, not to the lawyers or to the site location (unless they are the same).

The exception to this would be when there is compelling evidence that someone other than the authorization holder – such as an employee – operated independently, contrary to company policy and outside of their authority or training. In this rare situation there may be a case to impose an AMP on the employee only, not the company.

2. When the contravention or failure relates to an order

When the contravention is of an order issued by a ministry official, the AMP should be issued in the name of the person to whom the order was issued.

3. When the contravention or failure relates to a provision prescribed in the APR

Where there is no authorization, but rather, the matter involves a contravention of a provision of the Act or regulations that are subject to AMPs (e.g. such as an entity operating under a regulation fails to comply with a section of a regulation that has been prescribed in the APR) the evidence should point to whom the penalty notice should be issued. In most cases employees operate under the direction of company management – either officers of a corporation or owners of unincorporated companies. In these cases the AMP would be issued in the name of the company.

4. Where more than one party is liable for the contravention

Where more than one person is responsible for a contravention, direction from the Forest Appeals Commission (appeal 2000-FA-001, *Brekkas* and *Carter*) is to calculate the quantum of the penalty as a whole, and then apportion it amongst those responsible based on their role, economic benefit and cooperativeness during the investigation. Legal advice may be required in these situations.

5. Other considerations

In a situation where an AMP is going to be imposed on a company of questionable solvency or there is reason to believe the company may be sold or otherwise dissolve before payment of the AMP, a good strategy would be to issue the penalty in the name of an individual as well as the company to facilitate future collection. Legal advice should be obtained in these situations.

4.5. Should one or multiple penalties be imposed?

Compliance officers could submit a single AMP package to the SDM, recommending one AMP for a single contravention or failure; they could submit an AMP package covering multiple related contraventions or failures consolidated into one penalty amount; or, they could submit an AMP package that recommends multiple separate penalties for multiple separate contraventions or failures. The best approach depends on the circumstances. The SDM must ensure, however, that there is supporting evidence for each contravention that is alleged and recommended for an AMP. Considerations include:

- The source of the authorization: when there are multiple contraventions, involving more than one authorization source – such as the Act, a regulation and/or a permit – a separate PAF for each is the recommended approach.
- The requirement type – where there are distinct contraventions such as discharge exceedances, failure to maintain works, monitoring or reporting violations, separate PAFs would be appropriate.
- How related the chronology or fact pattern is: where the chronology and relevant facts are the same, leading to different contraventions (for example, failure to maintain works which causes an exceedance or unauthorized discharge), a single PAF with two separate penalty calculations (part 2) would be appropriate.
- Where there are multiple contraventions relating to the same requirement (e.g. subsections of the same section), such as late reporting + missing content of a report, one penalty would be appropriate with justification for a higher amount.
- Where multiple penalties are being contemplated, consider whether the combined total is reasonable with respect to the seriousness of the non-compliance, the compliance history of the person, the behavioral change requirement and whether the proposed penalty is in line with other penalties that have been issued. This is particularly relevant when imposing an AMP on an individual – avoid imposing total penalties that are prohibitively (and unnecessarily) high. In some situations it may be appropriate to pick the most significant contravention as the basis for the penalty and note additional contraventions in the PAF without including them in the penalty calculation.
- Whether multiple penalties are being applied to distinct or repetitive contraventions or failures, ensure there is evidence to support each one. Exclude any grey areas; include only non-compliance with compelling, clear evidence to support it.
- Where the maximum penalty for the contravention specified in Part 2 of the APR is likely inadequate to be a deterrent for the totality of the person's non-compliance, imposing separate penalties for repetitive contraventions would be an option for increasing the quantum. Using an example of multiple exceedances of a permitted discharge limit, on different dates, a penalty could be applied per discharge, each up to the maximum penalty prescribed in the AMP regulation.

- If the contravention or failure occurs for more than one day, separate AMPs may be imposed for each day the contravention or failure continues (s. 7(2) APR (as described in the next section).

4.6. Accounting for continuing contraventions or failures

The Administrative Penalty Regulation, section 7(2) allows for separate administrative penalties to be imposed for each day a contravention or failure continues.

The circumstances will dictate when daily penalties are appropriate. There are legal principles and case law that distinguish between "single" offences, where the conduct giving rise to the offence occurs in a distinct point in time, and "continuing offences", where the non-compliant conduct occurs over a period of time. The latter can include "passive conduct" involving the failure to perform a duty imposed by law. Arguably the same principles apply to contraventions or failures resulting in an AMP.

In practice, whether a non-compliance is continuing is not always a straightforward matter. For example, in a case where a permittee has not fulfilled an obligation under the permit, often by a certain date, the question is whether the non-compliance is a single contravention that occurred when the obligation was initially not fulfilled, or one that continues until the obligation is fulfilled. The wording of the requirement and the circumstances of each case will dictate. *Note:* whether a contravention is considered single or continuing has implications for the limitation period for imposing an AMP.

Some examples of typical ministry permit requirements include:

- *Requirements to construct or install something*: failure to comply with this type of obligation could give rise to a continuing non-compliance if the 'work' has not been constructed or installed in accordance with the permit. Contrast this with a requirement to notify the Director *before* bypassing authorized works or *prior* starting construction of new works, which are considered single violations. The commission of the act was complete on the date the person acted without prior authorization.
- *Requirements to maintain something*: an ongoing requirement to maintain something over the life of the permit, such as physical works or security, is a continuing obligation as the intent is always to maintain a state of compliance.
- *Requirements to take specific action*: an order to remove hazardous waste from a site by a certain date would likely give rise to a continuing failure to comply – the passing of the deadline does not mark a single discrete event, rather it is the commencement of a 'state of affairs' (site free from hazardous waste) that the party continues from day to day to neglect. Conversely, an obligation that applies at a single point in time, such as a requirement to conduct a month-end stack sample, becomes a single contravention occurring the day after the sample was due to be taken. If the person misses three monthly stack samples in a row, an AMP could be recommended for three repeated (rather than a continuous) contraventions.

- *Requirements to report something*: these requirements fall into a grey area where non-compliance could be considered either a single or a continuing contravention depending on the purpose of the requirement. Where a requirement imposes a time limit for reporting, for example when an emergency must be reported within 24 hours, non-compliance would be considered a single contravention that occurs after the expiration of the grace period. Conversely, where the duty to report does not have specific time limits attaches, such as the requirement to report non-compliance or to submit an annual report, the failure may be considered continuing until the party complies with the requirement.

Even when a contravention or failure is considered continuing, a 'per day' penalty may not be appropriate. The circumstances will dictate when it is appropriate, and consideration must be given to avoid imposing a penalty that is unreasonably high relative to the gravity of the violation or what is necessary to deter future non-compliance. Persistent non-compliance such as a landfill not being covered, a plan not being submitted or staff not being adequately training may be best acknowledged with a lump sum increase to the base penalty, using factor 7(d) (contraventions of a continuous nature).

When contemplating the use of a daily penalty, consultation with Legal Services Branch is advised.

