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**RE:** Administrative Penalties Regulation made under the *Resource Recovery and Circular Economy Act, 2016*.

This comment is submitted on behalf of all Osgoode Hall Law School students enrolled in the Environmental Law and Policy course. We recommend the Ministry of Environment, Conservation and Parks (‘the Ministry’) adopt the proposed Administrative Penalties Regulation (the ‘Proposal’) under the *Resource Recovery and Circular Economy Act, 2016* (the ‘RRCEA’) for the following reasons:

1. Administrative Monetary Penalties (AMP) are an Effective Enforcement Tool for Environmental Regulations
2. AMP Supports Ontario’s and the Federal Government’s Environmental Goals
3. AMP are Charter Compliant

However, we also encourage the Ministry to consider the recommendations and cautionary notes we include regarding the effectiveness of AMP in the context of environmental regulations.

These topics include:

1. Greater Transparency with Respect to Non-compliant Producers
2. Subjecting Small Producers to the Regulation and to AMP
3. Penalties for not Taking “Best Effort”
4. Neoliberalism
3. Agency Capture

## **AMP are an Effective Enforcement Tool for Environmental Regulations**

Section 89 of the RRCEA – authorizing the use of AMP under the RRCEA – states that administrative penalties may be imposed to “ensure compliance with this Act and the regulations” and “prevent a person from deriving... any economic benefit as a result of contravening a provision of this Act or of the regulations.”<sup>1</sup> This accurately captures why AMP are used as an enforcement tool for environmental regulations.

AMP are “financial disincentive[s] to noncompliance”,<sup>2</sup> issued by a regulator – in this case, the Resource Productivity and Recovery Authority (RPPRA) – without court proceedings for the violation of a regulatory scheme. AMP, as stated in a 2021 report for the Government of Manitoba, “have been found to be a quick, clear and tangible way of addressing contraventions of regulatory schemes.”<sup>3</sup>

There is a trend of environmental regulators under Canadian provincial and federal legislation increasingly looking towards AMP as an additional enforcement and compliance tool.<sup>4</sup> AMP function as a deterrent on two levels – societal and individual. Individual wrongdoers are targeted in attempts to show the “unprofitability of repeated wrongdoings.”<sup>5</sup> Larger groups of potential wrongdoers (‘society’) are targeted to demonstrate the financial and reputational

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<sup>1</sup> *Resource Recovery and Circular Economy Act, 2016*, SO 2016, c 12, s 89(1).

<sup>2</sup> Environment and Climate Change Canada, “Policy Framework of the Administrative Monetary Penalty Regime at Environment and Climate Change Canada to Implement the *Environmental Violations Administrative Monetary Penalties Act*” (2017) at 3, online (pdf): *Government of Canada* <[https://www.canada.ca/content/dam/eccc/documents/pdf/evampa/APF\\_E\\_JAN26-2018%20Final%20updated3\\_cover.pdf](https://www.canada.ca/content/dam/eccc/documents/pdf/evampa/APF_E_JAN26-2018%20Final%20updated3_cover.pdf)>.

<sup>3</sup> Dillon Consulting, “Manitoba Waste Diversion and Recycling Framework Review: Final Report” (2021) at 17, online (pdf): *Manitoba Conservation and Climate* <[https://gov.mb.ca/asset\\_library/en/proactive/20212022/waste-diversion-recycling-framework-review.pdf](https://gov.mb.ca/asset_library/en/proactive/20212022/waste-diversion-recycling-framework-review.pdf)>.

<sup>4</sup> Max Collett & Emily Chan, “Failure to report spills may attract penalties up to \$75,000: new administrative penalties in effect for BC land-based spills” (2021), online: *Norton Rose Fulbright* <<https://www.nortonrosefulbright.com/en-ca/knowledge/publications/f4fc285e/failure-to-report-spills-may-attract-penalties-up-to-75000-new-administrative-penalties>>.

<sup>5</sup> *Cartaway Resources Corp (Re)*, 2004 SCC 26 at para 52.

consequences of wrongdoing.<sup>6</sup> Thus, deterrence through AMP can be both *ex ante* and *ex post* in orientation.<sup>7</sup>

According to the Supreme Court of Canada, in some cases, large AMP are necessary to serve their deterrent purpose and not be viewed by industry as “a cost of doing business.”<sup>8</sup> Thus, for an AMP to be effective in deterring certain industries from violating environmental regulations, the monetary amount must be able to rise above a ‘cost of doing business.’

