

MANAGING MOE INVESTIGATIONS

Ontario East Municipal Conference

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Overview

- Where do prosecutions come from?
- Certificates of Approval
- Orders
- Personal liability
- Due Diligence
- Managing investigations
 - Why
 - Inspection versus investigation
 - Internal investigations
 - Preparing for interviews

Where do Prosecutions Come From?

- Certificates of Approval
 - When are they required
 - When do they need to be amended
 - Are you in compliance
- Orders
 - Breach of terms
- Operations
 - Discharges
 - Complaints
 - inspections

Certificate of Approval

Certificate of Approval

- Required for:
 - Waste disposal (garbage, compost, brush)
 - Waste management (hazardous waste days, recycling)
 - Emissions to air (includes dust, vibration and noise)
 - Emissions to water (includes sewers and waste water treatment)
- Amendments required:
 - Whenever a change is made in the approved equipment or process
 - Whenever a change may increase or decrease the discharge of a contaminant

BEFORE YOU MAKE THE CHANGE

Certificate of Approval

Certificates of Approval

- What does the Certificate require

- Reduce it to SOP's

- Train your staff

- Post it and have staff sign off each year that they have read it

- Monitor

- Who makes sure all obligations are complied with

- Who monitors the monitor

- Document

- If it is not written down it does not exist

Orders

- Orders
 - Investigate, sample, prepare clean up plans
 - Construct and operate equipment to reduce/eliminate contamination
 - Monitor and revise clean up plans
 - Can be appealed
 - Failure to appeal means there is no defence if prosecuted for breach of the order

Orders

- Orders can be issued to anyone with charge, management or control of a contaminant
 - This includes officers of a municipal corporation – but not automatically
- Requires knowledge of the operation and the control and direction of employees
- Control can include control over financial and budget decisions (day to day allocations)
- Orders may not be enforced where an officer can demonstrate they took all reasonable steps to prevent the offence – ignoring the problem will not create immunity

Personal Liability

s. 194 of the Environmental Protection Act states:

Every 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

(b) Failing to report a spill

(c) Breaching a Certificate of Approval or order

- The onus of proving all reasonable care was taken rests with the officer
- CAO's may be prosecuted even where the Corporation is not

Personal Liability

- Ignoring environmental issues is not the solution
- Reverse onus is a significant hurdle
 - The MOE does not need to prove the you did not exercise all reasonable care
 - If the MOE proves a breach, the fact the breach occurred is sufficient to convict a CAO, absent evidence to the contrary
 - You must prove that you did exercise all reasonable care
- Reasonable care amounts to due diligence – discussed later
- The MOE is sending a powerful message that senior management must take environmental issues seriously

Prosecution

- It does happen to municipalities
- Even if guilty of the offence the municipality may still be acquitted if it can show that it did everything reasonable in the circumstances to avoid the accident, but for unforeseeable reasons it was unable to prevent the accident – due diligence
- May also argue officially induced error or mistake of fact
 - more difficult to prove

Due Diligence

- Due diligence – what is required?
 - Risk assessment – is it foreseeable
 - System to prevent the foreseeable
 - Prior to the incident
 - Documented

Due Diligence

- Create an environmental management system
 - It does not need to be complex or expensive
 - It does need to be comprehensive and effective
- Prioritize what areas and what policies need to be done first
 - Based on highest environmental risk
 - Based on greatest need for improvement
- Work through the plan as resources permit

Due Diligence

- Basic elements of an environmental management system
 - Identify legal obligations and risks
 - Create policies
 - Identify roles and responsibilities
 - Communication and training
 - Monitoring and continuous improvement

Due Diligence

- What are your legal obligations and risks?
 - What does your municipality do?
 - How many certificates of approval are there?
 - How many facilities?
 - What operations may create a spill?
 - For each certificate of approval, facility etc. what are the municipality's obligations?
 - Not having an inventory is not due diligence
 - Assess what the risks are
 - If you do not consider the risk, you are not duly diligent

Due Diligence

- Create policies
- Start with the general and progress to the specific
 - Spill prevention, reporting and clean up
 - Require departments to identify environmental issues and legal obligations
 - Require departments to establish a priority and schedule for creating SOP's – consistent with risk assessment
 - Each department must implement its schedule for creating policies and SOP's

Due Diligence

- Identify Roles and Responsibilities
 - Who in each department is responsible for what
 - How is progress reported (supervision and responsibility)
 - Is there a mechanism to revise the priority list if a new risk is discovered or a priority is elevated?
 - There should be a “champion” in each department and someone in the municipality who has overall control over the entire process
 - This must be a priority or it will not get done

Due Diligence

- Communication

- Reporting (supervision) ensures progress is being made, and where it isn't that changes can be made
- Communication ensures that everyone appreciates that the environmental management system is a priority

- Training

- Does not need to be expensive outside training
- Basic environmental awareness
- Job and department specific training
- Documented

Due Diligence

- Monitoring and continuous improvement
 - Monitor progress and ensure priority areas are seeing improvement
 - Monitor effectiveness after the system is working
 - Monitor the quality of reporting and training
 - Continually improve based on the results of monitoring
 - If you identify problems and do not correct them you prove an absence of due diligence

Due Diligence

REMEMBER THIS

- Understand your obligations
- Create policy and procedure
- Train
- Document

YOU CAN'T CREATE DUE DILIGENCE AFTER THE FACT

Managing Investigations

- Even with a good EMS, ...IT happens
- When the Ministry calls – to inspect or investigate – you must understand their objectives, powers and the potential outcomes
- Why should you manage an investigation?
 - Assist the MOE
 - Protect the municipality and yourself
 - Prevent a prosecution – it is possible
- How can you manage an investigation?
 - Understand the role and powers of investigators
 - Take control of the process so that the MOE sees all the good stuff