4.7. Conducting the Opportunity to be Heard (OTBH) 'Hearing'

Section 3 of the APR grants an affected party an *opportunity to make representations*, more commonly referred to as an *opportunity to be heard*. The purpose of this OTBH is to provide the person an opportunity to present relevant evidence, make submissions, present witnesses, ask questions, and to respond to evidence presented by the Ministry or its witnesses.

It is the sole discretion of the SDM what format the OTBH will take: written, oral or electronic. However, all reasonable efforts should be made by the SDM to accommodate requests by the person, while ensuring that the process proceeds in a timely manner. Generally, the circumstances and complexity of the case will dictate the format and the preparation time allocated to both sides. The format of materials to be presented, and the timelines for submitting them should be negotiated with the person as early as possible. It is the responsibility of the SDM to conduct the hearing in a manner that ensures procedural fairness.

In complex cases, an in-person hearing presents a better opportunity for the SDM to understand the evidence and arguments of Ministry staff and the person while they are both in the room.

In deciding on the format, the SDM should consider:

- requests by the person for a specific format
- the magnitude of the penalty and the impact it will have on the person's livelihood

- the complexity of the case and whether the SDM can adequately understand all the issues without an oral hearing (which presents opportunity to seek clarification through follow-up questions)
- the credibility of the person (i.e. if in question, an oral hearing may be necessary to assess the accuracy of their information)

Regardless of the format of the OTBH, the SDM should stress to the person that the purpose of their submission is to address any perceived inaccuracies or omissions in the Notice. Emphasize that **they must demonstrate how each part of their submission supports or refutes assertions in the Notice.** This will ensure their information is sufficiently considered by the SDM and will reduce the time and effort required to make sense of extraneous information.

4.7.1. Written (including Electronic) Hearings

Written hearings should be the rule, rather than the exception, for most minor to moderate contraventions where the facts and evidence are straightforward providing the SDM is confident this approach will allow them to get the evidence they need to make a determination.

A short conference call preceding a written submission may be appropriate to discuss the requirements of the submission and the process (but not to discuss the merits of the case). The SDM should stress to the person that their submission should be succinct and specific to the elements of the Ministry's case that the person disagrees with or where they feel the SDM has not considered or missed any additional information. This will help to limit the information that is submitted in the OTBH to that which is relevant and supported by evidence.

The shortcomings of written hearing are that the SDM has no opportunity to ask clarifying questions. The SDM can ask staff to provide a written response to the person's submission but must then provide the person with an opportunity to respond to the Ministry's reply. This back and forth process can substantially prolong the process.

4.7.2. Oral Hearings

Who can attend?

Only the person and their counsel or other representative has a *right* to attend. It is not a public process. The SDM decides whether others may attend, including which Ministry staff, the most important consideration being that the person can respond freely and openly to the case against them. Depending on the complexity of the issues, the SDM may ask the compliance officer to attend to answer technical questions.

If there is more than one liable person, it may be most efficient and effective to hold a single OTBH. However, if any person would be inhibited by presenting their case in front of another person, separate OTBH's should be arranged.

Recording
Recording an oral hearing is optional: there is no legal requirement to do so but it may be useful for reviewing the evidence and for appeal purposes. Inform the party if the meeting is going to be recorded.

Whose hearing is it?
The SDM sets the rules for the OTBH and enforces them within the bounds of fairness and reasonableness but the hearing 'belongs' to the affected person. It is their opportunity to respond to the information presented in the Notice of Administrative Penalty and to present their side of the story. It is appropriate for the SDM to summarize the case against the person (or ask the compliance officer to do this) but this should be very brief.

Preparation
The SDM should be familiar with the material and the legislation in advance of the hearing to enable them to focus on critical issues and seek clarification while everyone is in the room. It is important that the SDM let the person know any concerns they have about the evidence and give the person an opportunity to speak to them. Basing a decision on considerations that the person was unaware of is contrary to procedural fairness.
When reviewing material submitted by compliance staff in advance of the OTBH it is important that the SDM maintain an open mind. This is only one side of the story.

Format
An oral hearing should commence with introductions, and a summary of the Ministry's case against the person, presented by the EPO or COS Investigator. As the details are available to the SDM in the AMP package provided by the compliance officer and presented to the affected person in the Notice of Administrative Penalty and Penalty Assessment Form, this summary should be very brief. The SDM can then ask the person to respond to the allegations and tell their side of the story inviting them to seek clarification from the EPO/COS investigator as required.

The oral hearing should close with the SDM asking the person if they have anything more to add and thanking them for participating. The SDM may provide the person with a sense of when they might expect a decision but should refrain from giving them an indication of what that decision will be as this may change with further thinking about the case.

Admitting Evidence
For oral hearings, the SDM may request that the person submit their information ahead of time so the SDM can become familiar with it. However, the person may choose to wait until the OTBH to respond to the Ministry's allegations and this is their right. It would not be reasonable to consider the person "uncooperative" for making this choice. If the person chooses not to submit their material in advance, the SDM should admit it during the hearing providing it is relevant. The SDM may wish to explain to the person, however, that submitting their arguments in advance is more administratively efficient as the SDM may have to adjourn the

hearing if they require more time to consider the arguments or finds it necessary to seek a response from the Ministry.

The Ministry's evidence should be presented in the AMP package; the SDM is not required to admit new evidence from the Ministry during the hearing but may choose to do so if useful and relevant. Again, this may require the SDM to adjourn the hearing to consider the information.

It is appropriate for the SDM to seek clarification of evidence from either side, and this may include requiring either side to submit additional evidence. The person must always be given the opportunity to respond to new evidence or arguments presented by the Ministry. Conversely, the Ministry has no automatic *right* of rebuttal, but the SDM may wish to hear the Ministry's response to the person's evidence and arguments in order to better understand the case.
Once a hearing is closed, it can be re-opened before the Determination is made if new evidence comes to light. If new evidence comes to light after the Determination is made, it cannot be changed but the person can appeal.

Adjournments
The SDM may need to adjourn a hearing if either side requires more time to gather or review evidence, particularly if new evidence has been presented at the OTBH.

4.8. Proving the contravention – Evidence and Proof

The SDM must be satisfied that the person has contravened or failed to comply with a specific requirement. They do this by assessing the evidence and arguments presented by both the Ministry and the alleged offender, determine what is relevant and compelling, decide whether there was a contravention and if so, impose an appropriate penalty.

The compliance officer's AMP package must provide satisfactory evidence to the SDM to support the allegation. If the SDM examines the evidence and does not feel that the Ministry's case has been made, he/she cannot find the person to be in contravention and cannot impose a penalty. In this case the SDM should send the AMP package back to the compliance officer, identifying the gaps in the evidence. The compliance officer can then decide whether those gaps can be filled and whether to bring the case forward at a later date.

The standard of proof that is required to prove liability is *a balance of probabilities*. If after considering all the relevant evidence the SDM concludes that the alleged events probably occurred, the case has been proven. In other words, if it was 'more likely than not' or 'more probable than not' that the events occurred, the case has been proven. This standard is less onerous than the *beyond a reasonable doubt* standard required to be met by Crown when prosecuting an offender in court for a statutory offence.

To make a determination that a contravention occurred, specific pieces of information related to that contravention must be proven – the "essential elements" of the contravention.