The flexible scheme and calculation tool for the contraventions of the RRCEA, Tires Regulation, Batteries Regulation, Electrical and Electronic Equipment Regulation, Blue Box Regulation, and Hazardous and Special Products Regulation, by:

- A) imposing larger penalty amounts for businesses than individuals
- B) including an “economic benefit amount” calculated in addition to a “base penalty amount”

ensures the Administrative Penalties Regulation for producers, manufacturers and importers included under the above regulations is rational. The “economic benefit amount” calculation and imposition is a measure that directly responds to the ‘cost of doing business’ concern outlined earlier.

### **AMP Supports Ontario’s and the Federal Government’s Environmental Goals**

Furthermore, an effective AMP scheme that supports compliance with the relevant environmental regulations and deters non-compliance supports the Government of Ontario’s and the Federal Government’s environmental goals.

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at para 4.

<sup>8</sup> *Guindon v Canada*, 2015 SCC 41 at para 80.

The adoption of the RRCEA was a major step in Ontario’s transition to an extended producer responsibility (EPR) framework. EPR policies aim to ensure that product prices – in this case, tires, lightbulbs, batteries, to only name a few captured in the relevant regulations – “incorporate their social and environmental life-cycle costs, including end-of-life treatment and disposal.”<sup>9</sup> This is a waste management strategy increasingly being taken up in Canada. EPR waste management frameworks, which include a wide spectrum of policies, generally make producers responsible, physically, and financially, for the waste created from their products and materials.<sup>10</sup> The RRCEA gives producers, manufacturers, and importers flexibility to “self-determine”<sup>11</sup> their waste management strategies to meet the relevant performance objectives and abide by relevant regulations. An EPR framework drives innovation in industries that are made responsible for their waste, promotes competition and innovation in waste management systems, fosters a provincial market for reuse/recycling, and has positive environmental outcomes related to reductions of waste in the environment.<sup>12</sup>

AMP, as an enforcement tool, helps “ensure a level playing field among actors as well as increase the likelihood of the success of EPR programs.”<sup>13</sup> Where there are effective deterrents and compliance mechanisms, producers are less likely to breach environmental regulations within the EPR framework (ex. overreporting collection and management, underreporting their product/materials that enter the market) which would skew perceptions of and the actual success

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<sup>9</sup> Denisa Mertiri, “When Theory Meets Practice: Lessons from Decades of Packaging EPR Experiences in Europe” (2020), online: *Green Earth Law* <<https://greenearthlaw.ca/2020/11/06/when-theory-meets-practice-lessons-from-decades-of-packaging-epr-experiences-in-europe/>>.

<sup>10</sup> Jonathan Arnold, “Extended Producer Responsibility in Canada” (2019) at 2, online (pdf): *Smart Prosperity Institute* <<https://institute.smartprosperity.ca/sites/default/files/eprprogramsincanadaresearchpaper.pdf>>.

<sup>11</sup> Letter from Canadian Environmental Law Association to Resource Recovery Policy Branch (Government of Ontario) (3 December 2020) at 4, online (pdf): *Canadian Environmental Law Association* <<https://cela.ca/wp-content/uploads/2020/12/ENGO-comments-ERO-019-2579-Blue-Box-and-Compost-Regs.pdf>>.

<sup>12</sup> *Supra* note 10 at 4, 13.

<sup>13</sup> *Supra* note 3 at 206.

of the EPR program.<sup>14</sup> Thus, with a better functioning EPR system, the better Ontario’s waste management, and the more likely provincial interests contained in the RRCEA are achieved. Specifically, Ontario’s interest in protecting the “natural environment and human health”<sup>15</sup> and fostering the “continued growth and development of the circular economy.”<sup>16</sup> An effective EPR program also supports the *Strategy for a Waste Free Ontario: Building the Circular Economy*.<sup>17</sup>

Ontario’s transition to EPR and establishing enforcement tools like AMP that create effective EPR strategies also supports the Federal government’s *Canada-Wide Action Plan for Extended Producer Responsibility (CAP)*.<sup>18</sup> CAP’s objective is to “establish a harmonized approach to EPR programs across the country, covering a common set of materials.”<sup>19</sup> However, most provincial EPR programs have differing covered materials, definitions, reporting mechanisms and governance structures.<sup>20</sup> While Ontario’s proposed AMP regulation differs in certain aspects from those of other provinces, the adoption of AMP in and of itself aligns Ontario with other provinces. For example, British Columbia<sup>21</sup>, Quebec<sup>22</sup>, and Alberta<sup>23</sup> utilize AMP to enforce provincial environmental legislation.

