

Enforcement Procedures of Regulatory Agencies

This Factsheet covers a subject we would probably rather not have to deal with - that is, what happens when something goes wrong on your farm or ranch and you are faced with an order, ticket or a charge by a government agency. This Factsheet briefly outlines the different level of charges and procedures you might be faced with; it is not intended to be legal opinion or advise.

Introduction

Regulatory agencies of the provincial or federal government have certain procedures they follow in dealing with enforcement of Acts.

Two Acts affecting a lot of farms and ranches are the provincial *Waste Management Act* (including the *Code of Agricultural Practice for Waste Management*) and the federal *Fisheries Act*. Although there are many Acts that affect agriculture, these two are amongst the most commonly enforced and will be used in the following examples.

Provincial Enforcement:

If anyone observes a situation on a farm or ranch that they feel could be a threat to the environment and puts in a complaint about it, the complaint could be sent to a producer association, the Ministry of Agriculture and Food (MAF) or the Ministry of Environment, Lands and Parks (MELP). The farm or ranch may not be aware of the complaint until someone from one of those agencies contacts them.

The Waste Management Act

To allow the industry to respond to such complaints, producer associations have set up Peer Advisory Programs. The intent of the programs is to allow a peer advisor the opportunity to attend complaints involving a risk of pollution or non-compliance with the Code, to resolve issues within their industry before they become a problem requiring the involvement of enforcement agencies. A high percentage of complaints are resolved at this point, but this may not exempt you from future enforcement or legal action.

Where there is obvious pollution or a high risk that pollution will occur, MELP's Pollution Prevention Regional Staff will attend to it directly. MELP staff have the right of entry for the purpose of inspection, with some limitations. They would talk to you about the problem and give you the opportunity to make corrections to stop or prevent the pollution. If you resist efforts to attend to the problem or do not take it seriously, or the problem requires immediate action to stop or prevent the pollution, MELP may issue one or both of the following *Orders*:

Pollution Prevention Order This is used when there is the risk that pollution will occur, and may have one or more of the following typical clauses:

- “immediately cease discharge or eliminate the potential for discharge of agricultural wastes from or on the problem location (e.g. fields) located at _____, to the receiving environment”
- “within 7 days remove all agricultural waste stored on the problem location (e.g. fields) located at _____”
- “a best agricultural waste management plan shall be developed by a qualified person and address the following _____”
- “this plan shall be submitted for approval within a specified time period (e.g. 90 days), and upon approval shall be implemented and completed by _____.” (this date is usually within 1 year or certainly before the same problem could reoccur)

The purpose of this order is to remove the risk (field manure piles for example) and then to have a waste plan drawn up to ensure improvements are made and the *Code* is met (i.e., a better manure handling method in this example).

Pollution Abatement Order This is used when there is pollution occurring and may have very similar clauses to the *pollution prevention order*. Such an *Order* may be given when there is reasonable and probable grounds to believe that pollution is occurring.

Important Clauses Both of these *Orders* will typically have final clauses worded similar to:

- “This is an *Order* under the *Waste Management Act* and may be appealed. An appeal does not operate as a stay. That is, you may chose to appeal the *Order*, but you must, until a decision is made on the appeal, comply with the terms of the *Order*.”

(A farmer may appeal an order based on things such as unreasonable time periods, or excessive works required in the *Order*. If an *Order* is appealed, the appellant may ask the Environmental Appeal Board (EAB) to stay (i.e. suspend) the terms of the *Order*. The EAB may: stay the *Order*, stay part of the *Order* or refuse to grant a stay.)

- “This *Order* is without prejudice to any further action that may be taken.”

(This means MELP may also take other action, such as laying a charge by way of a *Ticket* or *Formal Prosecution* in addition to the *Order*)

- “A contravention of this *Order* is a violation under the *Act* and may be subject to legal action.”

(This means ignoring the *Order* may lead to a *Charge*)

Both of these *Orders* will require work or a waste plan with deadlines that must either be met or an extension agreed upon with MELP. **It is most important to communicate with MELP about these deadlines if you cannot meet them or need an extension.** You may face a *Charge* for missing a deadline, **even after you do what is requested** (more about that later).

The Pollution Prevention Regional Staff will issue the *Order*, and may deliver it and work with the farmer or rancher to resolve the concern. A Conservation Officer (CO) can deliver the *Order* and will investigate the case, where warranted. At this point, and up to two years after the facts become known, a charge could be brought forward by either a *Ticket* or *Formal Prosecution* through the courts.

Ticket A *Ticket* may be issued as a result of the original problem or for failing to comply with the requirement of an *Order*. The *Ticket* carries a voluntary penalty (fine specified by regulation), which, when paid, is deemed to be an admission of guilt to the charge. *Tickets* may be contested by appearing in Court, at your expense. Failure to either pay the fine or dispute the ticket in court will result in a conviction. Tickets are registered with the Motor Vehicles Branch and non-payment may result in non-renewal of a driver's license until the fine is paid.

