

Proposed changes to the Nova Scotia Environment Act

A discussion paper

Nova Scotia Environment (NSE) is responsible for protecting the environment and human health and promoting sustainable development. We are responsible for many aspects of everyday life, such as air quality, drinking water and solid waste management.

The *Environment Act* is one of the primary laws that guide our efforts. Passed in 1995, the *Environment Act* is required to undergo a review every 5 years to determine how well it is working and what changes are needed to make it work better. The last review was completed in 2006.

Based on discussions with staff and input received from stakeholders and the public over the years, we have come up with a set of proposed changes to the *Environment Act*.

Part I of this paper gives a high-level summary of the proposed changes. These changes are intended to help us regulate more effectively. Our aim is to enhance the protection of the environment and human health while making the best use of resources. This drive to find better ways of doing things is at the heart of the proposed changes to the *Environment Act*.

We want to know what you think about the proposed changes to the *Environment Act*.

We are also seeking feedback on the possible introduction of administrative penalties to provide greater diversity and flexibility in our enforcement processes. Part II of this paper describes the basics of administrative penalties and how they might fit into our current enforcement framework.

We want to know what you think about administrative penalties and the role they could play in protecting the environment and human health.

Part I: Proposed Changes to the *Environment Act*

About the *Environment Act*

The *Environment Act* is an enabling act, which means that it grants NSE the power to create, implement and enforce regulations, approvals, policies and programs that help us protect the environment.

The *Environment Act* was created in 1995 by combining a number of different laws. This *Act* embodied the highest standards for environmental protection. In order to ensure that the law was working, the *Environment Act* contained a requirement that it be formally reviewed every 5 years. Accordingly, the *Act* underwent an extensive review that began in 2000. This process involved an evaluation of all aspects of the *Environment Act* and resulted in a number of updates in 2006.

Because the *Environment Act* governs a great deal of our day-to-day work, it is being constantly reviewed by staff and stakeholders whose activities and lives are impacted by it. Overall, the *Environment Act* has worked well for us and our stakeholders.

It's Time to Review our Act

The *Environment Act* must be reviewed every 5 years. 2011 marks the next review.

As part of the review, we undertook an internal evaluation of the *Act*. We have learned that while the majority of the *Act* works well, there are some changes that will help us improve how we deliver programs and services. We want your input on these proposed changes.

In addition, we will be relying on the advice and recommendations of an advisory committee that will provide input on the proposed changes. The advisory committee will be composed of representatives from key stakeholder organizations who will bring the benefit of their expertise and experience to the review process. Along with the feedback gathered during the consultation, the input from the advisory committee will be a key consideration in the ultimate decision regarding the proposed changes to the *Environment Act*.

Goals of the Review

The proposed changes to the *Act* are intended to help us better protect the environment and human health while ensuring that our resources are put to the best use. We plan to do this by:

1. Matching resource use to the level of risk to the environment and human health
2. Using resources more efficiently and effectively
3. Strengthening protection for the environment and human health
4. Correcting errors and inconsistencies

Goal #1: Matching resource use to the level of risk to the environment and human health

Currently, the *Environment Act* limits us in how we regulate the more than 100 activities under our supervision. These activities carry very different levels of risk. For example, establishing a new oil refinery and installing a culvert are both activities that we regulate. However, the risks associated with the oil refinery are much more complex and potentially significant than the culvert.

In its current form, the *Environment Act* calls for a 'one size fits all' approach to regulation. People or companies who want to undertake an activity known to carry risks to the environment have to apply for an approval to carry out the activity. The application process is resource-intensive both for us and for applicants. This approach is more appropriate for higher risk activities such as an oil refinery, where we need a lot of information about the activity to decide whether to approve it, and the flexibility to set particular terms and conditions that govern how the activity can be carried out.

However, many of the activities we regulate carry lower risks of harm and these potential risks are well understood. These kinds of activities still need to be regulated, but may not need to go through the same complex process as higher risk activities.

For example, in some instances a mandatory standard or a code of practice could be applied to regulate an activity, allowing us to place our efforts on auditing, inspection and enforcement, rather than the resource-intensive approval process. As this example suggests, these new approaches must be backed by a strong and accountable enforcement regime and appropriate standards that embody the current best practices.

Several other jurisdictions, including Ontario and Saskatchewan, have recently identified similar opportunities in their regulatory approaches and are in the process of re-designing their laws to create better ways to regulate activities.

