

Compliance Policy
Applying Abatement and Enforcement Tools

May 2007

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Legislative authority:

Environmental Assessment Act

Environmental Protection Act

Nutrient Management Act

Ontario Water Resources Act

Pesticides Act

Provincial Offences Act

Safe Drinking Water Act

Waste Diversion Act

The purpose of this document is to provide guidance to ministry staff in exercising their authorities under statutes administered by the Ministry of the Environment. As this is a policy, it cannot fetter the discretion of a Ministry official exercising an authority under a statute administered by the Ministry of Environment. To understand the scope of authority a Ministry official is given under a statute administered by the Ministry of Environment, it is important to refer to the legislation. A copy of Ministry legislation can be viewed on the Province's e-laws website at <http://www.e-laws.gov.on.ca/>

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1 Introduction

The Ministry of the Environment (Ministry) works to protect, restore and enhance the natural environment through tough legislation and enforcement, innovative programs and initiatives, strong partnerships, and public engagement. The Ministry works to provide all Ontarians with safe and clean air, land and water.

The Ministry's approach to compliance and enforcement, as embodied in this Policy, seeks to safeguard the public interest by ensuring that the Ministry's response to an incident is proportionate to the severity of the incident. This Policy sets out the approach Ministry staff will use to determine the severity of an incident. For incidents that are determined to be more severe in nature, this Policy requires staff to consider a mandatory abatement response. For less severe incidents, this Policy permits staff to consider a voluntary abatement response. Generally, a mandatory abatement response is one where the law is used to compel a person to respond to an incident whereas a voluntary abatement response relies on a person's voluntary actions to respond to the incident.

At all times, staff will seek to work cooperatively and in a professional manner with the responsible person(s) to help address the impacts of a violation and to prevent its recurrence.

This approach seeks to provide enhanced environmental protection by using firm and swift action to incidents that result in or have the potential for significant health and/or environmental consequences, while allowing flexibility to address other situations.

2 Objective

The objective of the Compliance Policy is to support achievement of the Ministry's vision through the appropriate use of abatement and enforcement tools.

This Policy provides guidance in the selection of abatement and enforcement tools to address violations of Ministry legislation. It also provides direction on how to respond to environmental incidents with the potential to adversely affect human health or the natural environment, where there is no violation, and legal authority for staff to require preventive action exists.

The approach and procedures for individual programs may vary from this policy when there are specific legislative requirements or program-specific inspection protocols or procedures.

3 Definitions

Abatement:	Actions taken to achieve compliance including education and outreach, warnings and the issuance of orders.
Abatement Plan:	A plan proposed by the responsible person that includes abatement measures to be undertaken by the responsible person to correct a violation or implement preventive measures. A responsible person may be requested to submit an abatement plan when the person is given a notice of violation. The abatement plan is an important voluntary abatement tool. Since an abatement plan is undertaken by the person voluntarily, the failure to carry out a plan is not an offence. However, such a failure may be grounds for issuing a control document to require the person to carry out the plan. See chapter 9.1.4 for more details.

Authorizing Documents:	An authorizing document is generally a type of permission that a person is required to obtain under Ministry legislation before engaging in an activity. For instance, a person is required under Part V of the <i>Environmental Protection Act</i> (“EPA”) to obtain a certificate of approval or a provisional certificate of approval before establishing and operating a waste disposal site. Generally, under Ministry legislation, the Director is given authority to issue, amend or revoke an authorizing document. Authorizing documents include licences, permits, approvals, certificates of approval, provisional certificates of approval, and certificates of property use. These legally enforceable documents regulate the manner in which activities are carried out or how a facility or undertaking is established or operated. In the case of the <i>Nutrient Management Act</i> , where administration of the Act is split, the Ministry of Agriculture, Food and Rural Affairs is currently responsible for issuing authorizing documents. See chapters 9.1.2 and 9.1.7 for more details.
Compliance:	A state achieved when a person who is bound by a provision of an act, regulation, control document or authorizing document acts in accordance with applicable provisions of ministry legislation, regulations, and any control or authorizing documents.
Control Documents (Orders, Direction or Notice):	A control document is generally an authority under Ministry legislation to require a person to deal with a violation or other types of incidents. Ministry legislation authorizes provincial officers, Directors, the Minister or a court to issue control documents, and they include orders, directions, reports and notices. The issuance of a control document is one of the primary mandatory abatement tools available to the Ministry to respond to an incident, because it imposes legal obligations on the person as opposed to allowing the person to deal with the incident voluntarily. Under Ministry legislation, the failure to comply with most types of control documents is an offence. See chapter 9.1.5 for more details.
Director:	A person appointed as a Director in writing by the Minister under a statute or regulation for the purposes of administering a particular provision of a statute or regulation.
Enforcement:	Prosecuting alleged violators for the purpose of punishing wrongdoing and deterring further non-compliance. Prosecutions are commenced and conducted under the <i>Provincial Offences Act</i> (“POA”) and includes the issuance of a Certificate of Offence (ticket) or summons under Part I of the <i>POA</i> , as well as the laying of charges under Part III of the <i>POA</i> . See chapter 9.2 for more details.
Environmental Penalty:	A penalty order that may be given by the Director to a regulated person who violates a provision of the <i>Environmental Protection Act</i> (“EPA”) or the <i>Ontario Water Resources Act</i> (“OWRA”). Like other types of control documents, an environmental penalty order is a type of mandatory abatement tool intended to induce a responsible person to respond swiftly to violations and to take actions to prevent their recurrence. Environmental penalty orders may only be issued in relation to certain types of violations under the EPA or the OWRA and only in relation to certain plants (e.g facility), as specified in the EP regulations. See chapter 9.1.6 for more details.
IEB Referral:	Process by which provincial officers refer an incident involving one or more violations to the Investigations and Enforcement Branch (IEB), recommending an investigation of a suspected violation. IEB may also

conduct an investigation at the request of the Minister, as part of an application for investigation under the *Environmental Bill of Rights* or on its own initiative.

Incident:	A finding that a responsible person has committed a violation or a responsible person's activity has the potential to result in an adverse impact on human health or the natural environment.
Ministry:	The Ministry of the Environment unless the text specifically indicates otherwise.
Ministry Legislation:	The statutes set out in chapter 5, "Ministry Legislation and the Authority for the Compliance Policy".
Notice of Violation:	A written or verbal statement by a provincial officer to a responsible person that a violation has been observed. Where a verbal notice has been given, a provincial officer will maintain a written record of such notice. A notice of violation may be accompanied with a request to the person to submit an abatement plan. See chapter 9.1.3 for more details.
Provincial Officer:	Any person designated as such under relevant legislation.
Regulated Person:	It is a person to whom an Environmental Penalty (EP) order may be issued under the EPA or the OWRA. A regulated person is a person who belongs to a class of persons prescribed in the EP Regulations and who holds or is required to hold an authorizing document under the EPA or the OWRA. If the regulated person is an entity such as corporation, the EP Order cannot be issued to employees, Directors, Officers or agents of a corporation.
Responsible Person:	A person who is bound by a provision of an act, regulation, control document or authorizing document and who has violated the provision; or to whom a control document or authorizing document may be or has been issued.
Settlement Agreement:	An agreement entered into by both a Ministry Director and a Regulated Person in receipt of a Notice of Intention to issue an EP Order. Settlement agreements require the regulated person to: conduct a beyond compliance project which may cancel the obligation to pay an EP or may reduce the amount of an EP in accordance with EP Regulations. Settlement agreements may also require the regulated person to implement specified abatement measures to achieve compliance with legal requirements that are the subject of the EP order. The Ministry may issue a new EP Order for a violation of a settlement agreement but it is not subject to prosecution. See chapter 9.1.6 for more details.
Staff:	For the purpose of this Policy, includes all Ministry employees, whether classified or unclassified, and agents of the Ministry of the Environment. See chapter 7 for more details.
Violation:	Any failure to comply with a provision of applicable Ministry of the Environment legislation, including acts and regulations; an authorizing document; or, a control document.

4 Compliance Approach

To achieve its compliance and enforcement objectives, the Ministry legislation authorizes a variety of tools. The response to any incident must be proportionate to the risk presented by the incident, the compliance history, and the response of the violator to the incident. Tools include education and outreach, warnings, orders and prosecutions.