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Supra* note 1, s 2(a).

<sup>16</sup> *Supra* note 1, s 2(b); “circular economy” means an economy in which participants strive, (a) to minimize the use of raw materials, (b) to maximize the useful life of materials and other resources through resource recovery, and (c) to minimize waste generated at the end of life of products and packaging.

<sup>17</sup> Ministry of the Environment and Climate Change, “Strategy for a Waste-Free Ontario: Building the Circular Economy” (2017), online (pdf): *Government of Ontario* <<https://www.ontario.ca/page/strategy-waste-free-ontario-building-circular-economy>>.

<sup>18</sup> Canadian Council of Ministers of the Environment, “Canada-wide Action Plan for Extended Producer Responsibility” (2009), online (pdf): *CCME* <[https://ccme.ca/en/res/cap-epr\\_e.pdf](https://ccme.ca/en/res/cap-epr_e.pdf)>.

<sup>19</sup> *Supra* note at 9.

<sup>20</sup> *Ibid* at 3.

<sup>21</sup> *Administrative Penalties Regulation*, BC Reg 133/2014.

<sup>22</sup> *Supra* note 3 at 145.

<sup>23</sup> *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, ss 237-8.

## **Charter Considerations**

The RPRA has structured their AMP in a constitutionally compliant manner. Legal legitimacy is essential, as the RPRA's penalties act as a deterrent. Recipients of an AMP with a significant financial penalty have challenged the substantial amount as unconstitutional, claiming an excessive fine is a criminal product rather than an administrative penalty and therefore a violation of section 11 of the Charter that provides procedural rights to those charged with a criminal offence.<sup>24</sup> As the penalties under the Act can total a million dollars, it would be fair to consider the legality of the Authority's framework for setting fines to ensure the lawfulness of the structure. The Supreme Court provided the test for determining if an AMP is an administrative penalty or a criminal charge in *Guindon*<sup>25</sup>, where the Court relied upon the second *Wigglesworth* test for direction.<sup>26</sup> The Court concluded a penalty would be a criminal charge if the AMP was punitive in nature. The size of the fine is not determinative. The Court must look at the considerations for setting the total amount and conclude if the penalty's purpose is to address a wrong done to society or to secure compliance with a regulation. Section 89 of the RRCEA states an AMP can be imposed under the following provisions, "1. To ensure compliance with this Act and the regulations. 2. To prevent a person from deriving, directly or indirectly, any economic benefit as a result of contravening a provision of this Act or of the regulations". The RPRA grounded the contemplations of a penalty with the intention that the fine would compel industry compliance with the RRCEA rather than punish. If the RPRA determines that an AMP

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<sup>24</sup> Doug McLeod, "An Unacceptable Standard: Administrative Monetary Penalties and the Erosion of Section 11", 2016, 36:2 NCJL 230.

<sup>25</sup> *Supra* note 8.

<sup>26</sup> *Ibid* at 76.

is punitive, Section 7(4) of the Proposal requires the fine be reduced until non punitive. Given this method the RRCEA's AMP should be viewed as a legally compliant administrative penalty.

### **Recommendations for Improving the Efficacy of AMP**

#### *Recommendation #1: Greater transparency with respect to non-compliant producers*

AMP provide an efficient way of incentivizing compliance, if appropriately applied. Transparency plays an integral role in the efficacy of AMP as it maintains public confidence in the RPRA's ability to regulate and enforce the RRCEA and its regulations. Transparency also reduces uncertainty as it ensures that regulated producers understand what their rights and responsibilities are in relation to the RPRA. Though we support the Proposal's existing commitment to ensuring transparency and accountability, we call for greater transparency with respect to non-compliant producers.