Managing Investigations

What is an Inspection

- Visit to confirm compliance with the Act, Regulation and permits
- Authorized by statute – no warrant required for entry
- Conducted by an abatement officer
- May lead to an order
- May lead to an investigation – but it is not an investigation
- Obligated to cooperate – obstruction charges are possible

Managing Investigations

Powers of an inspector

- Excavate
- Require equipment to be operated
- Take samples, take tests and measurements
- Examine and copy documents
- Make records with photos, video etc.
- Require the production of a document or data in any form
- Make reasonable inquiries of any person - NEW

Managing Investigations

Dealing with the inspector

- Everything seen, said and taken is “on the record”
- Designate one person to accompany the inspector
- Make detailed notes of all questions and answers and what the inspector did and saw
- The inspector has the right to take documents – obtain a receipt and make sure a copy of the document is kept
- The inspector has no right to take documents subject to solicitor client privilege
- Do not obstruct the inspector

Managing Investigations

What is an investigation

- An inquiry for the purpose of gathering evidence to support a prosecution
- Occurs at the time that the Ministry has reasonable and probable grounds to believe an offence has been committed
- An inspection can turn into an investigation – and you may not know it
- Conducted by investigation and enforcement branch – environmental police

Managing Investigations

Powers of an Investigator

- Investigators do not have the powers of an inspector
- Entry only with a warrant or consent
- Removal of documents only with a warrant or consent
- Interview of any personnel only with a warrant or consent
 - S. 157.0.1 – does it apply to investigators
 - Charter implications?
- Search warrants should be sent to legal counsel for advice immediately

Managing Investigations

- Should you consent to an investigation?
- Is there anything to gain by refusing?
- Do you lose the ability to manage the investigation if you refuse to consent?
- You lose the ability to challenge the admissibility of any evidence gathered under a warrant – if the warrant or the grounds for issuing it were faulty

Managing Investigations

Before the Ministry Investigation

- Conduct an investigation internally

- Why:

- Preserve the recollection of those involved
- Preserve documents and other data
- Have the information available if a prosecution is commenced
- Prepare staff for MOE interviews
- Have the information available to correct any problems
- Avoid Prosecution

Managing Investigations

Role of Legal counsel

- Provide legal advice about liability, defences, procedure
- Co-ordinate the internal investigation
- Analyze documents and information to assess the proper strategy to respond to the Ministry investigation
- If the purpose of the investigation is to assess legal issues, the investigation and all information gathered is subject to solicitor client privilege and cannot be seized by the MOE
 - The underlying information can still be obtained by the MOE, but not the compilation and legal analysis

Managing Investigations

Process of Investigation

- Preserve the “scene”
 - Photos, sketches, physical evidence, samples
- Gather all documents
 - SOP’s, policies, employment records, manufacturer’s records
 - Internal reports and records
- Require statements
 - All witnesses – may include people who were not present
- Engage professionals to prepare reports
 - Analyze cause and effect

Managing Investigations

Pre-interviews

- With all employees who have knowledge
 - Of the event
 - Of policies and procedures and training
- Immediately after the event
- Reason for interviews
 - Record knowledge for later
 - Better understand the event and root causes
 - Prepare staff for MOE interviews

Managing Investigations

Rules for MOE interviews:

- Understand the question first
- Answer truthfully – do not guess or speculate
- Do not volunteer answers – silence is your friend
- Do not speculate
- Where appropriate, volunteer information that demonstrates due diligence
- If an inspector provides a “caution” obtain legal advice before continuing the interview

Managing Investigations

Remember This

- An investigation can only proceed with consent, unless there is a warrant or an emergency
- Individuals who may be personally charged have the right to remain silent – municipalities have no such right (employees cannot refuse to answer questions)
- Have a procedure in place to respond to environmental incidents that includes dealing with an inspection and investigation

Managing Investigations

If you remember nothing else

- CAO's have a legal duty to take all reasonable care to prevent the corporation from breaching environmental laws
- The municipality cannot demonstrate due diligence if you do not understand what environmental laws apply
- Due diligence requires a reasonable system and follow up
- Managing an investigation is a reasonable response that will not offend the Ministry
- It is possible to avoid a prosecution in the right circumstances

Profile

Tony Fleming is a Partner in the Land Use Planning, Development and Environmental Group and the Municipal Group at Cunningham Swan. Tony is recognized by the Law Society of Upper Canada as a Certified Specialist in Municipal Law (Local Government/ Land Use Planning and Development). As a Certified Specialist, Tony has demonstrated expertise in the fields of municipal law and land use planning and development law.

Tony provides advice to municipalities and private sector companies on all aspects of land use planning and development as well as environmental law. Tony appears regularly before the Ontario Municipal Board, the Assessment Review Board and the Environmental Review Tribunal. In addition, Tony appears in all levels of Ontario Courts on administrative law matters, including defending challenges to municipal laws.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston. Tony focused on providing advice on land use planning and development and environmental law with the City of Kingston, building on his experience in private law firms in Toronto where Tony practised as a land use planning and environmental lawyer. Tony has defended large and small corporations and municipalities against Ministry of the Environment orders and manages regulatory investigations and prosecutions (Environment, Labour and Fisheries and Oceans).