Formal Prosecution Formal prosecution through the Courts may be used for a charge laid after the case has been investigated and reported to Crown counsel by the CO. The Crown counsel decides to proceed, or not, with the recommended charges. The Crown Counsel will prosecute a case in court and make recommendations to the Judge on the fine, penalty and remedial measures required. The Judge will determine whether you are guilty based on the evidence presented at the trial. You will be able to explain any mitigating circumstances that would aid the Judge when sentencing, even if pleading guilty.

The allegations become available to the public the day the charge is sworn at the court registry. The media regularly check with court registry for new charges and are free to publish the allegations accordingly.

MELP may include names of companies or persons that are not in compliance, whether charged or not, and names of companies or persons ticketed or served with an order, on their semi-annual "Non-Compliance List". A report on charges and penalties together with the Non-Compliance List are both made public.

Enforcement Up to Two Years Later It is important to understand that enforcement can still occur up to two years after the incident becomes known to the Ministry. This can result in unfortunate timing. For instance, a spring runoff concern may result in an *Order* that requires some immediate work and a waste plan be drawn up and in place before the next spring runoff. You may:

- have complied with the *Order* but be ticketed or prosecuted at any time up to two years after the facts become known for the original event;

- have complied with the *Order* but not within the time frame and therefore could be ticketed or prosecuted for either or both the original event and for not complying with the *Order* in time; or
- not have complied with the *Order* and anytime up to two years after the facts become known be ticketed or prosecuted for either or both the original event and for noncompliance with the *Order*.

The second scenario can raise concerns. The works and/or waste plan are done as required but the farm or ranch is still facing a fine, not only for the original event but possibly also for tardiness. This is over simplified, but while Pollution Prevention is most interested in the fact the improvements have been made and future pollution risks are removed, the fact remains that not meeting the requirements of an *Order* is an offence. Enforcement can continue.

Because of uncontrolled circumstances, this delay in complying with the *Order* can occur completely unintentionally. As mentioned previously, it is always in your best interest to talk to MELP about anything in an *Order* that is unclear, especially any deadlines that may be difficult to meet, etc.

Code of Agricultural Practice for Waste Management

How does the *Code* come into the picture? Compliance with the *Code* provides producers exemption from requiring a permit to discharge agricultural waste as a fertilizer or soil amendment. Where you do not comply with the *Code*, you are subject to the *Waste Management Act* and must have a permit. If you do not have a permit, you can be ticketed or prosecuted for “introducing business wastes into the environment without authorization”.

Federal Enforcement:

The Fisheries Act

This is federal legislation specifically designed to protect fish and fish habitat. Fish habitat includes spawning grounds and nursery, rearing, food supply and migration areas on which the fish depend directly or indirectly. Fish do not need to actually physically use an area or be in the area to have the area defined as habitat. Similarly, if they only use it for a small part of the year, it is habitat. Habitat includes the riparian vegetation. In other words, if it influences the life of fish it is protected.

Fish habitat may be created when a drainage ditch is dug, empties into a stream and is then accessible or used by fish. It is now considered an extension of the stream and the *Fisheries Act* provisions will apply to that ditch.

Fish Habitat Sections

The two primary habitat sections of this *Act* deal with:

- *harmful alteration, disruption and destruction (HADD) of fish habitat, and*
- *introduction of a deleterious substance* affecting either fish or fish habitat. This could also be pollution and fall under the provincial *Waste Management Act*. In such cases where pollution impacts fish or fish habitat, charges may be pursued under both acts. MELP and the Federal Department of Fisheries and Oceans (DFO) may jointly or independently investigate.

There are other relevant sections of this *Act* concerning:

- water intakes;
- destruction of fish by means other than fishing;
- allowing safe passage of fish;
- minimum stream flows for fish.

Enforcement The Fisheries Act is enforced by the DFO and Department of Environment Canada as well as provincial MELP. Charges under this legislation must be laid within 2 years of the date on which the offense became known to the government.

DFO has two types of enforcement staff:

- Habitat Inspectors - they may be habitat biologists or technicians
- Fisheries Officers - they also have Habitat Inspector status

Both of these have the right of entry for the purpose of inspection, with some limitations. If it is an investigation, they need a search warrant except in urgent or emergency circumstances.

The federal *Fisheries Act* provides for the issuance of *Inspector's Orders* to stop the depositing of a deleterious substance. The *Order* may also be used to prevent the deposit if it is likely to occur. Failure to comply with an *Order* is an offence.

When dealing with a potential HADD, a warning may be given to an individual indicating that they may be in violation of the *Fisheries Act* if they continue with the work. However, there are no preventive *Inspector's Orders* as there is with deleterious substances. Tickets are not given for any habitat violations; all are criminal prosecutions. These are strict liability offences in which intent does not have to be proven, but DFO must have proof beyond a reasonable doubt.