Part I: Proposed Changes to the *Environment Act*

To better match our resource use to the risk levels of the activities we regulate, we are proposing the following changes to the *Environment Act*:

Proposed Changes to Accomplish Goal #1

1. Add new sections to the *Environment Act* granting NSE the authority to take a more flexible approach to regulation

- We propose to add a number of new sections to the *Act* that will give us the authority to develop and use other ways of regulating that are faster and simpler than approvals, but just as rigorous. These might include registrations, notifications, permits, licences and codes of practice; all of which are used in other jurisdictions. The proposed changes will not, by themselves, create these new processes. The changes will simply give us the necessary authority to develop them. Once the new tools have been designed, stakeholders and the public will have a chance to review and comment upon them before they are implemented. It is also important to understand that these changes will not affect approvals that have already been issued.

2. Ensure the *Environment Act* permits the effective enforcement of new regulatory processes

- We propose to add new offence sections to the *Environment Act* that will allow us to enforce compliance with the new regulatory processes.

3. Ensure we can effectively monitor compliance with new regulatory processes

- We propose to clarify inspectors' entry and inspection powers to ensure that they will be able to monitor compliance with the new regulatory processes.

4. Clarify potential wording issues in the *Environment Act*

- We propose to clarify inconsistencies in the existing language in the *Environment Act* relating to standards, guidelines, policies, etc., to make sure that this language will work with the new regulatory tools and that we have the power to administer them.

5. Increase the flexibility of approvals

- Finally, we propose to simplify the definition of "approvals" to give us greater flexibility to increase the efficiency and utility of the approval process. For example, an application to renew an approval currently follows the same procedure as a new application. The revised definition will provide us with the option of channeling lower risk renewal applications through an expedited application process.

Goal #2: Using resources more efficiently and effectively

Another of our goals is to identify ways to use our resources more efficiently and effectively. Processes that are inflexible, unnecessarily complex and paperwork-intensive can delay decision-making and draw resources away from areas where they are most needed, such as inspections and responses to complaints. These kinds of processes can also be cumbersome and confusing for stakeholders.

To make better use of our resources and those of our clients and stakeholders, we propose the following changes to the *Environment Act*:

Proposed Changes to Accomplish Goal #2

1. Revise the definition of “adverse effect”

- NSE has responsibility over matters that have caused or may cause an “adverse effect”, which is defined as “an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property.” This wording has resulted in our staff having to assume responsibility over nuisance issues that do not pose a risk to the environment. As a result, staff are being drawn away from performing their core duties.
- We propose the following revised definition: “adverse effect means an effect that impairs or damages the environment, including those aspects of human health that are or can be negatively affected by changes in the environment.” This definition is based on a recommendation from the first *Act* review in 2000. It will better link with our core mandate and align more closely with the definitions used in Canadian legislation.

2. Provide greater flexibility to draw on the expertise of independent experts and advisers

- The *Act* permits the Minister to engage experts to report and provide recommendations on a range of matters. Within the *Act* there are specific situations where the Minister is required to engage arm’s length input, such as referrals of certain environmental assessments (EAs) to the Environmental Assessment Board (EAB). In other cases, the Minister may choose to appoint an expert or experts to provide advice or opinion.
- We propose to consolidate into one section the powers of the Minister to appoint experts and establish advisory committees, including the work of the EAB and the Round Table. In addition, the range of work that can be referred to advisory committees or experts would also be expanded to include appointing advisory committees to review the *Environment Act*. Through this change, the need to maintain a standing EAB even when no reviewable projects exist would be eliminated in favour of appointing expert assessment panels when required. This change will increase the flexibility to engage arm’s length experts and advisors, and will better align our EA framework with that of other jurisdictions.

Proposed Changes to Accomplish Goal #2 (Cont'd.)

3. Require reviews of the *Environment Act* every 10 years

- The *Environment Act* is currently required to undergo a review every 5 years. This requirement was introduced over 15 years ago when the *Environment Act* was new and untested. Today, the *Act* has proven largely successful in allowing us to deliver programs and services that maintain a high level of protection of the environment and human health. While there are some refinements that will further enhance our ability to meet our mandate, there is not the same need to review the *Act* so frequently.
- We propose introducing a 10-year period between reviews of the *Environment Act*. This will conserve resources and permit a longer period of time for evaluating the impacts of previous changes. It should also be noted that we can modify the *Environment Act* whenever we wish, regardless of the timing of the next review period. Therefore, where there is a good reason to do so, we can always make changes to the *Environment Act* between review periods.

4. Update the timelines for processing approval applications

- The current timelines in the *Environment Act* are also not aligned with those set out in the *Approvals Procedure Regulations*.
- We propose to eliminate these timelines in favour of adopting a service standard that provides stakeholders with a reliable expectation of processing times. This change will not impact the timelines for processing environmental assessment approvals under Part IV of the *Environment Act*.

