

DRAFT Guideline for the Implementation of Administrative Penalties under the *Climate Change Mitigation and Low-carbon Economy Act, 2016* (CCMLEA)

(Ontario Regulation 540/17)

For the purpose of public consultation and transparency, this document is the proposed draft guideline to be used by Ministry of the Environment and Climate Change staff when determining and issuing an administrative penalty order for non-compliance under the administrative penalties regulation (O. Reg. 540/17) established under the CCMLEA.

Ministry of the Environment and Climate Change
January 2018

DRAFT Guideline for the Implementation of Administrative Penalties under the *Climate Change Mitigation and Low-carbon Economy Act, 2016 (CCMLEA)*

(Ontario Regulation 540/17)

Please note that the regulation will take precedence where a conflict or ambiguity exists between this Guideline and the requirements of the regulation. While every effort has been made to ensure the accuracy of the information contained within this Guideline, it should not be construed as legal advice.

Cette publication hautement spécialisée Draft Guideline for the Implementation of Administrative Penalties Under The Climate Change Mitigation And Low-Carbon Economy Act, 2016 (CCMLEA) n'est disponible qu'en anglais conformément au Règlement 671/92, selon lequel il n'est pas obligatoire de la traduire en vertu de la Loi sur les services en français. Pour obtenir des renseignements en français, veuillez communiquer avec le ministère de l'Environnement et de l'Action en matière de changement climatique (MEACC) au (416) 326-3816 ou par courriel à dushan.jojkic@ontario.ca.

Table of Contents

Part 1: Overview	1
1.1 Administrative Penalties in Context.....	1
1.1.1 Existing Administrative Penalties Regulations.....	2
1.1.2 Administrative Penalties under the CCMLEA	2
1.1.3 Amounts from Administrative Penalties	3
1.2 Overview of the Process for Issuing an Administrative Penalty	4
Part 2: Determining the Penalty Value	7
2.1 Penalty Formula Overview	7
2.2 Base Penalty Determination.....	8
2.2.1 Daily Base Penalty Value	8
2.2.2 Multi-day Penalties and Penalty Caps	11
2.2.2 Base Penalty Revisions and Reductions	12
2.3 Economic Benefit Determination.....	15
2.3.1 Avoided Costs	16
2.3.2 Delayed Costs	16
2.3.3 Increased Profits.....	16
Part 3: Other Administrative Penalty Components	18
3.1 Penal Consequence	18
3.2 Requests to the Director.....	18
3.2.1 Contents of the Request.....	19
3.3 Failure to Pay	20

Part 1: Overview

Part 1 of this guidance document introduces Ontario’s framework for administrative penalties under the Climate Change Mitigation and Low-carbon Economy Act, 2016 (“CCMLEA”). Administrative penalties are a compliance tool that will help induce persons who contravene the CCMLEA to take timely corrective action when a contravention occurs. Administrative penalties also function to prevent any economic benefit that may be gained by non-compliance. The scope of the administrative penalty framework is discussed and the process leading to the issuance of an administrative penalty is described step-by-step.

1.1 Administrative Penalties in Context

The Ministry of the Environment and Climate Change (“ministry”) is responsible for enforcing and providing education and outreach on Ontario’s environmental laws. Strong oversight and governance is required to ensure effective implementation and compliance with environmental legislation.

In general, the ministry has a range of compliance and enforcement tools in its toolbox to help ensure the ministry is able to maximize compliance with legal requirements. Depending on the governing legislation, these tools have typically included inspection and investigation powers and the ability to issue compliance orders. More recently, the government has provided legislative authority in several statutes administered by the ministry to implement, through regulation, the use of administrative penalties to address non-compliance.

In general, an administrative penalty is a monetary penalty that can be imposed to achieve the following primary purposes:

1. To ensure compliance with legislative or regulatory requirements
2. To prevent a person from deriving economic benefit from non-compliance with legal requirements

Adding administrative penalties to the ministry’s compliance and enforcement toolbox allows the ministry to undertake a more graduated approach to helping ensure compliance with legal requirements. A broad range of compliance and enforcement tools provides the ministry with the ability to choose the most appropriate and effective tool, or combination of tools, to maximize compliance and prevent or deter future non-compliance.

The ministry’s response to a contravention is determined in accordance with the document entitled, “Compliance Policy: Applying Abatement and Enforcement Tools” (May 2007) as amended from time to time, (“Compliance Policy”). The Compliance Policy includes an Informed Judgment Matrix (“IJM”) which provides guidance regarding appropriate responses to contraventions. Contraventions are assessed on a case-by-case basis to determine which abatement and/or enforcement tool is most appropriate

for mitigating the effects of a contravention, achieving compliance with environmental laws, and improving environmental performance in both the short and long term.

