

ENVIRONMENTAL OFFENCES: 10 FAQs about Administrative Monetary Penalties



When a company or individual violates the environmental law, the government typically lays charges and pursues a full-blown prosecution. But even if the defendant ultimately pleads guilty, the process can take months and even years to be resolved. And in the meantime, any damage caused to the environment by the violation may be sitting there unaddressed until the violation's final resolution. In addition, minor offences may not be prosecuted at all because of the complexity and high costs of prosecution. That's why many jurisdictions now allow environmental regulatory agencies to impose administrative monetary penalties (AMPs) for certain offences. AMPs let the government fine violators quickly and respond promptly to violations before too much damage is done to the environment. As AMPs have become more common, it's important for EHS professionals to understand them. So here are answers to 10 frequently asked questions (FAQs) about this approach to penalizing environmental offenders.

10 FAQs

The main environmental laws in eight jurisdictions' Fed, AB, BC, NB, NL, ON, QC and SK' authorize AMPs. (Nova Scotia's *Environment Act* authorizes the creation of regulations for a system of AMPs but no such regulations have been enacted yet.) You should review the law in your jurisdiction for the details on its AMPs system. But here are general answers to 10 frequently asked questions about these penalties:

[learn_more caption="Q What's the Difference Between an AMP and a Ticket'"]

A Some jurisdictions let government officials, such as environmental inspectors or enforcement officers, issue on-the-spot tickets for minor environmental offences, such as littering. For example, tickets can be issued for federal environmental offences under Sec. 310 of CEPA, 1999 when there's minimal or no threat to the environment, or human life or health. The fines that can be imposed via ticket are much smaller than those that can be imposed as an AMP or pursuant to a prosecution for an environmental violation. (Note that although tickets are technically a form of administrative penalty, this article focuses on AMPs issued for more serious offences.)

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[learn_more caption="Q To Which Violations Do AMPs Apply'"]

A In general, AMPs can be imposed only for designated environmental violations. In many cases, the list of such violations is quite long and may cover a wide range of offences under various environmental laws (and their related regulations). For example, Alberta's *Administrative Penalty Regulation* has a schedule that lists the many sections of 14 different statutes and regulations for which AMPs can be issued.

Insider Says: In Saskatchewan, administrative penalties may currently be imposed only on the holders of certain water-related permits who commit designated violations. But the *Environmental Management and Protection Act, 2010*, which hasn't taken effect yet, will greatly expand the use of AMPs to other people and types of offences.

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[learn_more caption="Q When AMPs May Be Imposed"]

A To prevail in a prosecution for an environmental offence, the government has to prove beyond a reasonable doubt that you violated environmental law. But to impose an AMP, a designated government official must only:

- *Fed*: Have reasonable grounds to believe that a person, ship or vessel has committed a designated violation;
- *AB, NL, ON*: Be of the opinion that a person has violated a provision of the law;
- *BC*: Be satisfied on a balance of probabilities that a person has violated a provision of the law or failed to comply with an order, permit or approval issued under the law; and
- *NB*: Be of the opinion on reasonable and probable grounds that a person has violated or failed to comply with a provision of the law.
- In QC and SK, the environmental law just says that a designated official may impose an administrative penalty if a person commits certain environmental violations.

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[learn_more caption="Q How Are AMPs Imposed"]

A The designated government official must give the company or individual written notice that an AMP is being imposed on them. The law usually spells out the information that must be included in that notice, such as:

- The name of the person or company believed to have committed the violation;
- The relevant facts surrounding the violation, such as the location and any adverse effects on the environment;
- The penalty imposed for the violation, including whether it's a one-time payment or payable for each day the violation continues;
- How that penalty may be paid and the deadline for payment;
- The consequences of failing to pay the penalty; and
- The right, if any, of the company or individual to challenge or appeal the penalty.

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[learn_more caption="Q Who May Be Issued an AMP"]

A In general, a ship, vessel or legal 'person,' which typically includes individuals and organizations such as corporations, that commits a designated violation may be hit with an AMP. In some jurisdictions, municipalities and even the provincial government can also be subject to AMPs. And the officers and directors of a company or the corporate owner of a ship or vessel may be liable for an administrative penalty, but generally only if they directed, authorized, assented to, acquiesced in or participated in the commission of the environmental violation.