The *primary* elements include:

- the identity of the offender (who)
- the date and time of the contravention (when)
- the location of the contravention (where).

The type and amount of evidence required to prove these elements will vary. For example, it is relatively easier to prove the *who* and *where* of a contravention when it involves a permittee conducting business at an authorized industrial site versus an unauthorized individual operating a transient business.

An adequate evidentiary basis is one that has enough weight to tip the balance towards a finding of a contravention or failure.

The *secondary* elements of the contravention are the 'rest of the story' and depend on what the legislation, regulation or authorization define as the conditions that must be present, met or broken for a contravention to occur.

Proving the elements of a contravention requires the SDM to make findings of fact in relation to each element. While both sides will present their versions or understanding of the "facts", this is only evidence for the SDM to consider. When assessing all the evidence, the SDM must decide two things in order to conclude whether an element of the contravention has been proven:

1. what is relevant (i.e. has some value in proving a relevant fact) and
2. how much weight it carries (i.e. how reliable the source is and how persuasive is it).

The SDM must only consider evidence that is submitted before or during the OTBH that the alleged offender has had the opportunity to respond to.

4.9. Assessing the quantum of the Penalty

The following guidance pertains to the application of section 7 of the APR – the mitigating and aggravating factors that the SDM must consider when calculating the penalty quantum. These factors are intended to assist the SDM to determine an appropriate penalty that:

- reflects the gravity and magnitude of the contravention
- acknowledges the actions the person took before, during or after the incident, and
- creates an effective deterrence against future non-compliance without being excessively punitive.

Giving due consideration to each factor ensures the principled, consistent and fair treatment of affected persons while providing the SDM with the discretion and flexibility to account for the unique facts of each case. Sharing the preliminary assessment of the penalty with the affected

person as part of the Notice Prior to Determination of Administrative Penalty provides transparency and allows the person to understand the case against them, one of the fundamental principles of administrative fairness.

The SDM must 'turn their mind' to all the factors in section 7 and comments to this effect must be made in the Administrative Penalty Notice and the Penalty Assessment Form and/or the Determination. Not all factors will be relevant, and some will be neutral, having no effect on the quantum of the penalty. On the other hand, other factors may be so important that they have a proportionally greater effect on the penalty amount than other factors. All that is required is that the SDM consider each factor – this 'consideration' may amount to a decision that the factor does not affect the penalty amount.

The compliance officer will have presented relevant information on each mitigating and aggravating factor to the SDM in the draft Penalty Assessment Form. The OTBH then presents an opportunity for the SDM to gather further information on the factors – potentially including contrary evidence presented by the person - which may assist in finalizing the penalty amount in the determination.

4.10. Calculating a Base Penalty

There are two factors that together make up the "gravity" component of the penalty: they relate to the type and seriousness of the contravention or failure. Specifically, these factors are the **nature of the contravention or failure** (APR s. 7(a)) and the **real or potential adverse effect** (APR s. 7(b)).

These two factors have been combined in the following tables to assist SDMs to establish a reasonable starting point for the penalty quantum assessment (base penalty). The remaining mitigating and aggravating factors are applied to increase or decrease the penalty from this base amount. The tables are not meant to be prescriptive; that is, they are not binding on the SDM. Rather, the purpose of the tables is to encourage consistency and transparency in assessing penalty amounts. Regardless of the degree to which the base penalty table is followed, the SDM must adequately explain how all the factors in section 7 were considered to arrive at the penalty quantum.

The APR ascribes a maximum penalty to each 'AMP'able' provision in *EMA* and *IPMA* and their regulations. The following **base penalty tables** can be used to determine a based penalty for contraventions with maximum penalties of $10,000, $40,000 and $75,000 respectively.

For contraventions subject to $**10,000** maximum penalty:

	Nature of Contravention or Failure			
Real or Potential Adverse Effects		**Major**	**Moderate**	**Minor**
	High	8,000+	5,000	2,500
	Medium	5,000	3,500	1,500
	Low to None	3,500	2,000	1,000

For contraventions subject to $**40,000** maximum penalty:

	Nature of Contravention or Failure			
Real or Potential Adverse Effects		**Major**	**Moderate**	**Minor**
	High	30,000+	20,000	5,000
	Medium	20,000	10,000	3,000
	Low to None	10,000	5,000	1,000

For contraventions subject to $**75,000** maximum penalty:

	Nature of Contravention or Failure			
Real or Potential Adverse Effects		**Major**	**Moderate**	**Minor**
	Very High	65,000+	40,000	10,000
	High	40,000	20,000	5,000
	Medium	20,000	10,000	3,000
	Low to None	10,000	5,000	1,000

APR s. 7(a): Nature of the Contravention or Failure

The first step in using the base penalty table is to categorize the *nature* of the contravention. This factor refers to the type of contravention, which is linked to how important compliance with the requirement is to the Ministry's ability to regulate discharges or otherwise protect the environment. This factor may also consider how far the person varied from the expected standard of care. In categorizing this factor as minor, moderate or major for the purposes of using this table, the focus should be on the question: *what is the regulatory importance of compliance with this provision, order or authorization?*

Examples:

Minor: generally, refers to non-compliance with administrative requirements such as not providing reports within legislated timeframes; not supplying information at the request of the Ministry; keeping inadequate records. Minor could also refer to minor contraventions of operational requirements that relate to low-risk activities or wastes but where an enforcement response is necessary to motivate operators to quickly restore compliance and change their future behaviour (for example, in the case of chronic non-compliance).

> *Note*: Consider administrative requirements carefully: if a late or missing report is the only insight to the performance of a facility or its pollution abatement equipment, then a late submission would be considered more than of minor interest to the Ministry.

Moderate: refers to failure to perform required tasks or actions such as obtaining approval prior to a bypass, properly installing or maintaining equipment, constructing works or meeting operational standards or requirements; failure to conduct required sampling or studies; failure to undertake required monitoring; failure to develop or follow plans; not adequately consulting with FN or other stakeholders. Minor to moderate exceedance of a discharge limit (for example, 50% or less of the authorized limit) with no sustained impact to the environment or human health may also fall into this category.

Major: the most serious compliance issues that by their nature result a threat to the integrity of the environment or to human health or where non-compliance undermines the basic integrity of the overarching regulatory regime and significantly interferes with the Ministry's capacity to protect and conserve the natural environment. Examples include an unauthorized discharge, exceeding a discharge limit by a significant magnitude (75-100%), operating a high-risk activity without proper authorization, failing to meet key thresholds or values, actions that result in significant pollution, contamination or spills, failing to take emergency response measures.

Major can also include administrative requirements that form the basis of a regulatory regime and government's only way to ensure that regulatory objectives will be met. Examples include failure of a person to provide information (such as a stewardship or operational plan, or a significant monitoring report) or provide/replenish security that is required for long term care and maintenance of a high-risk site.