1.1.1 Existing Administrative Penalties Regulations

The ministry first implemented administrative penalties, known as “Environmental Penalties”, in 2007. Environmental penalties are administrative penalties that companies may be required to pay if they have violated a requirement under the *Ontario Water Resources Act* (OWRA) or *Environmental Protection Act* (EPA), as specified in the Environmental Penalties regulations. O. Reg. 222/07 made under the EPA and O. Reg. 223/07 made under the OWRA prescribe how, when and to which types of contraventions Environmental Penalty orders are applied. The ministry’s approach for implementing Environmental Penalties is addressed in a separate document titled “Guideline for Implementing Environmental Penalties (Ontario Regulation 222/07 and 223/07)”, as amended from time to time and available on the [ministry’s website](#).

Although the implementing regulations for Environmental Penalties and those for administrative penalties under O. Reg. 540/17 differ in terms of the contraventions they address and the specific penalties that can be applied to each contravention, they have common elements, such as a similar process for issuing the penalty order. This supports the ministry’s commitment to developing a fair, transparent and, wherever appropriate, consistent approach to implementing administrative penalties for existing and any future administrative penalty regulations.

1.1.2 Administrative Penalties under the CCMLEA

On May 18, 2016, the CCMLEA received Royal Assent. The CCMLEA is landmark climate change legislation that builds on and supports Ontario’s Climate Change Strategy. A key purpose of this CCMLEA is to establish a broad carbon price through a cap and trade program that aims to change the behaviour of Ontario businesses and households, including spurring low-carbon innovation. Ontario is able to link to other regional cap and trade markets (i.e., California and Quebec) as part of the international, national and interprovincial responses to reduce greenhouse gas emissions.

Specifically, the CCMLEA:

- Sets provincial targets for reduction of greenhouse gas (GHG) emissions for 2020, 2030 and 2050
- Establishes reporting and verification requirements for certain emitters of GHGs
- Establishes a framework for the reduction of GHGs through implementation of a cap and trade program

The CCMLEA also establishes the framework for implementing administrative penalties, as prescribed by regulation, for contraventions of the CCMLEA and its regulations. The framework in the CCMLEA includes the following:

- The scope of the contraventions for which administrative penalties can be issued

- Establishment of an absolute liability regime for the requirement to pay an administrative penalty (i.e., there is no “due diligence” defence)
- The total maximum penalty amount (i.e., an administrative penalty for a contravention cannot exceed \$1 million)
- The limitation on how long after a contravention that an administrative penalty can be issued (i.e., the latter of 1 year after the date the contravention occurred or after evidence of the contravention came to the attention of the ministry)
- That the issuance of an administrative penalty order does not prevent prosecution for the same contravention
- To whom an administrative penalty order can and cannot be issued
- Rights for appeal of an administrative penalty order (i.e., right to seek an appeal within 15 days to the Environmental Review Tribunal)
- Where money paid for administrative penalties goes (i.e., to the Greenhouse Gas Reduction Account)

Administrative penalties may be issued for contraventions under the Act or its regulations. Currently, the following regulations under the CCMLEA have provisions, for which an administrative penalty order could be issued if contravened:

- **O. Reg. 143/16, Quantification, Reporting and Verification of Greenhouse Gas Emissions, (“Reporting Regulation”)** – which sets out the detailed requirements for the quantification, verification and reporting of GHG emissions for certain emitters of GHGs and incorporates, by reference, the Guideline for Quantification, Reporting and Verification of Greenhouse Gas Emissions. The information obtained through this regulation is foundational to establishing a successful cap and trade program.
- **O. Reg. 144/16, The Cap and Trade Program (“Cap and Trade Regulation”)** – which includes detailed rules and obligations for businesses participating in the program, compliance and enforcement provisions to ensure accountability, transparency and to guard against fraud.
- **O. Reg. 539/17: Ontario Offset Credits (“Offsets Regulation”)** – which sets out the framework and specific legal requirements for establishing Ontario offset credits which may be used towards the compliance obligation of capped emitters in the cap and trade program. This regulation includes requirements for quantification, verification and reporting on offset initiatives and for replacing offset credits that have been reversed.

1.1.3 Amounts from Administrative Penalties

The CCMLEA requires that an account, known as the Greenhouse Gas Reduction Account (“GGRA”), be established and that any proceeds from the distribution of allowances under the cap and trade program, any amounts from the payment of administrative penalties and any amounts or fees payable under the CCMLEA to the

Ministry of the Environment and Climate Change
Guidance for the Implementation of Administrative Penalties under the CCMLEA

Crown, must be recorded within this account (see s. 71(1) of the CCMLEA). This account was established in 2017 to receive proceeds from the auction of allowances.