Incidents reported to the Ministry or identified by the ministry vary significantly in severity. Each incident is evaluated by staff on a case-by-case basis, using the Informed Judgment Matrix (“IJM”), discussed in chapter 8, to determine the appropriate abatement and/or enforcement response. Some incidents warrant immediate use of an order or initiation of an investigation, some are more suitable to a voluntary abatement response (e.g. Category I incidents that are minor in nature). However, when compliance is not obtained through use of a particular abatement tool, the ministry will reassess the incident and may escalate the response to enforce the legislation.

As a result of using this approach, where an incident results in or has the potential for significant health and/or environmental impacts, the Ministry will seek a firm and swift response, while still allowing for flexibility in other situations.

5 Ministry Legislation and Authority for Compliance Policy¹

The Ministry is responsible for administering many Provincial statutes that are designed to protect and conserve Ontario’s natural environment and to safeguard human health.

- *Environmental Assessment Act*, R.S.O. 1990, c. E. 18, as amended (“EAA”).
- *Environmental Protection Act*, R.S.O. 1990, c. E. 19, as amended (“EPA”).
- *Nutrient Management Act, 2002*, S.O. 2002, c.4, as amended² (“NMA”).
- *Ontario Water Resources Act*, R.S.O. 1990, c. O. 40, as amended (“OWRA”).
- *Pesticides Act*, R.S.O. 1990, c. P. 11, as amended (“PA”).
- *Safe Drinking Water Act, 2002*, S.O. 2002, c. 32 (“SDWA”).
- *Waste Diversion Act, 2002*, S.O. 2002, c. 6 (“WDA”).

Further information about the details of these Acts, as well as their regulations, can be obtained from the Ontario government E-Laws internet site <http://www.e-laws.gov.on.ca/>.

Under each of these statutes, designated Ministry officials, such as provincial officers and Directors, are given the authority to issue control or authorizing documents. Also, most of the statutes administered by the Ministry give provincial officers the authority to conduct inspections and to investigate and prosecute offences. In general, offences are prosecuted by counsel with Ministry of the Attorney General who work in the Ministry’s Legal Services Branch.

The legal authority to issue control or authorizing documents, to conduct inspections, or to investigate and prosecute offences is generally a permissive one. In general, a provision that grants a Ministry official the legal authority to exercise a power use the term “may” rather than “shall”. For instance, many of the Ministry’s statutes provide a provincial officer with the authority to issue an order to a person who has committed a violation. A provincial officer must exercise his or her discretion in each case to determine whether to issue an order to respond to a particular violation.

¹ Ministry legislation includes the regulations made under the statutes administered by the Ministry as may be amended from time to time.

² The administration of the NMA is divided between the Ministry and the Ministry of Agriculture, Food and Rural Affairs. The authority to issue these instruments will depend on the appointment of Directors and provincial officers by the responsible Minister under section 3 or 4 of the NMA. Under the current division of responsibilities under the NMA, the Ministry of the Environment will not be issuing NMA Authorizing Documents (actual authority to issue these instruments will depend on appointments of Directors by the responsible Ministers).

An order may not be appropriate in every case; indeed it may be better in cases involving administrative violations to use a voluntary abatement response. The authority for the Compliance Policy flows from the permissive nature of the abatement and enforcement powers given by statute to Ministry staff. This Policy is intended to guide Ministry staff when exercising these powers, to assist them in determining the circumstances to exercise their authority, and how to exercise it appropriately. (Note: The Compliance and Enforcement regulation under the SDWA (Ontario Regulation 242/05) is an exception to the permissive nature of the Ministry's compliance and enforcement powers. That law requires a "mandatory action" be used to respond to certain types of violations under the SDWA, and this may include the issuance of a provincial officer order.)

6 Violations: Identification and Response

Violations of legislation or incidents with potential to adversely affect human health or the natural environment are identified by Ministry staff through a variety of channels:

- Pollution incident reports (e.g., complaints from private individuals)
- Spill reports
- Notifications from the regulated community
- Responsive inspections
- Planned risk based inspections
- Mandatory inspections
- Adverse water quality incidents ("AWQI")
- Report submissions
- Ministry audits and investigations
- Application to investigate under the *Environmental Bill of Rights*
- Information furnished by other agencies

There are two primary courses of action that may be taken to address an incident that involves a violation. One is the abatement approach, where measures are taken to bring about and to maintain compliance or to prevent, reduce or eliminate the risk of adverse impact to human health or the natural environment. The second is enforcement, which involves prosecuting the responsible person who has committed an offence. These two courses of action may proceed in parallel to respond to an incident. For instance, in response to a severe spill that results in adverse impacts to the natural environment, the Ministry may issue a control document to ensure the responsible person is under a legal obligation to remediate the impacts and the Ministry may also commence an investigation to determine if the person should be prosecuted.

When an incident does not involve a violation but has the potential to adversely affect human health or the natural environment, abatement tools such as the request for an abatement plan or the issuance of a preventive measures order may be used to resolve the incident.

The decision as to which course of action is most appropriate is based on the provincial officer's application of the IJM and case specific considerations (see chapter 8).

6.1 Program-Specific Requirements

The drinking-water Compliance and Enforcement Regulation (O. Reg. 242/05 under the SDWA) sets out legally-binding requirements related to compliance and enforcement of the SDWA and its regulations. Other program areas also may have specific inspection protocols or procedures. If there is any conflict in the direction for how to respond to an incident between this Compliance Policy, and a program specific inspection protocols or procedures (including the SDWA regulation noted above), the program specific inspection protocol or procedure prevails.

If an incident is an emergency of a spill, the ministry response is conducted in accordance with the **Environmental Response Standard Operating Procedure**. If there is a need to address noncompliance or to prevent a recurrence or continuance of the emergency or spill, this policy will be applied, in addition to the **Environmental Response SOP**.

7 Staff

Staff involved in abatement and enforcement activities are designated under Ministry legislation as provincial officers (“P.O.s”). Ministry legislation provides P.O.s with the authority to enter private property to conduct inspections for the purpose of determining compliance. P.O.’s who undertake inspections and issue or recommend the issuance of control documents are generally considered part of the abatement arm of the Ministry.

P.O.s within the IEB are environmental investigators, as they are part of the enforcement arm of the Ministry. In addition to the authority to conduct inspections, Ministry legislation also gives P.O.s the authority to investigate offences, including search and seizure powers. The investigators follow up on IEB referrals from Ministry abatement staff. IEB officers also initiate their own independent investigations, to determine whether or not an offence has occurred, and if a prosecution is warranted. Also, although most of the statutes administered by the Ministry give provincial officers the authority to investigate and prosecute offences, offences are generally prosecuted by counsel with Ministry of the Attorney General who work in the Ministry’s Legal Services Branch.

