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**Official Report  
of Debates  
(Hansard)**

**Monday 30 May 2005**

**Journal  
des débats  
(Hansard)**

**Lundi 30 mai 2005**

**Standing committee on  
the Legislative Assembly**

Environmental Enforcement  
Statute Law Amendment Act,  
2005

**Comité permanent de  
l'Assemblée législative**

Loi de 2005 modifiant des lois  
sur l'environnement  
en ce qui concerne l'exécution

Chair: Bob Delaney  
Clerk: Douglas Arnott

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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

**STANDING COMMITTEE ON  
THE LEGISLATIVE ASSEMBLY**

**COMITÉ PERMANENT DE  
L'ASSEMBLÉE LÉGISLATIVE**

Monday 30 May 2005

Lundi 30 mai 2005

*The committee met at 1556 in room 228.*

**ENVIRONMENTAL ENFORCEMENT  
STATUTE LAW AMENDMENT ACT, 2005**

**LOI DE 2005 MODIFIANT DES LOIS  
SUR L'ENVIRONNEMENT  
EN CE QUI CONCERNE L'EXÉCUTION**

Consideration of Bill 133, An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters / Projet de loi 133, Loi modifiant la Loi sur la protection de l'environnement et la Loi sur les ressources en eau de l'Ontario en ce qui a trait à l'exécution et à d'autres questions.

**The Chair (Mr. Bob Delaney):** Good afternoon, and welcome back after our constituency week. This is the standing committee on the Legislative Assembly. We're here to consider Bill 133, An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters, at the stage of the always gripping clause-by-clause.

Are there amendments?

**Mr. Norm Miller (Parry Sound–Muskoka):** On a point of order, Mr. Chairman: Just for clarity, and I was speaking prior to this meeting with the parliamentary assistant, I understand there have been some new amendments that have been made a part of our package. I'm just wondering, from the parliamentary assistant, how many new amendments there are. It seems a little unfair to get them just as we're arriving at the meeting, when no one in our party has actually seen these amendments yet.

**Mr. John Wilkinson (Perth–Middlesex):** There are two very large government amendments on pages 66 and 111. You'll recall that, in regard to NDP motions that were on pages 63 and 64, just before we broke, the NDP were nice enough to agree to withdraw those and allow us, because they deal with section 25, to incorporate those into one motion so that from a legislative counsel point of view, the numbering of the amendment makes sense. So we've done that.

As well, there is a two-word amendment, which I'll discuss, to what was found in government number 77, in regard to consistency in our position about "may" to "likely." Everything that's in 66, which is the EPA, also has to be dealt with at 111, in regard to the OWRA. As far as we can see, it's just going to make it a bit easier for

legislative counsel for us to give them the whole—if we're going to read it, we might as well read in the section correctly, and do it just once. It will also incorporate the great suggestions from the Conservative caucus on the amendment.

**Mr. Toby Barrett (Haldimand–Norfolk–Brant):** I haven't seen these yet. Have these changes been sent out to the environmental community? Have they been sent out to industry or other stakeholders? Has anyone seen these? I haven't seen these.

**Mr. Wilkinson:** My understanding is that clause-by-clause is the purview of the committee.

**Mr. Rosario Marchese (Trinity–Spadina):** He's just about to read the amendment. Is that correct? Is that what I missed?

**The Chair:** At the moment, we're about to consider the amendment on page 65. The amendment being discussed here, I think, is the next one or the one after. Correct?

**Mr. Wilkinson:** That's the big one, yes.

**The Chair:** OK. Let's try again. Amendments?

Mr. Barrett.

**Mr. Barrett:** There is a PC motion on page 65. This amendment has not been changed or rewritten. This stands as of a week and a half ago when first submitted.

I move that sections 182.2 and 182.3 of the Environmental Protection Act, as set out in subsection 1(58) of the bill, be struck out.

The reason for this is to ensure that only Ministry of Environment directors are involved and have the ability and are authorized to issue environmental penalties. It ties in with and is to ensure consideration for due diligence and that evidence of guilt be taken into account at the director level or at a higher level. We feel there's a positive as well: It would avoid having field staff acting as police, prosecutor or judge in a situation where, if that occurred, we believe it would undermine any modicum of co-operative interaction between ministry staff and an organization where they feel there's a problem occurring.

**The Chair:** Discussion?

**Mr. Wilkinson:** We appreciate the amendment and the spirit of the amendment from the opposition. We'll be dealing with it in a more comprehensive manner in the next government motion, because we want to be absolutely clear, since we agree, about where the new government motion will remove any reference to authority to issue environmental penalty orders by provincial officers.

We agree; we just want to make sure it goes right through all of section 25. We were afraid that there were a couple of references that were missing there.

**The Chair:** Shall the amendment carry?

Those in favour? Opposed? I declare the amendment lost.

**Mr. Wilkinson:** Mr. Chair, before I begin amendment 66, just for clarity for our colleagues today, this motion, lengthy as it is, will do the following:

(1) Environmental penalty orders will only be issued by directors, not provincial officers.

(2) The orders must be issued against the company and not company officials.

(3) Provide specific circumstances when an EP order shall not be issued.

(4) Clarify that absolute liability does not apply to prosecutions.

(5) Provide that the payment of an EP order is not an admission of guilt if the person is prosecuted for the same contravention.

(6) Place specific restrictions on regulation-making authority for penalty assessments to provide persons with the ability to seek reductions for the steps they take to prevent and mitigate the effects of a contravention and for environmental management systems they have in place.

(7) Settlement agreements must be posted on the Environmental Bill of Rights registry, and the regulations can require public consultation before agreements are entered into.

(8) This revised motion—and this is where we get into the revisions—also incorporates the two NDP motions that required annual reports and five-year reviews of the environmental penalty regime in regard to subsections (19) and (20).

(9) This revised motion also gives the regulated person entitlement to a reduction if they can demonstrate that they took the prescribed mitigative or preventive measures.

I move that sections 182.1, 182.2 and 182.3 of the Environmental Protection Act, as set out in subsection 1(58) of the bill, be struck out and the following substituted:

“Environmental penalties

“182.1(1) Subject to regulations, the director may issue an order requiring a regulated person to pay a penalty if,

“(a) the regulated person contravenes,

“(i) section 14,

“(ii) section 93,

“(iii) a provision of the regulations that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment,

“(iv) a provision of an order under this act that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentra-

tion or level of anything that may be discharged to the natural environment,

“(v) a provision of a certificate of approval, provisional certificate of approval, certificate of property use, licence or permit under this act that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment; or

“(b) the regulated person contravenes a provision, other than a provision referred to in clause (a), of,

“(i) this act or the regulations,

“(ii) an order under this act, other than an order under section 99.1, 100.1 or 150 or an order of a court,

“(iii) a certificate of approval, provisional certificate of approval, certificate of property use, licence or permit under this act,

“(iv) a report under section 29, or

“(v) an agreement under subsection (9).

“Exceptions

“(2) Subsection (1) does not apply to,

“(a) a contravention of section 14, if,

“(i) neither this act nor the Ontario Water Resources Act requires the regulated person to notify the ministry of the discharge to which the contravention relates, or

“(ii) the discharge to which the contravention relates was authorized under this act or the Ontario Water Resources Act; or

“(b) a contravention of section 184.

“Contents of order

“(3) The order shall be served on the person who is required to pay the penalty and shall,

“(a) contain a description of the contravention to which the order relates, including, where appropriate, the date and location of the contravention;

“(b) in the case of a contravention of section 14, contain a description of the adverse effects that were caused by or that may be caused by the contravention;

“(c) specify the amount of the penalty;

“(d) give particulars respecting the time for paying the penalty and the manner of payment; and

“(e) provide information to the person as to the person’s rights under section 140.

“Amount

“(4) The amount of the penalty shall be determined in accordance with the regulations.

“Maximum penalty

“(5) The amount of the penalty shall not exceed \$100,000 for each day or part of a day on which the contravention occurred or continued.

“Absolute liability

“(6) A requirement that a person pay an environmental penalty applies even if,

“(a) the person took all reasonable steps to prevent the contravention; or

“(b) at the time of the contravention, the person had an honest and reasonable belief in a mistaken set of facts that, if true, would have rendered the contravention innocent.

“Same

“(7) For greater certainty, nothing in subsection (6) affects the prosecution of an offence.

“Limitation

“(8) An order requiring payment of an environmental penalty shall be served not later than the first anniversary of the later of the following dates:

“1. The date the contravention occurred.

“2. The date on which the evidence of the contravention first came to the attention of the director or a provincial officer.

“Agreements

“(9) The director and a person against whom an order may be or has been made under subsection (1) may enter into an agreement that,

“(a) identifies the contravention in respect of which the order may be or has been made;

“(b) requires the person against whom the order may be or has been made to take steps specified in the agreement within the time specified in the agreement; and

“(c) provides that the obligation to pay the penalty may be cancelled in accordance with the regulations or the amount of the penalty may be reduced in accordance with the regulations.

“Publication of agreements

“(10) The ministry shall publish every agreement entered into under subsection (9) in the environmental registry established under section 5 of the Environmental Bill of Rights, 1993.

“Penalty does not prevent prosecution

“(11) A person may be charged, prosecuted and convicted of an offence under this act in respect of a contravention referred to in subsection (1) even if an environmental penalty has been imposed on or paid by the person or another person in respect of the contravention.

“No admission

“(12) If a person pays a penalty imposed under subsection (1) in respect of a contravention or enters into an agreement under subsection (9) in respect of a contravention, the payment or entering into of the agreement is not, for the purposes of any prosecution in respect of the contravention, an admission that the person committed the contravention.

“Failure to pay when required

“(13) If a person who is required to pay an environmental penalty fails to comply with the requirement,

“(a) the order or decision that requires the payment may be filed with a local registrar of the Superior Court of Justice and may be enforced as if it were an order of the court;

“(b) the director may by order suspend any certificate of approval, provisional certificate of approval, licence or permit that has been issued to the person under this act until the environmental penalty is paid; and

“(c) the director may refuse to issue any certificate of approval, provisional certificate of approval, licence or permit to the person under this act until the environmental penalty is paid.

