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*Northumberland Manufacturers Association*

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Spill Reporting, Inspections and Investigations

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## 1 INTRODUCTION

You have heard from Pinchin about regulatory standards imposed on discharge from facilities into air, water or sewers, and the importance of getting into compliance with those standards.

This part of the presentation is about what to do when trouble happens. A discharge exceeds regulatory standards, or an official shows up at reception unannounced for example.

I will be discussing:

- Key sections in the Environmental Protection Act, and sewer By-laws
- The obligation to report discharges and spills to the regulator
- The difference between an inspection and an investigation and your rights and obligations in each
- How to respond to a Notice of Violation or Order under a by-law or an Order from the Ministry of Environment Conservation and Parks (MECP)
- How to respond to Summons

The purpose of talking with you about this is so that you can limit environmental risks to your facility, its employees and directors including substantial fines or even jail

time. I will be sharing just a few slides today. We will send our full slide decks to you after our session.

## 2 KEY DEFINITIONS

Section 14 of the Environmental Protection Act provides:

...a person shall not **discharge** a contaminant or **cause or permit** the discharge of a **contaminant** into the **natural environment** if the discharge causes or may cause an **adverse effect**

Many of these words are defined in the EPA and you need to be a bit of a language nerd to know if you have breached this section.

For example, Contaminant means:

Any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an **adverse effect**.

And Adverse Effect has a long definition, Some of it is intuitive like environmental impairment. Other adverse effects like damage to property, personal discomfort, loss of the enjoyment of property or interference with the conduct of business are not what you might expect. So for instance, rocks flying into a house or spilled potable drinking water have been considered to cause an adverse effect. Some might argue, if your child hits a baseball into a neighbour's window, it could be a contaminant under the EPA.

Also, you don't have to have been on the scene actually **causing** the discharge or spill to be responsible for it. You could have **"permitted"** it. Directors and Officers, senior management of corporations could "permit" an offence even if not on the scene.

### **3 REPORTING OBLIGATIONS**

Those with control or those who cause a spill or discharge must report. The obligations are somewhat different if it is a spill or discharge so it is important to understand the difference.

Here is a table comparing the definitions:

#### **W+SEL SLIDE 1**

The key difference between a Spill and a Discharge under the EPA is that a spill is from a container of some sort and a discharge is not.

Although the definition of discharge under the EPA does not have the abnormal in quality or quantity qualifier, the requirement to report a discharge is only triggered if it is abnormal in quality or quantity.

The timing of the report should be immediately, though the EPA uses the lovely old fashioned term "forthwith". In both cases it is understood that the reporter can first ensure personal safety, take initial steps to control the damage, and gather the basic information. However, you should not wait until you have full information about the incident.



A case in point on this is Dofasco case of February 2005 concerning a spill into Hamilton Harbour. In this case the company spent 3.5 hours investigating and remediating before reporting, and the court found that this was too long.

That is not to say that one should not investigate and remediate, just that this should not delay reporting for any significant length of time.

And there is also an obligation to remediate under the EPA, s. 93(1) including to forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.

To whom do you report?

If a discharge into the natural environment – to the Ministry of Environment, Conservation and Parks, through the 24 hour Spills Action Centre number.

If a Spill into the natural environment, to the SAC, but also the municipality, the owner of the pollutant and the person with control.

If a Spill into the sewer, the municipality, the owner of the premises and anyone directly affected, and 911 if there is immediate danger to health and safety.

But you have spilled into somewhere that looks like this

**W+SEL Slide 2**

Both. In this case you should report to both lists.

(These lists will be in the deck that we send to you following the presentation.)

#### **4 INSPECTIONS AND INVESTIGATIONS**

Poll that Rosanna did said ## people have been visited by the regulator. It would have been either an inspection or an investigation. It is important to know which is which...

##### Inspections

- occur to verify compliance with the Act
- take place where an Inspector reasonably believes there are substances or documents related to the Act (except a dwelling)

Inspectors can ask you to provide reasonable assistance including providing information needed for him or her to reasonably carry out his inspection. It is an offence for you to provide false or misleading information or samples, or to prevent or hinder the Inspector from doing his or her work.

Inspectors have the authority to take samples, conduct tests, take photos, video or tape recordings, remove documents (to copy and return), require repair, maintenance, disconnection of a sewage works, require relevant documents, require a person to carry out sampling. They do not need a search warrant from a court to conduct the inspection.



