Administrative Penalties Guideline

The Resource Recovery and Circular Economy Act, 2016 (the "RRCEA") and Ontario Regulation [558/22] ("AP Regulation") provide the Resource Productivity and Recovery Authority ("RPRA") with the power to impose administrative penalties as a tool to help ensure compliance with the regulatory scheme. This guideline is designed to explain what administrative penalties are, how the AP Regulation works, and the criteria that the Registrar and Deputy Registrar will use when making decisions about administrative penalties.¹

This guideline should not be considered as legal advice. It does not have the force of law, nor is it binding on RPRA. In the case of a conflict or ambiguity between this guideline and the RRCEA and its regulations, the legislation prevails.

What are administrative penalties and when will they be issued?

Regulated parties that fail to follow certain requirements in the RRCEA or its regulations may face compliance or enforcement action by RPRA. Compliance and enforcement decisions are guided by RPRA's Risk-Based Compliance Framework. Administrative penalties are one of many tools in the Framework that may be used to achieve compliance.

Administrative penalties are monetary penalties that RPRA can impose, as an alternative to court proceedings, for certain contraventions under the RRCEA and its regulations.² It is not the same as a court-imposed fine which requires a finding of guilt. Unlike when charges are laid, there is no criminal or quasi-criminal element when administrative penalties are imposed. By using an administrative penalties system of enforcement, RPRA is able to provide a more accessible. efficient, and effective method of resolving violations of the RRCEA and its regulations by focusing on compliance rather than punishment for unlawful activity.

Administrative penalties are used as a method to encourage compliance, and they help support the individual producer responsibility requirements for managing waste associated with products and packaging. Administrative penalties help (1) deter non-compliance, (2) ensure that there is a level playing field in Ontario for businesses that have waste reduction or resource recovery obligations, and (3) protect the provincial interest in having a system of resource recovery and waste reduction.

Sections 89 and 90 of the RRCEA set out the framework for administrative penalties. The AP Regulation provides greater detail on how the administrative penalties compliance tool will work.

Subsection 89(2) of the RRCEA and the AP Regulation specify contraventions that may be subject to administrative penalties including, but not limited to:³

- Failure to meet resource recovery performance targets for a designated material;
- Failure to respond to information requests from the Registrar, Deputy Registrar, or an inspector;

¹ RPRA may also impose administrative penalties under the Waste Diversion Transition Act. 2016. This guideline applies only to penalties imposed under the RRCEA. ² See Sections 89 and 90 in the RRCEA.

³ For a complete listing of contraventions that are subject to administrative penalties, and limits on the amount of the base penalty for each contravention, please see the schedules in the AP Regulation.

- Failure to submit reports on time; or
- Submitting incomplete, inaccurate, or misleading information through the Registry.

Note that under the RRCEA, administrative penalties are determined on an absolute liability basis. This means that you may be required to pay the penalty even if you took all reasonable steps to prevent the contravention, or even if you had a mistaken but honest belief that you were not committing a contravention.

Who is subject to an administrative penalty?

Any person who fails to comply with requirements identified in the schedules to the AP Regulation may be subject to an administrative penalty. This includes both corporations and individuals. For example, producers that supply designated materials into Ontario or service providers that perform activities related to resource recovery or waste reduction, may be subject to administrative penalties.

What is the process for issuing an administrative penalty?

The AP Regulation sets out a process for how administrative penalties can be issued. The decision to issue an administrative penalty and the amount of the penalty is always subject to the independent discretion of the Registrar or Deputy Registrar, and any limitations set out in the RRCEA and the AP Regulation.

Step 1: Notice of Intention to issue an Order

Before a final Administrative Penalty Order is issued, the Registrar or Deputy Registrar will first serve a Notice of Intention to issue an Order to the person who will be subject to the penalty.

A Notice of Intention is a preliminary step that must contain:

- The name of the person to whom the Order is issued
- The contravention that was committed and when it was committed
- The proposed amount of the monetary penalty, and how the penalty was determined
- If the contravention is continuing, information about the continuing nature of the contravention
- Information about the right to request that the Registrar or Deputy Registrar consider additional information before issuing a final Order

Step 2: Request to consider additional information

If you receive a Notice of Intention to issue an Order, you then have an opportunity to request that the Registrar or Deputy Registrar consider additional information before they decide to issue the Administrative Penalty Order. You may request that the Registrar or Deputy Registrar consider additional information related to the contravention, the determination of the penalty amount, or any actions you have taken to remedy the contravention since it occurred. All additional information and supporting documentation that you want the Registrar or Deputy Registrar to consider should be included with your request.