“Same

“(14) Section 129 of the Courts of Justice Act applies in respect of an order or decision filed with the Superior Court of Justice under subsection (13) and, for that purpose, the date on which the order or decision is filed under subsection (13) shall be deemed to be the date of the order that is referred to in section 129 of the Courts of Justice Act.

“Regulations

“(15) The Lieutenant Governor in Council may make regulations,

“(a) specifying the form and content of orders under subsection (1);

“(b) specifying types of contraventions or circumstances in respect of which an order may be issued under subsection (1);

“(c) requiring and governing public consultation before an agreement is entered into under subsection (9) and, subject to that subsection and to any regulations made under subclause (d)(iv), governing the contents of agreements under that subsection;

“(d) governing the determination of the amounts of environmental penalties, including,

“(i) prescribing criteria to be considered in the exercise of any discretion,

**1610**

“(ii) providing that the total amount of the penalty for a contravention that occurs or continues for more than one day not exceed a maximum prescribed by the regulations,

“(iii) providing for different amounts depending on when an environmental penalty is paid,

“(iv) with respect to agreements under subsection (9), governing the cancellation of the obligation to pay an environmental penalty or the reduction of the amount of an environmental penalty;

“(e) prescribing circumstances in which a person is not required to pay an environmental penalty;

“(f) prescribing procedures related to environmental penalties;

“(g) respecting any other matter necessary for the administration of a system of penalties provided for by this section.

“General or particular

“(16) A regulation under subsection (15) may be general or particular in its application.

“Regulations governing determination of amounts

“(17) The regulations made under clause (15)(d) must, with respect to a contravention referred to in clause (1)(a), provide for the following matters:

“1. The person who is required to pay the penalty must be entitled,

“i. to seek and obtain a reduction in the amount of the penalty if the person took steps prescribed by the regulations to prevent the contravention in respect of which the penalty is imposed, and

“ii. to seek and obtain a reduction in the amount of the penalty if the person took steps prescribed by the

regulations to mitigate the effects of the contravention in respect of which the penalty is imposed.

"2. The determination of the amount of the penalty must take into account factors prescribed by the regulations that relate to the seriousness of the contravention in respect of which the penalty is imposed.

"3. If the director is of the opinion that, as a result of the contravention in respect of which the penalty is imposed, a monetary benefit prescribed by the regulations was acquired by the person who is required to pay the penalty, the amount of the benefit must be considered in determining the amount of the penalty.

"Environmental management systems

"(18) The regulations made under clause (15)(d) must provide for a reduction in the amount of an environmental penalty if, at the time the contravention to which the penalty rates occurred, the person who is required to pay the penalty had in place an environmental management system required by the regulations.

"Annual report

"(19) The minister shall, not later than March 31 in each year, publish a report that sets out the following information for each contravention in respect of which an order was made under this section during the previous year:

"1. The name of the person against whom the order was made.

"2. The amount of the penalty.

"3. A description of the contravention.

"4. An indication of whether an agreement was entered into under subsection (9) in respect of the order and, if an agreement was entered into, the effect of the agreement on the obligation to pay the penalty or on the amount of the penalty.

"Five-year review

"(20) At least once every five years, the minister shall cause a report to be prepared and published on the operation of this act, including the effect of this section on prosecutions under this act and including recommendations on the contraventions to which and circumstances in which orders should be issued under subsection (1).

"Application

"(21) This section does not apply to contraventions that occurred before this section came into force."

**The Chair:** Just so that the Chair may clarify, in your reading of the amendment, clause 15(b), line 2, you read "an order may be issued"; don't you mean "may not be issued"?

**Mr. Wilkinson:** Yes, thank you, Mr. Chair. I see you're eagle-eyed, Mr. Chair. Again, for clarity, "specifying types of contraventions or circumstances in respect of which an order may not be issued under subsection (1)."

**The Chair:** Two more to go. On the last page, subsection (18), in the last line, you said, "had in place an environmental management system required by the regulations." Did you mean "specified by the regulations"?

**Mr. Wilkinson:** Yes, I did.

**The Chair:** And toward the end of the page, subsection (20), line 2, "prepared and published on the operation of this act," I take it that means "this section."

**Mr. Wilkinson:** Yes, "this section."

**The Chair:** OK. Discussion?

**Mr. Miller:** Certainly this is a rather large amendment, but just for a little clarity, I know we had representatives who came before the committee and were concerned about "may" versus "likely," and I gather from this amendment that you've gone with the threshold of "may" in terms of environmental penalties in terms of spills or possible spills so that, if I read this correctly, even if there's no spill, someone could be charged. It says, "including a limit of zero." Other language used: "or that may be caused by the contravention."

Maybe you can expand on that for me. I would think that any company doing any business in the province of Ontario may spill something at some time. I would assume that means an environmental officer or director can charge any company in the province, because they "may" cause a spill. Am I correct in that?

**Mr. Wilkinson:** I know it was late the other day when we got together. We were very clear and clarified for the industries involved, because they came here, and said, "If what you're doing is within your certificate of approval from the ministry, then you will not have an environmental penalty." So, first of all, we have to set that context, because there was a concern about whether or not the certificates themselves could be circumvented at the whim of the ministry. That's the first thing.

The second thing is that for a company to operate in this province, particularly in the MISA sector, they have a certificate of approval specifically telling them what things can be released into the natural environment. Anything a company does that is not approved is something that we have a great deal of concern about, which is why this bill is, I argue, broad, and gives that power. But the great environmental stewards that we have—and soon all companies will be great environmental stewards because of environmental penalties—have restrictions as to what it is they are allowed to do. If they're doing something they're not allowed to do and damaging the natural environment, then "they spill, they pay."

**Mr. Miller:** So help me understand how it's going to make Ontario cleaner if you have a MISA-regulated company that is taking all reasonable steps to try to prevent a spill—because in your section on absolute liability, it basically says that it doesn't matter whether you took reasonable steps or took precautions to prevent a spill. Say you're a MISA-regulated company—I'm trying to think of a circumstance—with a pump pumping out of a body of water, and it malfunctions and spills a small amount of oil into the water. I assume that with this, that company could be charged with an environmental penalty.

**Mr. Wilkinson:** Exactly, Mr. Miller. What we're talking about here in regard to civil administrative penalties—not prosecutions but this civil matter—is that it is absolute liability; it's not strict liability. If there is

something that's coming out of your factory that's not supposed to be coming out, you are responsible for it.

**Mr. Miller:** So even though they took all precautions, even though nothing that they could have done could have prevented this spill, they're still going to be charged with an environmental penalty. I'm wondering how this is going to make Ontario cleaner, if they've done everything they could do to prevent the spill anyway. We've heard from a lot of presenters who said—and your own report, which said that we should be concentrating on working with companies and trying to prevent spills and having spill prevention and pollution prevention plans. How does this make Ontario any cleaner?

**Mr. Wilkinson:** We're applying the same logic that your government used in regard to wheels coming off trucks. If a wheel comes off a truck in this province, you pay a penalty. If that wheel kills somebody, by the way, you're also going to be prosecuted. But if the wheel comes off the truck, you're charged. You don't have a defence of, "Well, I didn't mean for the wheel to come off the truck." Obviously the person driving the truck doesn't want the wheels to come off, but if they come off, it's a public hazard, and therefore you pay a penalty. That was brought in—wisely, I thought—by the previous government. I think everyone agrees to that. You don't get to say, "I didn't mean for that to happen." The question is, there shouldn't be wheels coming off of trucks in this province, and if it does happen, you are held responsible.

**Mr. Miller:** Through the Chair, I would say that that comparison is a little different. In the case of wheels falling off trucks, there were some negligent truck operators around, and I think those rules and changes were meant to catch some of those negligent truck operators.

I'm thinking of an instance where a resort neighbouring to Muskoka, where I live, was trying to comply—I realize it's not a MISA company—with the new drinking water regulations ahead of time, and being very responsible. They spent a quarter of a million dollars putting a new water system in, which it turns out they don't need now because the rules have changed. But they spent a quarter of a million dollars, they put a new water system in, and part of that new water system was a pump at the lake to pump water up to higher ground, where the new filtration centre was going to be making the drinking water for this resort cleaner. In the first year of operating with all this new equipment, part of the backwash system failed and pumped one litre of oil into the lake. I could see that scenario happening with a company that is a MISA company, where the company is trying to do everything they can. They wouldn't change their actions, whether this law is in place or not; they're going to end up with a fine or a penalty. I really wonder what's being accomplished.

1620

**Mr. Wilkinson:** I say to the member, your concern is addressed by section 17, which says that we will definitely take into account the reasonable actions taken by that company either to prevent or mitigate the release.

**Mr. Miller:** So you're saying, just so I'm clear, that they'll get the penalty, but then after the fact their due diligence might be taken into account to reduce the amount of the penalty or lessen the penalty that they've paid because they've been shown to be good corporate citizens that have always been trying to do the best job and not pollute the environment.

**Mr. Wilkinson:** That's right. They have that right under section 17. I think that is the balance we've tried to strike there.

**The Chair:** Mr. Barrett and then Mr. Marchese.

**Mr. Barrett:** Just to back up a bit, this amendment is seven pages long, and I know the original on page 66 was a number of pages long as well.

**Mr. Marchese:** Do you think it's just a little too long?

**Mr. Barrett:** I think it's a little too long, but I am concerned. We have 123 pages of amendments, and I have a basic concern that things have gotten a bit out of hand. I've had phone calls from stakeholders that are having difficulty understanding where this is going, or they're not sure whether their input has been taken into consideration. That's fine, but they quite honestly don't understand a lot of these amendments, and I'm just concerned that we've gotten so far off course with this legislation. I say that quite honestly. I'm very concerned.

**Mr. Marchese:** Mr. Parliamentary Assistant, we thank you for including some of our amendments on the annual report and the five-year review. You see, from time to time government can throw a few crumbs away to the other side. It's important to do that every now and then.

The other question I have is on page 70 of the old document, under "Regulations": "The Lieutenant Governor in Council may make regulations...." Parliamentary Assistant, do you feel good with that language?

**Mr. Wilkinson:** Yes, I do.

**Mr. Marchese:** You do. And under what circumstances might the Lieutenant Governor in Council make regulations as they relate to the items that are listed below? Item six is one example.