If a landowner hires a machine operator to conduct works that result in a habitat offence, it is likely that both the operator and the landowner will be charged. For this reason, a machine operator should ensure all approvals are in place before starting work and land owners should ensure that only appropriate operations are undertaken.

Like the provincial system, decisions to proceed with prosecution are made by Crown Counsel.

If a minor HADD occurs then a warning may be given, particularly if reasonable efforts are made to remedy the problem, such as replacing lost vegetation. However, ignorance is a poor defense.

DFO Approvals Work “in and about a stream” requires approval from MELP under Section 9 of the *Water Act*, and they may coordinate with DFO to avoid work proceeding without all the necessary approvals in place. However, it is your responsibility to ensure that DFO is aware of your proposed work.

Although you do not technically need DFO approval to do work in a stream, you do need approval if your work will affect the stream or habitat.

It is far better to get approval beforehand; by notifying DFO and receiving the appropriate approval (which will have work conditions set out to protect the fisheries resource), you can avoid causing damage to the environment and the likelihood of an investigation and possible charges if damage is determined.

The types of activities that you should have DFO review include; rip rap; riparian alteration (such as removing streamside vegetation); channel alteration (straightening, redirecting, side channel filing, wetland draining); dredging; ditch cleaning; any construction close to streams or lakes (fill, retaining walls, docks, bridges, dyking); driving through streams (fording).

What Should a Landowner Do?

It is important to try to get a basic understanding of the “rules”, such as the main *Acts*, as well as your “rights and responsibilities”. Factsheets such as this one and others, your producer associations, etc. can be a start.

Obtain copies of “Guidelines” for your commodity from MAF and review operations on your farm to identify potential sources of pollution. Do your best to schedule and budget improvements to bring your operation into compliance with the *Code* before a complaint is filed. Check with MAF to see if programs might be available to help defray costs or provide expertise to help resolve the concern. In this manner, improvements are made on your terms, as your time and resources are available.

It is the responsibility of the producer to comply with the *Code*. In many cases, an officer attending a complaint, where the farm is in compliance, must then explain to the complainant that the practices leading to their concerns are allowed under the *Code*. This is the preferred method of resolving a complaint.

If an enforcement officer talks to you, be polite and find out what the issue or problem is. Try to keep an open mind. A small discharge that has been ignored for years might have a significant impact on a sensitive waterbody. Try to identify and accept the problem then try to think of changes in management, or works which would alleviate the concern. In many cases, relatively minor changes can improve or eliminate the problem

Take notes. Keep track of what occurs in talking with an enforcement officer and focus your attention on a solution. However, being cooperative while at the same time avoiding saying you are responsible is a fine balance. Consider first cooperating fully in getting the problem under control, and then, if necessary, dealing with the issue of blame, or who caused the problem.

While it is reasonable for you to cooperate, you do not have to incriminate yourself. At some point if you are uncomfortable or do not understand, you may want to seek advice from your producer association or a lawyer.

Influencing Factors in a Prosecution

There are a number of factors that can influence the prosecution of a case. You have some control over most of these:

- **Your Due Diligence** - this concerns your need to foresee and prevent a problem before it occurs as well as your reaction to the problem. Diligence is defined in the dictionary as “constant and earnest effort” but due diligence has a more precise legal definition which says that it is the action that would be expected, and ordinarily exercised by, a reasonable and prudent professional or expert under the circumstances; *it may not be just the knowledge and skill of an ordinary person*. Due diligence is not something measured by an absolute standard but depends on the facts of each case. You may want assistance or advise to ensure that you are in fact exercising ‘due diligence’.

The standard of due diligence will be applied to your actions, or lack of actions, prior to, during and after a pollution event. Should an *Order* be issued, your due diligence may prevent a *Charge* from occurring, depending on the circumstances. As mentioned previously, something as simple as good communication with MELP will help.

A prosecution is likely to occur in circumstances where the problem occurred as a result of carelessness. On the other hand, if the investigation determined that you did everything that could be reasonably expected under the circumstances (i.e., you exercised all due diligence) and the problem still occurred, then this may be considered by officers and the Court should your case proceed to court. It is important to note that the Crown does not have to prove the lack of due diligence; the onus is on you to prove you exercised due diligence.

- **Mitigative Actions You’ve Taken to Minimize the Impact** – this is somewhat related to due diligence. When a problem has been pointed out and you have made a sincere effort to deal with it, both MELP and a court will recognize that in any judgment.
- **Your Compliance History** - how you’ve handled any similar past situations may have a bearing on whether an agency places any trust in you to handle current concerns.
- **Severity of the Impact** - this concerns the problem itself. The more severe the problem the more likely prosecution may proceed. You have control of this through the management you have been using of the area in question. Here, prior due diligence will not only reduce the severity of any potential problem but may also serve you well in the face of legal action.
- **Sensitivity of the Receiving Environment** - this is beyond your control. While the *Code* and other legislation is in place for all of B.C., enforcement can be ‘heightened’ in the more sensitive environments. If you are located near such environments you will need to have the best management practices in place.

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