An Investigation is more serious. It occurs when there is reasonable and probable grounds that an offence was committed. And a visit may start as an inspection but become an investigation if the Inspector finds reasonable and probable grounds. An investigation can involve police assistance.

The purpose is not to confirm compliance but to find evidence of the offence.

Unless the circumstances are urgent (for example, imminent loss or destruction of evidence) or the Officer has a search warrant, you do not have to co-operate in an investigation.

What to do if an officer shows up unannounced with a search warrant?

First ask to see a copy. Review it with legal counsel to determine what the scope of the investigation, and if properly obtained.

Then co-operate with caution. Non-cooperation is contempt of court and there could be criminal sanctions. But there are steps you can take while still being cooperative.

Ask for a list of items seized.

Segregate and seal any documents over which you can claim solicitor – client privilege. It is best practice to keep these in a separate file or separate location on your computer drive. This would include any consultant reports prepared for your lawyers to use to advise you.



You have more flexibility if it is an investigation without a warrant. First as there is no warrant, ask if it is an inspection or investigation. If it is an inspection, ask periodically throughout a things may change. If an investigation, you may be able to negotiate a time. You may have your lawyer present. Corporate counsel may be present as well for any interviews of personnel. You may substitute a person for the one being interviewed. You may ask for the questions in advance.

We are frequently asked for tips for dealing with investigators. There are some basic behaviours of the investigator to understand. They are not your friend even if they come across as smooth and friendly. In this case resist the urge to be overly helpful. If they are assertive, do not be intimidated. You should know there are basic things that you can and should do to protect yourself.

For example you may: Accompany the official during visit, take split sample, make notes of the investigators questions and activities, record the investigation.

You should only answer questions that you are sure of, don't rush to fill in gaps or be overly helpful. You need only give materials that are relevant to the scope of the investigation. The investigator will prepare a written statement of what was told him and will ask you to sign it. You don't have to.

As with inspections, it is an offence to hinder them, provide false or misleading information, or refuse to provide information that you are required to maintain. It is not an offence to assert Charter rights, refuse to furnish solicitor client information or not to let an investigator in without a warrant.

After an inspection or investigation under a sewer bylaw you may receive a Notice of Violation.

### W+SEL Slide 3

Identifies the non-compliance and what you need to do to come into compliance and gives you a certain amount of time to comply.

Do not ignore this. If the company does not come into compliance, charges may be laid.

You may also be issued a Provincial or Municipal Order that asks for things to be done to remedy a non-compliance. Provincial Orders can be appealed to the ERT. You must appeal within 7 days. Municipal abatement orders are not appealable.

In either case if you do not comply, the regulator may step in and do the work ordered and recover costs from you and you may be charged.

You will be informed of a charge with a Summons.

### W+SEL Slide 4

This tells you the specific provision of the Act that you are charged under, and the specific date and time of the alleged offence. The Summons sets a court date. If a representative or counsel does not show up, the trial may carry on and charges may be laid.

Resolving charges does not happen at one court appearance. There may be several judicial pre-trials in front a JP to attempt to settle.

To prepare, the company will want to engage counsel who will interview personnel and determine how strong a case can be made out in the company's favour. The company will want to take steps to come into compliance. Your counsel will assess whether the Crown can make out its case. With counsel and expert help, the company may seek to have the charges withdrawn where there are no reasonable grounds for prosecution. Or counsel may be able to argue that the company took all reasonable care to prevent the offence, and prove a due diligence defence to the charges.

If not settled within a reasonable time, the charges will go to trial.

#### W+SEL Slide 5

The potential fine ranges for by-law infractions are significantly lower than for EPA charges.

Here is the fine range and note that

- there is liability for both individuals and corporations
- EPA charges imprisonment is possible
- A Victim Fine surcharge of 25% is added to fines over \$1,000



## 5 TAKE AWAYS

We leave with some thoughts.

Off the top, being in compliance can prevent environmental liability.

If you receive a Notice of Violation, take steps to come into compliance.

And if you receive an Order, you have two choices – comply or appeal. If you cannot comply with an Order, appeal it. Failing to comply or appeal may result in charges and penalties.

Second, not just corporations, but individuals who caused or permitted, or who had charge or control can be charged.

Third, to reduce liability know your rights and obligations. For example – recognise a Spill or discharge and know when to report a discharge or spill, know how to conduct yourself during an inspection or investigation, respond to a Notice of Violation by taking steps to comply.

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