**Mr. Wilkinson:** You're dealing with number—

**Mr. Marchese:** "Regulations," on page 70 of the old document.

**Mr. Wilkinson:** I think we're going to go with the ones that I actually read in, as opposed to the old ones. The new ones I think might be clearer for all of us today. I see (15) divided into (a) through (g), but I don't see a reference to six.

**Mr. Marchese:** It's 15(c), "requiring and governing public consultation." Under what circumstances might the Lieutenant Governor in Council decide to make regulations as it relates to (c)?

**Mr. Wilkinson:** I would not speculate on the future intentions of the government.

**Mr. Marchese:** And you feel good to let the government have free rein to decide under what circumstances it may or may not have regulations respecting that or other items?

**Mr. Wilkinson:** Absolutely, because this has been done in a democratic process. It's what we're here for.

**Mr. Marchese:** I hear that; I understand that. I'm referring to the language of "may." You see, for parliamentarians, "may" means that it probably won't happen, generally speaking, unless, if pushed by the public, the government might decide to pass a regulation dealing with that. They may have consultations if pressed by someone. Otherwise, my suspicion is that your government simply won't enact that regulation because it's "may." It's designed to make some people feel good, but it doesn't really do anything because it's not "shall." You understand the difference, right? But you feel OK as a government member with that language. I thought you would.

**Mr. Wilkinson:** Absolutely.

**Mr. Marchese:** I just don't feel good with that. When I was in another committee dealing with issues having to do with people with disabilities, "may" appeared in so many places. Part of my making fun of your government was that it probably won't happen. In so many instances the government dealt with the issue of, "The minister may appoint a body or the minister may tell this body to do so and so," but it may not, and it's not likely to unless you spell it out. That's my opposition to your point and disagreement with your feeling good about the language that has been given to you to feel good about.

I don't like the use of the word "may." I know it's intended for things not to happen; otherwise it would have been "shall." I just wanted to tell you that I disagree with that section and feel strongly about it, and we're going to vote against that particular part. That's one thing.

The other is, do I understand you correctly that the directors and officers will not be liable now for the amendments you made here in this section?

**Mr. Wilkinson:** Individuals will not be subject to environmental penalties. In other words, for the people who work for a company, it will be to the company.

**Mr. Marchese:** OK. Those individuals refer to officers and directors as well. Is that what you mean?

**Mr. Wilkinson:** Yes.

**Mr. Marchese:** In the old act, you deemed that it was important to make directors and officers liable, and now you've changed your mind.

**Mr. Wilkinson:** We've heard from stakeholders. We've heard from both unions and industry that they had serious concerns, and we wanted to make sure that individuals felt that they, in not having a personal liability, would then make sure they did the right thing and reported the spill without fear that they themselves would be subjected to an environmental penalty. That doesn't mean that they may not be prosecuted if they've been negligent.

**Mr. Marchese:** Right. But I don't recall the unions saying "directors and officers." I think unions—the ones I heard, at least—talked about individual employees, but I don't think they made reference to directors and officers. Do you have a different recollection of what the unions said?

**Mr. Wilkinson:** We're treating all individuals the same, and for clarity making it the company.

**Mr. Marchese:** And do you think they're all individuals in the company: officers and directors and regular employees?

**Mr. Wilkinson:** It's the company that has the certificate of approval from our ministry as to whether or not they can do whatever they're doing, so that's whom we are dealing with. I agree with the stakeholders who came to us and said it was important to do that.

**Mr. Marchese:** So you feel good with the changes you're making.

**Mr. Wilkinson:** Oh, yes, very.

**Mr. Marchese:** It's so good to have a soldier.

**Mr. Wilkinson:** I think the glass is half full. You think it's half empty; I'm one who believes it's half full.

**Mr. Marchese:** Yes, I know. Of course.

**Mr. Ted McMeekin (Ancaster–Dundas–Flamborough–Aldershot):** Three quarters full.

**The Chair:** Just to remind the members, let's flow the discussion through the Chair.

**Mr. Marchese:** I just want to say that I agreed with the wording of old bill, personally, that you had introduced versus the amendments you're making. And that's it.

**The Chair:** Thank you. Mr. Barrett, you had a comment.

**Mr. Barrett:** The reason I asked to be recognized is that I wish to put forward a motion. I am aware that I did put forward a motion—

**The Chair:** Are you proposing an amendment to this motion?

**Mr. Barrett:** No. This is more on process. It really derives from comments I just finished making about the number of amendments and the direction we're heading in.

**The Chair:** The debate at the moment is on this particular amendment. Are you proposing an amendment to this amendment?

**Mr. Barrett:** No. I'm making a motion on process.

**The Chair:** OK. Can we dispose of this particular amendment? Then the Chair will recognize your motion.

**Mr. Barrett:** OK.

**The Chair:** Shall the amendment carry? Carried.

Mr. Barrett, you have a motion.

**Mr. Barrett:** Thank you, Chair. I do wish to put forward a motion. I have given a copy of the motion to our clerk and I will quote from the motion.

Bill 133 is now so far off course, it needs to be scrapped and a fresh start made to get it right. There have been so many amendments proposed, over 70 from the government alone, in such a short time frame that it's difficult to assess whether the amendments will truly address the fundamental flaws contained in Bill 133. I urge the government and this committee to find a way to recommend to the ministry to immediately begin working on effective spills prevention legislation using the sound work of IPAT and stakeholder consultations as a foundation.

I've titled the motion "Withdraw and rewrite Bill 133."

1630

**The Chair:** One moment.

Mr. Barrett, the preamble to your motion is, by definition, out of order. Your motion itself, contained in the second paragraph, is in order. Discussion?

**Mr. Wilkinson:** We're prepared to vote.

**The Chair:** Shall the motion carry? All those in favour? All those opposed? I declare the motion lost.

Further amendments?

**Mr. Barrett:** There is a PC motion on page 72. Is that the correct page?

**The Chair:** Yes.

**Mr. Barrett:** I move that subsection 182.4(3) of the Environmental Protection Act, as set out in subsection 1(59) of the bill, be struck out and the following substituted:

"Payments out of account

"(3) If money is deposited in the account referred to in subsection (1), the Minister of the Environment may direct that money be paid out of the account to compensate persons for response, abatement and remediation costs incurred with respect to contraventions of this act or the Ontario Water Resources Act."

By way of discussion, I know that much of the direction for this came from the government's advisory committee, the IPAT report. In particular, with respect to the St. Clair River, the downstream communities were not recouping the full cost of spills. There was concern that these communities bear the cost of spills—something as obvious as providing bottled water, for example, to their communities when drinking water intakes must be closed. There seems to be a history where these communities seem to receive little, if any, revenue generated by fines or other fees. So I do know the minister's advisory committee was hoping that the minister or the ministry would find a way to work with the judicial system to find ways of resolving these concerns. That's the reason for this motion.

**The Chair:** Comments?

**Mr. Wilkinson:** It's interesting. We agree in principle about the fact of compensating communities. What you just said, Mr. Barrett, was about helping communities, which is what the government bill does, but in your amendment, you talk about giving money to persons—in other words, individuals—and we disagree with that. We actually agree with the IPAT recommendation about the money being used for communities and not compensating directly to individuals, which, in my definition, would be a person. So we'll be voting against your amendment.

**Mr. Barrett:** I have to admit, in this wording of "person," I think a corporation, legally, can be classified as a person. Maybe I'd better get some advice on that.

**Mr. Doug Beecroft:** Yes. A corporation is a person.

**Mr. Barrett:** So I wasn't thinking of, say, one guy downstream. I wasn't thinking of one individual. I was thinking of non-governmental organizations.

**Mr. Wilkinson:** But individuals are persons, too, and therefore it's too broad. That's why the bill discusses

communities, because that has always been the intention, in my opinion, of the IPAT report.

**Mr. Barrett:** So I guess an individual, a person, say, living on their own piece of property on the river would have to resort to a lawsuit, then? Is that how they would have to do that?

**Mr. Wilkinson:** People always have the right to sue in this province anyway, whether or not we have Bill 133; that's the first thing. The second thing is that we are very clear about taking the IPAT report and specifically helping communities, to compensate them directly through the use of environmental penalties for those who have incurred extraordinary costs because someone else upstream has hurt them.

**The Chair:** Shall the amendment carry? Those in favour? Those opposed? I declare the amendment lost.

**Mr. Wilkinson:** On page 73, I move that section 1 of the bill be amended by adding the following subsection:

"(59.1) Section 186 of the act, as amended by the Statutes of Ontario, 1998, chapter 35, section 36, 2001, chapter 9, schedule G, section 5 and 2001, chapter 17, section 2, is amended by adding the following subsection:

"Exception

"(1.1) Subsection (1) does not apply to a contravention of section 14 unless the contravention causes or is likely to cause an adverse effect."

Again, this is another thing where we're making sure that, for prosecution, the definition is "likely."

**Mr. Marchese:** For the record, I'm opposed to it.

**The Chair:** Thank you.

**Mr. Marchese:** You're welcome.

**The Chair:** Further discussion? Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that section 1 of the bill be amended by adding the following subsection:

"(59.2) Subsection 186(2) of the act is amended by striking out 'under section 150' and substituting 'under section 99.1, 100.1, 150 or 182.1.'"

This motion will ensure that there is no prospect that a person can face prosecution for the failure to pay an environmental penalty or a cost recovery order. It ensures appropriate separation between prosecutions and the civil process, and that only civil collections methods will be used. It makes sure that when we're dealing with a civil matter, it's a civil matter, and our criminal matters are criminal.

**Mr. Miller:** Just a clarification. In your explanation, you said no "person." What do you mean by "person" in that description?

**Mr. Wilkinson:** The person, in the broadest legal sense, who receives an environmental penalty. Of course, under our amendment at 66, we've defined what a person is in the bill, which is restricted to corporations.

**The Chair:** Shall the amendment carry?

**Mr. Barrett:** In way of discussion, then—

**The Chair:** Sorry. Mr. Barrett?

**Mr. Barrett:** This legislation, then, would actually have two separate definitions for the word "person"?

**Mr. Wilkinson:** No. A “person” is defined legally, but I just mentioned previously that an individual is also a person.