The Proposal provides that "...all administrative penalties will be posted on the Authority's public website" to ensure transparency and accountability on the RPRA's part. This is a welcomed scheme as it minimises information asymmetry and increases the chance of compliance. However, the Proposal is not clear on whether producers who are subject to fines under the RRCEA will be broadcasted to the public due to noncompliance. This is a valuable market mechanism that should be implemented as it provides greater incentives for companies to comply with the RRCEA and its regulations. By revealing the list of non-compliant producers on a regular basis, consumers will be equipped with greater information that could inform their purchase preferences. This is a desirable outcome as consumers are increasingly conscious about purchasing environmentally friendly products and engaging with corporations who are mindful

of environmental, social, and governance (ESG) best practices.<sup>27</sup> Providing the public with a list of non-compliant producers also gives retailers the chance to reassess their relationship with their suppliers given this shift in consumer preferences. This is particularly relevant under the Tire Regulation as it generally covers Ontario-based car producers.<sup>28</sup> With the increase in demand (and consequent supply) for eco-friendly vehicles, tire producers are more likely to comply with the Tire Regulation to avoid a negative reaction from the increasingly eco-friendly automobile industry.

A “soft” enforcement mechanism of this sort has seen success in environmental and non-environmental contexts.<sup>29</sup> In the world of corporate governance for example, the Ontario Securities Commission adopted a “comply or explain” policy in 2015 to increase the representation of women on corporate boards.<sup>30</sup> The program required S&P/TSX listed companies to disclose what fraction of their board of directors is made up of women and any policies related to the identification and nomination of women directors. If companies do not comply with the disclosure requirements, they are obligated to provide a public explanation as to why. The policy has seen great success since its implementation with a notable increase in the share of women directors on corporate boards in S&P/TSX listed companies.<sup>31</sup> Similar results have also been observed in other parts of the world.<sup>32</sup> By increasing transparency through the

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<sup>27</sup> “Return on experience is a metric business can’t ignore: Canadian Consumer Insights Survey” (2019), online (pdf): PWC <[www.pwc.com/ca/en/retail-consumer/publications/pwc-canada-2019-canadian-consumer-insights-p567530.pdf](http://www.pwc.com/ca/en/retail-consumer/publications/pwc-canada-2019-canadian-consumer-insights-p567530.pdf)>

<sup>28</sup> *Tires*, O Reg 225/18.

<sup>29</sup> For an environmental example, see Wang et al. “Environmental performance rating and disclosure: China’s GreenWatch program” (2004) *Journal of Environmental Management* 71: 123–133.

<sup>30</sup> “Increasing Gender Diversity in Corporate Leadership”, online: *Ontario Newsroom* <<https://news.ontario.ca/en/release/31201/increasing-gender-diversity-in-corporate-leadership>>.

<sup>31</sup> Beata Caranci & Leslie Preston, “Corporate Canada Is Getting On Board: An Update Since Comply or Explain Gender Disclosure Policy Came Into Effect” (2019), online: *TD Economics* <<https://economics.td.com/corporate-canada-getting-on-board>>.

<sup>32</sup> *Ibid.*



“comply or explain” policy, the regulators have successfully advanced their policy objective using a non-punitive measure by mobilizing an increasingly ESG-conscious financial market. We call for the RRCEA to take advantage of similar market trends to advance its resource recovery and waste reduction policy objectives.

Though a “comply or explain” policy would indeed be effective under the RRCEA and its regulations, it would impose a great upkeep cost on the RPRA as well as the regulated producers that makes it less appropriate than in the context of large S&P/TSX listed companies. Instead, we suggest that non-compliant producers be automatically listed on an official webpage similar to the Federal government’s “[Employers who were found non-compliant](#)” database or Nasdaq’s “[Noncompliant Companies Listing Centre](#)”. This information should also be included in the annual report to the Minister. The listing of such information also increases public participation as it provides valuable and easily accessible data to researchers in academic and professional spheres.

*Recommendation #2: Subjecting small producers to the regulation and to AMP*

Minimizing the opportunity for free ridership is important for maintaining the economic viability of EPR programs such as RRCEA. In the context of EPR, free riding refers to producers who are not registered with EPR schemes but nonetheless take advantage of it. Such producers contribute products to be recycled but avoid take-back obligations and any penalties associated with noncompliance.<sup>33</sup> This largely occurs as it is difficult to monitor and ensure all producers are participating in the EPR program. The Blue Box regulation under the RRCEA exempts small producers – those with annual revenues of less than C\$2,000,000 - from most obligations and, by

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<sup>33</sup> “Development of Guidance on Extended Producer Responsibility (EPR)” (2014), online (pdf): *European Commission – DG Environment* <[https://www2.deloitte.com/content/dam/Deloitte/fr/Documents/sustainability-services/deloitte\\_sustainability-les-filieres-a-responsabilite-elargie-du-producteur-en-europe\\_dec-15.pdf](https://www2.deloitte.com/content/dam/Deloitte/fr/Documents/sustainability-services/deloitte_sustainability-les-filieres-a-responsabilite-elargie-du-producteur-en-europe_dec-15.pdf)>

extension, any AMP.<sup>34</sup> We propose that small producers should not be exempted from the RRCEA and that they be subject to AMP.

