

# Administrative Monetary Penalties In Environmental Regulation: What You Need To Know



Administrative monetary penalties (**AMPs**) are one of several enforcement tools available to environmental regulators to incentivize compliance with environmental laws. Many federal and provincial statutes, including in British Columbia, allow regulators broad discretion to levy AMPs on persons who fail to comply with an environmental statute or authorization (e.g., a permit or environmental assessment certificate). For example, the BC *Environmental Management Act*, the BC *Mines Act*, and the federal *Environmental Violations Administrative Monetary Penalties Act* each establish an AMP regime.

AMPs have become more common in recent years, both in availability under statute and in usage. An AMP regime was established under the BC *Mines Act* in 2017 and under the BC *Water Sustainability Act* in January 2024. Furthermore, with recent amendments to the *Energy Resource Activities Act* (previously the *Oil and Gas Activities Act*), the AMP regime under that Act will apply to new industries. AMPs are generally easier for regulators to impose compared to regulatory offences, because they require a lower burden of proof (balance of probabilities vs. beyond a reasonable doubt) and demand less administrative time and expense than the more rigorous court process. However, these gains in efficiency

result in a more informal process that does not afford the respondent the same level of procedural fairness rights as would the prosecution of a regulatory offence. Respondents must remember that, despite the less formal process, AMPs can nonetheless have serious consequences.

AMPs can have significant impact on your bottom line. The maximum AMP amount may be as low as \$2,000 or as high as \$1,000,000 depending on the nature of the contravention at issue and the applicable legislation. Often, these maximums apply on a daily basis. That is, if a contravention continues for more than one day, the total amount of the AMP may exceed these maximums. For example, under the *Water Sustainability Act*, the Comptroller of Water Rights may levy an AMP of up to \$100,000 per day on a person who diverts water from a stream or an aquifer without the appropriate authorization.

## WHAT ARE AMPS?

As their name suggests, AMPs are *administrative* in nature. They are levied by statutory decision makers (e.g., the Chief Inspector of Mines, the BC Energy Regulator, or the Comptroller of Water Rights), without trial or hearing in court. In some circumstances, AMPs can be levied for the same non-compliance that may also attract an offence. The statutory decision maker has the discretion to refer the matter for prosecution, or levy an AMP, and may choose an AMP due to the lower burden of proof required.

The main purposes of AMPs are to deter future non-compliance and eliminate any financial gain from a non-compliance. AMPs are just one of a suite of enforcement measures available to environmental regulators. Other enforcement measures include advisories, warnings, tickets, sanctions, and prosecution of an offence. Among these enforcement measures, AMPs are typically a more advanced measure applied by decision makers when, for example, the nature of the contravention or failure is more serious, previous enforcement (e.g., through

advisories or warnings) has not resulted in compliance, or a person has realized a financial gain from a contravention or failure.

A key characteristic of AMPs is the liability they attract. AMPs are often imposed on an absolute liability basis, meaning that even if the person subject to the AMP (the “respondent”) took all reasonable steps to avoid the non-compliance (i.e., did their due diligence), they may not be able to fully vacate an AMP. As noted below, however, the decision maker may reduce the amount of the AMP where the respondent demonstrates due diligence. The available defences to an AMP differ between statutes, therefore it is important to consult the applicable legislation and seek legal advice before disputing an AMP.

## **HOW ARE AMPS LEVIED?**

The process for levying an AMP differs depending on the applicable legislation.

Typically, AMPs originate from an inspection of a person’s activities or premises that reveals a non-compliance. Note that such inspections are not subject to the same procedural safeguards as an *investigation* underlying the prosecution of a regulatory offence in court.

An AMP may be preceded by an advisory letter or warning letter, or a letter indicating that the non-compliance has been referred to the statutory decision maker for an AMP.

Most, but not all, statutes and regulations require that the decision maker provide notice before levying an AMP. Most statutes and regulations also provide an opportunity for the respondent to provide either written or oral submissions. The statutory decision maker will consider these submissions prior to making a final determination on the AMP. Often, a respondent will have a single opportunity to make submissions, therefore it is critical that these submissions are well

organized, accurate, and substantiated by evidence so that the statutory decision maker has a clear picture of the respondent's efforts to prevent or correct the contravention or failure and comply with the applicable law.