**Mr. Barrett:** But not in this case.

**Mr. Wilkinson:** Well, in the other case, we want to make sure that we’re being specific about a community. I think your amendment, though we agree, was poorly drafted, because it wasn’t clear that you meant “community.”

**Mr. Barrett:** I’m not going to suggest that this is poorly drafted, but I just find it confusing.

**The Chair:** Shall the amendment carry? All those in favour? Opposed? Carried.

**Mr. Wilkinson:** I move that subparagraphs 1 i, ii and iii and subsection 187(3) of the Environmental Protection Act, as set out in subsection 1(61) of the bill, be struck out and the following substituted:

“i. contravening section 14 or 15,

“ii. contravening section 27, 40 or 41 in respect of hauled liquid industrial waste or hazardous waste as designated in the regulations relating to Part V,

“iii. contravening section 92 or 184, or.”

This motion will make the failure to notify the ministry of a spill under section 92 or a discharge under section 15 a second-tier offence.

**The Chair:** Discussion?

**Mr. Marchese:** So the failure to notify—

**The Chair:** Mr. Miller first.

**Mr. Miller:** Can you just expand on what this second tier means, please?

**Mr. Marchese:** Great; that’s what I was asking.

**Mr. Wilkinson:** It would be easier if my friend from the ministry explains that, because it has to do with the fact that we have tiers.

**The Chair:** Please start by identifying yourself for Hansard.

**Mr. Stephen Carty:** Stephen Carty, Ministry of the Environment. In the penalty section of the act—and I use “penalties,” this time meaning charges in the court, not penalties in terms of environmental penalties—we use the terms “tier 1” and “tier 2,” but there are really two levels of offences when you’re charged in court. What’s usually referred to as tier 1 would be the more minor type of offences, and tier 2 would be the more serious type of offences like spills and discharges. So this motion is to put “failure to notify” into the second tier, which are more serious offences.

**Mr. Miller:** And it applies to—

**Mr. Wilkinson:** Prosecutions.

**Mr. Miller:** Sorry, what businesses? It applies to all liquid industrial waste? Does it apply to sewage handlers, for example, or only for MISA companies?

**Mr. Carty:** Here we’re talking about prosecutions and not environmental penalties, so you can put aside what we’ve been talking about in terms of MISA and the types of companies subject to EPs. This is for any person who may be charged with an offence in court.

You were listing the sections there, so section 14 was discharges, sections 27, 40 and 41 were hauled liquid,

industrial waste. Anyone subject to those sections would be in this tier of offences.

**1640**

**Mr. Miller:** And this is for prosecutions, not environmental penalties.

**Mr. Carty:** Right, yes.

**The Chair:** Further questions and comments?

Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that subsection 188.1(6) of the Environmental Protection Act, as set out in subsection 1(63) of the bill, be amended by striking out “may consider the order” and substituting “shall consider the order.”

This motion will require a court to consider the payment of an environmental penalty as a mitigating factor when determining the sentence for that same contravention.

**The Chair:** Discussion?

**Mr. Miller:** If a company has had an environmental penalty charge—fine; whatever you want to call it—that shall be taken into consideration?

**Mr. Wilkinson:** If they’re subsequently prosecuted and now they’re going to have to pay a fine as prescribed by the court, then the court shall take this into account. Again, from stakeholders—

**Mr. Miller:** They’d probably be supportive of it.

**Mr. Marchese:** Mr. Parliamentary Assistant, you must have been persuaded by the deputants who came before us that this would be something that would be helpful, that they shouldn’t be burdened twice with penalties. Is that the idea? We don’t have to worry about this affecting the issue of deterrence in any way, because the bill is still very tough, according to you. Is that the idea?

**Mr. Wilkinson:** I don’t consider this to be watering down the bill in any way, Mr. Marchese. We’ve been listening to stakeholders from all sides on this issue for six months. It is our job, particularly at first reading, to try to strike a proper balance. As far as we’re concerned, as we look into this, what companies are now going to have in this province, which is in every state in the United States, is civil administrative penalties. They’re just going to have to get used to the fact that they have absolute liability. They’ll be glad to know our insurance friends say that their insurance rates will go down because they’re going to have to do a better job.

Again, we want to make sure that at the end of the day a company, if they’re being prosecuted and they’ve been found guilty and they have to pay a fee, that the broadest consideration will be given by the judge, looking at all of the facts in the record.

**Mr. Marchese:** No, I understand that. It’s just that the original draft didn’t have this, and now you feel, after hearing people, that you’ve achieved a balance, according to you.

**Mr. Wilkinson:** Yes.

**Mr. Marchese:** That’s very good, John. We just don’t support that. I just wanted to hear you on the record to see whether or not you had been persuaded by the

persuasive arguments made by people or whether it's a typical Liberal thing, to achieve balance, that kind of thing.

**Mr. Wilkinson:** I would say that it would be a Liberal thing to achieve balance, Mr. Marchese.

**Mr. Marchese:** OK. Thanks, John.

**Mr. Miller:** I notice on this section from our submissions that there were also submissions asking that the amount of fines should be reduced by the amount of money a company has spent on abatement or remediation. Is that being taken into consideration at all with your amendments?

**Mr. Wilkinson:** Again, we're looking at a company that, let alone received an environmental penalty because something that shouldn't happen happened, it was so grievous that the ministry actually charged them, we successfully prosecuted them and now they're before the court, who has already determined that the company is guilty and is going to look at what should be the monetary fine that they should have to pay. We're making sure that the courts have all of the information available to them as they make that determination. I would leave it up to the judge to decide.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** Have we distributed the revised 77?

*Interjection.*

**Mr. Wilkinson:** OK. Just give us one moment. As I mentioned earlier, there are three government amendments that were retyped. As that's being distributed, I'll just talk about what the motion does before I read it in.

This motion will reduce the scope of the duty of corporate officers and directors from the duties specified in Bill 133 so that it focuses on contraventions of a serious nature.

This revised motion also adds a subsection to the motion that the government filed in relation to subsection 194(1) of the EPA on May 17. This subsection clarifies that, in relation to a corporate officer and director's duty to comply with section 14 of the EPA, they fail that duty if the discharge causes or is likely to cause an adverse effect.

In other words, they are not being held to the "may" threshold, but only the "likely" threshold. This is consistent with the government policy that in a prosecution, a person not be subject to the "may" threshold for a section 14 contravention. It ensures that section 14 remains one of strict liability as opposed to environmental penalties, which are absolute liability. The government apologizes for not having the clarity there at our first run at this number 77 on May 17.

I move that subsection 194(1) of the Environmental Protection Act, as set out in subsection 1(69) of the bill, be struck out and the following substituted:

"Duty of director or officer

"(1) Every director or officer of a corporation has a duty to take all reasonable care to prevent the corporation from,

"(a) discharging or causing or permitting the discharge of a contaminant, in contravention of,

"(i) this act or the regulations, or

"(ii) a certificate of approval, provisional certificate of approval, certificate of property use, licence or permit under this act;

"(b) failing to notify the ministry of a discharge or a contaminant, in contravention of,

"(i) this act or the regulations, or

"(ii) a certificate of approval, provisional certificate of approval, certificate of property use, licence or permit under this act;

"(c) contravening section 27, 40 or 41 in respect of hauled liquid industrial waste or hazardous waste as designated in the regulations relating to part V;

"(d) contravening section 93 or 184;

"(e) failing to install, maintain, operate, replace or alter any equipment or other thing, in contravention of a certificate of approval, provisional certificate of approval, certificate of property use, licence or permit under this act; or

"contravening an order under this act, other than an order under section 99.1, 100.1, 150 or 182.1.

"Contraventions of section 14

"(1.1) Clause (1)(a) does not apply to a contravention of section 14 unless the contravention causes or is likely to cause an adverse effect."

**The Chair:** Just for clarification, the second-last clause should be clause (f); correct?

**Mr. Wilkinson:** I meant "(f)." Thank you, Chair.

**Mr. Marchese:** I just want to say for the record that the language that was in the bill had stronger provisions that made directors and officers responsible for preventing any contravention. This obviously provides exceptions or, to put it differently, excludes some of those provisions, which in our view weakens this bill. I just wanted to, for the record, say that I don't support this amendment.

**The Chair:** Thank you. Shall the amendment carry? Carried.

Page 79.

**Mr. Wilkinson:** I move that subsection 194(2.1) of the Environmental Protection Act, as set out in subsection 1(70) of the bill, be struck out and the following substituted:

"Onus

"(2.1) If a director or officer of a corporation is charged with an offence under subsection (2) in connection with a specific contravention of the corporation, the director or officer has the onus, in the trial of the offence, of providing that he or she carried out the duty under subsection (1) in connection with that contravention."

This motion clarifies that in a prosecution the crown has the onus of showing that the corporation committed a contravention before the onus shifts to the corporate officer or director to show that they took all reasonable care. That seems to me to be self-evident.

**The Chair:** Just as a point of clarification, in the second-last line that should be "proving" and not "providing."

**Mr. Wilkinson:** “Proving,” yes.

**The Chair:** Thank you. Discussion? Shall the amendment carry? All those in favour? All those opposed? Carried.

Shall section 1, as amended, carry? Carried.

**Mr. Wilkinson:** Perhaps I’d better have a coffee. I don’t think I was making as many errors the other day.

I move that the definition of “environmental penalty” in subsection 1(1) of the Ontario Water Resources Act, as set out in subsection 2(1) of the bill, be amended by striking out “under sections 106.1, 106.2 or 106.3” at the end and substituting “under section 106.1.”

This motion removes reference to sections of the Ontario Water Resources Act that deal with provincial officer environmental penalty orders, and I would add that I’d be more than happy to withdraw this if we move forward on PC motion 81.

**1650**

**Mr. Barrett:** If that makes the committee business flow a little more smoothly, that’s fine.

**Mr. Wilkinson:** Mr. Chair, I withdraw number 80.

**The Chair:** It is withdrawn.

Mr. Barrett?

**Mr. Barrett:** There is a PC motion on page 81.

I move that the definition of “environmental penalty” in subsection 1(1) of the Ontario Water Resources Act, as set out in subsection 2(1) of the bill, be amended by striking out “under section 106.1, 106.2 or 106.3” at the end and substituting “under section 106.1.”