In addition, the CCMLEA requires that all funds recorded in the GGRA, including funds from the payment of administrative penalties, must be used only for administration and enforcement of the Act and to fund initiatives that are likely to reduce or support the reduction of greenhouse gas (see s. 71(2) of the CCMLEA).

1.2 Overview of the Process for Issuing an Administrative Penalty

The following table outlines, as a summary, the process for issuing an administrative penalty order. The sections that follow provide a more detailed discussion on each step of the process and what is proposed.

Table 1: Process for Issuing an Administrative Penalty Order

#	Step	Timeline
1	<p>Notice of Intent</p> <p>Upon identification by the ministry of a potential contravention or contraventions, a Director gives the person a notice of intent to issue an administrative penalty. The notice of intent would include, among other things, the initial amount of the penalty, whether it is a continuing contravention, and information about the right of the person receiving the notice of intent to make a request to the Director to consider additional information before the final administrative penalty order is issued.</p> <p>The information in the notice of intent is based on the available information the Director has in regards to the contravention.</p>	<p>Within 60 days of the ministry becoming aware of the non-compliance.</p> <p>(Note: The timeline may extend beyond 60 days, depending on complexity of the contravention and whether other compliance actions were taken prior to the issuance of the notice of intent)</p>

#	Step	Timeline
2	<p>Request to the Director to Consider Additional Information</p> <p>The person receiving the notice of intent will have an opportunity to make a request to the Director to consider any relevant information regarding one or more of the following:</p> <ol style="list-style-type: none"> 1. Any additional information related to the contravention; 2. Information about any actions the person had taken to prevent the contravention from occurring or has taken since the contravention to remedy it or prevent it from recurring; or, <p>In addition to the two points above, the Director may consider other information in the request, such as the ability of the person to pay the amount stated in the notice of intent.</p> <p>If there is no request made to the Director by the person within the specified timeframe, an administrative penalty order may be issued for an amount determined by the Director, in accordance with the regulation, and based on the information available.</p> <p>The Director may consider a request made prior to the issuance of an administrative penalty order, by a person receiving the notice of intent, to meet with the Director and/or ministry staff to further discuss the information provided.</p> <p>Upon consideration by the Director of the information in the request, the administrative penalty may reflect adjustments to the penalty amount based on the information provided, including any reductions made to the penalty as a result of the preventive and mitigative measures taken in relation to the contravention.</p>	<p>Within 15 days of the notice of intent being issued or longer, if provided for in writing by the Director.</p>

#	Step	Timeline
3	<p>Issuing the Administrative Penalty Order</p> <p>The Director will consider the information provided in a request to the Director by the person prior to making a decision regarding the administrative penalty order.</p> <p>After considering the information in the request, the Director will first decide whether to issue an administrative penalty order.</p> <p>Where a decision is made to issue the order, the amount of the administrative penalty may reflect adjustments based on the information provided including information related to how long the contravention continued, and any preventive and mitigative measures taken.</p> <p>Where a decision is made to not issue an administrative penalty order, the Director must provide notice of that decision.</p>	<p>From 15 days to 1 year after the ministry becomes aware of the non-compliance.</p>
4	<p>Appealing an Administrative Penalty Order</p> <p>A person who has been issued an administrative penalty order has the right to appeal it to the Environmental Review Tribunal (“ERT”) within 15 days of being given the order.</p> <p>When an appeal is being made to the ERT, the administrative penalty order is automatically stayed, pending a decision by the ERT.</p> <p>The tribunal may confirm or revoke an administrative penalty order, or vary the amount if it considers the penalty to be unreasonable.</p>	<p>Within 15 days of the administrative penalty order being served.</p>
5	<p>Payment</p> <p>The administrative penalty order, unless revoked by the ERT, will state the deadline for payment of the penalty amount.</p> <p>If payment is past due, the ministry may take steps to enforce payment of the penalty amount including by filing the order in Superior Court (see section 3.3 Failure to Pay).</p>	<p>Orders will typically require payment within 30 days of the administrative penalty order being issued (unless appealed)</p>

Part 2: Determining the Penalty Value

Part 2 of this guidance document discusses the process for determining the exact administrative penalty value for a given contravention. In general, the Director will consider the penalty value at least twice in the process of issuing an administrative penalty order.

The first time will be when determining the initial penalty amount to include in the notice of intent. This determination is based on the information available to the Director at the time.

The second time will be when determining the final penalty amount to include in the administrative penalty order. This determination is primarily based on consideration of any information included in a request to the Director that may have been provided by the person upon receiving the notice of intent.