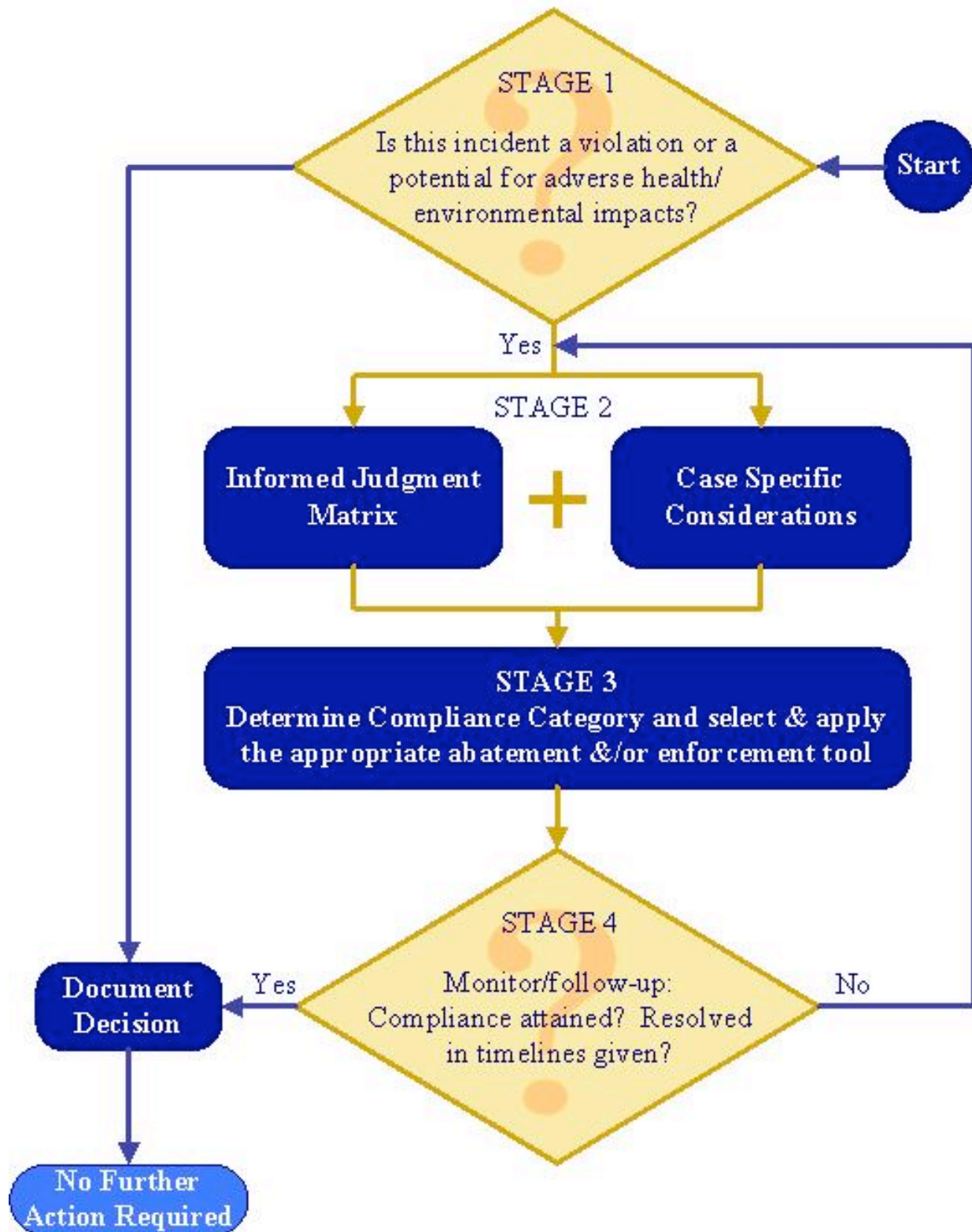
There are other staff, some of whom may be designated as P.O.s, who support the abatement and enforcement process by identifying incidents of non-compliance and assessing potential and actual health and environmental impacts for other abatement and enforcement P.O.s. They include staff from the Environmental Assessment and Approvals Branch, scientists, hydrogeologists, air and water modelers, engineers, etc.

All P.O.’s perform their duties according to the Code of Professionalism developed for Ontario inspectors and investigators, which promotes respect for the law by ensuring their duties are performed in a timely, consistent, impartial and courteous manner.

8 Overview of a Step by Step Process: Determining an Appropriate Abatement and/or Enforcement Tool

P.O.s should use a step-by-step process to assist them in selecting which abatement and enforcement tools are the most appropriate to use when responding to an incident. In many instances, the response may involve a combination of tools. This process, as shown in the following decision tree, guides the P.O. through his/her evaluation of an incident by using the IJM to classify the severity of the incident, and then applying case-specific considerations to determine whether the recommended response for that classification is appropriate in the circumstances.

Decision Tree



8.1 Stage 1: Is this incident a violation or does it have potential for adverse health/environmental impacts?

The P.O. will assess if the incident is a violation where the responsible person needs to take steps to come into compliance. Even if an incident does not involve a violation, the P.O. must assess whether there are other grounds for issuing a control document to deal with the incident. For instance, under some Ministry statutes, an order can be issued to a person requiring the person to take steps to prevent an adverse impact to human health or the environment, even though the person has not committed a violation.

8.2 Stage 2: Evaluating the incident

In this stage, the P.O. considers all of the following relevant information including: the health and environmental consequences associated with the incident (chapter 8.2.1); the compliance history of the facility/responsible person (chapter 8.2.2); and case-specific considerations (chapter 8.2.3). The IJM includes the health and environmental consequences and compliance history. The P.O. will use the IJM and case-specific-considerations to determine the severity of an incident to assist him/her in determining an appropriate abatement and/or enforcement response (chapter 8.3)

8.2.1 Health and Environmental Consequences

An incident may result in actual or have the potential to result in health and environmental consequences (i.e. impacts). The consequences may range from severe (e.g. a major health impact) to less severe (e.g. administrative). The P.O. will evaluate the incident and determine what type of consequence the incident represents.

When assessing the type of consequence for an incident, the P.O. should consider any relevant Ministry standards or guidelines. Should additional guidance be needed in selecting the appropriate consequence, the P.O. may seek the advice of ministry toxicologists, health professionals (local medical officer of health) or other experts.

Health and Environmental Consequence Categories		
Number	Name	Description
1	Administrative Consequence ³	<ul style="list-style-type: none"> Administrative non-compliance that does not result in or does not have the potential to result in any environmental or health impacts and generally includes: the violation of reporting and record-keeping requirements and some monitoring and sampling requirements Examples of exclusions would be those under the SDWA or requirements to report unlawful discharges or spills.

³ Administrative impacts that are excluded from this category will be classified based on the actual or potential health or environmental impacts(s) as described in the Health and Environmental Consequence Categories. For instance, failure to forthwith report an environmental limit exceedance that is not health-based will be classified as medium environmental.

Health and Environmental Consequence Categories		
Number	Name	Description
2	Minor Environmental Consequence	<ul style="list-style-type: none"> Actual or potential localized impacts to property, animal or plant life⁴ and the impacts to animal life in the natural environment are not lethal. Actual or potential impacts relating to short-term or localized loss of enjoyment of the normal use of property, or short-term or localized interference with the normal conduct of business. If actual impacts have occurred in the natural environment they require little or no abatement action to restore the natural environment.
3	Minor Health Consequence	<ul style="list-style-type: none"> Actual or potential minor human health impact that does not require hospitalization or emergency treatment and does not result in known illness and would include material discomfort on a limited or localized basis. Includes circumstances where short term or localized precautionary measures were taken to protect human health from risk of the incident (e.g. short-term closure of drinking-water intake).
4	Medium Environmental Consequence	<ul style="list-style-type: none"> Actual or potential widespread impact property, to animal or plant life⁴ where impacts to animals in the natural environment are not lethal. If impacts to the natural environment have occurred they require abatement action to restore the natural environment and the impacts are amenable to restoration. Actual or potential impacts relating to widespread or long-term loss of enjoyment of normal use of property or widespread or long-term interference with the normal conduct of business. Includes incidents involving discharge of contaminants in excess of numerical environmental discharge standards established under Ministry legislation or by Ministry guidelines but does not include standards or guidelines that are health-based⁵.
5	Major Environmental Consequence	<ul style="list-style-type: none"> A major consequence is major if it is not classified as minor or medium environmental consequence. Examples include: widespread and long-term damage to the ecosystem resulting from an incident which is not amenable to restoration or a fish kill that results from an incident.

⁴ Impact to plants may include mortality or injury.

⁵ Incidents involving the discharge of contaminants in excess of environmental discharge standards that are health-based are classified using the health consequence categories. Health-based standards or guidelines include such items as health effects-based standards and Upper Risk Thresholds listed in Air Pollution –Local Air Quality Regulation (Reg. 419) and health effects-based Ministry Point of Impingement Guidelines and Ambient Air Quality Criteria, as well as Ontario Drinking - Water Standards. When an incident involves the failure of an acute lethality test; the incident must be categorized at a minimum as medium environmental and Ministry staff may escalate the incident to major environmental consequence depending on the specific circumstances and potential impacts of the incident. Also, when trying to determine potential impacts of an incident, Ministry staff may have regard to Ministry ambient criteria, such as Provincial Water Quality Objectives and Provincial Sediment Quality guidelines.

Health and Environmental Consequence Categories		
Number	Name	Description
6	Medium/Major Health Consequence	<ul style="list-style-type: none"> A health consequence is medium/major if it is not classified as minor health. Examples include: residents are treated in hospital as a result of an incident, residents in a large portion of a community were required to evacuate their homes to protect human health from the risk of the incident, long-term closure of drinking-water intake(s) to protect human health from the risk of the incident or a discharge exceedence of a health-based standard listed in Reg. 419.