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that section 2 of the bill be amended by adding the following subsection:

“(1.1) Subsection 1(1) of the act, as amended by the Statutes of Ontario, 1992, chapter 23, section 39, 1993, chapter 23, section 73, 1998, chapter 35, section 44, 2000, chapter 22, section 2, 2000, chapter 26, schedule E, section 5, 2000, chapter 26, schedule F, section 13, 2001, chapter 9, schedule G, section 6, 2001, chapter 17, section 5 and 2002, chapter 17, schedule F, table, is amended by adding the following definition:

““regulated person” means,

“(a) a person who belongs to a class of persons prescribed by the regulations and who holds or is required to hold,

“(i) an approval, licence or permit under this act, or

“(ii) a certificate of approval, provisional certificate of approval, certificate of property use, licence or permit under the Environmental Protection Act, or

“(b) a corporation that belongs to a class of corporations prescribed by the regulations’.”

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that clauses 1(3)(d) and (e) of the Ontario Water Resources Act, as set out in subsection 2(2) of the bill, be struck out and the following substituted:

“(d) a scientific test that is generally accepted as a test of aquatic toxicity indicates that the material or derivative, in diluted or undiluted form, is toxic;

“(e) peer-reviewed scientific publications indicate that the material or derivative causes injury to or interference with organisms that are dependent on aquatic ecosystems; or.”

For my colleagues, this motion clarifies the wording of two clauses in the OWRA’s deemed impairment provision by including requirements for aquatic toxicity tests and for peer-reviewed scientific publication when making determinations of impairment.

**The Chair:** Comments?

**Mr. Marchese:** Thanks for that clarification.

A material must be toxic and not simply cause injury or interference with any living organism—is that the point? If it causes injury, too bad, so sad; it has to be scientifically proven to be toxic, right?

**Mr. Wilkinson:** In section 2(2), we have (a), (b) and (c). But in (d) and (e), what’s being amended is adding in the need to ensure that we have scientific rigour in regard to what it is that we’re doing.

**Mr. Marchese:** I understand. But some things can cause injury and not be toxic.

**Mr. Wilkinson:** That’s right. If I drink too much water, it can kill me, even though water is not toxic.

**Mr. Marchese:** If it can’t be proven to be toxic but it causes injury, too bad. Is that the effect of this change?

**Mr. Wilkinson:** No. What we’re doing is ensuring that scientific rigour can be applied to the process.

**Mr. Marchese:** Yes, I know that. I understand scientific rigour. I asked you a different question. It has nothing to do with scientific rigour. You can only get redress for this if it is scientifically shown to be toxic. That’s what you’re saying, right? If there are other side effects and you’re injured in so many other different ways, if the product is not toxic, then it’s not a problem?

**Mr. Wilkinson:** With due respect, we’re not amending (a), (b), (c) or those clauses that are subsequent to (e). In other words, we’re not looking at it in total.

**Mr. Marchese:** But if some staff person could answer that question for me, that would be helpful. Is my question relevant? Is my question relevant?

**Mr. Carty:** I’m Stephen Carty, Ministry of the Environment. As Mr. Wilkinson said, if you were to look at subclauses (a), (b) and (c), they do talk about injury to living organisms. The point of (d) and (e) that you see here was to add aquatic toxicity, but that is not the only test of deemed impairment when you look at the whole definition. Injury is included in (a) and (b) in the original bill.

**Mr. Marchese:** Thank you.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that section 2 of the bill be amended by adding the following subsection:

“(3.1) Clause 16(1)(b) of the act, as re-enacted by the Statutes of Ontario, 1998, chapter 35, section 49, is repealed and the following substituted:

“(b) a provision of an order, notice, direction, requirement or report made under this act, other than an order under section 84 or 106.1 or an order of a court; or.”

This motion will ensure that provincial officer orders cannot be used to enforce collection of orders that require the payment of money like environmental penalty orders, or to enforce court orders. Again, this is concurrent with what we just agreed to in regard to section 1.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** On page 85: I move that clause 16(2)(b.1) of the Ontario Water Resources Act, as set out in subsection 2(4) of the bill, be amended by striking out “a contravention of section 30” and substituting “a contravention of subsection 30(1) for which an order to pay an environmental penalty could be issued.”

This motion clarifies when a provincial officer’s order has to describe the effects or potential effects of the discharge. This only has to be done when an environmental penalty order can be issued. Again, it’s similar to what we were doing with the EPA.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that clause 16(3)(g) of the Ontario Water Resources Act, as set out in subsection 2(5) of the bill, be amended by striking out “may” and substituting “is likely to.”

This motion restores the “likely” threshold for when a provincial officer can order a person to provide alternate water supplies.

**Mr. Marchese:** For the record, Marchese is opposed to that threshold change.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that section 2 of the bill be amended by adding the following subsection:

“(8.1) The French version of section 23 of the act is amended by striking out “la propriété en l’état où elle” and substituting “le bien en l’état où il.”

Of course, this motion is necessary, as we discussed earlier, to ensure that the French translation meshes correctly with the English text of the legislation.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that subsections 84(5) to (7) of the Ontario Water Resources Act, as set out in subsection 2(10) of the bill, be struck out and the following substituted:

“Joint and several liability

“(5) Where two or more persons are liable to pay costs pursuant to an order under subsection (1), (2) or (2.1), they are jointly and severally liable to Her Majesty in right of Ontario.

“Contribution and indemnity

“(6) Where the director is entitled to issue an order to two or more persons under subsection (1), (2) or (2.1) in respect of costs, as between themselves, in the absence of an express or implied contract, each of those persons is liable to make contribution to and indemnify the other in accordance with the following principles:

“1. Where the director is entitled to issue an order to two or more persons under subsection (1), (2) or (2.1) in respect of costs and one or more of them caused or contributed to the costs by fault or negligence, such one or more of them shall make contribution to and indemnify,

“i. where one person is found at fault or negligent, any other person to whom the director is entitled to issue an order under subsection (1), (2) or (2.1), and

“ii. where two or more persons are found at fault or negligent, each other and any other person to whom the director is entitled to issue an order under subsection (1), (2) or (2.1) in the degree in which each of such two or more persons caused or contributed to the costs by fault or negligence.

“2. For the purpose of subparagraph 1 ii, if it is not practicable to determine the respective degrees in which the fault or negligence of two or more persons to whom the director is entitled to issue an order under subsection (1), (2) or (2.1) caused or contributed to the costs, such two or more persons shall be deemed to be equally at fault or negligent.

“3. Where no person to whom the director is entitled to issue an order under subsection (1), (2) or (2.1) caused or contributed to the costs by fault or negligence, each of the persons to whom the director is entitled to issue an order under subsection (1), (2) or (2.1) is liable to make contribution to and indemnify each other in such degree as is determined to be just and equitable in the circumstances.

“Enforcement of contribution

“(7) The right to contribution or indemnification under subsection (6) may be enforced by action in a court of competent jurisdiction.

“Adding parties

“(8) Wherever it appears that a person not already a party to an action under subsection (7) may be a person to whom the director is entitled to issue an order under subsection (1), (2) or (2.1) in respect of the costs, the person may be added as a party defendant to the action on such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties.”

This is congruent with what we did under the EPA.

1700

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that paragraph 4 of subsection 89.3(3) of the Ontario Water Resources Act, as set out in subsection 2(12) of the bill, be amended by striking out “may” and substituting “is likely to”.

**Mr. Marchese:** I’m opposed.

**The Chair:** Thank you. Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that paragraph 4 of subsection 89.8(4) of the Ontario Water Resources Act, as set out in subsection 2(13) of the bill, be amended by striking out “may” and substituting “is likely to.”

**Mr. Marchese:** I’m opposed.

**The Chair:** Thank you. Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that paragraph 4 of subsection 89.12(5) of the Ontario Water Resources Act, as set out in subsection 2(14) of the bill, be amended by striking out “may” and substituting “is likely to”.

**Mr. Marchese:** I’m opposed.

**The Chair:** Thank you. Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that the French version of subsection 102(1) of the Ontario Water Resources Act, as set out in subsection 2(21) of the bill, be amended by striking out “ou d’une décision rendue” in the portion before clause (a) and substituting “ou d’une décision ou d’une ordonnance rendue.”

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that subsection 102.1(1) of the Ontario Water Resources Act, as set out in subsection 2(23) of the bill, be amended by striking out “the regulations made under clause 106.1(13)(d) governing the determination of the amounts of administrative penalties by the director” and substituting “the regulations made under clause 106.1(15)(d) governing the determination of the amounts of environmental penalties.”

This motion replaces the term “administrative penalties” with “environmental penalties,” as we did earlier under the EPA.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Barrett:** There’s a PC motion on page 95.

I move that subclause 102.2(1)(b)(i) of the Ontario Water Resources Act, as set out in subsection 2(23) of the bill, be struck out and the following substituted:

“(i) an order made under subsection 106.1(1), or.”

This is actually one of a series of motions referring to the recommendation that only directors issue penalties. Only someone at the director level or higher should be authorized to issue environmental penalties.

**Mr. Wilkinson:** We thank the opposition for the motion. We can assure you that under government 111, what you want to do will be incorporated in that rather large and lengthy amendment; therefore, we’ll be voting against.

**The Chair:** Shall the amendment carry? All those in favour? Those opposed? I declare the amendment lost.

**Mr. Wilkinson:** I move that section 102.2 of the Ontario Water Resources Act, as set out in subsection 2(23) of the bill, be struck out and the following substituted:

“Onus for certain proceedings that relate to discharges

“102.2(1) This section applies to a hearing by the tribunal under section 100 if,

“(a) the hearing was required by a regulated person;

“(b) the order that is the subject of the hearing is,

“(i) an order made under subsection 106.1(1), or

“(ii) an order made under section 16, an order made under section 16.3 that amends an order made under section 16, or an order made under section 16.4 that confirms or alters an order made under section 16, unless the contravention in respect of which the order is made is prescribed by the regulations made under section 106.1 as a contravention in respect of which an order may not be issued under subsection 106.1(1); and

“(c) the order that is the subject of the hearing relates to a contravention described in clause 106.1(1)(a).

