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Submitted via email ([andre.martin@ontario.ca](mailto:andre.martin@ontario.ca)) and via ERO website

**RE: Comments on ERO Posting No. 019-0750 – Holding Polluters Accountable by Expanding the Use of Administrative Monetary Penalties (AMPs) for Environmental Contraventions**

Dear Mr. Martin,

I am writing on behalf of the member firms of the Ontario Environment Industry Association (ONEIA) to provide our response to the above-noted ERO posting.

As you know, Ontario is home to Canada's largest group of environmental and cleantech companies which employ more than 65,000 people across a range of sectors including private waste/resource recovery services, water and wastewater, brownfields remediation and redevelopment, and environmental consulting. These companies contribute more than \$8 billion to the provincial economy, with approximately \$1 billion of this amount coming from export earnings. As private companies that provide significant employment across our province, ONEIA members are committed to working with the government to enact smart regulations that ease unnecessary regulatory burdens while protecting our environment and our fellow citizens.

In this light, our resource recovery subcommittee has reviewed the posting and has identified the following areas for discussion and improvement.

### **OVERVIEW**

We support the effort of this approach to ensure polluters are held accountable and have held initial talks with the Province's Red Tape reduction staff in support of this overall approach, as in many cases it can streamline processes that may already be too cumbersome.

We do have some concerns in respect of the expansion of this regulatory tool into the waste and resource recovery sector. ONEIA also has other environmental sectors that it represents including brownfield, excess soils, water, and climate change that have an interest in this ERO and will engage further in this topic, but will specifically address its relevance to the resource recovery field in this submission.

ONEIA's resource recovery companies provide a diverse range of services including materials collection and transfer, organic and recycling solutions, alternative energy systems and landfill and waste to energy disposal. ONEIA members are committed to engaging and collaborating with governments to develop policies and regulations that are consistent with our principles of sound science, sound environment and a sound economy. To that end, we convened a working group of members drawn from across these areas to provide our comments.

## **SETTING THE CONTEXT**

Currently, given the framework for administrative monetary penalties (AMPs) and environmental penalties (EPs) set out in the Environmental Protection Act, many of ONEIA's members do not fall within the industries and activities which are subject to these penalties. The repeal of EPs, which will presumably be replaced by the expanded AMPs regime, and the proposed expansion of the existing limited AMPs regime to other industries and to more contraventions of the Environmental Protection Act and other legislation set out in the Proposal, will impact ONEIA's members, particularly in the waste and resource recovery sphere.

Many of ONEIA's members work within the heavily regulated waste and resource recovery industry and are subject to Environmental Compliance Approvals for their activities, including waste management and air emissions. In the ERO, ONEIA also saw reference to the Nutrient Management Act and would request more information on how the use of AMPs would occur under this Act.

## **SPECIFIC COMMENTS**

While ONEIA's members uniformly support legislation that would hold polluters accountable, we have concerns and questions about the Proposal as set out on the Environmental Registry and in Schedule 9 to Bill 132 (the Proposed AMPs System). While ONEIA recognizes that many of these issues would be dealt with by forthcoming regulations and guidance documents, we believe it is important to bring these issues forward at this stage.

### **1. Industries and Contraventions to be Excluded from the Proposed AMPs System**

As set out in the Proposal, violations of the Environmental Protection Act and other legislation that would be subject to enforcement through the use of AMPs are to be prescribed by regulation. However, the Proposal indicates a desire to include a broad range of environmental violations under the Environmental Protection Act and other acts, such as the Nutrient Management Act, Ontario Water Resources Act, Pesticides Act and the Safe Drinking Water Act in the Proposed AMPs System.

ONEIA understands the intention is to include all industries, including the waste and resource recovery sector, within the Proposed AMPs System. ONEIA's members believe that there are sufficient regulatory enforcement tools (from voluntary abatement to prosecutions) to ensure compliance within this heavily regulated sector without expanding the Ministry of the Environment, Conservation and Parks (MECP) toolkit to include AMPs with respect to waste and resource recovery.

If it is the intention of the government to include the waste and resource recovery sector within the Proposed AMPs System, ONEIA's members wish to raise certain compliance issues within the sector which are not suited to enforcement by way of AMPs.

The existing EPs regime applies only to the regulated persons in the limited Municipal Industrial Strategy for Abatement (MISA) industries. Within those industries, EPs are only issued for a discrete number of compliance concerns, including limit exceedances, acute toxicity, spills and discharges and monitoring and reporting violations where each of the specific areas require monitoring and reporting to the Ministry. These compliance concerns are appropriate for the use of AMPs as they may be more accurately measurable (in the case of limit exceedances or acute toxicity) or more reliably determined and confirmed (in the case of spills and monitoring and reporting).