5. Streamline the process for issuing emergency orders

- Inspectors have the power under the *Environment Act* to issue emergency orders to do things like requiring those responsible for spilling a harmful substance to take steps to clean up the spill. Currently, inspectors must have emergency orders reviewed and signed by the Minister of Environment within three days of issuing the order. However, in practice, the emergency has since been resolved by the time the three days are up.
- We are proposing to replace the requirement to have emergency orders be reviewed by the Minister with a policy requiring inspectors to inform their supervisor when issuing an emergency order. This will ensure that there is appropriate oversight during the time of the emergency. In addition, by virtue of their duties, supervisors are closer to matters in the field than the Minister, and can bring the benefit of their experience and expertise to bear in reviewing emergency orders.

Proposed Changes to Accomplish Goal #2 (Cont'd.)

6. Reduce the potential for redundancy in the collection of air emissions data

- The wording in the *Environment Act* relating to the collection of air emission inventories is not aligned with the way NSE actually collects this information. Currently, we rely on emissions data contained in Environment Canada's emissions database, supplemented with data collected by our staff through operating approvals. This approach provides an efficient means of gathering high quality emissions data. However, the wording in the *Environment Act* can be interpreted in such a way as to suggest that NSE should be required to duplicate the efforts of Environment Canada with respect to air emissions data collection.
- We propose to update the wording in the *Environment Act* to better align it with existing practice. This change will have no impact on the quality of NSE's air emissions data, which will continue to be collected in the same way, but will ensure there is no need for redundant efforts by NSE and Environment Canada with respect to data collection.

Goal #3: Strengthening protection for the environment and human health

In our discussions with our field staff and stakeholders, we have identified a number of opportunities to enhance the protection of the environment and human health by strengthening and clarifying enforcement powers. These opportunities are outlined in the following proposed changes to the *Environment Act*:

Proposed Changes to Accomplish Goal #3

1. Enhance the duty to report spills or releases

- The *Environment Act* currently requires those people who are responsible for spilling or releasing a substance that could harm the environment or human health to report that spill or release. Owners of sites on which releases have occurred have also been bound by this requirement.
- We propose expanding this requirement to include persons or companies who would tend to become aware of spills or releases during the course of their work. For example, a consultant involved in an assessment of a property may become aware of a prior spill or release while performing his or her duties. For clarity, the expanded requirement is not intended to apply to persons or companies not associated with the property who may learn of a spill or release through chance, although voluntary reporting will still be encouraged.

2. Create an offence for failing to comply with Protected Water Areas regulations

- Municipalities share responsibility with NSE for monitoring compliance with Protected Water Areas regulations. They have communicated to us that there are insufficient powers in the *Environment Act* to allow effective enforcement.
- We are proposing to make violating Protected Water Areas regulations an offence in order to assist municipalities with enforcing these regulations.

3. Clarify inspectors' power to issue directives to require compliance

- Inspectors rely on issuing directives to help them perform their duties. Directives can be issued to persons or businesses to require them to provide information to inspectors and/or to take measures to clean up a spill or release.
- We propose to clarify the directive power to assist inspectors in performing their duties under the *Environment Act*.

Proposed Changes to Accomplish Goal #3 (Cont'd.)

4. Clarify NSE's authority to seek enforcement measures

- The language in the 'Purpose' section of the *Environment Act* sets out our approach to enforcing the *Act*. We use an array of enforcement measures, ranging from non-regulatory approaches such as cooperation and education through to serious regulatory measures such as fines and jail time. We are committed to relying on non-regulatory measures where indicated by our enforcement model. However, some violations of the *Environment Act* are so severe or flagrant that we need to apply more serious enforcement measures to ensure that the environment is protected.
- We propose to update the language in the 'Purpose' section of the *Environment Act* to clarify that we have the flexibility to seek more serious enforcement measures against offenders in appropriate cases without first having to apply educational measures.

5. Update the authority to cancel or suspend approvals

- Currently, the Environment Minister can only cancel or suspend an approval where he or she learns that an adverse effect has occurred due to the activity subject to the approval. This means that the Minister cannot act to prevent harm by cancelling or suspending an approval where he or she learns that there is a likelihood of an adverse effect. Instead, the Minister must wait until the harm has occurred.
- We are proposing to update the Environment Minister's authority to cancel or suspend an approval to allow the Minister to respond proactively to information about the likelihood of an adverse effect.