APR s. 7(b): Real or Potential Adverse Effects

The next step in determining the base penalty is assessing whether the real or potential adverse effects are very high or high, medium or low. These categories relate to the real or potential harm the contravention has on the environment, human health or safety. In categorizing this factor as very high, high, medium or low, for the purpose of using this table, the focus should be on the question: *how serious is the actual or potential harm?*

Potential effects are an important consideration to factor into the gravity of the contravention although they may not be given the same weight as actual adverse effects. The Ministry's mandate is to prevent harm to the environment and human health – not wait to act until something bad has happened. As such, harm that *might* have occurred but for fortuitous circumstances must be considered.

The base penalty table sets out four categories of potential adverse effect. Questions a SDM might ask when considering which category applies include:

- Is the effect real, or only a potential threat?
- If the effect is real, is it temporary in nature, likely to persist or irreversible?
- Is the effect localized or widespread?
- What was the duration of the violation? Did the violation continue after the person was aware of it, or after the Ministry intervened?
- If there is a *potential* for a negative effect, how likely is it? Does it depend on other factors? Do we know or understand those other factors?
- Is the potential effect imminent or something that might happen in the distant future?
- Might serious impacts have occurred if not for fortuitous circumstances (i.e. they got lucky)?
- If the violation is an exceedance of an environmental limit, how toxic is the pollutant and by what magnitude was the authorization exceeded? How sensitive is the environment in the location where the violation occurred?

Examples:

Low to None: the contravention does not result in an adverse effect or interfere with the Ministry's capacity to protect the environment or human health, or the potential to do so is low.

Medium: the contravention interferes with the Ministry's capacity to protect the environment or human health, or has the potential to do so, but does not result in an adverse effect or the potential to do so is moderate. Any effect is localized, short-term and can be mitigated or damage repaired within a reasonable timeframe.

High: the contravention causes an adverse effect that is, or has the potential to be, widespread, persistent, threatening to property or animal health and cannot be restored easily or within a reasonable time.

The following category only applies to contraventions subject to $75,000 maximum:

Very High: the contravention has the potential to cause widespread injury or damage to animal or plant life, harm or material discomfort to any person, an adverse or potentially fatal effect on

the health of any person or impairs the safety of any person. This category would only be used to assess potential risks; if a contravention caused an actual very serious adverse impact on the environment or human health, the Ministry would most likely pursue prosecution.

4.11. Applying the Penalty Adjustment Factors

While the above factors speak to the 'seriousness' of the contravention, the remaining factors in section 7 of the APR refer to mitigating or aggravating considerations that may increase or decrease the amount of the penalty from the base amount. The mitigating and aggravating factors are useful tools, in that they provide the SDM with the flexibility to consider more than simply what happened, including why it happened, whether it has happened before and the person's past and current actions and attitude. With this discretion comes the duty to consider all factors and to articulate reasons for any adjustments (or lack of) to the penalty.

Compliance officers should have provided the SDM with as much information as possible about these factors in the draft Notice of Administrative Penalty and the draft Penalty Assessment Form. The SDM will then have to weigh these factors, in terms of their effect on the final quantum of the penalty. Additional information regarding these factors may be revealed during an OTBH.

The following provides information as to what the SDM might consider when assessing each factor. Most of these factors would either increase or decrease the penalty, but not both (the exceptions are compliance history and 'other factors'). For example, efforts to prevent reoccurrence of the contravention or failure might decrease the penalty, but a lack of effort would not increase it; the exercise of due diligence might decrease a penalty, but the absence of due diligence would not increase the penalty.

APR s. 7(c): Previous contraventions or failures, AMP's imposed or orders issued (+/-)

- This factor could increase or decrease the penalty.
- This factor considers the person's compliance history. This can include 'determined contraventions' - tickets, previous administrative penalties, administrative sanctions and prosecutions - as well as advisories and warnings (although there are conflicting appeal decisions on including the latter). Where a person may not have had an opportunity to respond to the alleged non-compliance, they may challenge its use as an aggravating factor. Orders issued for reasons similar or related to the contravention should also be considered.
- Evidence to support this factor does not include prior enforcement responses to the current contravention. (e.g. an advisory or warning that preceded the AMP). Those provide evidence in support of factor (d) or (e).
- Contraventions under appeal should not be considered.

- When considering the relevance of previous contraventions, consider the degree of similarity and extent to which the previous enforcement action should have deterred the person from doing the same type of thing again.
- The relevance of a positive compliance history (i.e. no past contraventions) in reducing a penalty may be influenced by how long the person has been operating and how many inspections they've had.
- The time elapsed since prior contraventions or the person's response to prior contraventions (e.g. promptness and completeness of corrective action) may also be relevant.
- The compliance officer may have included a list of all non-compliances found in COORS for the company, even those relating to their other operations. This is information an SDM may wish to consider.

APR s. 7(d): Whether contravention or failure was repeated or continuous (+)

- This factor would increase the penalty.
- This factor should be considered differently than the authority granted in section 7(2) of the APR to impose separate penalties for each day a contravention or failure continues. Guidance for the application of 7(2) is provided elsewhere in this chapter. A per day penalty should be reserved for the most significant contraventions that are of short, measurable duration; to apply a daily penalty to contraventions that continued for a long period of time would quickly result in what may be an unjustifiably high penalty.
- A contravention could be considered repeated if the same incident or behavior occurs at two or more separate times. For example, a person has failed to conduct a monthly stack test three times in the past twelve months or failed to report non-compliance to the ministry on multiple occasions. The events are separate, but the contravention is the same.
- Contraventions may be considered continuous from the day the non-compliance is confirmed until the day the person demonstrates compliance, unless the person has evidence that the violation was not continuous (e.g. they have continuous emission monitoring data). Failure to install equipment may be considered a continuous violation, as would failure to comply with obligations that are in force on a particular date (for example, producer responsibilities under the Recycling Regulation).
- If the facts indicate that the repeated or continuing nature of the contravention should have alerted the person to the contravention and the need to stop, but the person continued nevertheless, this would justify a higher penalty.

APR s. 7(e): Whether contravention or failure was deliberate (+)

- This factor would increase the penalty.

- Knowledge, willfulness and intent are indicators of deliberateness.
- Questions the compliance officer may ask include:
  - Does the ministry have evidence that the person was aware of the requirements (conversations, inspections) or that they took deliberate actions that caused or failed to prevent the contravention?
  - Did the contravention or failure continue despite warning(s) or an order by the ministry?
  - How far did the person depart from a reasonable standard of care?
- Actual intent may be difficult to prove (and my only be possible through an investigation) but the conduct may be so poor as to indicate that the person was willfully blind to the potential for the contravention and just didn't seem to care. How much control did the person have over the events that constituted the violation? How predictable was the outcome of their action or inaction?
- Suspicions about the integrity of the person or their motives are not a sound basis for a finding of deliberateness. Evidence is required.
- Previous enforcement responses for the same non-compliance (e.g. an advisory, warning or violation ticket) demonstrates the party was aware they were out of compliance.