8.2.2 Compliance History

To classify an incident using the IJM, the P.O. should also assess the responsible person's compliance history. A description of the compliance history categories is contained in the table below.

Generally, the compliance history will be assessed on an individual facility basis. However, situations may arise where the compliance history may be assessed on a corporate basis. For instance, mobile operators, such as waste haulers or pesticide applicators, carry out their business at various locations, and it would not be appropriate to assess their compliance activities on a facility (location) basis.

Compliance History Categories		
Number	Name	Description
A	No history/good compliance history	<ul style="list-style-type: none"> No record of a violation in the last 3 years which has been addressed by a Control Document, EP Order (Settlement Agreement), suspending/revoking an Authorizing Document, an Abatement Plan and/or a Notice of Violation or by proceedings commenced under Part I or III of the POA.
B	Previous violation (Un-related)	<ul style="list-style-type: none"> 1 or more un-related* violations in the last 3 years which have been addressed by a Control Document, Environmental Penalty order (Settlement Agreement), suspending/revoking an Authorizing Document, an Abatement Plan and/or a Notice of Violation or by proceedings commenced under Part I or III of the POA.
C	Previous violation (Related*)	<ul style="list-style-type: none"> 1 or more related violations in the last 3 years which have been addressed by a Control Document, Environmental Penalty order (Settlement Agreement), suspending/revoking an Authorizing Document, an Abatement Plan and/or a Notice of Violation, or by proceedings commenced under Part I or III of the POA.

* The term "related" is intended to apply to (a) two or more violations of the same set of legal requirements (e.g. the standards for waste management systems prescribed by sections 10 and 16 of Regulation 347) or, (b) where the origin or cause of two or more violations (or offences) is related to the same commercial or industrial process or a similar activity. For example, an effluent discharge violation may be considered related to a subsequent record-keeping violation if the failure to collect and maintain records for that effluent process can be a contributing factor that could result in a subsequent effluent violation.

Compliance History Categories		
Number	Name	Description
D	Ongoing Violation Not Resolved Despite Ministry Directions	<ul style="list-style-type: none"> Despite the issuance of a Control Document, Settlement Agreement, suspending or revoking an Authorizing Document, an Abatement Plan and/or a Notice of Violation to respond to a violation, the responsible person continues to violate or ignore the Control Document, Settlement Agreement, Abatement Plan and/or Notice of Violation.
E	Previous Significant Convictions or Environmental Penalty Orders	<ul style="list-style-type: none"> One or more previous convictions or EP Orders of related offences within the last 3 years that resulted in a fine over \$10,000 or a jail term for a conviction or a penalty over \$10,000 for an EP Order. The fine/penalty for an environmental offence has not been paid.
F	Obstruction	<ul style="list-style-type: none"> Responsible person providing false or misleading information; hindering or obstructing a provincial officer or Ministry staff; refusing to furnish required information; or including false or misleading information in any required document. This includes being convicted of any of the above-described offences in the last 3 years. This includes a situation in the last 3 years where a responsible person has prevented a provincial officer from conducting inspections for the administration of Ministry legislation, requiring a provincial officer to obtain a judicial order to carry out the inspection.

8.2.3 Case-Specific Considerations

A case-by-case approach to select the most appropriate abatement and/or enforcement tool requires an assessment of how the responsible person(s) is likely to deal with the incident and other incident-specific factors.

Responsible persons who have a history of disregarding Ministry legislation or responsible persons who commit violations deliberately or with negligence may be treated differently from those who do not. Knowingly taking steps to conceal information in relation to the violation may be considered proof of negligence or deliberateness.

In addition, while ignorance of the law is no excuse for any responsible person, when it comes to determining an appropriate response to an incident, Ministry staff may assume a level of legal knowledge depending on the size or sophistication of the responsible person. A facility run by a large corporation should be assumed to know the legal requirements under Ministry legislation that apply to the facility and should not have to be reminded of their legal obligations by Ministry staff. The situation may be different for responsible persons who are small businesses or less sophisticated individuals. When dealing with such persons, especially where the incident is a first occurrence of its kind, it may be appropriate for Ministry staff to take a compliance assistance approach to abatement by educating the responsible person about their legal obligations, rather than using a mandatory abatement response.

Examples of questions where case-by-case circumstances may influence the final decision in selecting an appropriate abatement and/or enforcement tool include:

1. Is there public concern about the incident?

2. Is the responsible person someone with whom the ministry can work to achieve a positive environmental outcome?
3. Did the responsible person disclose the incident voluntarily?
4. Did the responsible person co-operate?
5. How swiftly did the responsible person respond to the incident?
6. Did the actions taken by the responsible person effectively resolve the incident and prevent its recurrence?
7. What resources did the responsible person expend responding to the incident?
8. Given the sophistication of the responsible person, would education and outreach be more effective to assist the person in understanding, managing and complying with ministry legislation, than issuing an order or prosecuting?
9. When responding to an incident, is there a need to promote specific or general deterrence?
10. Was the incident the result of gross negligence and/or deliberate actions by a responsible person?

It is not expected that a P.O. answer every one of these questions in making his/her decision. If no case-specific considerations such as these are applicable (e.g. support a conclusion that taking further steps would not be in the public interest), the response may be based using the IJM exclusively.

8.3 Stage 3: Determining Compliance Category and Selecting Compliance/Enforcement Tool(s)

First, the P.O. classifies the incident's consequence, and, second, the responsible person's compliance history. Then the P.O. should determine into which of the three categories in the IJM the incident falls. There are three general compliance categories in the IJM:

- **Compliance Category I** recommends tools that encourage the responsible person to attain compliance voluntarily. The best course of action may be education and outreach to help the responsible person understand its regulatory environmental obligations. However, orders, EP Orders, tickets and IEB referrals may also be considered in Compliance Category I.
- **Compliance Category II** recommends stronger mandatory application of tools such as orders, EP Orders, and use of POA tickets. An IEB Referral shall be considered for incidents that fall in Category II, except when a POA ticket is used.
- **Compliance Category III** recommends the use of a mandatory abatement tool such as the issuance of a control document, to resolve the incident. Incidents that fall in Category III must also be referred to IEB.

The next step is to determine if case specific considerations should shift the compliance category. For example, a small business with no compliance history causing material discomfort, such as an odour, would initially fall into Category II (minor health consequence, no compliance history). The business has proactively taken steps to identify the source and is working towards correcting the problem in a manner which the P.O. deems to be appropriate. Since the small business owner has agreed to address the odour problem in a timely manner, a voluntary approach to resolving the incident may be appropriate. If so, an order is not necessary at this time, and the incident shifts from Category II to Category I.

However, if the small business owner does not make timely progress, it may be necessary to escalate the incident response by issuing an order (Category II).

The determination of a compliance category should not be based solely on health and environmental consequences and compliance history in the IJM. All the information gathered through the IJM and case specific considerations provide the framework for a

P.O. to exercise informed judgment when determining an appropriate response to an incident.

Note that both an EP Order and a referral to IEB for investigation may be considered for the same violation where the EP Regulations apply to the specified plant and violation. Where an EP is used to address an incident that is within category II or III and results in actual human health or environmental impacts, a referral to IEB should also be considered to ensure that prosecutions remain available to deter serious violations. IEB investigators in cooperation with Legal Services Branch will determine whether a prosecution is warranted in accordance with the principles and details of chapter 9.2.3 in this policy. As an EP Order cannot be issued to employees, Directors, Officers or agents of a corporation, an IEB referral should be considered where an individual needs to be held accountable for their actions in regard to an incident. These two processes, issuing an EP Order and investigating offences, should in most circumstances occur concurrently.

