

Best practices in environmental incident response

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We have seen a growing trend, driven by provincial ministries of the environment and federal regulators (like Environment and Climate Change Canada, or ECCC), to

- carry out more frequent facility inspections and inquiries
- refer administrative (e.g., “paperwork”) and minor non-compliances for investigation, even if there has been no negative impact to the environment
- cooperate and conduct concurrent investigations with other regulators
- adopt novel strategies to pursue more aggressive enforcement
- pursue higher fines, including in the six-figure range

A conviction for an environmental offence gains press attention, and can have a negative impact on a corporation’s ESG report card. Environmental regulators publish press releases outlining the key facts and penalties for each conviction, and ECCC maintains a publicly accessible “Environmental Offender Registry”.

One key step to navigating this increased regulatory scrutiny and enforcement action is to be ready from the “get go” — when the environmental inspector comes “knocking.”

Common mistakes

Some common mistakes include

- mis-coordination on site, and among contractors and subcontractors
- succumbing to the urge to respond too quickly to inspectors’ questions, resulting in “loose” language and incomplete details, without thinking through the strategic implications of those answers
- filing spill reports or conducting root cause assessments that are unnecessarily self-critical, making assumptions, speculating, and admitting (unfairly) to defects in procedures, policies, training or equipment
- giving oral interviews, including recorded statements, without legal advice
- not realizing that calls to a regulatory spills line (like Ontario’s Spills Action Centre) are audio-recorded — everything that is said (including tone of voice, nervous laughter) is captured
- most importantly, not immediately referring regulatory inquiries and incidents to in-house legal teams, and/or external legal counsel, to obtain “real-time” advice about next steps,

and to determine if and when legal privilege should be asserted

Best practices

Some best practices we recommend to avoid these common mistakes include

Pre-incident

- Ensure Spill Contingency and Prevention Plans include clear protocols, procedures and checklists for spill/incident response, coordination and reporting, including the phone number(s) of applicable regulators/spill reporting lines, and get legal counsel to review these plans.
- Appoint a Lead Coordinator and Incident Response Team, with assigned in-house counsel, if applicable, and/or external legal counsel (with cell phone numbers/emails).
- Have ready instructions to contractors on spill response protocols.
- Ensure the Incident Response Team and the contractors are appropriately trained, including on spill reporting, with signed certifications and annual refreshers.
- Select — and, if possible, retain — outside counsel before a potential incident occurs.

Immediately upon incident and ongoing

- Follow the spill reporting chain of command, with site personnel immediately contacting the Lead Coordinator and legal counsel; ensure the communication chain is not too cumbersome.
 - One person should manage communications internally, and the distribution list.
 - One person should be assigned the task of communicating with regulators.
- The Lead Coordinator or assigned point person must immediately call the applicable environmental regulators to report the incident.
- Legal counsel should determine if an internal, privileged investigation into the incident should be conducted, and whether a privileged investigation protocol or charter should be erected.
- The Incident Response Team should restrict communications and documentation relating to the incident to facts (not casual conversations, opinions or speculation).
 - Pick up the telephone and have live conversations as often as possible — avoid the temptation to put everything in email.
 - When email is used, be cautious: no jokes to avoid misinterpretation.
- Ensure any formal correspondence or documentation sent to regulators is reviewed by legal counsel first.

When inspectors/investigators arrive

- When the regulator arrives, be calm, co-operative and professional.
- Get the regulators' names, badge number and position.
- Determine the purpose of the visit — i.e., an inspection or investigation into potential charges.

- Immediately call internal or external legal counsel.
- Take notes (marked "Privileged & Confidential") and shadow inspectors/investigators.

Post-incident follow-up inquiries

- Re-confirm purpose of inquiry (i.e., inspection or investigation) and whether the company is required to respond, or if a response is voluntary.
- Obtain legal input on responses in writing to regulators' inquiries.

Responding to search warrants

- Ask for a copy of the search warrant, and obtain the names/business cards of the officers involved.
- Immediately contact legal counsel and send them a copy of the search warrant.
- Review the search warrant carefully to determine scope of the warrant.
- Inform the officials that legal counsel is on the way and ask them to wait until counsel arrives. If this request is refused, ask why and record any response by the officials.
- Ask employees to cooperate with officials.
- Generally, do not discuss anything substantive with the investigators or officers; avoid conversations with colleagues or taking phone calls while investigators are present.
 - Questions about the location of documents or electronic files can be answered, but generally do not answer other questions unless a lawyer is present or has been consulted. If unsure, say that you would like to speak to a lawyer before answering the question.
- Ask to copy all documents that the investigators want to seize. If they will not let you, ask why, record the reason given and inform legal counsel or Lead Coordinator.
- Take notes of
 - the names and positions of the investigators
 - what the investigators wish to search
 - what the investigators seize
 - files or other locations that the investigators search but do not seize
 - anything that the investigators say
- Label your notes "Privileged and Confidential" and "Prepared at the Request of Legal Counsel" and provide them to the Lead Coordinators.
- Notify the Lead Coordinator and legal counsel of any disagreements or allegations of obstruction, or if the investigators wish to
 - have you sign any documents
 - seize original documents
 - seize documents you believe are privileged (for example, to, from or copied to a lawyer; containing legal advice; about or relating to litigation)
 - copy whole mailboxes or hard drives
 - seal an area, office or filing cabinet
 - question you or any other employee, other than to locate documents
- Follow Wrap-Up Checklist — check that there is

- a copy of the search warrant and Information-To-Obtain
- a list and copies of all documents copied/seized
- copies of any letters given to the officials during or immediately after the search explaining any difficulties concerning production of documents, oral explanations or the correctness and completeness of information and documents supplied
- copies of any documents or notes issued by the officials during the search
- copies of any notes recording differences of opinion with the officials
- a note of any information the company agreed to provide after the visit

Further information

To find out more about these and other issues affecting the investigation, enforcement and prosecution of matters related to the environment, please reach out to learn more about how Osler can help your organization navigate the challenges in this increasingly complex area.