From a cost perspective, exempting small producers from EPR obligations has some merit. Imposing EPR obligations on small businesses could prove to be financially and logistically burdensome for many that are operating at the margin. It indeed also makes it costlier for the RPRA to monitor compliance with the RRCEA given the likely large number of small producers. Through these exemptions, however, the RRCEA may be creating a significant number of free riders. In British Columbia for example, it is calculated that fewer than 1% of producers are indeed required to participate in its EPR system, with the largest 150 producers paying 80% of the costs.<sup>35</sup> This disparity can also undermine the financial viability of EPR programs. Again, in British Columbia, newspaper producers initially refused to partake in the province's printed paper and packaging recycling program even though newspapers were still being calculated and recycled by that same program. It was calculated that the program was underfunded by C\$3-5 million per year largely given that newspaper producers were not making a financial contribution to the program they were benefiting from.<sup>36</sup> Overall, excluding small producers from any obligations effectively means that large producers are subsidizing the costs of the waste management system.

While some form of a disparity is expected with respect to share of the RRCEA's costs, excluding small producers from any obligations and penalties also has other indirect harmful effects. First, some studies suggest that free riders may distort performance measures of EPR

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<sup>34</sup> *Blue Box, O. Reg. 391/21 s.73.*

<sup>35</sup> Carol Bellringer "Product Stewardship: An Overview of Recycling in B.C." (2016) online (pdf): *Office of the Auditor General of British Columbia* <[https://www.bcauditor.com/sites/default/files/publications/reports/FINAL\\_Product\\_Stewardship.pdf](https://www.bcauditor.com/sites/default/files/publications/reports/FINAL_Product_Stewardship.pdf)> at 10.

<sup>36</sup> *Ibid* at 14.

programs. For example, British Columbia’s printed paper and packaging recycling program reported a recycling rate of 78% in 2017, higher than the mandated 75%. However, one estimate concluded that if the products manufactured by free riders are considered, the actual recycling rate could be as low as 57%.<sup>37</sup> This distortion largely occurred because products produced by free riders were collected by the EPR program but were not accounted for in calculations of the total amount sold therefore skewing the recycling rate.<sup>38</sup>

A second indirect harmful effect concerns the muting of one of the big benefits of EPR programs, product design. EPR programs have been shown to stimulate green product design.<sup>39</sup> Given that producers are responsible for the post-consumer stage of a product’s life cycle, they have an incentive to create more eco-friendly products and packaging to minimize collection and recycling costs. By continuing to exempt hundreds of thousands of Ontario producers from the Blue Box regulations and any penalties, this incentive is off the table. While it is true that creating greener packaging could be more expensive and likely lead to higher product costs, this may not necessarily translate to worse business outcomes for small producers. As noted earlier, consumers are increasingly cognisant of their environmental footprint and a number of them are increasingly willing to pay a “green-premium” for environmentally friendly products at least partly for their social signalling benefits.<sup>40</sup> Overall, though we recognize that exempting small

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<sup>37</sup> Chaz Miller, “Recycle British Columbia’s Extended Producer Responsibility for Packaging and Paper: An Assessment of Its Impact” (2019), online (pdf): *Recycle BC* <[http://www.crrcnorth.org/uploads/pdf/Recycle\\_BC\\_White\\_Paper\\_2-19.pdf](http://www.crrcnorth.org/uploads/pdf/Recycle_BC_White_Paper_2-19.pdf)> at 13.

<sup>38</sup> Allison Boutillier “Extended Producer Responsibility: Designing the Regulatory Framework” (2020), online (pdf): *Environmental Law Centre* <<https://elc.ab.ca/wp-content/uploads/2020/05/Extended-Producer-Responsibility-May-2020.pdf>> at 19.