Where an incident is within category III and results in significant and observable human health or environmental impacts, or where a category III violation has been committed deliberately or with wilful neglect careful consideration needs to be given to determine whether it is appropriate in the circumstances to respond to the incident using an EP Order. For these types of very serious violations, it may be appropriate to only refer the matter to IEB rather than also issuing an EP Order. When an EP Order has been issued and a person is prosecuted for the same violation – if the person is convicted the court is required to consider the environmental penalty as a mitigating factor and may impose a fine less than the minimum. However in order to send a clear message to the regulated community that such serious incidents will not be tolerated and will be prosecuted, it is important that if the responsible person is convicted, the court has the full discretion to apply both the minimum and maximum fines to the case without any mitigating factors. Further details regarding EP orders and IEB referrals, as well as the other abatement and enforcement tools are included in chapter 9.

Informed Judgment Matrix (IJM)		Health/Environmental Consequences					
		1. Administrative	2. Minor Environmental	3. Minor Health	4. Medium Environmental	5. Major Environmental	6. Medium/Major Health
Compliance History	A. No history / Good Compliance History	Compliance Category I		Compliance Category III			
	B. Previous Violation (unrelated)	Compliance Category II					
	C. Previous Violation (related)						
	D. Ongoing Violation Not Resolved Despite Ministry Directions						
	E. Previous Significant Convictions or Environmental Penalty Orders						
	F. Obstruction/ False Information**						

Compliance Category I: Recommend Education & Outreach, Notice of Violation, Abatement Plan &/or Amend Authorizing Document (Control Documents (e.g. Orders), EP Order, Ticket, or IEB Referral for Investigation may be considered).

Compliance Category II: Recommend Amend Authorizing Document, Control Document (e.g. Order) or EP Order. May Write A POA Ticket* and shall consider IEB Referral for Investigation except when a ticket is used.

Compliance Category III: Recommend Amend Authorizing Document, Control Documents (e.g. Order) or EP Order. Shall refer to IEB for Investigation (No Ticket).

*A ticket cannot be issued for a violation that is subject to an EP.

** Obstruction is not a violation subject to an Environmental Penalty

8.4 Stage 4: Monitoring/Follow-up

Follow-up and ongoing monitoring is an important part of effective compliance. The P.O. determines if compliance has been achieved within the specified timelines. If it has not, then the P.O. should return to Stage 2 to re-evaluate the incident. At this point, the P.O. should consider escalating his/her response to resolve the incident, especially if the responsible person continues to violate or ignore an order, abatement plan, settlement agreement or notice of violation, or there is an increased risk of environmental impacts.

9 Types of Abatement and Enforcement Tools

9.1 Abatement

9.1.1 Education and Outreach

Staff seek to work cooperatively with all responsible persons in order to help address the impacts of an incident and to prevent its occurrence or recurrence through education and outreach. For example, a P.O. may provide relevant contacts or environmental fact sheets to a small business. In addition, the Ministry may work with a sector to communicate compliance findings and encourage proactive compliance by the sector and its members to improve the sector's environmental performance.

A P.O. may use other abatement or enforcement tools, such as an abatement plan or order in combination with education and outreach.

9.1.2 Issue/Amend an Authorizing Document

An authorizing document is generally a type of permission that a person is required to obtain under Ministry legislation before engaging in an activity. Generally, under Ministry legislation, the Director is given authority to issue, amend or revoke an authorizing document. Authorizing documents include licences, permits, approvals, certificates of approval, provisional certificates of approval, and certificates of property use. These legally enforceable documents regulate the manner in which activities are carried out or how a facility is established or operated.

In many instances under Ministry legislation, Ministry officials are given concurrent authority to regulate the same activity through a control document or an authorizing document. Generally, the authority to issue a control document applies to a much broader range of activities, while authorizing documents apply to a narrower range of activities. An example of this concurrent authority can be seen under the EPA between a section 9 certificate of approval and a section 157.1 preventive measures order. A person is not authorized to discharge contaminants into air from a stationary source, such as plant, unless they first obtain a certificate of approval from the Director under section 9 of the EPA. Stationary sources of air discharges may also be regulated by a preventive measure order issued under section 157.1 (or section 18) of the EPA. However the preventive measure order authority to regulate contaminants is much broader. Under section 157.1 of the EPA, the P.O. is given the authority to regulate any contaminants in, on or under a property, whether or not they have already been discharged into the natural environment, and whether or not they are being or have been discharged from a stationary source.

Because a control document can regulate a much broader range of activity than an authorizing document, and because the control document is also designed to respond to specific incidents as opposed to regulating an activity over its lifespan, as is the case with an authorizing document, the Ministry will generally use control documents or abatement plans in accordance with the IJM to bring a specific activity back into compliance following an incident. The P.O. will monitor the activity to ensure that the responsible person takes the steps necessary to bring the activity back into compliance. The steps addressed through an order or abatement plan often result in the need for the responsible person to apply for or amend an authorizing document for the equipment/processes that will be installed to return the person to compliance. For example, where an air discharge from a plant is causing odour impacts on residents that constitutes a violation of section 14 of the EPA – even though the stationary source may be regulated under the plant's section 9 certificate of approval, the Ministry's preference is to use the preventive measure order to bring the plant's air discharge back into compliance with section 14. The imposition of the order on the responsible person will likely require the person to obtain an amendment to their section 9 certificate of approval, if one is required. For instance, if the responsible person must install equipment to prevent the incident from recurring, an amendment to their section 9 C of A will be required. In this way, a responsible person's authorizing documents will, in many, cases

support the abatement actions under a control document or abatement plan that is intended to bring the person back into compliance by controlling the manner in which the activities are carried out or how a facility is established or operated to minimize or prevent adverse impacts.

In addition, as part of his or her abatement duties, a P.O. may determine that the conditions of a responsible person's authorizing document do not provide the appropriate level of protection for human health and/or the environment and may recommend to a Director who is responsible for issuing the authorizing document that the Director exercise his/her discretion to amend the conditions on an authorizing document to provide a sufficient level of protection based on local conditions or to update the conditions of the authorizing document to reflect existing conditions at the facility.

9.1.3 Notice of Violation

A notice of violation is a written or verbal statement by a P.O. or other employee of the ministry to a responsible person that a violation has been observed or identified by staff. Where verbal notice has been given, the P.O. will maintain a written record of such notice,

A notice of violation is intended to address Category I violations (i.e. minor violations). Letters and inspection reports are forms of a notice of violation. An order, or a provincial officer's report written in support of an order, is not a notice of violation, rather it forms part of the control document. A notice of violation may include a request to a responsible person to carry out activities related to achieving compliance i.e. could include the development of an abatement plan as described in chapter 9.1.4. Upon receipt of a notice of violation, it is up to the responsible person to ensure that the necessary measures are taken to correct the violation.

9.1.4 Abatement Plan

A P.O. may make a written or verbal request to the responsible person to develop an abatement plan within a specified time period to correct a violation or implement preventive measures. Where verbal notice has been given the P.O. will maintain a written record of such notice. A P.O. may request, in writing, that a responsible person submit an abatement plan within a specified time period to correct a violation or implement preventive measures. The abatement plan is an important voluntary abatement tool. Since an abatement plan is undertaken by the person voluntarily, the failure to carry out a plan is not an offence. However, such a failure may be grounds for issuing a control document to require the person to carry out the plan. A responsible person may be requested to submit an abatement plan when the person is given a notice of violation.

The responsible person shall submit to the Ministry a written abatement plan that, at a minimum, outlines environmental, administrative, and/or operational measures to be undertaken by the responsible person. This must include the timeframe in which the implementation of the plan must be completed to correct a violation or reduce the risks of its recurrence or take measures to abate any environmental risks identified by a P.O. The abatement plan should include mitigation and/or control of any actual or potential off-site impacts, if applicable. Note that the timeframe to implement an abatement plan will vary depending on the incident and the measures required for the responsible person to achieve compliance or to prevent impacts to human health and/or the natural environment.

If, after an abatement plan has been submitted by a responsible person to deal with an incident, a P.O. has reason to believe that the plan has not or will not be implemented in the manner and within the timeframes specified in the plan, the P.O. may issue a control document requiring the person to implement the abatement plan. At the same time, a responsible person's failure to implement an abatement plan should not automatically lead a P.O. to issue a control document – there may be some legitimate reasons for the responsible person's failure. The circumstances and consequences of the failure should be considered by the P.O. when determining whether a mandatory abatement response is

appropriate to deal with the failure. For instance, in some cases the responsible person's failure to implement an abatement plan may be due to circumstances beyond the person's control, or the failure may have purely administrative consequences.