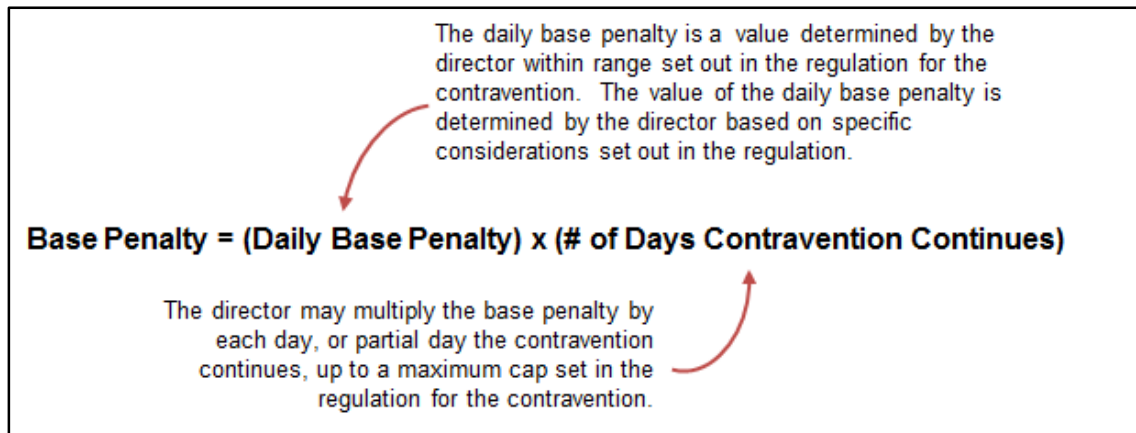
2.1 Penalty Formula Overview

The formula for calculating the penalty amount is as follows:

Penalty Value = Base Penalty + Economic Benefit

where,

- “**Base Penalty**” is calculated using the following formula:



As a result of the information provided in a request to the Director, the final base penalty value may be adjusted due to a clarification of facts or reduced for preventive and mitigative actions taken by the person receiving the notice of intent.

- “**Economic Benefit**” is the monetary benefit that the person gained as a result of the non-compliance. This may include costs that were avoided or delayed, or may include profit that was gained as a result of the non-compliance. The economic benefit amount may be adjusted based on clarification of facts provided by the person or other information available to the Director. The

economic benefit portion of the penalty is not subject to reductions as a result of preventive and mitigative actions taken by the person.

Note: The penalty value (i.e., the sum of the base penalty and economic benefit) cannot exceed \$1 million. This absolute cap is established in the CCMLEA.

2.2 Base Penalty Determination

2.2.1 Daily Base Penalty Value

All of the contraventions that may be subject to an administrative penalty order are categorized into one of two penalty classes, based on the relative seriousness of the contraventions. The following table identifies the two classes and the base penalty ranges for corporations and those entities that are not corporations (e.g., individuals, partnerships, etc.) under each. Schedule 1 under O. Reg. 540/17 identifies the contraventions subject to an administrative penalty and the associated penalty range.

Table 2: Daily Base Penalty Ranges

Class	Daily Base Penalty Range (Persons that are not Corporations)	Daily Base Penalty Range (Corporations)
1	Up to \$1,000	Up to \$5,000
2	Between \$1,000 to \$2,000	Between \$5,000 to \$10,000

When determining the amount of the daily base penalty, the Director has the discretion to set the base penalty value, up to the maximum amount in the range. In setting the amount of the daily base penalty value (i.e., the specific amount in the penalty range), the Director may consider the following:

- Impact of the contravention on the cap and trade program and its administration
- Any convictions or orders issued, in the five years preceding the contravention under:
 - The CCMLEA
 - Regulations made under the CCMLEA; or,
 - O. Reg. 452/09 (Greenhouse Gas Emissions Reporting), made under the *Environmental Protection Act*
- Whether the contravention was deliberate

In general, the daily base penalty amount will start at the mid-point of the base penalty range and the considerations, as noted above, will be taken to determine if the penalty will be adjusted up or down from that mid-point.

The Director will use the steps outlined below when determining the amount of the daily base penalty within the range.

Step 1: The Director determines the appropriate formula to use to calculate the daily base penalty value from table 3 below. The Director determines the formula to use based on the applicable class for the contravention and whether the person subject to the penalty is a corporation or a person that is not a corporation.