Your request must be made in writing no later than 21 days after the date on which the Notice of Intention (or an amended Notice of Intention, where the Registrar or Deputy Registrar has

amended the Notice), was served on you. Your request can be sent using the methods identified in the Notice of Intention. There is no mandatory form for the request.

The penalty amount is divided into two components: (1) the base penalty amount and (2) the economic benefit penalty amount. The base penalty amount is not meant to be punitive. If there are reasons to believe that the base amount is punitive, this would be important information to include in your request. If it is determined that, having regard to all the circumstances, the base penalty is punitive and not reasonable, the penalty could be reduced so that it is consistent with the two purposes for administrative penalties set out in s. 89(1) of the RRCEA: to ensure compliance, and to prevent economic benefit from the contravention.

The economic benefit component of the penalty is, by its nature, non-punitive. Instead, it helps remove economic incentives to break the law.

See below for more information on how penalty amounts will be set.

Step 3: Finalizing the administrative penalty decision

After a request to consider additional information has been received, or 21 days after a Notice of Intention has been served, whichever is sooner, the Registrar or Deputy Registrar will decide whether to issue an Administrative Penalty Order.

If a request to consider additional information has been received on time, the Registrar or Deputy Registrar will consider the information before deciding to issue an Order. If the Registrar or Deputy Registrar decides to issue an Order, they will serve the Order on the person subject to the penalty. The Order will describe the decision, the contravention, the amount and details of the monetary penalty, and information about how to appeal the Order.

If the Registrar or Deputy Registrar decides not to issue an Order, the person who received the Notice of Intention will be notified.

Payments will be made through the Registry. Typically, an Administrative Penalty Order will allow 30 days for payment. If the payment is past due, the Registrar or Deputy Registrar may take steps to enforce payment.

Step 4: Posting Orders on the Registry

Administrative Penalty Orders will be posted to RPRA's Registry, which can be found at: www.rpra.ca.

If an Order is appealed, the fact of the appeal and its eventual result will be noted on the Registry.

Step 5: Appealing the Order

You have the right to appeal an Administrative Penalty Order to the Ontario Land Tribunal ("OLT"). By appealing an Order to the OLT, the Order will be temporarily stayed until a decision is rendered. The RRCEA sets out several rules regarding appeals from Orders made by the Registrar or Deputy Registrar in Sections 91 to 97 of the Act. Information about the appeals process, including the Tribunal's detailed rules of practice can be found on the OLT website.

Appeals before the OLT are treated as new hearings. The Tribunal may confirm, vary, or revoke the Order. However, the Tribunal has the authority to alter the amount of the penalty that was ordered <u>only</u> if it considers the amount to be unreasonable.

How is the penalty amount determined?



Base penalty

The base penalty is subject to a maximum amount set out in the regulation. The economic benefit penalty has no pre-set maximum. This is because it is intended to recover whatever costs were delayed or avoided, or whatever gains were accrued by the person subject to the penalty.

These two components of the penalty, taken together, help ensure that a regulated entity cannot gain a competitive advantage in the market by choosing not to comply.

The AP Regulation requires that the total amount of a penalty (the base amount combined with the economic benefit amount) cannot exceed \$1 million. Additionally, a person cannot be subject to more than \$1 million in penalties in the same year for the same continuing contravention.

1. The base penalty

The AP Regulation establishes maximum base penalty amounts for each contravention, which are different for corporations and individuals. The base penalty maximums are specified in the Schedules to the regulation. The regulation also sets out factors that will be considered when setting the penalty.

a) Factors in determining the base penalty:

The AP Regulation sets out three factors that the Registrar or Deputy Registrar must consider when determining the base penalty:

- i. The contravention's impact on RPRA's ability to carry out its objectives.
- ii. The contravention's impact, if any, on resource recovery and waste reduction.
- iii. With respect to the person who carried out the contravention,
 - (a) the person's history of compliance under the RRCEA or the *Waste Diversion Transition Act, 2016* (WDTA), and
 - (b) any information available to the Registrar regarding whether the person has remedied the contravention or is in the process of remedying the contravention, and how quickly the contravention was or is being remedied.

