



# Avoiding Environmental Liabilities

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# What Environmental Liabilities?

- ✱ Clean-up costs
- ✱ Lost Production from Down Time
- ✱ Civil liability for off-site impacts
- ✱ Administrative Orders
- ✱ Prosecution defence and fines
- ✱ Environmental Penalties
- ✱ Stock Value & Public Relations Hits

# Avoid Clean-Up Costs

- ★ Clean-up costs unpredictable
- ★ Some contaminants difficult to remediate
- ★ Plan in advance to minimize damage
- ★ Know site conditions & exposure pathways



# Avoid Lost Production

- ✦ Clean-ups can require facility closures and business disruption
- ✦ Anticipation of issues and containment of adverse effects key
- ✦ Be proactive – rethink processes to reduce risk & severity of incidents
- ✦ Plan for regular maintenance in advance of incidents

# Off-Site Impacts Liability

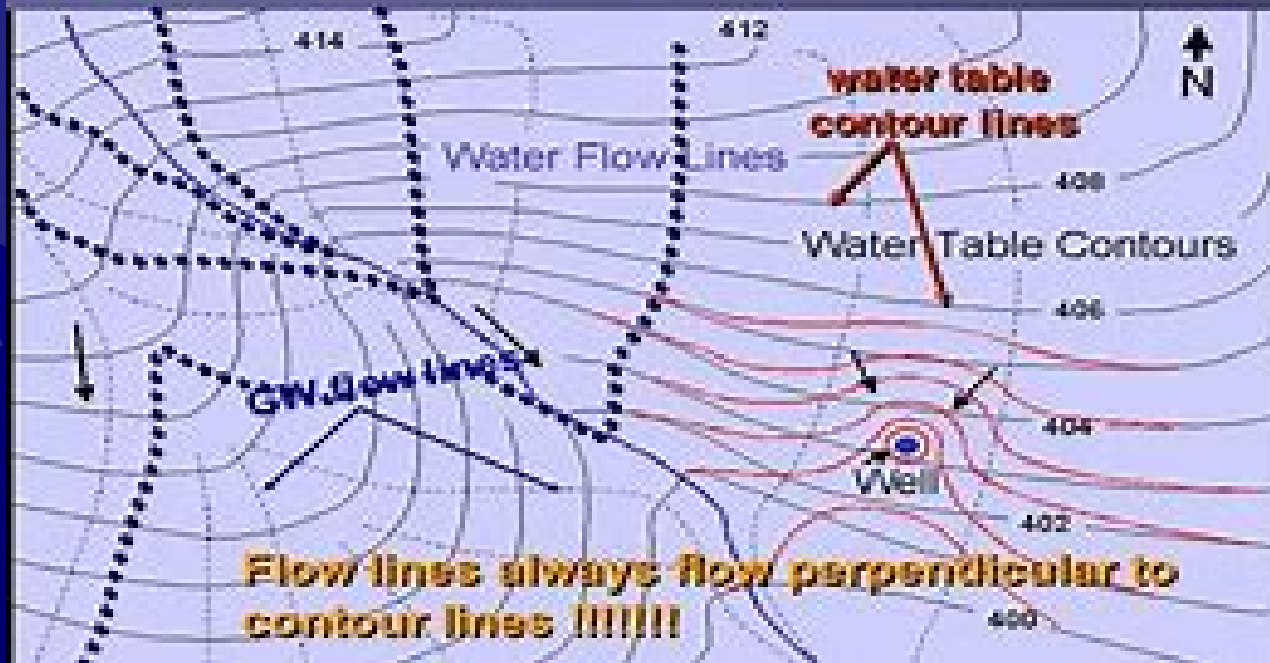
- ★ Huge expense of environmental incidents comes when effects go off-site
- ★ Neighbours expect to be kept whole for clean-up costs and legal fees
- ★ Compensation for impacts on neighbours' property values often difficult issue
- ★ Contain impacts on-site