APR s. 7(f): Economic benefit derived by the person from the contravention or failure (+)

- This factor would increase the penalty, potentially by a significant magnitude.
- Removing economic benefit is one of the most important objectives of an AMP. It sends a message to operators as well as the public that it is not ok to profit from breaking the law; the intent is to deter individuals and companies from taking their chances of getting caught, by ensuring the consequence (penalty) is equal or greater to the benefit of not complying.
- Even if the SDM chooses not to account for the economic benefit in the penalty quantum, he/she is required to consider it before levying a penalty. Therefore, the SDM may want to ask questions during the OTBH about any economic benefit so it can be factored into the Determination.
- There are several ways the alleged offender can obtain an economic benefit from non-compliance: by avoiding compliance (avoided costs), delaying compliance (delayed costs), through direct profit obtained by selling products or services or by achieving an illegal competitive advantage.

Avoided costs are costs that the regulated person avoided incurring by failing to comply with a requirement. Avoided costs may apply when there is a requirement that must be complied with on or by a certain date and once that date passes, cannot be complied with on a future date. Examples of violations that enable a person to permanently avoid certain compliance-related costs are:

This material extracted from *Determination and Application of Administrative Fines for Environmental Offences: Guidance for Environmental Enforcement Authorities in EECCA Countries. OECD (2009).*

- Costs savings for operation and maintenance of existing pollution control equipment;
- Failure to employ enough adequately training staff;
- Failure to establish or follow management practices (including self-monitoring) required by regulation or their authorization;
- Laboratory analysis costs saved by not doing sampling over a period of time;
- Improper treatment or disposal of waste.

Delayed costs are costs that the person delayed incurring, allowing them the use of the money that should have been spent on achieving compliance. Although they eventually comply, there is an economic advantage associated with delaying the expenditures until the Ministry takes enforcement action. Examples of violations that result in a savings from delayed costs are:

- Delayed capital investments such as the installation or upgrade of equipment;
- Delayed process changes needed to eliminate pollutants from products for waste streams;
- Delayed testing that is required to verify compliance;
- Improper storage of waste;
- Failure to obtain necessary authorization (saving include conducting studies, preparing an application, application fee);
- Delayed preparation of spill prevention or contingency plans.

– The actual dollar amounts, such as the savings derived from not following the regulations, are the best evidence. When direct evidence is not available, the compliance officer may have estimated the values using the best evidence that is available. If the officer was unable to provide a reasonable estimate, the SDM may assign a value based on a description of the most likely economic benefit.

– While under-estimating economic benefit is counterproductive, over-estimating may result in an appeal. SDMs should ensure that estimates of economic benefit can be substantiated.

- *However*: the test for estimating economic benefit is one of **reasonableness**. Provide a best estimate based on a defensible methodology. Making a wildly unsubstantiated claim is likely to be quashed by the appeal board and embarrassing for the SDM; conversely, supporting the estimate with sound reasons will likely be upheld. Further, the estimate of economic benefit is significantly off base, the party will either be silent (which is useful information) or provide contrary evidence during the OTBH which the SDM can then use to adjust the penalty.

APR s. 7(g): Exercise of due diligence to prevent the contravention or failure (-)

- This factor would **decrease** the penalty.
- *Black's Law Dictionary*, 10th ed., defines due diligence as "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation".
- The Ministry's AMP regulation creates an *absolute liability* penalty regime. This means that due diligence is not an outright defence as it may be in a court of law when a person is charged with a statutory offence. Section 6 of the APR makes it clear that regardless of whether a person exercised due diligence, they may still be held liable for a contravention.
- However, the SDM must consider due diligence in deliberations on the quantum of the penalty and reduce the penalty if the person provides persuasive testimony or evidence that they exercised due diligence the penalty. The extent of the reduction would depend on how compelling their evidence is and its weight relative to other factors the SDM must consider, including their compliance history, immediate efforts to contain or correct the problem and prevent it from happening again, and whether there were any environmental or human health impacts that need to be accounted for.
- If the contravention resulted from a lack of due diligence – for example, failure to conduct routine maintenance – this would be noted in this section, but it would not increase the penalty (it would only justify no reduction for due diligence).
- There is considerable case law relating to what constitutes due diligence. It is generally accepted there are two parts (based on Supreme court of Canada decision in *Regina v. city of Sault Ste. Marie, 1978*):
  - Did the accused have an honest and reasonable belief in a **mistaken set of facts**, which if true, would render the act or omission innocent, **or**
  - Did the accused person take all **reasonable** steps to avoid the event, based on what a prudent person would have known or done?

Some questions that the SDM might ask to determine if the person exercised due diligence include:

- What studies or examinations, if any, would a prudent person have done?
- What qualified professionals would have been engaged by a prudent person?

- What kind of training and guidance would have been provided on the ground by a prudent person?
- What level of monitoring would have been carried out by a prudent person?
- Is there a commonly acknowledged standard of care in the industry?
- Did the person fail to fulfil their obligations despite a clear record of communication with the Ministry where those obligations were confirmed?
- How foreseeable was the risk? A greater degree of care can reasonably be expected when work is done near a sensitive habitat or a source of human water consumption, for example.
- *Reasonable foreseeability* does not require foresight of an *exact* sequence of events, but rather enough to generally foresee a potential danger.

– The question of whether a company can argue due diligence when the actions of an employee result in a contravention depends on whether the company exercised all reasonable care, such as providing adequate training and establishing adequate systems to prevent the contravention. The courts have said that employee negligence is foreseeable (i.e. employee error is not a defence to a contravention) but *flagrant* breaches of basic rules might not be reasonably foreseeable, and could therefore suggest that due diligence was exercised.

APR s. 7(h): Efforts to correct the contravention or failure (-)

– This factor would **decrease** the penalty.

– This factor considers what the person did *after* the contravention or failure to restore compliance or reverse or mitigate the impacts.

- Did the regulated person do *everything practical* to prevent, eliminate and ameliorate the adverse effects and to repair any damage; or
- Did the regulated person take some *steps* that had some effect in preventing, eliminating and ameliorating the adverse effects or in restoring the environment; or
- Did the regulated person *fail to take any effective steps* to prevent, eliminate or ameliorate the adverse effects or to restore the environment?

– If the person has taken some action to correct the contravention it should be recognized. This does not have to include an expenditure of funds, but a sincere effort should be demonstrated.

APR s. 7(i): Efforts to prevent reoccurrence of the contravention or failure (-)

– This factor would **decrease** the penalty.

– This factor considers whether the person has taken any action to avoid a repeat of the contravention or failure in the future.

- Has the person addressed the failure to ensure it won't happen again? For example, did they repair equipment or works, put in place supporting policies, provide training, etc.
- If the person has not yet taken any action but has demonstrated a solid plan and the capacity to follow-through, a reduction to the penalty may still be in order.

APR s. 7(j): Any additional factors that are relevant (+/-)

- These additional factors may **increase** or **decrease** the penalty
- Other factors that the SDM may consider (but are not limited to):

Self-reporting: Did the person self-report the violation?

Cost to government: Did the contravention result in damage to the environment that government had to pay (for example, emergency response was required rather than ordering the person to do the remediation)? Alternatively, did the person spend significant resources in relation to responding to the contravention?

Cooperation: How cooperative has the person been? Examples of being uncooperative include actively evading contact with the investigator; attempting to hide evidence or obstructing the investigation; not providing a statement to investigators; refusing to give evidence that was in the power of the person to give. Cooperative behaviour may be rewarded by the SDM by reducing the penalty; an uncooperative attitude may signal that a higher deterrent is required to deter future uncooperative behaviour.