“Contraventions of subsection 30(1)

“(2) If this section applies to a hearing and the order that is the subject of the hearing relates to a contravention of subsection 30(1), the person who required the hearing has the onus of proving that the material that was discharged into the natural environment is not material that may impair the quality of the water of any waters in the manner described in the order.

“Contraventions of other discharge provisions

“(3) If this section applies to a hearing and the order that is the subject of the hearing relates to a discharge into the natural environment in contravention of a provision referred to in subclause 106.1(1)(a)(ii), (iii) or (iv), the person who required the hearing has the onus of proving that the person did not contravene the provision.”

This motion removes the reference to provincial officer environmental penalty order provisions in the bill, and also uses the new language of “regulated person.”

**The Chair:** Shall the amendment carry? Carried.

**Mr. Barrett:** This is a PC motion on page 98.

I move that subsection 106.1(2) of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be struck out and the following substituted:

“Application

“(2) Subsection (1) applies to a person if the person is a corporation engaged in a business activity and,

“(a) the business activity is prescribed by the regulations; or

“(b) the corporation holds, is required to hold or is exempted under this act from the requirement to hold a licence, permit or approval under this act.”

The purpose of this amendment is to ensure that only corporations are issued penalties, not employees, directors of the company or others who are not a corporation that has a responsibility and derives a profit from the activity that’s going on there.

**Mr. Wilkinson:** With respect, we believe that government motion 111 looks after this, and it ensures that it’s not officially a corporation.

**The Chair:** Shall the amendment carry? I declare the amendment lost.

**Mr. Barrett:** The committee will find a PC motion on page 99. I move that section 106.1 of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be amended by adding the following subsection:

“Contraventions relating to discharges

“(2.1) If a contravention involves the discharge of material into water, no order shall be issued under subsection (1) in respect of the contravention unless the discharge impairs the quality of the water.”

Again, an amendment for specificity, to better clarify just what the definition of a spill is in this legislation, bearing in mind that this is a ministry that has to make decisions based on scientific evidence and fact.

**The Chair:** Comments?

**Mr. Wilkinson:** We feel that that would actually gut the bill by removing the “may” provision on environmental penalties in regard to the OWRA, so we’d be voting against the motion.

**The Chair:** Shall the amendment carry? All those in favour? Those opposed? I declare the amendment lost.

**Mr. Barrett:** The committee will find a PC motion on page 100.

I move that section 106.1 of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be amended by adding the following subsection:

“Considerations

“(4.1) The director shall consider the following matters in determining the amount of the penalty:

“1. Preventative actions taken by the person who is required to pay the penalty.

“2. The costs of response, abatement and remediation incurred by the person who is required to pay the penalty.”

The reason for this is to ensure that an organization that has conducted itself in a proper way and has indicated due diligence would essentially be allowed to be rewarded for that. The spirit of this is to encourage companies to continue to practise due diligence.

1710

**Mr. Wilkinson:** We agree with the spirit of the motion, but we believe that the amendment, as worded, by making the legislative change—this matter is better settled by regulation, which allows input from stakeholders prior to the regulation, and that very public process that we have in this province with regard to the environmental registry.

**The Chair:** Shall the amendment carry? All those in favour? Those opposed? I declare the amendment lost.

**Mr. Barrett:** The committee will find a PC motion on page 101.

I move that subsection 106.1(6) of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be amended by striking out the portion before clause (a) and substituting the following:

“Strict liability

“(6) No order shall be issued against a person under subsection (1) if.”

Again, this reflects the feedback I’ve received and the widespread concern about the loss of due diligence as a defence.

**The Chair:** Comments?

**Mr. Wilkinson:** The government will vote against this because it would actually gut the bill, as we said earlier, by imposing strict liability rather than absolute liability in regard to environmental penalties. It’s the government’s contention that if you spill, you pay.

**Mr. Miller:** Could the parliamentary assistant explain how using the “may” threshold makes sense? Particularly in the real world, where there may be personalities involved, how does using this “may” threshold, where there is actually no spill but may be a spill—justify that for me, if you don’t mind.

**Mr. Wilkinson:** Mr. Miller, there will not be an environmental penalty issued if there isn’t a spill. We’ve been very clear about that, and as you saw in government motion number 66 and you’ll see again in government motion 111, what is required is that that environmental

penalty has to lay out in English or French exactly what the government says happened, when it happened and what is involved. The whole principle here is swiftness of foot. If this happens and we want to impose an environmental penalty and we have strict liability, and therefore it becomes a legal issue as to whether or not there are mitigating factors, then we will not be able to deal with the spill—you pay right away—when you drag this through the courts for three or four years.

**Mr. Miller:** But you could actually have a fine even if there’s been no—

**Mr. Wilkinson:** The person can then go to the Environmental Review Tribunal—swiftly, not later on. They can go back and say, “Wait a minute, we didn’t do this. The ministry says we did this. We didn’t do this.” But then it falls on the company to say—because it’s their pipe, for example, going into the river—that it didn’t come out. The company is in the best position to be able to prove, in regard to a civil administrative matter, whether something happened. We can assure you that in regard to a criminal prosecution, the onus would fall on the government or on the crown to make their case.

**The Chair:** Shall the amendment carry? All those in favour? All those opposed? I declare the amendment lost.

**Mr. Marchese:** I move that section 106.1 of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be amended by adding the following subsections:

“Publication before agreement

“(8.1) A proposal to enter into an agreement under subsection (8) is deemed to be a class II proposal for an instrument for the purposes of the Environmental Bill of Rights, 1993, unless the regulations under that act classify the proposal as a class I or III proposal for an instrument.

“Publication after agreement

“(8.2) if an agreement is entered into under subsection (8), the ministry shall publish notice of the agreement in a newspaper having general circulation in the part of Ontario affected by the agreement, setting out the following information:

“1. The name of the person with whom the director or provincial officer entered into the agreement.

“2. A summary of the contents of the agreement.

“3. The reasons that the director or provincial officer entered into the agreement.

“4. The effect of the agreement on the obligation to pay a penalty under this section or on the amount of the penalty.”

I just wanted to say by way of argument that while I recognize that the government has introduced half of this amendment into a previous motion, the other is not there, and the one that is not there is “Publication before agreement,” which stipulates that we would make sure that any settlement agreement reached between the director and the corporation regarding any penalty is made public. Subsection (8.1) would make certain that there would be public consultation before the settlement

agreement becomes law. The government has simply introduced an amendment that would say that the Lieutenant Governor in Council “may” make regulations. That’s the only difference. My point is that the government will never have publication-before-agreement discussions; it just won’t happen. The government can say what it likes, but that’s my contention, and that’s why we think the motion before us would be stronger than the government’s amendment that has been made earlier on.

**The Chair:** Comments?

**Mr. Miller:** I’d just like ask Mr. Marchese if he has shares in some provincial newspapers and that’s why he’s requiring publication in newspapers for this provision, or why just being published on the Environmental Bill of Rights or other means wouldn’t satisfy him.

**Mr. Marchese:** It’s just that this would simply force a public consultation in advance of settlement agreements becoming law. That’s all it says. Rather than simply saying, “We’re publishing it like this,” we’re simply saying that a meeting and/or a consultation ought to happen in public so that the public would have an opportunity to offer its input. That’s the difference between what we’re proposing and what you’re suggesting.

**Mr. Miller:** If I’m correct in reading this, you’re also requiring publication in a newspaper after an agreement, which I believe is different from the government—

**Mr. Marchese:** Right, and the government agrees with us on this, in terms of the changes it made on their own document, page 70, under “Regulations.”

**Mr. Miller:** To the parliamentary assistant: Previously you said that the Environmental Bill of Rights was sufficient publicity. Are you now agreeing with the NDP that newspaper advertisement is required?

**Mr. Wilkinson:** We’ll be voting against the motion, because, as we went over in regard to section 1 of the bill, we feel that the proper place for all of this to be public is a place that’s accessible to all the people of Ontario, not just the local community where the infraction takes place. Though I understand that my friend from Trinity–Spadina is much more pessimistic than I am, I am an eternal optimist.

**Mr. Marchese:** I know. That’s what happens when you’re in government.

**The Chair:** Shall the amendment carry? All those in favour? All those opposed? I declare the amendment lost.

**Mr. Barrett:** The committee will find a PC motion on page 103.

I move that subsection 106.1(9) of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be struck out.

Again, this is another in a long line of motions ensuring that penalties are only issued by directors or someone at the director level or higher.

1720

**The Chair:** Discussion?

**Mr. Wilkinson:** We’d vote against. We agree in principle, but we believe that government motion 111 will cover this and make sure that there is clarification in how the bill is drafted.

**The Chair:** Shall the amendment carry? Those in favour? Those opposed? I declare the amendment lost.

**Mr. Barrett:** Page 104 is a PC motion.

I move that section 106.1 of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be amended by adding the following subsection:

“No admission

“(10.1) If a person pays a penalty imposed under subsection (1) in respect of a contravention, the payment is not, for the purposes of any prosecution in respect of the contravention, an admission that the person committed the contravention.”

Again, it gets into this issue of being hit twice—I think this would refer to the term “double jeopardy”—and the concern that if a company is administered an environmental penalty and is subsequently also charged under either the Environmental Protection Act or the Ontario Water Resources Act, it’s this concept of being penalized twice for the same infraction.

**The Chair:** Discussion?

**Mr. Wilkinson:** We appreciate the amendment from the opposition, and we agree in principle, but we’ll deal with this in government motion 111.

**The Chair:** Shall the amendment carry? Those in favour? Those opposed? I declare the amendment lost.

**Mr. Barrett:** The committee will find a PC motion on page 105.

I move that section 106.1 of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be amended by adding the following subsection:

“Repayment

“(10.2) If a person pays a penalty imposed under subsection (1) in respect of a contravention and, in a subsequent prosecution in respect of the contravention, the person is acquitted, the minister shall repay the amount of the penalty to the person.”

Again, very simply, if one is found not guilty subsequently, you should get your money back.

**The Chair:** The motion proposed by Mr. Barrett is contrary to standing order 56, in that it would, if passed, specifically direct the allocation of public funds. Such a motion may be proposed only by a minister of the crown. I must therefore rule the motion out of order.