6. Update the authority to amend approvals issued before 1995

- Activities that received approvals before the *Environment Act* was created in 1995 have no expiry date and can only be amended in limited circumstances. Because these approvals are quite old, they may not require the approval-holder to comply with the newest and best operating standards and management practices.
- We are proposing to introduce the authority to review and amend approvals issued before 1995 in order to ensure that these approvals can be brought up-to-date with current standards and practices. This authority will not be used to re-open all old approvals automatically. Rather, it will be used in a targeted fashion to address concerns relating to particular approvals that are out-of-date with current standards and practices.

Proposed Changes to Accomplish Goal #3 (Cont'd.)

7. Update the authority to enact a new set of contaminated sites regulations

- NSE is in the process of developing a set of regulations to address the management of contaminated sites.
- In order to ensure that we have the authority to implement these regulations, we propose to make several minor additions to the regulation-making powers in Part VIII of the *Environment Act*.

8. Revise the definition of the term “substance”

- The definition of the word “substance” in the *Environment Act* has caused some difficulty for NSE in prosecutions of offences relating to spills or releases of harmful substances. This term is defined narrowly such that certain specific types of spills or releases that should be covered under the definition may not be. This has made it difficult to enforce effectively the parts of the *Act* relating to these types of spills or releases.
- We therefore propose to update the definition of “substance” to capture these spills and/or releases.

9. Clarify the provisions relating to the appeal of orders

- The appeal provisions in the *Environment Act* are worded in such a way that there are two unintended interpretations of these sections that should be clarified.
 - First, it could be interpreted that appealing an order suspends the need to comply with that order until the appeal has been decided. This interpretation could be problematic where an order requires a person or company to take immediate action to protect the environment. Instead of following the order, the person or company might think they can wait until the court is done processing their appeal, by which time irreversible harm may have occurred. We propose to update the language in the appeal provisions to clarify that appealing an order does not suspend the need for immediate compliance with that order.
 - Second, it could be interpreted that a person or company who appeals a Ministerial order gets to have the court conduct a new hearing into the facts that gave rise to the order. This is not the way that appeals are meant to proceed. The facts of the matter should not be re-visited by the court. Instead, the court is only asked to determine whether the Minister’s decision was legally acceptable based on the facts that were before him or her. We propose to update the wording in the *Environment Act* to clarify that an appeal of a Ministerial order is not a new hearing of the matter.

Goal #4: Correcting errors and inconsistencies in the *Environment Act*

We are proposing a number of changes to the *Environment Act* that are designed to address minor errors, omissions or inconsistencies:

Proposed Changes to Accomplish Goal #4

- Correct the misspelling of “inpractical”, “responders” and “ground water” [“groundwater”].
- Update the titles of the Department and Minister, the Federal Regulatory Authority over pesticides and the term “water bodies” [to “water resources”, which is the terminology used in the rest of the *Environment Act*].
- Revise the lettering scheme in s. 3 (“Interpretation”) to eliminate double-lettering.
- Move s. 56A (“Temporary approvals”) directly after s. 65 (“Approvals”). Section 56A is currently located adjacent to unrelated provisions, and this change will place all related provisions in the same place in the *Environment Act*.
- Make s. 133 (“Court may order compliance”) part of s. 166 (“Court orders relating to penalty”). This change will serve to locate all court powers in the same place in the *Act*.
- Add a reference to section 89 (“Remedial action plans and agreements”) to require activities such as remedial action plans to conform to the new contaminated sites regulations, which are currently under development.
- Eliminate provisions in the *Environment Act* which needlessly duplicate provisions in the Well Construction Regulations.
- Clarify the use of the term “administrator” to distinguish between an administrator appointed by Minister under the *Act* and other types of administrators (i.e., for estates).
- Replace the term “administrator” with “Minister” in sections 36, 37, 115 and 116. This change will not impact how the duties in these sections are performed, but will simply update them to reflect the fact that the Minister or his/her authorized delegate rather than an administrator is currently performing these duties.
- Update and re-organize sections 8 and 25 to clarify the regulation-making powers of the Minister and Governor in Council. In some cases, the *Environment Act* is not sufficiently clear and precise when it sets out which types of regulations can be made by the Minister versus the Governor-in-Council.

Part II: Should We Introduce Administrative Penalties?

Administrative penalties are monetary penalties used by several other Nova Scotia provincial departments, other provinces and the federal government to protect the environment. Compared to the existing enforcement measures in the *Environment Act*, administrative penalties have the potential to be a faster and more efficient way to address behaviours that can damage the environment and human health.

We are considering updating the *Environment Act* to allow us to implement administrative penalties. The changes to the *Act* would not create the penalties, but would give us the authority to introduce them at a future date.