<sup>39</sup> See, Don Fullerton & Wenbo Wu “Policies for green design” (1998) *Journal of Environmental Economics and Management* 36: 131–148; Thomas Eichner & Rüdiger Pethig “Product design and efficient management of recycling and waste treatment” (2001) *Journal of Environmental Economics and Management* 41: 109–134.

<sup>40</sup> Joël Berger “Signaling can increase consumers’ willingness to pay for green products. Theoretical model and experimental evidence” (2019) *Journal of Consumer behaviour* 18(3): 233-246.

businesses from certain regulations and penalties is well-intentioned, we believe the benefits of their inclusion outweigh the costs.

*Recommendation #3: Penalties for not taking “best effort”*

Several regulations under the RRCEA include “best effort” provisions.<sup>41</sup> These are provisions which obligate producers to exercise a high level of effort to comply with the regulation. Section 11 of the Proposal provides that:

*Despite anything else in this Regulation, the Registrar or Deputy Registrar shall not issue an administrative penalty in respect of a person’s contravention of a requirement to make best efforts to do something.*

In other words, Section 11 exempts any contravention of “best effort” provisions from AMP. We call for this exemption to be removed. Instead, AMP should equally apply to any producers who fail to apply “best effort” where required by a regulation.

Courts have defined “best effort” provisions in contract law to mean that a party must take all reasonable steps to achieve the objective, carrying the process to its logical conclusion and “leaving no stone unturned”.<sup>42</sup> The standard is also objective and an element of good faith is embedded in the obligation.<sup>43</sup> Importantly, the courts have specified that “best effort” obligations impose a higher burden than other phrases such as “reasonable efforts” or “commercially reasonable efforts”.<sup>44</sup> On the whole, this signifies that the “best effort” provisions included in some of the regulations impose a legally high burden of effort – however, no penalty is imposed if such a burden is not met. AMP are an effective form of enforcement as they deter non-compliance by penalizing them sufficiently such that it is rational to comply. By imposing a

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<sup>41</sup> For example, see *Batteries*, O. Reg. 30/20 s.13.

<sup>42</sup> *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.* 1994 CarswellBC 158, para 77. Followed in Ontario in *Bruce v. Waterloo Swim Club* 1990 CarswellOnt 779 at para 40.

<sup>43</sup> *Bruce v. Waterloo Swim Club* 1990 CarswellOnt 779 at para 40.

<sup>44</sup> *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.* 1994 CarswellBC 158.

“best effort” obligation without a suitable penalty, it effectively encourages producers to not comply with these provisions as the cost of compliance is high, and the punishment is zero. There must be a penalty in place to stop producers from blatantly violating regulations. As such, we recommend that Section 11 of the Proposal explicitly state that producers will be subject to AMP if “best effort” are not attempted where required.

### **A word of caution: Neoliberalism and Agency Capture**

#### *Neoliberalism*

The proposed AMP regulation will provide the RPRA a resource to compel industry compliance with the RRCEA. However, the threat of a financial penalty should not be viewed as the elixir to ensure industry obedience. For financial penalties to perform as a deterrent, the RPRA must establish and maintain a functioning regulatory system capable of administering the RRCEA. The RRCEA’s ability to achieve a waste free Ontario will depend on industry’s cooperation as waste management responsibilities are changing within the new EPR system. Producers of regulated materials will be responsible for the waste management of their products.<sup>45</sup> Shifting responsibilities from the state to industry is a central tenet of neoliberalism.<sup>46</sup> Given the changing dynamic, the RPRA’s environmental protection systems must be viewed within the context of neoliberalism to evaluate the RPRA’s capabilities to maintain a functioning compliance system.

Adopting neoliberal environmental policy has been a standard practice in Ontario for the past thirty years.<sup>47</sup> In regard to environmental management, some benefits can be derived from

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<sup>45</sup> “The Circular Economy”, online: *Resource Productivity and Recovery Authority* < [rpra.ca/about-us/the-circular-economy](http://rpra.ca/about-us/the-circular-economy)>.

<sup>46</sup> Scott Prudham, “Poisoning the well: neoliberalism and the contamination of municipal water in Walkerton, Ontario”, (2004), 35:3, *Geoforum*, 345.