**Mr. Barrett:** Page 106 is a PC motion.

I move that clause 106.1(13)(d) of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be amended by striking out “and governing the determination of those amounts by provincial officers” in the portion before subclause (i).

Again, this is yet another amendment to ensure that only staff at the director level or above issue these penalties.

**The Chair:** Discussion?

**Mr. Wilkinson:** I thank the opposition, but we’ll vote against it, in favour of government motion 111, which keeps things more clear.

**The Chair:** Shall the amendment carry? Those in favour? Those opposed? I declare the amendment lost.

**Mr. Barrett:** This is a PC motion on page 107.

I move that clause 106.1(13)(g) of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be struck out.

This is, yet again, an amendment with respect to the importance of having a director or someone senior administer these penalties.

**The Chair:** Comments?

**Mr. Wilkinson:** It will be the same: We agree in principle, and we'll deal with it in 111.

**The Chair:** Shall the amendment carry? I declare the amendment lost.

**Mr. Marchese:** I move that section 106.1 of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be amended by adding the following subsection:

“Annual report

“(16) The minister shall, not later than March 31 in each year, publish a report that sets out the following information for each contravention in respect of which an order was made under this section during the previous year:

“1. The name of the person against whom the order was made.

“2. The amount of the penalty.

“3. A description of the contravention.

“4. An indication of whether an agreement was entered into under subsection (8) in respect of the order and, if an agreement was entered into, the effect of the agreement on the obligation to pay the penalty or on the amount of the penalty.”

I'm assuming, given the changes we have made earlier and that the government has agreed to, that they will agree to this without my having to make an argument.

**Mr. Wilkinson:** We will vote against it because we've contained it in government 111, which we have recirculated, as we did with government 66. We thank the NDP.

**Mr. Marchese:** If that is true, this would be redundant, then; I didn't have to read it for the record.

**Mr. Wilkinson:** Yes.

**The Chair:** You may withdraw it.

**Mr. Marchese:** Usually, we're reminded by someone, either legal counsel or the clerk, that this is redundant. Anyway, that's helpful.

If there is another motion I'm introducing that is redundant, please let me know.

**The Chair:** It can't be redundant unless it presupposes the passage of an amendment that hasn't yet been discussed.

**Mr. Marchese:** Yes.

**Mr. Wilkinson:** So we have to deal with yours because we agreed to keep the numbering straight. That's why we redid 111, Mr. Marchese.

**Mr. Marchese:** Sure; OK.

**Mr. Wilkinson:** It would be the same thing with your motion 109.

**The Chair:** Shall the amendment carry? I declare the amendment lost.

**Mr. Marchese:** I move that section 106.1 of the Ontario Water Resources Act, as set out in subsection

2(25) of the bill, be amended by adding the following subsection:

“Five-year review

“(17) At least once every five years, the minister shall cause a report to be prepared and published on the operation of this section, including the effect of this section on prosecutions under this act and including recommendations on the contraventions to which and circumstances in which orders should be issued under subsection (1).”

**The Chair:** Discussion?

**Mr. Wilkinson:** We appreciate the member from Trinity–Spadina's motion. We're going to be covering that in 111, but I just want to put on the record that it was the passionate advocacy of the member that made the government see the light of day and amend number 111. We had many discussions on that, and we appreciate your input, but we regretfully vote against.

**The Chair:** Shall the amendment carry? I declare the amendment lost.

**Mr. Barrett:** The standing committee will find a PC motion on page 110.

I move that sections 106.2 and 106.3 of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be struck out.

Yet again, this is in the spirit of ensuring that the needed level of sufficient senior management oversight is there when a critical decision point comes up, like fining somebody on the job or on the site.

**The Chair:** Discussion?

**Mr. Wilkinson:** Again, we agree in principle, but we would recommend voting against it so that we can deal with government motion 111 and make sure that we have this straight legislatively.

**The Chair:** Shall the amendment carry? I declare the amendment lost.

The long-awaited 111: Mr. Wilkinson.

**Mr. Wilkinson:** Mr. Chair, before I read it in, because it's just being distributed, it will be the same as we dealt with government 66.

We want to make sure that EP orders will only be issued by directors, not provincial officers. They will be issued against a company, not company officials. It provides specific circumstances where an EP order shall not be issued. It clarifies that absolute liability does not apply to prosecutions. It provides that the payment of an EP order is not an admission of guilt if the person is prosecuted for the same contravention. It places specific restrictions on regulation-making authority for penalty assessments to provide persons with the ability to seek reductions for the steps they take to prevent and mitigate the effect of a contravention and for environmental management systems they have in place, as recommended. Settlement agreements must be posted on the EBR, and the regulations can require public consultation before agreements are entered into.

This revised motion also incorporates the two NDP motions that required annual reports and the five-year review of the environmental penalty regime. This revised

motion also gives a regulated person entitlement to a reduction if they can demonstrate that they took the prescribed mitigative or preventive measures.

### 1730

I move that sections 106.1, 106.2 and 106.3 of the Ontario Water Resources Act, as set out in subsection 2(25) of the bill, be struck out and the following substituted:

#### “Environmental penalties

“106.1(1) Subject to the regulations, the director may issue an order requiring a regulated person to pay a penalty if,

“(a) the regulated person contravenes,

“(i) subsection 30(1),

“(ii) a provision of the regulations that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment,

“(iii) a provision of an order, notice, direction, requirement or report under this act that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment, or

“(iv) a provision of a licence, permit or approval under this act that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment; or

“(b) the regulated person contravenes a provision, other than a provision referred to in clause (a), of,

“(i) this act or the regulations,

“(ii) an order, notice, direction, requirement or report under this act, other than an order under section 84 or an order of a court,

“(iii) a licence, permit or approval under this act, or

“(iv) an agreement under subsection (9).

#### “Exceptions

“(2) Subsection (1) does not apply to,

“(a) a contravention of subsection 30(1), if,

“(i) neither this act nor the Environmental Protection Act requires the regulated person to notify the ministry of the discharge to which the contravention relates, or

“(ii) the discharge to which the contravention relates was authorized under this act or the Environmental Protection Act; or

“(b) a contravention of section 98.

#### “Contents of order

“(3) The order shall be served on the person who is required to pay the penalty and shall,

“(a) contain a description of the contravention to which the order relates, including, where appropriate, the date and location of the contravention;

“(b) in the case of a contravention of subsection 30(1), contain a description of the adverse effects that were caused by or that may be caused by the contravention;

“(c) specify the amount of the penalty;

“(d) give particulars respecting the time for paying the penalty and the manner of payment; and

“(e) provide information to the person as to the person’s rights under section 100.

#### “Amount

“(4) The amount of the penalty shall be determined in accordance with the regulations.

#### “Maximum penalty

“(5) The amount of the penalty shall not exceed \$100,000 for each day or part of a day on which the contravention occurred or continued.

#### “Absolute liability

“(6) A requirement that a person pay an environmental penalty applies even if,

“(a) the person took all reasonable steps to prevent the contravention; or

“(b) at the time of the contravention, the person had an honest and reasonable belief in a mistaken set of facts that, if true, would have rendered the contravention innocent.

#### “Same

“(7) For greater certainty, nothing in subsection (6) affects the prosecution of an offence.

#### “Limitation

“(8) An order requiring payment of an environmental penalty shall be served not later than the first anniversary of the later of the following dates:

“1. The date the contravention occurred.

“2. The date on which the evidence of the contravention first came to the attention of the director or a provincial officer.

#### “Agreements

“(9) The director and a person against whom an order may be or has been made under subsection (1) may enter into an agreement that,

“(a) identifies the contravention in respect of which the order may be or has been made;

“(b) requires the person against whom the order may be or has been made to take steps specified in the agreement within the time specified in the agreement; and

“(c) provides that the obligation to pay the penalty may be cancelled in accordance with the regulations or the amount of the penalty may be reduced in accordance with the regulations.

#### “Publication of agreements

“(10) The ministry shall publish every agreement entered into under subsection (9) in the environmental registry established under section 5 of the Environmental Bill of Rights, 1993.

#### “Penalty does not prevent prosecution

“(11) A person may be charged, prosecuted and convicted of an offence under this act in respect of a contravention referred to in subsection (1) even if an environmental penalty has been imposed on or paid by the person or another person in respect of the contravention.

#### “No admission

“(12) If a person pays a penalty imposed under subsection (1) in respect of a contravention or enters into an agreement under subsection (9) in respect of a contravention, the payment or entering into of the agreement is not, for the purposes of any prosecution in respect of the contravention, an admission that the person committed the contravention.

“Failure to pay when required

“(13) If a person who is required to pay an environmental penalty fails to comply with the requirement,

“(a) the order or decision that requires the payment may be filed with a local registrar of the Superior Court of Justice and may be enforced as if it were an order of the court;

“(b) the director may by order suspend any licence, permit or approval that has been issued to the person under this act until the environmental penalty is paid; and

“(c) the director may refuse to issue any licence, permit or approval to the person under this act until the environmental penalty is paid.

“Same

“(14) Section 129 of the Courts of Justice Act applies in respect of an order or decision filed with the Superior Court of Justice under subsection (13) and, for that purpose, the date on which the order or decision is filed under subsection (13) shall be deemed to be the date of the order that is referred to in section 129 of the Courts of Justice Act.

“Regulations

“(15) The Lieutenant Governor in Council may make regulations,

“(a) specifying the form and content of orders under subsection (1);

“(b) specifying types of contraventions or circumstances in respect of which an order may not be issued under subsection (1);

“(c) requiring and governing public consultation before an agreement is entered into under subsection (9) and, subject to that subsection and to any regulations made under subclause (d) (iv), governing the contents of agreements under that subsection;

“(d) governing the determination of the amounts of environmental penalties, including,

“(i) prescribing criteria to be considered in the exercise of any discretion,

“(ii) providing that the total amount of the penalty for a contravention that occurs or continues for more than one day not exceed a maximum prescribed by the regulations,

“(iii) providing for different amounts depending on when an environmental penalty is paid,

“(iv) with respect to agreements under subsection (9), governing the cancellation of the obligation to pay an environmental penalty or the reduction of the amount of an environmental penalty;

“(e) prescribing circumstances in which a person is not required to pay an environmental penalty;

“(f) prescribing procedures related to environmental penalties;

“(g) respecting any other matter necessary for the administration of a system of penalties provided for by this section.

