



Concordia Pacific

Environmental, Government and Town Planning Law

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### **POLLUTION INVESTIGATION FACT SHEET**

A prosecution for a pollution offence under the *Protection of the Environment Operations Act 1997* can be a very costly and time consuming exercise. Amendments to the Act that were made in May 2006 increased the maximum penalty for strict liability offences to \$1 million in the case of corporations, with additional penalties of \$120,000 for each day that the breach continues; penalties for so-called “Tier 1” offences, involving willful or negligent conduct, can attract penalties as high as \$5 million, as well as gaol sentences of up to 7 years. Furthermore, penalties can be imposed personally on directors and other persons who are engaged in the management of a company that commits an offence.

Once a prosecution is commenced by the Environment Protection Authority, there is generally no means by which the case can be “settled” by negotiation with the regulator. The amount of the penalties that are to be imposed is determined by a judge of the Land and Environment Court. In addition to any fines, a business that is prosecuted will almost certainly be required to pay the EPA’s legal and investigative costs. The Court may also require a defendant to publish notice of the offence in a newspaper or in its annual report, resulting in damage to a business’s reputation and good will.

Because of the severe penalties that can be imposed, the best course is to take all practicable measures to avoid causing a pollution incident in the first place. However, if pollutants are released from your facility, either due to an unanticipated accident, plant upset, or other cause, steps can be taken to minimize the risk of a prosecution, or to limit the potential exposure to penalties.

#### **Prevention Is Far Better Than Cure!**

Any business that is engaged in handling potentially polluting substances should have procedures in place for ensuring that an incident does not occur.

It is essential that all pollution control equipment necessary to comply with an environment protection license is in place, is regularly maintained, and is capable of meeting applicable discharge/emission limits at all times. Plant staff should be fully trained to operate the equipment and to carry out emergency response measures if a failure occurs. Breakdowns should be anticipated so that spills are contained and controlled before pollutants escape into the environment. It is particularly important to have bunding with adequate capacity around all storage tanks and transfer points, and to implement measures to stop contaminants from entering storm water drains which lead to waterways.

Plant staff should be instructed to monitor discharge points so that pollution incidents are detected at the earliest possible stage; where practicable, automatic alarm systems should be installed to

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notify employees that an unauthorized discharge has occurred.

If the worst-case scenario does unfold and a pollution incident occurs despite all precautions, then immediate clean up action should be carried out so that any possible environmental harm is limited. An analysis should be carried out so that the causes of the incident are identified and measures should be taken to ensure that a similar release of pollutants does not occur again.

### **Duty to report pollution**

The POEO requires that when a pollution incident threatens or causes “material harm” to the environment (actual or potential harm to the health and safety of human beings or to ecosystems that is not trivial, or that results in actual or potential harm to property exceeding \$10,000), the person carrying out the activity that caused the incident must notify the “appropriate regulatory authority” (which is the EPA in the case of any activity that is licensed under the POEO, and the local council in the case of other activities). Environment protection licenses also universally contain a condition which requires that notice of pollution incidents be given.

The POEO specifies that notice must be given even if doing so might be incriminating or could lead to the imposition of a penalty.

Any member of the public can also notify the EPA or local council of a pollution incident and an investigation may follow into the source of that pollution.

### **Site visits by enforcement agencies**

Once the EPA or local council is informed that a pollution incident has occurred, it is likely they will visit the site where the pollution originated (authorised officers have a practically unfettered right to enter premises that are suspected to have caused pollution). They may undertake a site inspection and take photographs and samples, which may be used as evidence in court. During the site inspection the officers of the enforcement agency may also ask question employees and contractors concerning the circumstances relating to the pollution incident. The answers to these questions may be recorded in affidavits of the investigating officers and presented to court. Authorised officers also have authority under the POEO to seize items and records that may provide evidence of an offence.

It is essential that key personnel accompany and assist the investigators during the site inspection.

Questions that are asked by the investigators must be answered truthfully. However, care should be taken that any information that is provided by plant employees relates to matters that are within

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the scope of their knowledge and responsibilities and is accurate and factual, as statements made during an inspection are likely to be relied on by the regulatory authorities if the incident becomes the subject of court proceedings.

### **Requests for Information and documents and Records of Interview**

During an investigation the enforcement agency may issue a statutory notice requiring the production of documents and records relevant to the incident and to pollution control procedures at the facility. The regulators may also seek to conduct a formal interview with plant personnel, and may require a company to nominate a representative to answer their questions. The interview will be transcribed and may be relied upon to prove that an offence has occurred or to show that a business has failed to take reasonable precautions to prevent pollution.

If the enforcement agency carries its investigation to the stage of seeking detailed information concerning the circumstances relating to the pollution incident, it is likely that a prosecution is being seriously considered. Therefore, it is strongly recommended that you seek legal advice before you respond, in order to be sure that your rights are protected and that employees do not inadvertently make statements that may damage your defence.

### **Early preparation is the key**

It is never too soon to anticipate the possibility of a prosecution and to begin to prepare to defend against it. The nature of the environmental management systems and pollution prevention programs that you have in place before an incident occurs, the timeliness of your clean up response and implementation of measures to prevent a recurrence, and the extent of your cooperation with regulators can all greatly influence whether a prosecution is taken against you as well as the severity of any penalties that may ultimately be imposed.

### **We can help!**

Concordia Pacific has a wealth of experience in environmental law, including air and water pollution, waste disposal and clean up of contaminated sites. We are skilled at defending prosecutions both in the Land and Environment Court and in Local Court and provide you with proactive, creative strategies to deal effectively with regulatory compliance issues.

For more information about how we can assist you, please call us on 9233 4914 or contact us by email at [conpacif@tpg.com.au](mailto:conpacif@tpg.com.au).

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