At this point, we are exploring the benefits and drawbacks of administrative penalties. No decisions have yet been made about how these penalties would work if they were to be introduced. We are interested in hearing what stakeholders and the public think about administrative penalties before considering this further.

- **Should the *Environment Act* be changed to allow the introduction of administrative penalties at some future point?**
- **What would be the benefits and drawbacks of this approach?**
- **Are there any concerns about how administrative penalties might impact particular groups or organizations?**

To assist stakeholders and the public in answering these questions, the following is a brief introduction to administrative penalties.

What are administrative penalties?

Administrative penalties are used to promote compliance with a law. They are monetary penalties that are imposed on a person or company who has done something that is prohibited by law, or failed to do something that is legally required. Ordinarily, administrative penalties are used for offences that are administrative in nature. Typically, these are less serious violations.

How are administrative penalties different from fines?

The *Environment Act* currently allows a court to order a person or company who has violated the *Act* to pay a fine as part of their punishment. This means that before a person can be fined, he or she must be: (a) charged with an offence under the *Environment Act*; (b) given the

Part II: Should We Introduce Administrative Penalties?

opportunity to plead guilty or not guilty; (c) put on trial if the plea is not guilty; (d) convicted; and (e) sentenced. This can be a lengthy and expensive process for both the government and the accused. Administrative penalties are different from fines because they are administered by government, rather than the court system.

What are the benefits of administrative penalties?

Because the person receiving the penalty does not have to go through a trial, administrative penalties can provide a faster, more cost-effective and more efficient way to address less serious offences for both the government and the offender. They can also enable the Government to address a violation quickly, which will allow more resources to be focused on any remedial actions needed to protect the environment.

There is a strong argument that courts should only deal with more complex, severe and/or persistent offences. It is not fair or appropriate to force people to go through the trial process to deal with minor offences or offences that are administrative in nature. Another benefit of administrative penalties is that they do not result in a criminal record for the offender, which can have long-term and far-reaching impacts.

If you are ordered to pay an administrative penalty, could you also be charged with an offence for the same violation, and vice versa?

Generally, no. Of all the other jurisdictions that have administrative penalties for environmental violations, only Ontario permits a person or company to be charged with an offence and issued an administrative penalty for the same violation. In all other provinces and federally, a person or company can either be charged with an offence or issued an administrative penalty, but not both.

How would an administrative penalty be issued?

The process varies across the country but generally, the person or company who violated the law must first receive written notice of the violation. This notice generally contains all of the necessary information about the penalty, including details such as

- The name of the person or company that committed the violation;
- The relevant facts surrounding the violation, such as the date, location and what happened; and
- The amount of the penalty, how it may be paid and the deadline for payment.

How much will the penalties be?

The Government is still very early in the process of exploring administrative penalties. At this time, no decisions have been made about details such as penalty amounts.

Part II: Should We Introduce Administrative Penalties?

What would happen if you didn't pay the administrative penalty?

In other jurisdictions with administrative penalties, the government is usually given the power to sue to recover the penalty or to have the penalty enforced in the same way as a court order.

What if you didn't agree with the administrative penalty – could it be challenged?

There is a lot of variation in how other jurisdictions have answered this question. Some do not permit any challenge of an administrative penalty. Some permit a penalty to be reviewed by an internal appeal to the responsible minister. Still other jurisdictions allow administrative penalties to be appealed to an independent tribunal.

Again, since the Government is at a very early point in the process of exploring administrative penalties, it has not made any decisions about this issue.

How to Respond

The *Environment Act* can be found at <http://nslegislature.ca/legc/statutes/envromnt.htm>

We welcome your comments on the issues raised in this discussion paper. You can provide your feedback via mail or e-mail. You can also provide your feedback via an online form.

Comment Period

Submissions will be accepted until **August 22, 2011**.

How to Reach Us

Comments can be submitted via NSE's online consultation form at www.gov.ns.ca/nse/act.review/

Written comments can be sent via mail to:

Environment Act Comments
Nova Scotia Environment
5151 Terminal Road
P.O. Box 442
Halifax, NS
B3J 2P8

NSE can also be reached via e-mail at policy@gov.ns.ca.

To request a copy of this paper, please call 1-888-320-0555.

Submissions received will be considered by Nova Scotia Environment as part of the public consultation process. Your submission may be made available to the public with the exception of your personal information, which will only be disclosed in keeping with the privacy provisions of the NS *Freedom of Information & Protection of Privacy Act*. Should you wish any of the information provided to be held in confidence, please clearly indicate this for consideration.