Table 3: Daily Base Penalty Formulae

Class	Persons that are not a Corporation	Corporation
Class 1	Daily Base Penalty Value = \$500 + (\$500 x (Total % Modifier))	Daily Base Penalty Value = \$2,500 + (\$2,500 x (Total % Modifier))
Class 2	Daily Base Penalty Value = \$1,500 + (\$500 x (Total % Modifier))	Daily Base Penalty Value = \$7,500 + (\$2,500 x (Total % Modifier))

Step 2: Using tables 4-6 below, the Director will determine which percentage modifiers to apply for each of the three considerations based on the description of the consideration and the circumstances of the contravention. The modifiers are used with the formula in Step 1 to determine where in the penalty range the daily base penalty value falls.

Table 4: Compliance History Consideration

No Existing History	Some History	Poor History
No convictions or orders in the previous 5 years under any of the Acts or regulations mentioned in section 4(2) of the regulation	No convictions and no more than 1 order in the previous 5 years under any of the Acts or regulations mentioned in section 4(2) of the regulation	1 or more convictions or 2 or more orders in the previous 5 years under any of the Acts or regulations mentioned in section 4(2) of the regulation
-20%	0%	+25%

Table 5: Impact of the Contravention Consideration

Minimal	Moderate	Significant
Minimal to no adverse impact to either the environment, integrity/reputation of the program, or to other regulated or unregulated parties	Limited adverse impact to either the environment, integrity/reputation of the program, or to other regulated or unregulated parties	Significant adverse impact to either the environment, integrity/reputation of the program, or to other regulated or unregulated parties
-15%	0%	+25%

Table 6: Intent Consideration

Unintentional	Unknown	Intentional
Non-compliance was a result of an unintentional error, omission or as a result of factors not in the person's control)	Reason for non-compliance is unknown	Person intentionally took actions that were out of compliance with legal requirements
-15%	0%	+50%

Step 3: The Director will sum the percentages for each consideration in Step 2 and determine the amount of the daily base penalty in the range using the appropriate formula determined in Step 1.

The following is an example showing how the amount of the daily base penalty is calculated using the steps described above.

Example 1: Calculating the daily base penalty value

A corporation has contravened a provision of the CCMLEA that is a Class 1 contravention. The Director has decided to issue a notice of intent to issue an administrative penalty order. The information available to the Director shows that the person who has contravened the provision has had 1 administrative penalty order issued in the past. Also, the circumstances of the contravention are such that there is little impact on the program, as a result. Finally, it appears as if the contravention may have been unintentional. Based on this information, the Director determines that:

Example 1: Calculating the daily base penalty value

- The penalty range is up to \$5,000 for a corporation with a Class 1 contravention
- There is some history of non-compliance, which has a modifier of 0%
- There is minimal impact to the program, which has a modifier of -15%
- The contravention was unintentional, which has a modifier of -15%
- The total of the modifiers is -30%

With this information, the Director calculates the daily base penalty value using the following formula for a corporation with a Class 1 contravention (see table 3):

$$\text{Daily Base Penalty Value} = \$2,500 + (\$2,500 \times (\text{Total \% Modifier}))$$

$$\text{Daily Base Penalty Value} = \$2,500 + (\$2,500 \times (-30\%))$$

$$\text{Daily Base Penalty Value} = \$2,500 - \$750$$

$$\text{Daily Base Penalty Value} = \mathbf{\$1,750}$$

2.2.2 Multi-day Penalties and Penalty Caps

Where the Director determines that a contravention has occurred or continues to occur over multiple days, the daily base penalty is applied to each day, or part of a day, that the contravention continues – up to a maximum base penalty cap.

The following table identifies the base penalty caps for the two penalty classes.

Table 7: Multi-day Base Penalty Maximum Caps

Class	Multi-day Base Penalty Cap (Persons that are not a Corporation)	Multi-day Base Penalty Cap (Corporations)
1	\$30,000	\$150,000
2	\$60,000	\$300,000

Contraventions will be assessed by the Director to determine if, by their nature and the circumstances of the contravention, they may be considered to be continuing. For example, some non-continuing contraventions may include one-time or periodic events.

When issuing the notice of intent, the Director would revise the initial base penalty value by multiplying the daily base penalty value by the number of days the contravention has been occurring to that point, as determined by the Director. If the contravention has not

been remedied at the time the notice of intent issued, the notice of intent will indicate that the final penalty amount may exceed the initial penalty indicated in the notice to reflect the ongoing nature of the contravention.

When issuing the administrative penalty order, the Director may re-determine the initial base penalty amount for a continuing contravention based on the actual number of days, or part of days that the contravention continued from the date that it first occurred. As with the notice of intent, the Director will calculate the final base penalty by multiplying the daily base penalty value by the number of days or part days of the contravention. The Director's knowledge on the duration of the contravention (i.e., when it started and when and if it was remedied) may be informed by the information provided by the person as part of their request to the Director.