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[learn_more caption="Q How Much Can an AMP Cost'"]

A The maximum amount of an AMP is generally limited under environmental law and is usually much less than the top fines that can be imposed for standard environmental prosecutions. The penalty can be a one-time fixed amount or an amount for each day that the violation continues. In addition, there may be different limits depending on:

- Whether the violator is an individual or company;
- The type of environmental violation committed;
- Whether the conduct was a minor, moderate or major deviation from the requirements; or
- The degree of harm caused to the environment or human health by the violation.

Some jurisdictions specify the factors the official issuing the AMP must consider when setting the amount of an AMP. For example, Sec. 7(1) of BC's *Administrative Penalties (Environmental Management Act) Regulation* requires a director establishing the amount of an administrative penalty in a particular case to consider:

- The nature of the violation;
- The real or potential adverse effect of the violation;
- Any previous violations by, administrative penalties imposed on or orders issued to the following: a) the person who's the subject of the determination; b) if the person's an individual, a corporation for which the individual is or was a director, officer or agent; or c) if the person is a corporation, an individual who is or was a director, officer or agent of the corporation;
- Whether the violation was repeated or continuous;
- Whether the violation was deliberate;
- Any economic benefit derived by the person from the violation;
- Whether the person exercised due diligence to prevent the violation;
- The person's efforts to correct the violation;
- The person's efforts to prevent recurrence of the violation; and
- Any other factors that, in the opinion of the director, are relevant.

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[learn_more caption="Q Are There Any Time Limits on AMPs'"]

A Depending on the jurisdiction, a notice of an AMP must generally be served on the violator within one to two years of the violation or of the date on which evidence of the violation first came to the government's attention.

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[learn_more caption="Q Can You Be Issued an AMP and Prosecuted for the Same Violation'"]

A The short answer is no. After all, it would logically make sense that if your company pays an AMP for an environmental violation, it wouldn't also be subjected to a standard prosecution for the same violation. In fact, the jurisdictions that permit AMPs *do* bar prosecution for the same offence if the person or company has paid an administrative penalty for that violation. For example, Sec. 106(2) of Newfoundland's *Environmental Protection Act* says that a person who pays an administrative penalty with respect to a contravention may not be charged with an offence under this Act with respect to that contravention.

In addition, the reverse is true. In other words, if the government has prosecuted you for an environmental offence, it can't also impose an administrative penalty for the same underlying violation.
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[learn_more caption="Q Can You Challenge an AMP'"]

A Most jurisdictions provide some process for individuals or companies issued AMPs to challenge either the violation or the amount of the penalty. In general, you can appeal the administrative penalty to either an individual or an appeals board or both (if multiple appeals are permitted). For example, under Québec's *Environment Quality Act*, a person or municipality issued a 'monetary administrative penalty' may apply in writing for a review of the decision within 30 days after being notified of the notice of claim [Sec. 115.17]. And in Alberta, you can appeal an administrative penalty to the Environmental Appeals Board. *Exception*: New Brunswick *does not* let a person appeal the amount of an administrative penalty or any other matter related to it.
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[learn_more caption="Q Is Due Diligence a Defence to an AMP'"]

A It depends. In some jurisdictions, the environmental laws don't specifically address whether a violator can argue due diligence in defence to an AMP. However, the environmental laws in several jurisdictions specifically state that due diligence *is not* a defence to an AMP. (See **this chart** for what the main environmental law in each jurisdiction says about AMPs and due diligence.) For example, in Ontario, a person may be issued an administrative penalty even if:

- The person took all reasonable steps to prevent the contravention; or
- At the time of the violation, the person had an honest and reasonable belief in a mistaken set of facts that, if true, would have rendered the violation innocent [Sec. 182.3(10)].

These jurisdictions treat the violations subject to AMPs as 'absolute liability' offences, meaning that as long as the violation occurs, you can be penalized for it regardless of your intent or attempts to comply with the law. And because trying to comply is irrelevant for such offences, due diligence isn't a defence. But your due diligence *may* be relevant in terms of the amount of the AMP. That is, the fact that you tried to comply with the law may weigh in favor of a lesser penalty.

Insider Says: There are other defences you can raise to an AMP, such as arguing

that the violation didn't occur or that you didn't commit the violation'someone else did.

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BOTTOM LINE

The possibility of being subjected to an AMP heightens the importance of *preventing* environmental violations from happening in the first place. If you commit a violation for which an AMP could be imposed, the fact you took all reasonable steps to comply may not help you avoid liability. Thus, prevention is critical and that's why your company still need to exercise due diligence.