Remorse: what is the attitude, or degree of remorse of the offender? How has this been demonstrated?

Ability to pay: Although this is not one of the factors must consider, it is reasonable and appropriate for the Ministry to be sensitive to this when imposing a penalty. The penalty must be sufficient to motivate future compliance (remove economic incentives to break the law) but not be considered excessively punitive. Penalties for individuals and small operators should be lower than for companies (many AMP regimes prescribe different penalty levels to recognize this). Penalties that are large compared to a facility's resources could put an otherwise sound operation at risk.

Financial impact: Related to ability to pay, the SDM may consider the financial impact on the person of other administrative remedies related to the contravention (such as a stop work order or preventative measures required by a pollution abatement order) as these may impose significant financial obligations on the person, such that the additional imposition of an AMP may have significant financial consequences.

4.12. Other Considerations in Establishing a Penalty Amount

Deterrence vs. Punishment or Retribution

- The main purpose of an administrative penalty is to demonstrate that breaking the law has consequences, and to motivate the person to improve their standard of behaviour or

performance level. Although imposing a penalty on someone may be viewed punishment, it is not punishment imposed as retribution (payback or revenge) but rather to promote deterrence and future compliance.

- Keeping this in mind, the main question to be answered when assessing the penalty is *'How much of a penalty is required to bring the person up to a higher standard so they are unlikely to do the same thing again'*? Anything short of this will not be an effective deterrent, but anything more than this may be considered retribution.
- A 2015 Supreme Court decision (Guindon v. Canada) has advanced the thinking about AMPs, addressing a previous concern that high penalties could be interpreted as 'penal consequences' and invoke Charter rights. The Decision included the following:
  - AMPs do not impose a true penal consequence i.e.: AMPs are not imposed for wrong done to "society at large", rather simply to "secure compliance".
  - Magnitude of penalty is not a determining factor to choose between AMP and prosecution. i.e. in some cases, high penalties are necessary as long as the penalty reflects the objective of deterring non-compliance.
  - AMPs are "constitutionally legal". No need for Charter protection under AMP schemes (providing there is procedural fairness and a review mechanism).
- For some parties concerned about social license or certification, the finding of a contravention itself (and subsequent public reporting) may serve as at least a partial deterrent as might the time and expense of responding to the allegations.
- To be a true deterrent, the administrative penalty must go beyond simply restoring compliance or companies may be more likely to take their chances on getting caught and only comply when they are caught.

Specific vs. General Deterrence

- Specific deterrence targets the individual person. It is an attempt to bring the person up to a higher standard.
- General deterrence targets industry and the public generally. It is intended to send a message to the general population, especially those who might engage in the kind of activity that led to the contravention, that the conduct is unacceptable.
- General deterrence should always be considered to discourage similar behaviour in others. For example, imposing too low a penalty might be misconstrued as a license to break the law or an indicator that the Ministry does not take such contraventions seriously.

4.13. Compliance Agreements

Both *EMA* s. 115 and *IPMA* s. 23 allow the SDM to enter into an agreement with a person who is liable for an AMP. Even though the APR does not address this, the option is available *at the sole discretion of the SDM*. Specifically:

- After the SDM makes a Determination, but before the AMP is due, the director *may* enter into an agreement;
- The agreement may result in the reduction or cancellation of the penalty subject to terms and conditions the director considers necessary or desirable;
- An agreement must specify the time for performing the terms and conditions, and if the person fails to perform them by the date, the penalty specified in the Determination is due and payable on that date;
- Neither the director's decision to enter into an agreement, nor the terms or conditions of the agreement, are appealable.

From time to time, there may be circumstances where the SDM feels an agreement will better serve the program's compliance objectives; however, this is the exception rather than the rule. The benefits of an agreement must be carefully weighed against the time and effort required to construct and monitor the agreement. In most situations, the person has been given several opportunities to come into compliance before the ministry's response escalates to an AMP; creating another 'off ramp' threatens the efficacy of AMPs in creating specific and general deterrence and sets precedence. Some jurisdictions consent to agreements only when their terms and conditions will implement measures beyond those required by the law (i.e. they will deliver benefits greater than just being in compliance).

4.14. Writing AMP Determinations

The Administrative Penalty Regulation requires that the SDM explain and justify their determination of non-compliance. A well-reasoned and written determination is a testament to a fair process and reasonable decision while a poor one can undermine an otherwise sound process and outcome.

Providing reasons for the determination serves several important purposes:

- It provides transparency about the process and demonstrates to the affected person that the SDM understands what has transpired and that the issues and evidence have been properly and fairly considered.
- It reduces likelihood of an appeal if the person not only understands the decision but also feels the decision was fair, even if they don't agree with it.
- If the determination is appealed, a well written determination will be invaluable to refresh the SDMs memory, particularly if a significant period has passed waiting for the appeal to be heard.
- It may increase regulatory compliance by helping the person understand what is required to meet the requirements of the legislation or authorization.
- It provides useful guidance for other SDMs considering similar cases and can increase the consistency of decisions within the program.

The courts have observed that the duty to provide reasons is only satisfied if the reasons are *adequate*, which does not mean simply reciting the submissions by the parties and stating a conclusion. While writing the determination, the SDM acts in a quasi-judicial capacity and engages in legal analysis. To satisfy the obligation to provide adequate reasons the SDM must:

- set out the elements of the contravention or failure
- show that they focused on the facts before them
- provide the principal evidence upon which those facts were based
- address all the relevant major points at issue
  - it is not necessary to repeat all the information provided in the Notice. Focus on points of disagreement between the Ministry and the party, on any new information brought forward during the OTBH and on any changes to how the factors are applied in the calculation of the penalty.
- show their chain of reasoning (how the decision was reached).
- provide a sound rationale for the conclusions.

Further, a good determination will:

- provide all key dates, events and names
- be concise and error-free
- consider the literacy needs and abilities of the person involved
- follow a logical flow
- be concluded in a timely fashion
- include an explanation of any changes to how the mitigating and aggravating factors were applied in the final penalty calculation, for example if the SDM decided to give more or less weight to a particular factor based on evidence presented in the OTBH.
- address any areas of disagreement between the ministry and the person, should describe the evidence considered (or extraneous information not considered) and should result in well-reasoned findings of fact, proven on a balance of probabilities.

SDMs are cautioned against being too wordy, repetitive or overly detailed when summarizing the evidence in the determination; the details of the contravention and the key elements of the Ministry's case will have been laid out in the PAF. This information should not be repeated in the determination except in summary fashion as the SDM articulates their analysis and conclusions. Be careful not to "over-write": deal only with what is necessary to explain the decision and the rationale.

Well written decisions will be invaluable to the SDM if the determination is appealed.