However, in no case, will the Ministry tolerate unsatisfactory progress on a voluntary abatement plan beyond six months (180 days).

This six month period refers to a period of unsatisfactory progress with the abatement plan (e.g. plan is six months behind the submitted schedule and the P.O. has not agreed to an extension or the person continues to deviate from their submitted plan without the agreement of the P.O.). The intent is to ensure that in accordance with stage 4 of the decision tree, a P.O. determines if compliance has been achieved within the specified timelines which may include intermediate steps. If it has not, then the P.O. should return to Stage 2 and the IJM to re-evaluate the incident. At this point, if an abatement plan is being violated, the P.O. should consider escalating his/her response (e.g. issue an order to resolve the incident), especially if the responsible person continues to violate or ignore the abatement plan or there is an increased risk of environmental impacts.

9.1.5 Control Documents (Orders)

P.O. orders are the most common type of control document issued by the Ministry. A P.O. Order is a mandatory abatement tool that is a legally-binding document that sets out obligations for a specific person or persons in relation to a specific operation. P.O. Orders are typically used to deal with incidents involving significant non-compliance and/or environmental or human health risks or when there is reason to believe the person involved with the non-compliance will not respond to a voluntary abatement approach.

Upon issuance of the P.O. Order, the responsible person may request that it be reviewed by a designated Director (normally the Manager of the local Ministry office). If dissatisfied with the Director's review, the responsible person may appeal the decision of the Director to the Environmental Review Tribunal ("ERT") within certain timelines.

A P.O. may also prepare a provincial officer's report and recommend to the Director that a Director's order be issued. A Director's order should be considered in cases where many responsible parties may be named in an order to deal with an incident and the extent of their contribution to the incident is difficult to determine. With respect to waste or contamination issues, Ministry legislation authorizes that only a Director's order can be issued to past responsible persons. For orders related to waste or contamination, the policies in Appendix 1 should be considered by the Director when issuing such orders or when considering submissions made by persons named in such orders. A responsible person may appeal the Director's order to the ERT within certain timelines.

Note that not all control documents issued by the Director are subject to appeal before the ERT. For instance, provisions such as a notice issued by the Director to a responsible person under Air Pollution-Local Air Quality Regulation (O. Reg. 419/05) under the EPA cannot be appealed to the ERT.

Failure by a responsible person to comply with a control document should not generally be addressed by issuing another control document that requires compliance with the original control document. Such incidents should generally be addressed by referrals to IEB or, where such an administrative remedy is available, the issuance of an EP Order. If a responsible person requires more time to comply with a provision of a control document and the Ministry supports the reasons and purpose for the time extension, then this should be achieved by amending the original control document, or where that is impractical by issuing a new control document that sets out the abatement program to be undertaken with new deadlines – rather than requiring compliance with the original control document.

In regard to issuance of orders, financial hardship on the part of the responsible person should not be accepted as a reason for not issuing an order to respond to an incident. Financial hardship may be taken into consideration when determining the compliance schedule, and the type of requirements to be

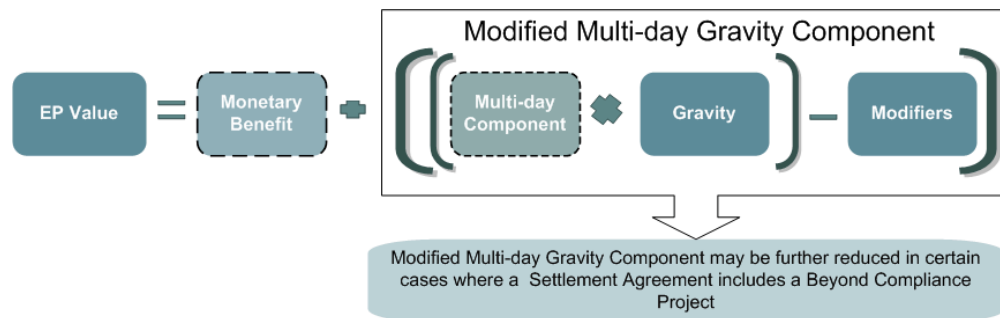
incorporated into the order. In support of a financial hardship submission, the responsible person should file the financial information specified in Guideline F-14, “Economic Analyses of Control Documents on Private Sector Enterprises and Municipal Projects” so that the ministry can undertake an economic analysis of that person’s financial capacity in accordance with that Guideline.

The legislation also provides that a person who complies fully with an order shall not be prosecuted for or convicted of an offence in respect of the matter or matters dealt with in the control document that occurs during the period within which the control document is applicable.

9.1.6 Environmental Penalty Order

An EP Order under the EPA and OWRA is an abatement tool that will help induce certain violators to take swift corrective action when a violation occurs and to negate any monetary benefits of non-compliance. It can only be issued to a “regulated person” for specific types of violations at specified plants owned or operated by the person, all of which is specified in the EP Regulations.

An EP Order is calculated in accordance with EP Regulations. An overview of the components of an EP Order is shown below.



An EP Order is comprised of a gravity component and where applicable a monetary benefit component. The “gravity component” of the penalty is assessed based on the type and seriousness of the violation. For violations that continue for more than one day (such as a failure to install equipment) the regulation requires that the gravity component be multiplied by a “multi-day component” depending on the length of the violation. The modifiers reduce the gravity component of the penalty, in accordance with the EP Regulation, by considering the preventive and mitigative measures taken or planned to be taken by the regulated person and whether the regulated person had an environmental management system in place that met regulatory requirements. In addition, a reduction to the modified multi-day gravity component may be allowed through completion of a settlement agreement as noted below. The “monetary benefit” component of the penalty includes financial benefits gained by the regulated person because of its non-compliance with legal requirements (delayed and avoided costs) and cannot be reduced by entering into a settlement agreement.

The Director and a regulated person against whom an EP Order may be or has been issued may enter into a settlement agreement. The agreement will identify the violation and the actions that the regulated person will undertake in return for a further penalty reduction.

A settlement agreement may include one or more of the following:

- 1) A Beyond Compliance Project (“BCP”): an investment in a plant-based pollution prevention or pollution reduction project that aims to yield human health or environmental benefits beyond those required by any law. The inclusion of a BCP may lead to a reduction in the EP amount to be paid or may cancel the obligation to pay an EP, with certain limitations as specified in the EP Regulations.

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- 2) Abatement measures: other abatement actions required by the regulated person to come into compliance with legal requirements that are the subject of the EP Order. Because these are steps taken to achieve compliance, their inclusion in a settlement agreement does not lead to a reduction in the assessed EP amount.

The inclusion of BCPs or abatement measures in a settlement agreement may not be appropriate in all cases; such a decision is at the discretion of the Director.

If a settlement agreement is reached, the Director would only enter into an agreement if the regulated person consents as part of the agreement not to appeal the associated EP Order to the ERT.

The issuance of an EP Order is not a form of prosecution that results in a conviction. An absolute liability regime applies for EP Orders, where due diligence is not considered as a defense to an EP Order, but rather as a consideration for reducing the penalty amount.

A person can be given an EP Order and prosecuted for the same violation. The payment of a penalty or entering into a settlement agreement is not, for the purposes of any prosecution for the same violation, an admission of guilt. Prosecution remains available to deter serious pollution incidents and repeat offenders and will be considered in accordance with direction provided in chapter 8.3 of this Policy. However, if a regulated person is convicted for the same violation where an EP Order has already been issued, the court may consider the payment of a penalty as a mitigating factor when imposing sentence.

Where an appeal of an EP Order is related to an unlawful discharge, the EPA places the onus on the regulated person to disprove certain elements of the violation. Since the regulated person is responsible for managing its contaminants, it is in the best position to provide the necessary evidence to discharge this onus.

In accordance with the IJM, the use of EP Orders is recommended as an option for responding to violations that fall into compliance categories II and III. The use of EP Orders for compliance category I violations is generally not recommended unless there are case-specific considerations where the issuance of an EP Order is appropriate.