The Registrar and Deputy Registrar will apply the first two factors using an impact scale. The greater the impact of the contravention on the ability of RPRA to carry out its purposes, and on resource recovery and waste reduction, the greater the penalty will be (up to the maximum amounts in the regulation).



Evaluating impact

Generally, a contravention will be considered to have a greater impact when the contravention makes it harder for RPRA to enforce compliance with resource recovery obligations and ensure a level playing field for businesses.

For example, consider a contravention of a producer's obligation to submit an audit report by an independent auditor on its management system for used tires (s. 26 of the Tires Regulation):

Minor impact: submitted on time, but failure to include a required element

Moderate impact: submitted on time, but not conducted by independent auditor

Major impact: not submitted

Another consideration in terms of the regulatory impact is the impact, if any, on resource recovery and waste reduction of certain classes of materials as designated by s. 60 of the RRCEA. Generally speaking, the greater the amount of material impacted by the contravention, the greater the impact on resource recovery or waste reduction, and the higher the assessment on the impact scale.

Note: These are examples only. The impact will be assessed by looking at each contravention individually and in consideration of all relevant circumstances.

After the contravention is assessed on the impact scale, the Registrar and Deputy Registrar will consider the third factor as described above, which takes into account the history of the obligated party along with the context in relation to steps that were or were not taken to remedy the contravention. This third factor provides important factual context that will impact the penalty amount.

b) <u>Continuing and non-continuing contraventions</u>

The AP Regulation differentiates between continuing and non-continuing contraventions. Noncontinuing contraventions and their associated maximum base penalty amounts are identified in Schedule 1. Continuing contraventions and their associated maximum base penalty amounts are identified in Schedule 2.

For non-continuing contraventions, the base penalty is determined using the factors set out above, up to the maximum amount specified in Schedule 1.

Continuing contraventions are contraventions that continue for more than one day. For continuing contraventions, the base penalty is determined using the factors set out above up to the maximum "per day" base penalty specified in columns 3 or 4 of Schedule 2 of the AP Regulation. This amount is then multiplied by the number of days or partial days during which the contravention continued. This total (the "per day" penalty multiplied by the number of days) cannot exceed the maximum "total" base penalty specified in columns 5 or 6 of Schedule 2.

Example calculation of penalty for a continuing contravention:

Assume a corporation fails to ensure that no charge is imposed at the time of collection, as required by s. 68(3) of the RRCEA. Item 2 of Table 1 of Schedule 2 identifies this as a continuing contravention. Column 3 of the table sets the maximum "per day" base penalty for this contravention for a corporation at \$2,500. Column 5 of the table sets the maximum "total" base penalty for this contravention for a corporation at \$75,000. Assume also that the "per day" penalty is determined by the Registrar or Deputy Registrar to be \$2,500, which is the maximum in column 3.

If the contravention was ongoing for 20 days, then the base penalty would be calculated to be $2,500 \times 20 = 50,000$.

If the contravention was ongoing for 40 days, then the base penalty would be calculated to be $2,500 \times 40 = 100,000$. However, in that case, the base penalty would be automatically reduced to 75,000, so it does not exceed the "total" base penalty for the contravention in column 5.

2. <u>The economic benefit penalty determination</u>

When a person does not comply with a legal requirement, whether deliberately or unintentionally, they may derive an economic benefit either directly or indirectly from the noncompliance. Administrative penalties help level the playing field by removing the economic benefit gained from breaking the law. The Registrar or Deputy Registrar will consider the following factors when determining the economic benefit penalty:

- 1. Costs that the person avoided by failing to comply with the provision.
- 2. Costs that the person delayed by delaying compliance with the provision.
- 3. Gains that the person has accrued by failing to comply with the provision.

For example, if a producer fails to meet a performance target for management of a material, the economic benefit penalty will include the cost to recover the difference between the amount of material actually recovered by the producer and the required amount of recovered material.

The economic benefit penalty may also include an amount that reasonably reflects the return on investment that the producer gained because the amounts that should have been spent on complying with the legislative requirements were put to some other use. This return on investment would be an example of a gain accrued by failing to comply with a provision.