# Tricky Issues in Off-Site Litigation

- ★ Communicate effectively; rebuild trust
- ★ Important to maintain reasonable relationships with neighbours even while dispute going on
- ★ Dual Tracks: Resist damages claim while pursuing possible remediation
- ★ May be better than full fight

# Work with environmental consultants

Migration of groundwater (movement) using flow lines



# Other Sources of Civil Liability

★ Potential civil liability associated with:



- ★ Groundwater migration
- ★ Personal injury
- ★ Financing issues
- ★ Business interruption
- ★ Securities claims



# Dealing with the Regulator

- ✦ Regulators have broad powers to inspect and issue Orders
- ✦ Build respectful relationship; many regulators will work with you and help
- ✦ Get out in front. Make regulators job easy by organizing information, assessing issues, presenting a plan.
- ✦ If they see you acting responsibly, they will let you do your job.

# Avoid Fights

- ★ Some regulators aren't pleasant
- ★ Like bossing people around
- ★ Suspicious, cynical, uncaring
- ★ Can make your life miserable
  - expensive studies
  - shutdowns
  - equipment replacement
  - no consideration for cost
  - excessive attention



# Challenging Orders

- Discuss impending orders
- Ask for second level review.
- Must appeal within short time – Ontario:15 days
- If you can't live with an order, must appeal
- Offence to Fail to Comply with Order

# Investigations and Prosecutions

- ★ Numerous offences in environmental legislation
  - offence to fail to comply
  - offence to cause or permit discharge that may cause adverse effect
  - offence to operate outside approval restrictions
- ★ Companies, directors, officers, employees can all be charged

# Should You Talk?

- ✦ When faced with request for interviews, legal rights depend on purpose. If inspection power, must co-operate. If for prosecution, don't have to.
- ✦ Ask for business card: if it uses words like "investigation" or "enforcement," get legal counsel.
- ✦ Test: reasonable and probable grounds to believe offence has been committed

# Defence of Reasonable Diligence

- ✱ All environmental offences are subject to a defence of reasonable diligence
- ✱ By judicial decree: regulatory offences are between criminal and parking tickets
- ✱ Onus on defendant to prove defence
- ✱ The real offence is carelessness
- ✱ Accidents happen

# Due Diligence Defence

- Must take “All reasonable care” to avoid violating the law
- “All reasonable care” depends on circumstances
  - nature and gravity of adverse effect
  - was result foreseeable
  - potential harm to people and environment
  - industry standards
  - efforts to address problem
  - complexity of situation

# Due Diligence Defence Case Study

- ★ R. v. UBA Inc.

- ★ chemical spill from pressurized tank

- ★ proved cause: defective rupture disk

- ★ instant expert response

- ★ good training, monitoring, records

- ★ regular preventive maintenance

- ★ overzealous investigator; false impact reports

- ★ Acquitted



## Case Study 2

- ✦ R. v. Control Chem Canada Ltd.
- ✦ employee drained chemicals into catch basin, contrary to instructions
- ✦ Court found “strong commitment to proper environmental standards”
- ✦ Environmental management systems
- ✦ Good manuals, SOPs, training
- ✦ Engineered spill containment features
- ✦ Acquitted

# Prosecution Penalties Can Be Severe

- ✱ High maximum penalties
- ✱ Escalating fines for subsequent offences
- ✱ Minimum fines becoming more frequent
- ✱ Most fines substantially smaller
- ✱ Cost of defending prosecutions high



# Corporate Social Responsibility & Image

- ✦ Markets, consumers punish polluters
- ✦ Bad publicity can affect value of brand
- ✦ Good publicity can affect value of brand
- ✦ Morale, training, professionalism of employees important ingredient in productivity

# Prevention is Golden

- ✦ Avoiding environmental incidents can avoid most environmental liabilities
- ✦ Invest in people and training
- ✦ Consciousness of issues avoids problems
- ✦ Regular review & improvement of business processes

# Questions?

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