As noted above, in responding to an incident where an EP Order can be issued, a control document or a settlement agreement may be used to require a person to undertake abatement measures to attain compliance or to prevent a violation's recurrence. In such circumstances if the person remains in compliance with the order or settlement agreement, the Director will generally not issue an additional EP order for the matters dealt within the order or settlement agreement. No EP Order can be issued for a MISA limit violation where an order under the EPA and OWRA or a direction under the OWRA has been issued to the regulated person in respect of the MISA limit violation. Also, no EP Order can be issued for a spill that violates s. 14 of the EPA or s. 30 (1) of the OWRA, if the regulated person is not required by the EPA or OWRA to report the spill to the Ministry.

9.1.7 Suspension/Revocation/Refusal of an Authorizing Document

In certain situations, the Director who is responsible for issuing an authorizing document may determine that it is necessary and in the public interest to consider suspension or revocation of an authorizing document or to refuse issuance of an authorizing document. This may be appropriate in circumstances such as: multiple or repeat violations for which abatement and enforcement tools have been ineffective; evidence that the person applying for an authorizing document is incompetent, dishonest or is not in compliance or will not comply with ministry legislation. Generally, the refusal, suspension or revocation of an authorizing document should be used as an abatement tool of last resort. In most circumstances, a suspension or revocation of an authorizing document or refusal to issue an authorizing document may be appealed to the ERT.

9.1.8 Program Approval

A Program Approval is a document describing a schedule of abatement activities, which has been developed by the responsible person and approved in writing by the Director under the authority of sections 10 and 11 of the EPA. Agreement by the Ministry to an abatement plan described in chapter 9.1.4 above does not constitute a Program Approval. A violation of a program approval itself cannot be directly enforced by prosecution as it is not an offence. Also, a person who complies fully with a Program Approval shall not be prosecuted for or convicted of an offence in respect of the matter or matters dealt with in the Program Approval that occurs during the period within which the Program Approval is applicable.

With Program Approvals any deviation from the schedule by the responsible person outlined in a Program Approval must be confirmed by an order under the EPA subsection 11(3), amending the Program Approval. The Director must sign such an amendment. Because of these limitations, Program Approvals are not a preferred tool.

9.1.9 Notice of Control Documents (Orders) and Authorizing Documents

Before a Director issues or amends a control or authorizing document, the Director must do so in accordance with the *Environmental Bill of Rights* (“EBR”). In many cases, this requires that the Director give notice of his or her proposed decision on the Environmental Registry and the public must be provided with a period to comment on the proposal. Public comments must be considered by the Director before he or she makes a decision on the proposal. Notification under the EBR is not required in certain circumstances set out in the legislation. For example, notification is not required in the case of an emergency, or where public participation that is equivalent to that afforded by the EBR has already occurred.

Notification of proposed control and authorizing documents shall be provided to affected First Nation and Aboriginal communities in accordance with provincial protocols. These protocols assist in ensuring that any affected First Nation and Aboriginal communities are adequately consulted before a decision is made to proceed with a proposal and that, if any constitutional obligations to consult under section 35 of the *Constitution Act, 1982* exist in relation to a proposal, such obligations are satisfied.

9.2 Enforcement

9.2.1 Part I of the Provincial Offences Act

Part I of the POA allows for the issuance of Offence Notices (POA tickets) and Summons by P.O.s. This part of the POA is intended for minor offences, where the Offence Notice or Summons is issued at the time of the offence or no later than 30 days after the date of the offence. The maximum penalty under Part I of the POA is \$500.

There are violations which may warrant the issuance of a Part 1 POA Offence Notice, commonly known as a ticket issued by a P.O.. A regulation under the POA prescribes short-form wordings for use on Offence Notices and establishes set fines for each of the offences under Ministry legislation that is included in the regulation.

Serving a ticket on a responsible person and then filing a Certificate of Offence in court in accordance with Part I of the POA initiates a prosecution in the provincial court. The P.O. has seven days after serving a ticket or summons to file the ticket or summons with the court.

The person to whom the ticket is issued may choose to plead guilty and pay the fine out of court, or the person may plead guilty with a reason, or not guilty, and defend themselves in Provincial Offences Court.

A Part I Summons is generally used for minor offences for which there are no set fines, or where the offence constitutes a subsequent offence. Unlike the Offence Notice, there is no provision to plead guilty

and pay the fine out of court. The issuance of a Part I Summons requires both the defendant and the Crown to appear before the court for a trial.

Part 1 POA tickets are not to be used where the Environmental Penalty Regulations authorize the issuance of an EP Order to respond to a violation.

9.2.2 Part III of the Provincial Offences Act - Found Committing Summons

Part III, section 22 of the POA provides that a P.O., who finds that an offence has been committed by a person whom he or she finds at or near the place where the offence was committed, may issue a Summons to the individual prior to laying an information.

The use of a section 22 Summons is limited to P.O.s within IEB. Where an IEB P.O. is considering whether to serve a Summons under section 22 of the POA to respond to a violation, chapters 8 (Informed Judgment) and 9.2.3 (IEB referral) of this policy should be consulted.

9.2.3 Part III of the Provincial Offences Act - Laying Charges (IEB Referral)

The Ministry will act in accordance with established principles of enforcement when investigating and prosecuting offences which include the following:

- (a) all persons are entitled to equal protection and benefit before and under the law;
- (b) prosecution will be the result of an informed judgment by staff of the IEB and the proper exercise of prosecutorial discretion by crown counsel; and
- (c) enforcement will be administered in an even-handed, nondiscriminatory and fair manner which advances and protects the public interest.

A P.O. will consider initiating a referral for investigation in accordance with the IJM and case specific considerations. In addition, IEB may initiate an investigation on its own. Generally, IEB referrals are recommended for violations falling into category II and III of the IJM.

IEB investigators conduct investigations of violations to determine if reasonable and probable grounds exist for the laying of charges under Part III of the POA. In order to reach an informed judgment on whether a prosecution is warranted, the following is considered:

- Severity of the violation
- Severity of the violation in the context of the Ministry's overall regulatory scheme
- Whether the violation appears to have been deliberate
- Whether the offender appears to have been negligent
- Whether the violation has been repeated or is ongoing
- Whether the offender has demonstrated and continues to demonstrate a negative attitude towards compliance
- Whether the offender has concealed pertinent information
- Whether the offender has disregarded warnings issued by the ministry
- Compliance history
- Deterrent effect of enforcement action on similar or other operations
- Whether enforcement action is necessary to maintain the integrity of the regulatory process
- Whether failure to pursue enforcement action would tend to bring the law into disrepute
- Whether an EP Order has been or will be issued for the violation

Crown prosecutors with the Ministry's Legal Services Branch will determine if the evidence obtained and documented in a Crown Brief is sufficient to ensure a reasonable prospect of conviction and whether a prosecution would be in the public interest. Ultimate authority as to whether a prosecution proceeds rests with the Crown prosecutors who work at the Ministry's Legal Services Branch.

10 Public Reporting

The Ministry is committed to keeping the public informed about environmental compliance activities in their communities and to ensure that responsible persons comply with environmental laws. Information about compliance and enforcement activities are available on its internet site at www.ene.gov.on.ca.

Examples of current reporting include:

- News releases detailing convictions of violators;
- Environmental Compliance Report that provides information about exceedances of contaminant discharges limits to air and water from industrial, municipal, commercial and private facilities regulated by the Ministry;
- Chief Drinking Water Inspector Annual report that includes information from municipal residential drinking water systems, non-municipal year round residential systems, drinking water systems serving designated facilities and information on the Ministry's laboratory licencing and inspection program and operator certification and training program;
- Annual report of environmental penalty orders.

The Ministry will continue to undertake abatement and enforcement activities to support an Ontario with clean and safe air, land and water. As a result, in cases where there is a potential for significant human health or environmental impacts, the Ministry will respond firmly and swiftly to address the violation and prevent its recurrence. Public reporting of these activities is an important part of bringing transparency and accountability to the abatement and enforcement process.

Appendix 1: Ministry Policies: Naming of Persons in Control Documents

Once the decision has been made under the Compliance Policy to deal with an incident through the issuance of a control document, the next determination is against whom the control document should be issued. Where a control document is to be issued in response to a violation (for instance, a P.O. violation-based order), the determination is straight-forward: the control document should be issued against those persons who were responsible for committing the violation that gave rise to the incident.