Before issuing either the notice of intent or the administrative penalty order, the Director will ensure that the calculated base penalty amount does not exceed the caps established in the regulation or in the CCMLEA.

The following is an example showing how the initial base penalty is calculated for a multi-day contravention.

Example 2: Calculating the initial base penalty for a continuing contravention

The Director is ready to issue a notice of intent for a Class 1 contravention by a corporation. The Director has determined that the daily base penalty value is \$1,750 (see Example 1).

At the point that the notice of intent is issued, the contravention has occurred for 5 days and is continuing. So, the Director would determine the base penalty value using the following formula:

Base Penalty = Daily Base Penalty Value x # of Days Contravention Continues

Base Penalty = \$1,750 x 5 days

Base Penalty = \$8,750

Next, the Director would confirm that the calculated base penalty is below the prescribed cap. A Class 1 contravention for a corporation has a cap of \$150,000. In this example, the calculated base penalty of \$8,750 is below this prescribed cap.

Prior to issuing a notice of intent, the Director would determine if there is any economic benefit gained from the non-compliance. If there is no economic benefit, then the Director could issue a notice of intent with an initial penalty value of **\$8,750** and a statement that the initial penalty is increasing on a daily basis, as it is a continuing contravention.

2.2.2 Base Penalty Revisions and Reductions

After the issuance of the notice of intent, the Director may make revisions or apply reductions to the initial base penalty as calculated in the notice of intent. The Director may make these revisions/reductions based on additional information the Director has

become aware of, or based on information provided by the person as part of their request to the Director, after receiving the notice of intent.

The Director will take the following steps, once a request has been received from the person, to determine the final base penalty value to be used for calculating the amount in the administrative penalty order.

Step 1: The Director will use the formula in table 8 below to calculate the final base penalty using the information from Steps 2 and 3.

Table 8: Final Base Penalty Formula

Final Base Penalty
<p>Final Base Penalty = Initial/Revised Base Penalty – (Initial/Revised Base Penalty x (% Reduction A + % Reduction B))</p>

Step 2: The Director may revise the initial base penalty as a result of new information regarding the contravention. This new information may come from the person receiving the notice of intent or from other information the Director becomes aware of (e.g., an inspection, etc.). These revisions may be made as a result of information that adjusts the duration of the contravention or affects the Director’s evaluation of one of the three considerations made when setting the base penalty value (i.e., compliance history, the degree of impact and intent).

If the Director deems that the initial base penalty needs to be revised, the revised base penalty will be used to calculate the final administrative penalty amount.

The request made by the person may include information stating actions that have been taken to prevent or mitigate the contravention that occurred. The Director may reduce the base penalty by considering the actions taken, using the steps below.

Step 3: Identify the percentage reduction for actions that were taken prior to the contravention to prevent the contravention (Reduction A) and actions that were taken after the contravention occurred to mitigate the contravention and to prevent the contravention from occurring in the future (Reduction B)

Table 9: Preventive Actions (Reduction A)

Significant	Some	None
Significant, well-documented actions were taken prior to the contraventions designed to prevent the	Some relevant actions were taken prior to the contravention designed to prevent the contravention from occurring (e.g., some	Very limited or no relevant actions were taken prior to the contravention designed to prevent the

Significant	Some	None
contravention from occurring (e.g., one or more of the following were undertaken: policies implemented, check-lists, IT systems, processes, training, established and documented)	of the following were undertaken to a limited degree: policies implemented, check-lists, IT systems, training, processes established and documented)	contravention from occurring.
30%	15%	0%

Table 10: Mitigation and Future Preventive Actions (Reduction B)

Significant	Some	None
The contravention was, or is in the process of being corrected in a timely manner <u>and</u> significant action has been taken to prevent the contravention from occurring in the future.	The contravention was, or is in the process of being corrected in a timely manner <u>or</u> significant action has been taken to prevent it from occurring in the future.	The contravention was not, or is not in the process of being corrected in a timely manner, <u>nor</u> has any significant action taken to prevent the contravention from occurring in the future.
20%	10%	0%

The following is an example showing how the Director might apply and calculate revisions and reductions to the penalty amount.

Example 3: Calculating base penalty revisions/reductions

The Director issued a notice of intent for a Class 1 contravention by a corporation with an initial penalty value of **\$8,750** and statement that the initial penalty was covering 5 days and is increasing on a daily basis (i.e., \$1,750 daily base penalty) (see Example 2)

The person receiving the notice of intent makes a request to the Director with additional information stating that the contravention was remedied within 2 days of receiving the notice of intent and that some preventive actions were taken prior to the contravention occurring.