Additional information on writing good decisions is provided by the Ministry of Justice here:

4.15. Service

SDMs are required to provide formal notice when issuing both a Notice Prior to Determination of Administrative Penalty and a Determination. The rules for service are governed by s. 133 of *EMA* and s. 35 of the *IPMA*. These provisions dictate that anything served on a person should be served by registered mail to the last known address of the person. If notice is sent by registered mail, the notice is deemed to be served on the person on the 14th day after it has been deposited with Canada Post, unless the Ministry has confirmation that the person received actual service before this day (e.g. Canada Post tracking documentation).

4.16. Timelines: OTBH, Making and Correcting Determinations, Appeals and Payment

The APR has established the following timelines for various aspects of the AMP process:

1. A person must request an opportunity to be heard within 30 days after the day they receive a Notice of Administrative Penalty: APR s.3.
2. Corrections to a Determination must be made within 15 days of the date the initial Determination is made: APR s. 5.
3. If a person wants to appeal a Determination, they must do so within 30 days after a Determination has been made: s. 14(4) *IPMA*, s. 101 *EMA*)
4. Administrative Penalties must be paid within 30 days after the later of the day the Determination was served on a person, the date a person receives notice of a correction to a Determination or, where there has been an appeal, the day the person receives a copy of the order or decision of the appeal board confirming or varying the penalty, or the day a new Determination is made if the appeal board has send the decision back to the SDM: APR s. 8.
5. A Notice of Administrative Penalty must be served within 3 years of the later of a) the date the alleged contravention occurred or b) the date the evidence of the alleged contravention first came to the knowledge of the administrator: APR s. 10 *IPMA*, s. 11 *EMA*.

For the purposes of counting days, the *Interpretation Act*, s. 25 governs.

The following rules apply:

- Calendar days, not business days, are counted
- In the calculation of time the first day must be excluded and the last day included
- If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday

- If the time for doing an act in a business office falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open.

If in doubt about the counting of days, SDMs should err on the side of being generous with their counting rather than restrictive.

4.17. Preparing for an Appeal

If a person chooses to appeal an administrative penalty, the Environmental Appeal Board will provide a copy of the notice of appeal and any documents included with it to the SDM (respondent), or directly to the SDM's representative if directed to do so. In most cases the SDM will be represented by legal counsel from Legal Services Branch.

The Board will decide whether a hearing will be conducted orally, by way of written submissions, by telephone or videoconferencing, or a combination of these. If the Board schedules an **oral hearing**, it will notify all participants of the date, time and location (or dial-in directions) via a "notice of hearing". If a **written hearing** is scheduled, the Board will notify the participants of the submission schedule. This typically includes:

- a date for the person (appellant) to submit comments and pertinent documentation;
- a subsequent date for the SDM (respondent) to submit written responses to the appellant's initial comments; and
- a final date for rebuttal comments from the appellant.

In consultation with the SDM, all the materials will be prepared and submitted by Legal Counsel.

Note: check the date when the appeal was filed carefully. The appeal must be filed within 30 calendar days of when the party received the Determination of Administrative Penalty, as confirmed by the Canada Post or process server

4.18. Freedom of Information and Protection of Privacy (FOI) Considerations

From time to time the ministry receives requests for information relating to enforcement actions taken (or not taken), and this may include requests for AMP records. The ministry is authorized in section 6.1 of the *Ministry of Environment Act* to disclose information about an AMP including the person's name and location, a description of the non-compliance, the amount of the AMP and whether the AMP was paid. This information is routinely published in the ministry's Quarterly Environmental Enforcement Summary.

Providing the ministry is not disclosing personal information other than the type of information described in the *Ministry of Environment Act* s. 6.1.(1), privileged information (advice from lawyers, Cabinet confidences) or confidential business information, there are no restrictions on disclosing information in relation to an AMP that has been issued. The Notice, Penalty

Assessment Form and/or attachments may be disclosed, but all requests must be examined with the *FOIPPA* lens regardless of whether they are received through formal FOI channels.

If a request for AMP records contains information that the ministry believes might be excepted from disclosure under *FOIPPA* (e.g. personal or business info), the requirement to give notice to the party applies (*FOIPPA*, s. 23). After giving the party an opportunity to respond, the ministry may or may not decide to release the information.

In relation to all enforcement action records, the exception referred to in *FOIPPA* s. 15 (disclosure harmful to law enforcement) is likely only triggered when there is an investigation (i.e. an adversarial search for evidence distinct from an inspection or AMP process aimed at verifying compliance and encouraging corrective action). This means that an active inspection or AMP file may be subject to release even while an officer or SDM is still deliberating. However, it is useful to note two other sections of *FOIPPA* that may apply in the event of a request for enforcement records:

s. 20(1) *Information that will be published or released within 60 days* – the SDM can refuse to release information that will be later released. However, the ministry has to notify the applicant when the information is available.

s. 3 (1)(b) Scope of the Act – the Act does not apply to *a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity*. This is broadly interpreted in judicial realms as 'deliberative privilege' (which is distinct from *reasons for decision*). Deliberative privilege protects records that show the thinking processes of judges, and the principle has been extended to administrative decision makers through case law.

Additional Resources

The following resources are available here: iComply

Templates

- Notice Prior to Determination of Administrative Penalty
- Penalty Assessment Form (PAF)
- Determination
- Cancellation of Notice
- Expedited AMP

Other Resources

- Administrative Penalty Fact Sheet (to provide information to regulated persons)
- Checklist for Issuing Admin Penalty (summary of key requirements of the process)
- Checklist for Admin Assistants
- OTBH Guidelines for Oral Hearings
- OTBH Guidelines for Written Submissions
- Guidance for Staff Preparing for OTBH
- OTBH SDM Script and Checklist
- Best Practices tips (feedback from SDMs)

Frequently Asked Questions

1. What is an administrative penalty?

An administrative penalty (AP) is a monetary penalty that can be imposed by the Ministry on a party who has not complied with a requirement of the *Environmental Management Act* or the *Integrated Pest Management Act* or their respective regulations, with an enforcement order or with the terms or conditions of an authorization such as a permit, licence or approval.

2. How are administrative penalties different from other enforcement tools that the Ministry currently uses?

An administrative penalty is an administrative (rather than prosecutorial) remedy that is imposed by a designated ministry official rather than the court, resulting in a more certain, timely and cost-effective response to non-compliance. Unlike 'one size fits all' violation tickets, APs allow the Ministry to consider a range of mitigating and aggravating factors when establishing the amount of a penalty to ensure that it appropriately reflects the seriousness of the violation and provides an adequate deterrence against future non-compliance.

3. Why did the Ministry implement administrative penalties?

Ministry staff need access to a range of enforcement mechanisms to ensure compliance. The Ministry learned from examining the AP programs of other regulatory agencies that APs are a timely, flexible and effective way to achieve compliance goals. APs fill a gap in the continuum of enforcement tools that are currently available to the Ministry, occupying a middle ground between warnings and violation tickets issued for minor offences, and court prosecutions for major violations. APs help to relieve pressure on the courts by providing an alternative remedy when prosecution of a significant contravention is not in the public interest. They will also allow the Ministry to enforce administrative requirements (such as submitting data or reports on time) where non-compliance may not present an immediate environmental risk, but nevertheless, undermines the integrity of the regulatory regime.