In deciding the amount of an AMP, the decision maker must consider a range of factors enumerated in the applicable statute or regulation. These factors vary little between statutes and include:

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 by, AMPs imposed on, or orders issued to the respondent;
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 respondent exercised due diligence to prevent the contravention or failure;
8. the respondent's efforts to correct the contravention or failure; and
9. the respondent's efforts to prevent recurrence of the contravention or failure.

Most statutes also include a provision that provides the decision maker with discretion to consider other factors it finds relevant.

The decision maker will then provide a written final determination of the AMP. Typically, this determination will include details of the provision(s) contravened, the amount of the AMP, when the AMP must be paid, and if applicable, the respondent's right to a review or appeal of the AMP.

Respondents dissatisfied with a final determination may have a

right to a statutory review, appeal, or judicial review, depending on the applicable legislation.

## **KEY RISKS ASSOCIATED WITH AMPS**

Aside from the obvious financial impact of an AMP, there are a few other key risks to consider when dealing with an AMP.

- 1. Failing to appreciate the significance of opportunities to make submissions.** Many statutes provide for an opportunity to be heard before a final AMP is levied. Failure to take full advantage of these opportunities may result in a higher fine and make a future review or appeal of the AMP more difficult. Often, a respondent will have a single opportunity to make submissions on both whether an AMP should be imposed and, if an AMP is imposed, the amount of the AMP. Failing to provide submissions on both aspects may result in a higher fine. Furthermore, the regulator may interpret a failure to make submissions as the respondent conceding the non-compliances. Similarly, taking advantage of these opportunities without sufficient preparation or consideration of the facts may lead to inadvertent admissions or may further confuse the regulator. This too, can make a future review or appeal of the AMP more difficult.
- 2. Failing to understand the case to be met.** AMPs often do not attract the same procedural fairness protection as regulatory offence provisions. As a result, the regulator imposing the AMP may not fully disclose to the respondent the evidence on which the regulator is relying, or may not provide the respondent to the AMP with sufficient time to investigate the matter. If a respondent believes the regulator has more information it should be providing – or requires more time to investigate the underlying facts and respond to a proposed AMP – the respondent should make those requests

in writing to the regulator. Failing to make those requests can make a future review or appeal of the AMP more difficult.

3. **Previous contravention factor.** In determining the amount of an AMP, administrative decision makers commonly consider previous contraventions. It follows that a failure to defend an AMP properly at first instance (either to reduce the AMP or vacate the AMP entirely) may “snowball” into larger AMPs for future contraventions.
4. **Failing to address the underlying issue.** As set out above, the purpose of AMPs is to deter future non-compliance and eliminate any financial gain from a non-compliance. A failure to rectify a non-compliance following an AMP (or even a proposed AMP that is eventually vacated) could result in further and higher AMPs. This will especially be the case if a regulator believes that the respondent is treating AMPs as the “cost of doing business.”

## MINIMIZING THE RISK OF AMPS

Given the financial impact of AMPs, it is important that companies minimize their risk exposure. Below are some of the most effective ways to achieve this:

1. **Prevention.** The best way to minimize the risk from AMPs is to avoid them altogether by remaining in compliance with your authorization and the applicable legislation. To this end, it is important to stay up-to-date on amendments with applicable laws and authorizations (e.g., permits), set up compliance programs, educate employees regularly, keep thorough records of compliance activities, and pro-actively identify and address potential non-compliances before they occur. Such programs, education, and record-keeping can be of assistance even when a non-compliance occurs. While a

defence of due diligence is not always available, evidence of diligence is almost always a factor in determining the quantum of an AMP.

2. **Response to Non-Compliance.** If you discover a non-compliance with applicable laws or authorizations, ensure that you comply with your immediate reporting obligations (if any) and notify legal counsel immediately. Consider how long it will take to resolve the non-compliance and confer with legal counsel on the most appropriate way to communicate this to the regulator prior to the imposition of an AMP.
3. **Response to AMP.** If, despite the recommendations above, you receive a notice of AMP or an AMP is levied against you, seek legal advice immediately and ensure that you diligently participate in any opportunities to provide submissions, appeal the penalty, or have the penalty reviewed, as applicable.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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