Example 3: Calculating base penalty revisions/reductions

The Director revises the initial base penalty for the corrected duration of the contravention. The revised base penalty is **\$12,250** (\$1,750 daily base penalty x 7 days).

The Director determines, based on the information in the request, that for preventive actions, a 15% reduction will be applied for Reduction A (see table 9). Also, since the contravention was remedied within 2 days, but no additional future preventive actions were taken, the Director will apply 10% reduction for Reduction B (see table 10). The Director calculates the final base penalty value:

Final Base Penalty = Revised Base Penalty – (Revised Base Penalty x (Reduction A + Reduction B))

Final Base Penalty = \$12,250 - \$12,250 x (15% + 10%)

Final Base Penalty = \$12,250 – \$3,062.50

Final Base Penalty = **\$9,187.50**

2.3 Economic Benefit Determination

When a person fails to comply with a legal requirement, whether the contravention was deliberate or unintentional, the person may acquire an economic benefit from the non-compliance. One of the purposes of administrative penalties under the CCMLEA is to prevent any financial or economic benefit that a person may gain from non-compliance. This serves to maintain the integrity of the market and maintain confidence that there is a level playing field between all participants in the market.

There are three potential types of economic benefit that can be gained as a result of non-compliance: avoided costs, delayed costs and increased profit/revenue. Where the Director determines that the person has acquired a monetary benefit from the contravention, the Director determines the timeframe during which the person acquired the monetary benefit and then the amount of the monetary benefit.

In general, where an administrative penalty is used to respond to a contravention, the Director will consider whether the person has acquired an economic benefit when determining the initial penalty amount prior to issuing the notice of intent and the final penalty amount when issuing the administrative penalty order. However, an economic benefit component will, in most cases, only be added to the notice of intent or administrative penalty order by the Director when the Director is of the opinion the total amount of the economic benefit acquired by the person is over \$300.

If the Director assesses an economic benefit component, the notice of intent will indicate an estimated amount of the economic benefit and a summary of how it was calculated. The person may make a request to the Director prior to issuing the administrative penalty order (e.g. case-specific interest rates, more specific costs of

capital, etc.). Unlike the base penalty, a person cannot seek and obtain reductions to the economic benefit component of the penalty.

In addition, there is no specific cap for the economic benefit portion of the penalty value. However, under the CCMLEA, an administrative penalty cannot exceed \$1 million in total.

2.3.1 Avoided Costs

Avoided costs are costs that the person avoided incurring by failing to comply with a legal requirement.

Avoided costs apply in respect of provisions that must be complied with on or by a certain date and that, once that date has passed, cannot be complied with on a future date.

Avoided costs could include, among others: costs associated with human resources, energy, consumable materials, disposal of residuals, and laboratory analyses. For example, if a person does not undertake sampling and analysis as required by the “Guideline for Quantification, Reporting and Verification of Greenhouse Gas Emissions” in a given time period, it can never incur the costs for that time period’s sampling and analysis, even when sampling and analysis is resumed.

Note: When determining avoided costs, the Director will use the general methodology and formulas described in Part 2, Part 4 and Appendices B and C of the “Procedure for Calculation of the Monetary Benefit of Environmental Penalties”, as available on the ministry’s website.

2.3.2 Delayed Costs

Delayed costs are defined as costs that the person delayed incurring by delaying compliance with a legal requirement.

Delayed costs would include, among others: depreciable capital investments, such as sampling and monitoring equipment; and, non-depreciable things, such as submitting reports and registering as a mandatory participant in the program.

Note: When determining delayed costs, the Director will use the general methodology and formulas described in Part 2, Part 4 and Appendices B and C of the “Procedure for Calculation of the Monetary Benefit of Environmental Penalties”, as available on the ministry’s website.

2.3.3 Increased Profits

Economic benefit may also be gained as a result of an increase in profits as a result of non-compliance with a legal requirement, beyond those that are attributable to the effects from avoided or deferred costs. This type of benefit provides the person who is in non-compliance a competitive advantage over other entities that are complying with legal requirements.

Determination of economic benefit as a result of increased profits may be inherently complex and specific to the circumstances of the contravention. As a result, there are no standard formulae, such as with avoided costs and delayed costs that can be used to calculate this type of economic benefit.

For example, this type of economic benefit may occur where a person has violated prohibitions or rules designed to protect the market from manipulation (e.g., exceeding purchasing limits, insider trading, providing false or misleading information, etc.).

The ministry will look at each contravention subject to an administrative penalty on a case-by-case basis to determine if there is a potential for economic benefit that may have resulted in an increase in revenues or profits, beyond what is attributable to avoided/delayed costs.