“General or particular

“(16) A regulation under subsection (15) may be general or particular in its application.

“Regulations governing determination of amounts

“(17) The regulations made under clause (15)(d) must, with respect to a contravention referred to in clause (1) (a), provide for the following matters:

“1. The person who is required to pay the penalty must be entitled,

“i. to seek and obtain a reduction in the amount of the penalty if the person took steps prescribed by the regulations to prevent the contravention in respect of which the penalty is imposed, and

“ii. to seek and obtain a reduction in the amount of the penalty if the person took steps prescribed by the regulations to mitigate the effects of the contravention in respect of which the penalty is imposed.

“2. The determination of the amount of the penalty must take into account factors prescribed by the regulations that relate to the seriousness of the contravention in respect of which the penalty is imposed.

“3. If the director is of the opinion that, as a result of the contravention in respect of which the penalty is imposed, a monetary benefit prescribed by the regulations was acquired by the person who is required to pay the penalty, the amount of the benefit must be considered in determining the amount of the penalty.

“Environmental management systems

“(18) The regulations made under clause (15)(d) must provide for a reduction in the amount of an environmental penalty if, at the time the contravention to which the penalty relates occurred, the person who is required to pay the penalty had in place an environmental management system specified by the regulations.

“Annual report

“(19) The minister shall, not later than March 31 in each year, publish a report that sets out the following information for each contravention in respect of which an order was made under this section during the previous year:

“1. The name of the person against whom the order was made.

“2. The amount of the penalty.

“3. A description of the contravention.

“4. An indication of whether an agreement was entered into under subsection (9) in respect of the order and, if an agreement was entered into, the effect of the agreement on the obligation to pay the penalty or on the amount of the penalty.

“Five-year review

“(20) At least once every five years, the minister shall cause a report to be prepared and published on the operation of this section, including the effect of this section on prosecutions under this act and including recommendations on the contraventions to which and

circumstances in which orders should be issued under subsection (1).

“Application

“(21) This section does not apply to contraventions that occurred before this section came into force.”

1740

**The Chair:** Discussion?

**Mr. Miller:** To the parliamentary assistant, first of all, this is a huge amendment, but on your section “Exceptions” on page 2 of your motion, “(b) a contravention of section 98,” can you explain what section 98 is?

**Mr. Wilkinson:** I could ask Stephen.

**Mr. Carty:** Section 98 is the obstruction section of the act, meaning obstructing a government ministry official from doing their job.

**Mr. Miller:** So, to further explain it, an environmental penalty can’t be issued if an officer is being obstructed from doing their job. Is that correct?

**Mr. Carty:** That’s right. That would be left to be pursued through a prosecution.

**Mr. Miller:** Very good.

**Mr. Barrett:** Here again we’ve been handed a seven-page amendment just before it was read into the record. I don’t know about the rest of the members of this committee, but I find it difficult to assess whether this seven-page amendment truly addresses the flaws in this proposed legislation. I feel it puts the committee in an awkward position. I realize it’s just been revised today, May 30, but at minimum it would have helped to have gotten this the night before to have had at least some time to read it.

I don’t know whether you have had a chance to show it to anybody in the environmental community or within industry and some of the stakeholders who are attempting to follow this. They’ve indicated to me they’re really getting concerned, partly because they don’t understand part of what is going on here.

**Mr. Wilkinson:** Mr. Barrett, with respect, both the original government 66 and 111 stand the same as revised, except for three areas. We’ve incorporated the two friendly amendments that came from the NDP in regard to five-year review and also the annual report. The last thing is that it gives an entitled person the entitlement to a reduction if they can demonstrate they took the prescribed mitigative or preventive measures. I think that’s responsive to what we’ve been hearing from people.

It’s not like this is a brand new motion. It’s the same one that was here two weeks ago, other than the fact that, from an ordering point of view, we took the two NDP motions and put them into this section to make sure we had the numbering correct. We took the advice of people, that they wanted to make sure—you’ve mentioned many times about the need for the carrot and the stick. What we’ve said is that if companies with environmental management systems take that step up, which is what we want, then that will be taken into account. It’s exactly what people have asked for.

**Mr. Marchese:** All the member is saying is that if you’re going to make some changes, whether they’re substantive or minor, it would be nice to look at it the previous day. That’s all he is saying.

**Mr. Barrett:** People who will be involved by this legislation will just have to take your word for it.

**Mr. Wilkinson:** Well, we’re at first reading, Mr. Barrett.

**The Chair:** Shall the amendment carry?

**Mr. Miller:** Just one other clarification: I know you’ve used the same terminology in other amendments, but on the first page of this one, where you’re saying “a numerical limit, including a limit of zero,” could you explain? Obviously, if there is a zero discharge, I would assume there is not going to be an environmental penalty issued, so why do you say “including a limit of zero”?

**Mr. Wilkinson:** Because a company can have a certificate of approval, but we’re very specific in our certificate of approval as to what they can and cannot do. If they take something and introduce it to their manufacturing process and add something else into the environment that wasn’t in their approval or as a result of the incident that happened, and that caused a problem, this bill ensures we can apply an environmental penalty and they can’t weasel out of it by saying, “Oh, that wasn’t in. We didn’t know about that.”

We have to make sure we’re very clear that the government reserves the right that there are certain things that are not to be released into the environment under any circumstances. That’s why you can have a numerical limit of zero.

**Mr. Miller:** So even if there’s not a discharge, there still can be an environmental penalty.

**Mr. Wilkinson:** The onus is on the government and on the ministry to be very specific, as we’ve learned through this process, about exactly what we say happened. This can’t be something that just kind of floats in. Again, the company has the right to go to the Environmental Review Tribunal immediately. With absolute liability, we are assured that they will be swift of foot and we will deal with the issue.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** We would refer to page 117 in our package.

I move that section 2 of the bill be amended by adding the following subsection:

“(26.1) Subsection 107(2) of the act is amended by striking out ‘under section 84’ and substituting ‘under section 84 or 106.1.’”

This motion will ensure that there is no prospect that a person can face prosecution for the failure to pay an environmental penalty or a cost recovery order. It ensures appropriate separation between prosecutions and civil process and that only civil collection methods will be used because environmental penalties are not prosecutions; they are civil.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that subparagraph 2 i of subsection 109(1) of the Ontario Water Resources Act, as

set out in subsection 2(30) of the bill, be struck out and the following substituted:

“i. contravening subsection 30(1) or (2)”

This motion makes the failure to report a discharge, as required under subsection 30(2), a second-tier offence, congruent to what we talked about under the Environmental Protection Act.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that subsection 110.1(6) of the Ontario Water Resources Act, as set out in subsection 2(32) of the bill, be amended by striking out “may consider the order” and substituting “shall consider the order.”

This motion will require a court to consider the payment of an environmental penalty as a mitigating factor when determining sentence for that same contravention. It would be congruent to what we talked about under the EPA amendments.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that subsection 116(1) of the Ontario Water Resources Act, as set out in subsection 2(37) of the bill, be struck out and the following substituted:

“Duty of director or officer

“(1) Every director or officer of a corporation has a duty to take all reasonable care to prevent the corporation from,

“(a) discharging or causing or permitting the discharge of any material, in contravention of,

“(i) this act or the regulations, or

“(ii) a licence, permit or approval under this act;

“(b) failing to notify the ministry of a discharge of any material, in contravention of,

“(i) this act or the regulations, or

“(ii) a licence, permit or approval under this act;

“(c) contravening section 98;

“(d) failing to install, maintain, operate, replace or alter any equipment or other thing, in contravention of a licence, permit or approval under this act; or

“(e) contravening an order, direction, notice or report under this act, other than an order under section 84 or 106.1.”

This motion will reduce the scope of the duty of corporate officers and directors from the duty specified in

Bill 133 so that it focuses on contraventions of a serious nature.

**The Chair:** Shall the amendment carry? Carried.

**Mr. Wilkinson:** I move that subsection 116(2.1) of the Ontario Water Resources Act, as set out in subsection 2(38) of the bill, be struck out and the following substituted:

“Onus

“(2.1) If a director or officer of a corporation is charged with an offence under subsection (2) in connection with a specific contravention of the corporation, the director or officer has the onus, in the trial of the offence, of proving that he or she carried out the duty under subsection (1) in connection with that contravention.”

Again, the motion clarifies that in a prosecution the crown has the onus of showing that the corporation committed a contravention before the onus shifts to the corporate officer or director to show that they took all reasonable care.

**The Chair:** Shall the amendment carry? Carried.

Shall section 2, as amended, carry? Carried.

**Mr. Wilkinson:** I move that subsection 3(2) of the bill be struck out and the following substituted:

“Same

“(2) Subsections 1(2), (2.1), (2.2), (3), (37), (44.2), (45), (53), (57), (58), (59), (59.1), (60), (67) and (68) and 2(1), (1.1), (4), (8), (23), (25), (26), (35) and (36) come into force on a day to be named by proclamation of the Lieutenant Governor.”

This just cleans up the section in regard to numbering.

**The Chair:** Either that or they're good Lotto 6/49 numbers.

**Mr. Wilkinson:** I was thinking bingo, myself.

**The Chair:** Shall the amendment carry? Carried.

Shall section 3, as amended, carry? Carried.

Shall section 4 carry? Carried.

Shall the title of the bill carry? Carried.

Shall Bill 133, as amended, carry? Carried.

Shall I report the bill, as amended, to the House? Carried.

Ladies and gentlemen, this concludes our business for the day. This meeting is adjourned.

*The committee adjourned at 1751.*





## CONTENTS

Monday 30 May 2005

<b>Environmental Enforcement Statute Law Amendment Act, 2005, Bill 133, Mrs. Dombrowsky / Loi de 2005 modifiant des lois sur l'environnement en ce qui concerne l'exécution, projet de loi 133, M<sup>me</sup> Dombrowsky .....</b>	<b>M-469</b>
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Ministry of the Environment

#### Clerk / Greffier

Mr. Douglas Arnott

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Ministry of the Attorney General