4. How did the Ministry develop the administrative penalties regime?

The Ministry did extensive research of existing AP schemes within B.C. and across Canada and reviewed numerous legal briefs that have been written on administrative enforcement tools. Ministry staff consulted with agencies that have a history of using APs and, with the benefit of their insight and experience, developed a principled, transparent program that will be consistent and fair for the regulated community while strengthening the Ministry's ability to achieve regulatory compliance.

5. Are administrative penalties a new type of enforcement tool?

Although new to the Ministry, administrative penalties are used by regulatory agencies within B.C. and across Canada to encourage compliance among the regulated community. Within the natural resource sector in B.C., APs have been used in the forest sector for many years and more recently have been introduced in the oil and gas sector. Alberta, Saskatchewan and Ontario environmental agencies all use administrative penalties, and they are used extensively by the federal government in the enforcement of environment-related statutes.

6. How does the Ministry make the decision to use an administrative penalty rather than another response to non-compliance?

The Ministry's Compliance and Enforcement Policy guides staff in choosing the most appropriate response to non-compliance. Staff consider the magnitude of the real or potential harm caused by a non-compliance and the likelihood of achieving compliance, which takes into consideration factors such as the party's efforts to prevent or correct the non-compliance and their compliance history. Each case is assessed on its own merits to determine the most appropriate response to bring the party back into compliance, address any environmental or human health impacts and create positive behaviour change.

7. Which violations may be subject to administrative penalties?

Contravention of any legal requirement in the *Environmental Management Act* or the *Integrated Pest Management Act* or their regulations may be subject to an AP. Specifically, the AP regulations list the requirements in the Acts and regulations that, if contravened, may result in a penalty and the maximum penalty that can be imposed for each contravention. Examples from the broad range of contraventions include:

- Discharging waste without a required authorization or in contravention of a regulation or Code of Practice
- Releasing a substance into the environment in an amount exceeding that permitted under an authorization or regulation
- Not complying with facility construction, maintenance or operating requirements specified in a regulation
- Submitting a monitoring report late

This does not mean that a penalty will be imposed in all cases, nor does it mean that the maximum penalty will be applied. Guided by enforcement policy and the admin penalty regulation, ministry staff will consider the facts and circumstances of each case to determine whether an AP is appropriate, and if so, the amount of the AP that reflects the gravity of the non-compliance and that is likely to encourage future compliance.

8. Will penalties be automatic in response to non-compliance?

No. Unlike some other jurisdictions that utilize automatic penalties (for example, when a permitted discharge level is exceeded), this is not the case under the Ministry's penalty program. Ministry policy dictates that staff take a risk-based approach to assessing and responding to non-compliance. In effect, this means that when faced with a regulatory contravention, staff consider the real or potential impacts to the environment or human health and safety and the likelihood of achieving compliance using a range of tools. Their first goal is to achieve voluntary compliance; where this is not possible, staff select the enforcement response most likely to achieve the desired outcome – restoring compliance and deterring future non-compliance.

9. Which Ministry staff are authorized to impose administrative penalties?

Only designated ministry officials impose the penalties, working in consultation with field staff who conduct inspections or encounter non-compliance while conducting their duties. Only a limited number of staff have this delegated authority.

10. How is the amount of a penalty calculated?

Maximum penalty limits are prescribed in the AP Regulation. Consistent with the approach taken under other provincial natural resource legislation such as the *Oil and Gas Activities Act* and the *Forest and Range Practices Act*, contraventions are grouped into four maximum penalty categories that reflect the real or potential risk that the contravention poses to the environment or human health and safety. There are no minimum penalties prescribed – regardless of which maximum applies, the penalty quantum can range from $0 to the maximum depending on specifics of the file. Unlike 'one size fits all' violation tickets, when

calculating a penalty the Ministry considers a range of mitigating and aggravating factors (specified in the AP regulation) to arrive at a penalty that is commensurate with the seriousness of the violation.

11. How does the Ministry ensure that administrative penalty decisions will be fair?

The AP scheme has been designed to uphold the principles of administrative fairness. The AP regulations specify which contraventions may be subject to a penalty, the maximum penalty that can be imposed and the process to be followed. The penalty notice issued to the party provides the facts on which the penalty assessment is based and the factors that the decision maker considered when calculating the penalty. An 'opportunity to be heard' offers the party the chance to tell their side of the story or supply additional information that the decision maker may not have considered. Further, APs can be appealed to the Environmental Appeal Board.

12. What if a party doesn't agree with the penalty?

The administrative penalty process will offer the affected party an opportunity to be heard (OTBH), through a written, oral or electronic submission, to provide any information they feel the decision maker may have missed during the preliminary penalty assessment. The decision maker will consider this information before making a final determination whether to impose the penalty and the amount of the penalty. If the party still does not agree with the penalty, they can appeal the decision to the Environmental Appeal Board (EAB). The EAB will determine if the appeal has merit and if so, will hear the appeal and decide to uphold, vary or cancel the penalty.

13. How do administrative penalties affect business?

Reputable individuals and businesses benefit from the use of administrative penalties which are viewed as a fair and equitable approach to enforcement. APs help to 'level the playing field' by imposing penalties that reduce or eliminate the extent to which some operators can break the law to gain a competitive advantage. The ministry's AP regime brings greater predictability and increased consistency to the treatment of non-compliance within the B.C. natural resource sector as it brings the Ministry in line with its primary regulatory partners. The Ministry is now better equipped to administer 'swift and certain' measures against individuals and businesses that refuse to comply.

14. Does the Ministry use administrative penalties to respond to all non-compliance now?

No, administrative penalties are just one enforcement tool the Ministry uses to respond to non-compliance. APs complement other types of regulatory sanctions used by the Ministry as part of its enforcement regime, including advisories, warnings, violation tickets, orders, licensing sanctions, restorative justice and prosecution.

15. Can administrative penalties be used with other enforcement tools?

Administrative penalties can be issued in conjunction with an order or in response to continued non-compliance following the issuance of an advisory, warning or violation ticket. However, if the Ministry issues an administrative penalty to a party, a prosecution for the same contravention may not be brought against the person. Similarly, a party who has been charged with an offence under the Acts cannot be subject to an administrative penalty in respect of the circumstances that gave rise to the charge. However, if an administrative penalty is imposed in relation to a contravention, and the contravention continues afterwards, a prosecution could be brought against the party in relation to the part of the contravention that continued after the imposition of the administrative penalty.

16. Will the public know who has been issued an administrative penalty?

Yes, consistent with its current practice to report enforcement actions, the Ministry records all administrative penalties in its publicly searchable Natural Resource Compliance and Enforcement Database and reports

them in the Quarterly Environmental Enforcement Summary. This includes naming the individual(s) and business who received the penalty, the amount of the penalty and the circumstances of the contravention.

17. Some other agencies in B.C. have authority to enforce the *Environmental Management Act* (EMA). Do they impose APs?

Only designated decision makers are able to impose APs under this regulation. Other agencies who have delegated authorities under EMA are not able to impose penalties unless they are explicitly delegated under the appropriate Act. Enforcement staff in these agencies work in partnership with ministry staff to deal with contraventions where they feel an AP is the appropriate remedy.