Given the absolutely liability nature of the Proposed AMPs System (as there is no due diligence defence) and the very limited ability to appeal or review the issuance of AMPs

(further addressed below) that the Proposal contemplates, it is not appropriate to allow AMPs to be issued in any circumstance of non-compliance with the EPA or its regulations.

As an example, in the waste and resource recovery sector, odour emissions are very subjective and not easily or reliably measured. Contravention of odour emissions limits would not be appropriate for enforcement through the Proposed AMPs System.

## **2. Enforcement Concerns**

ONEIA is concerned about the use and enforcement of the Proposed AMPs System as currently set out in the Proposal.

The Proposed AMPs System, unlike the current EPs regime, allows for the issuance of penalties by a provincial officer, rather than only the Director. This raises the concern that AMPs will be unevenly enforced across the province (and even within districts) as some provincial officers may use the tool more or less often than others and apply it to different situations.

AMPs may be a useful tool to encourage compliance within industries but only where they are used consistently across industries and across the province. Consistent use of regulatory tools by regulators is the most effective way to hold polluters accountable and increase overall compliance with Ontario's environmental laws.

The Proposed AMPs System should be revised to provide for issuance of an AMP only by the Director. Alternatively, the process set out by s. 5 of the Environmental Penalties Regulation, which includes the issuance of a Notice of Intention to issue an EP and then allows for submissions to be provided by the regulated entity in accordance with s. 6 of the Regulation, should be adapted for the Proposed AMPs System.

Further, ONEIA's members have concerns about the circumstances in which AMPs would be used under the Proposal. The MECP Compliance Policy currently provides that EPs can be used, even in Compliance Category 1, which includes cases where the target of enforcement has no previous compliance history and there is no human health or environmental risk. This should be revised to provide that AMPs should not be issued in the case of Category 1. Where AMPs are available as a regulatory tool, it should not replace those scenarios in which a warning or voluntary abatement approach is preferable. This is particularly true in a heavily regulated industry such as waste and resource recovery, where regulated entities typically have strong relationships with regulators. The MECP Compliance Policy should be updated to reflect guidance on how the new AMPs regime should be undertaken and a review should be undertaken in 2 years to assess the use of AMPs.

Given the financial and other impacts that the issuance of an AMP may have on a member of the waste and resource recovery sector, it is important that AMPs be issued consistently and only after some consideration. This is important to ensure that AMPs are effective in achieving the aims set out in the Proposal and to appropriately reflect a regulated entity's right to procedural fairness. Additionally, ONEIA's members believe that it is important that MECP staff be appropriately provided with guidance and training to ensure the consistent and fair application of AMPs.

## **3. Penalty Amounts**

Given that the option of prosecution is still open to the MECP in cases of serious violations of the EPA and other legislation, we would recommend that penalty amounts be limited to less than \$100,000, as the \$200,000 envisioned in the Proposal is a significant penalty and may in fact be greater than many fine amounts imposed in

prosecutions under the Environmental Protection Act. Such a penalty could also be considered overly punitive in nature and may open the government up to challenge of the Proposed AMPs System under s. 11 of the Charter of Rights and Freedoms. Further discussion should occur with industry on maximums related to various types of incidents where AMPs would apply.

ONEIA also would like to better understand whether due diligence will still be permitted to address the quantum of any AMP as is allowed in the current EP program. ONEIA members have significant concerns in this regard and we would request additional dialogue or guidance material on this matter.

#### **4. Use of Funds**

The Proposal indicates that funds collected from the payment of AMPs would be directed to an existing account that would be revised to allow the funds to be used for activities that implement the Made-in-Ontario Environmental Plan. ONEIA looks forward to receiving further details on these activities. As we represent companies in the cleantech sector, ONEIA encourages the government consider using these amounts to fund new technology and innovation in the environment sector in Ontario. ONEIA would be pleased to provide further input on this issue.

Thank you for your consideration. ONEIA members are available to work with the Ministry on the proposed AMPs system and would welcome the opportunity to discuss this further. Should you have any questions with respect to this letter, feel free to contact our office at (416) 571-5030 and we will connect you with the chairs of our Resource Recovery Committee.

Yours truly,

A handwritten signature in black ink that reads "Alex Gill". The signature is written in a cursive, flowing style.

Alex Gill  
*Executive Director*