<sup>47</sup> *Ibid* at 351.

this practice. For example, having industry take responsibility for waste diversion falls within Canada's larger environmental policy platform by adhering to the polluter pays principle. Industry should be compelled to be mindful of their environmental impact and have it structured within their operations rather than as an externality. However, neoliberalism produces environmental risks that can lead to disastrous consequences when not properly managed.<sup>48</sup>

Understanding risk derived from neoliberalism is essential because it allows authority to anticipate what can go wrong and then plan accordingly. Critics of neoliberalism's impact on environmental policy suggest inherent flaws within re-regulation of industries creates the potential for poor oversight of industry operations, which can devolve regulatory systems.<sup>49</sup> Risks associated with environmental disasters are routinely a product of human actions that take place within organized systems like the RPRA. A key example is the poisoning of the Walkerton water supply.

Following neoliberal reforms to Ontario's water management system throughout the 1990s, the town of Walkerton suffered several deaths when E. coli and other bacteria contaminated the municipal water supply.<sup>50</sup> In a review of the events leading up to the disaster, it was determined that several factors contributed to the unfortunate outcome. One element that contributed to the harm was how systemic incompetence plagued different environmental sectors that influenced water management despite the oversight of the Ministry of the Environment (MOE) and the Ontario Environmental Protection Act, legislation that imposed standards and procedures on the storage and transport of hazardous wastes including financial costs for failing

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<sup>48</sup> *Ibid* at 345.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* at 344.

to comply with regulations.<sup>51</sup> While MOE likely constructed the water management system with the best intentions, the impact of lobbyist, fraudulent activity within the industry and incompetent administration all contributed to weakening Walkerton's water management capabilities.<sup>52</sup>

Walkerton was not an isolated incident. The adoption of neo-liberal reforms spurred environmental degradation in Ontario, despite government legislation and deterrents.<sup>53</sup> Therefore, if the RPRA is implementing neoliberal styled policy then an increased probability of environmental damage should be anticipated. However, the RPRA has supports that were absent from Walkerton. The municipal water supply deteriorated in part due to the consequence of poor oversight and a lack of mandatory reporting.<sup>54</sup> The RPRA has structured reporting and independent certified auditors for assessing producer's reports. Nevertheless, much like the AMP, the system is dependent on accountability. The waste management system will not operate in a vacuum. The Authority must not overlook the social component to their system. There will be lobbyists and opportunities for corruption just as there were in Walkerton. The RPRA should anticipate a higher likelihood of environmental harm if the system to maintain operations is not kept in check.

### *Agency Capture*

Securing the required resources to maintain optimal operations could have unintended and adverse effects on the RPRA operations. As a means of securing operational capabilities, administrative agencies have a tendency to utilize the industry they are regulating as a supplementary resource to provide technical expertise, political support and even human

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<sup>51</sup> *Ibid* at 356.

<sup>52</sup> *Ibid* at 354 and 355.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*.

capital.<sup>55</sup> Industry actors are motivated to provide support and establish a dependent relationship with regulators as the dynamic can offer an opportunity for influence on policy development.<sup>56</sup> Industry's ability to guide or even control regulation because of interconnected influence is known as agency capture.<sup>57</sup> Critics of private interest's impact on regulation are concerned with a loss of neutrality as industry bias overwhelms and distorts an agency's original mandate.<sup>58</sup> Influence can be the consequence of corrupt activities or just the result of familiarity.<sup>59</sup> The operations and technical knowledge overlap between the private and public sectors has personnel shifting back and forth between industry and administrative agencies. No matter the cause of agency capture, the overall concern is the impact industry bias can have on environmental regulation. For example, following the appointment of a Kinder Morgan consultant to the board of the National Energy Board (NEB) during the review of the Trans Mountain expansion project, the NEB altered procedure for project review in industry's favour, including narrowly reducing the scope of reviewable issues.<sup>60</sup> Reducing the risk of agency capture requires diluting the need for regulatory agencies to depend on industry. A 2017 report from the Minister of the Environment and Climate Change on the federal assessment framework highlighted the benefits of expanding public participation.<sup>61</sup> While the RRCEA offers opportunity for public consultation, there are no mandatory obligations. The proposed framework should be amended to increase and command a larger public role within the RPRA to draw on resources outside of industry.

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<sup>55</sup> William A. Tilleman et al, *Environmental Law and Policy*, 4 th ed (Toronto: Edmond, 2020) at 386.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Warren Bernauer, "Regulatory capture" and "extractive hegemony": the relevance of Nicos Poulantzas' theory of the state to contemporary environmental politics in Canada" (2020) 13:2 *Human Geography* at 16.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*