Example 4: Economic benefit

A mandatory participant in the cap and trade program who has a compliance obligation underreports their greenhouse gas emissions. As a result, the person is able to avoid purchasing allowances that they would otherwise be required to have for compliance purposes.

Part 3: Other Administrative Penalty Components

Part 3 of this guidance document discusses aspects related to the process for issuing and determining an administrative penalty not otherwise covered in Parts 1 and 2.

3.1 Penal Consequence

The administrative penalty regulation states (see sub-section 8(2) of the regulation):

“If, after determining the final amount in accordance with subsection (1), the Director determines that, due to its magnitude, the imposition of the penalty is punitive in nature having regard to all the circumstances, the Director shall reduce the final amount such that the imposition of the penalty is consistent with the purposes set out in subsection 57 (1) of the Act.”

In order to determine whether the amount of an administrative penalty is, by its magnitude, punitive in nature, the Director may consider the fine structure set out in the CCMLEA for the contravention.

Generally, the economic benefit portion of the penalty would not be reduced as part of this consideration – as the economic benefit portion is by its nature not punitive in nature, but rather the means to remove any benefit arising from the contravention of the requirements of the cap and trade program. Removing economic benefit is consistent with the purpose of the administrative penalty regime under the CCMLEA.

In making a determination on whether a penalty is punitive in nature, the Director may also consider the financial impact of other administrative remedies available to ministry officials under the legislation to deal with the contravention that is the subject of the administrative penalty. Other administrative remedies which are available include:

- Temporarily suspending the person’s ability to trade allowances,
- Cancel a person’s account
- Issuing compliance orders to correct the contravention or prevent its recurrence

The exercise of the above administrative remedies to resolve non-compliance have the potential to impose a significant financial obligation on a person.

The Director may reduce the administrative penalty based on these considerations. The amount of a reduction, if one is required, will depend on the circumstances of each case.

3.2 Requests to the Director

After receiving a notice of intent, the person may make a request to the Director to consider additional information when calculating an administrative penalty order for the

contraventions set out in the notice of intent (see Step #2 of Table 1). The request must be made in writing within 15 days as indicated on the notice of intent. The notice of intent should be served as soon as possible (e.g., via a means that allows for same-day delivery), such as fax service or e-mail service) in order to allow the person the full 15 days to respond. Section 67 of the CCMLEA and O. Reg. 451/17 (Service of Documents) identifies the means by which documents can be served or given. In extenuating circumstances, the deadline for making a request to the Director may be extended by written agreement of the Director. A request to extend the deadline must be made within 15 days of receiving the notice of intent.

3.2.1 Contents of the Request

The request to the Director may apply to one or more parts of the notice of intent:

Content Item	Description
Initial Base Penalty Calculation	<p>The person may provide information for the Director to consider when assessing the initial base penalty amount, including the multi-day component of the calculation. For instance, the person may believe that the Director has erroneously classified a contravention as a Class 2 contravention as opposed to a Class 1 contravention. Alternatively, the person may believe that the Director has classified the impact of a contravention as “significant” as opposed to “moderate” and provide information to that effect.</p>
Reductions for Preventative and Mitigative Actions	<p>The person may request a reduction based on steps taken to prevent or mitigate the contravention. The request must state the grounds for the reduction and specify the steps taken consistent with those listed in this guideline.</p>
Initial Economic Benefit	<p>If the notice of intent includes an estimate of economic benefit, the person may request the Director to consider the information in the request to the Director and reassess the economic benefit. For instance, the person may believe that the Director has made erroneous assumptions regarding discount rates or other variables used in calculating the economic benefit.</p>

In addition to the contents listed in the table above, the Director may consider other information in the request, such as the ability of the person to pay the amount stated in the notice of intent.

If the person is requesting a different payment schedule or claiming financial hardship as a result of paying the initial amount of the proposed administrative penalty order, the person may provide the preferred schedule of payment or the documents identified in Chapter 5.2 of Guideline F- 14 “Economic Analyses of Control Documents on Private Sector Enterprises and Municipal Projects” (April, 1994) as amended from time-to-time, as part of its initial request to the Director that issued the administrative penalty order.

If the notice of intent applies to more than one contravention, the request for review may also apply to more than one contravention.

3.3 Failure to Pay

If the administrative penalty order is not paid by the deadline, the ministry’s potential responses under CCMLEA, if payment is not received within 30 days of the notice, are as follows:

- file the administrative penalty order or Environmental Review Tribunal decision with the Superior Court of Justice such that the order or decision may be enforced as if it were an order of the court; and,
- suspend the person’s authority to deal with emission allowances and credits in the person’s cap and trade accounts until the administrative penalty is paid