Where a control document is to be issued in relation to an environmental incident that may not involve a violation, ministry legislation often authorizes issuing control documents to more than one person, such as an owner, an occupier or a person in charge, management or control of an undertaking. Under the EPA, the Director is empowered to name past owners, occupants and persons who were in charge, management or control of an undertaking, property or source of contaminant.

When a statutory decision-maker is deciding whether to relieve a person from being named in a control document or from a requirement specified in the document, the statutory decision-maker should consider and weigh only those factors and circumstances of the case which are demonstrated to be relevant, having regard to the legislative provision authorizing the issuance of the control document and the purposes of the statute under which the document is being issued. For instance, if the control document is being issued under section 18 of the EPA, the person seeking relief would have to demonstrate that the factor or circumstance is relevant having regard to the wording of section 18 and the purposes of the EPA, which is "protection and conservation of the natural environment". Factors and circumstances which the statutory decision-maker concludes are irrelevant to either the statutory provision that authorizes the issuance of the control document or legislative purpose should be ignored.

Where a person is named in a control document, and he/she submits that his/her name ought to be removed from the document, the statutory decision-maker should only agree to the request based on a consideration of relevant factors. The named person must demonstrate, on balance of probabilities, that the purpose of the provision authorizing the issuance of the control document and the statute will be served, and not impaired, by exempting the person from the control document.

When issuing a control document to more than one person, it is not the role of the statutory decision-maker to apportion or allocate liability among parties, or make findings of "fault" or "degrees of fault". Since the legislation provides no mechanism to adjudicate such issues in relation to persons named in a control document, statutory decision-makers should generally refrain from apportioning liability among those persons. Also, any apportionment of liability in a control document would not be binding on any court, should the same incident be the subject of a civil action between some or all of the persons named in the document. Generally, those named in a control document are to be held jointly and severally liable to carry out the work specified in the document. After the control document is issued, named persons are free to negotiate matters of "fault" and apportionment of liability among themselves. Failing a settlement of such issues, they are free to take legal action against one another and have matters of apportionment of liability and "fault" adjudicated by the courts. If indeed the named persons are able to reach a settlement which includes a clear basis for allocating liability for the work specified in the document, with the consent of the statutory decision-maker and the named persons, the control document may be amended to incorporate the settlement.

In addition, the statutory decision-maker must consider provisions in the EPA, OWRA and the PA that provide some persons, such as secured creditors, trustees in bankruptcy and receivers, municipalities and fiduciaries with limited protections from orders. The legislation allows a person, such as a municipality who may have an interest in a non-municipal property: to conduct, complete or confirm environmental investigations related to the site; ensure the supply of water, sewage services, etc.; secure the property by means of locks, gates, fences etc.; or to insure the property under a contract of insurance without taking on the liability of being subject to an order. This is to encourage redevelopment of brownfield sites. The legislation does not provide any protection from prosecutions.

In addition, the authority to issue an order to specified people in relation to past contamination at a specific property after a record of site condition has been filed on the Environmental Site Registry is restricted in the EPA and the OWRA. This limitation applies to the owner that files the record of site condition and subsequent owners, as well as any person with charge, management or control of the property at the time the record of site condition was filed, or subsequent to that time. There are limitations to the protection provided to these parties by the legislation such that in some circumstances a specific order may be issued.

Policies not to be augmented

The above policies are meant to provide guidance for the issuance of control documents, and naming of persons in control documents, under the ministry's legislation as currently worded. These policies are not to be altered or changed through the consideration and application of any policies which have not been officially adopted by the ministry.

Four Common Fact Situations:

Below are four examples of common situations where a statutory decision-maker has been asked to relieve a person from the liability which may otherwise be imposed by a control document, and how they may be addressed, taking into consideration the policies outlined above. These examples are not intended to be prescriptive of how the statutory decision-maker must analyze those factors, nor are they intended to be exhaustive of all relevant or irrelevant factors. They are provided as examples only.

1. Innocent previous persons

Where a statutory decision-maker is authorized under the EPA to issue an order to a previous owner, occupant or person in charge, management or control of a site, and that person only had a connection with the site before any contaminating substance became present upon it, and has no other connection to the problem leading to the contamination or the contamination itself, it is unlikely that the statutory decision-maker has any statutory authority to issue a control document to such a person. They would not be a relevant previous owner, occupant or person in charge, management or control of the site for the purposes of the statute. Even if they were, it would likely be appropriate for the statutory decision-maker to relieve such a person of liability (i.e. not name him/her in the control document). Including such an entirely innocent and uninvolved person in a control document would tend to bring the administration of the EPA into disrepute, thereby encouraging the parties and the public to flout it. This would not serve the purpose of Ministry legislation.

Of course, it is possible to conceive of situations where a person who previously had a connection to the site (for instance a previous owner) may be subject to a control document, and should not be relieved of liability, i.e. where he/she has chosen to sell uncontaminated property where an undisclosed hazardous materials storage tank was buried and subsequent to the sale of the site, the tank ruptured which led to the discharge of a contaminant into the natural environment. Therefore, every fact of a situation must be examined on its own merit.

2. Victimized current owners and occupants and those in charge, management and control

Generally, a current owner, occupant and those in charge, management and control of a contaminated site should not be relieved by a statutory decision-maker from liability (or taken off a control document) on the grounds that the circumstances leading to the contamination were beyond the control of that person.

In general, the current owner of the property should be named in a control document in order to ensure that:

- any potential for adverse impacts to human health or the environment will be addressed by the owner in the event the polluting or illegal actor defaults under the control document;
- the Ministry may recover costs for "work done by Ministry" under the cost recovery provisions of ministry legislation where both the polluter and the owner default under the control document;
- the statutory decision-maker issuing the control document may require the owner to register a certificate on title of the property to ensure those acquiring an interest in the property have notice of the control document.

In exceptional or unusual circumstances, the statutory decision-maker may take into account the fact that a person named in a control document has been victimized when determining the timing and content of the work to be specified in the document. Also, there may be rare circumstances where no environmental purpose would be served to name a victimized person in a control document. For example, where an owner's property has been contaminated by a groundwater plume originating from a source of contamination on an adjacent property and the required cleanup must, in order to be effective, focus upon the adjacent property rather than the owner's, it may serve no environmental purpose to include the victimized owner in the control document.

3. Buyer Beware

The fact that an owner of a contaminated site may have purchased it without notice of the presence of contamination is irrelevant to the purpose of Ministry legislation and generally will not be considered by the statutory decision-maker to be grounds for relieving that owner from liability under a control document. Pursuant to the common law, prospective purchasers are expected to exercise due diligence and conduct all the necessary environmental site assessments of a property before purchasing it. Purchasers are expected to take property as they find it or subject to any conditions which may be specified in an agreement of purchase and sale. As well, protection and conservation of the natural environment are best served by encouraging "buyers to beware", because it will ensure purchasers have identified and addressed site contamination issues in the agreement of purchase and sale.

It is also beneficial for the vendors of property to ensure that an agreement of purchase and sale identifies and addresses site contamination issues. For instance, under the *Brownfield's Statute Law Amendment Act*, a vendor of property could become eligible for the limited protection from orders under Part XV.1 of the EPA by including a condition in the agreement of purchase of sale that requires the purchaser to complete the necessary work and file a Record of Site Condition in the Environmental Site Registry.

4. Financial Hardship

Where a named person can demonstrate, on reasonable and probable grounds, that they are unable to pay and can therefore not carry out the requirements of an order, the statutory decision-maker may consider adjusting the requirements of the order so that his or her imposition does not cause undue financial hardship. Generally, however, a statutory decision-maker should refrain from taking a person off a control document on the grounds of financial hardship or constraints. Doing so will tend to encourage other potential responsible persons to divest themselves of their assets when confronted with environmental cleanup costs, in order to render themselves financially unable to meet the requirements of a control document. This would undermine the administration of Ministry legislation. In addition, it may be necessary to name an individual despite their claims of financial hardship in order to ensure the ministry's ability to cause work to be done or to require registration on title.

Finally, experience shows that it is often extremely difficult to assess whether a person named in a control document faces undue financial hardship since all of the information is within the control of the person alleging the undue financial hardship.

Human health and environmental protection is first and foremost. The Ministry will use mandatory abatement tools such as orders and name responsible parties whenever warranted to firmly and swiftly respond to a situation or incident that has the potential for significant human health and/or environmental consequences.