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A S S O C I A T E S



Environmental Practice in 2020 – Balancing on a Tight Rope

Presented by:

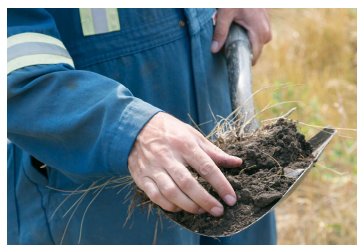
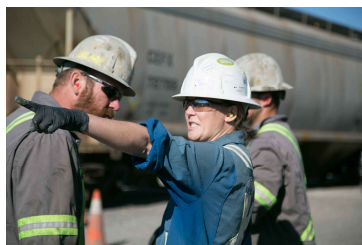
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Presentation Overview

- In this current reality, environmental professionals walk a 'tight rope' to balance meeting client, regulator and stakeholder expectations, and operating in a professionally prudent manner.
- Today we will discuss some of those foot slips, and how we can navigate the tight rope to better prevent the potential fall into liability. Foot slips to be discussed include:
 - Reporting Releases and Historical Contamination;
 - Limited Scopes and Inheriting Sites/Work Product; and
 - Environmental Services During COVID-19.



Spill Reporting and Notification to Regulators

- When to report or notify regulators of spills/historical contamination has long been a grey area.
- Often the discovery of contamination doesn't fit nicely into the "spill" category where reporting requirements are clear, and reporting tools are readily accessible.
- Industry standard has been to report if it is moving off site, or if there are known immediate adverse effects.



Example

- A wellsite has changed hands multiple times, a Phase 1 ESA and a Phase 2 ESA have been conducted, and a drilling waste disposal area with hydrocarbon impacts is identified.



Questions?

- When is a property owner, licensee, or stakeholder legally required to report?
 - Refer to the law/regulation in your jurisdiction
 - **Alberta** – immediate reporting by a person who releases, causes, or permits the release, or by a person having control of a substance that may cause, is causing, or has caused an adverse effect to the environment when become aware of the release, spill, discharge.
 - **Saskatchewan** – every person who discharges, discovers, or discovers while conducting work, must immediately report any spill, release, or emergency that may cause, or is causing an adverse effect, or in a quantity that could pose a risk or that meets criteria of Discharge and Discovery Reporting.
 - **British Columbia** – if person has possession, charge, or control of a polluting substance or waste immediately before the spill or introduction must immediately report after he or she learns of the escape, spill, or introduction, in accordance with regulation
 - Words with legal meaning include “release”, “causes or permits”, “report”, “causes or may cause”, “adverse effect”, “person having control of substance”, “charge, management or control”, “while conducting work”

Questions?

- Does the consultant have any obligation with respect to reporting?
 - Obligations to client – retainer, confidentiality.
 - Understand requirements of professional designation.
 - Understand the requirements of the law/regulations.
 - Advise client of discovery of contamination and encourage reporting.
 - If client doesn't report, seek legal advice about obligation to report the discovery.

Questions?

- Are there any examples of legal action being taken for failure to report with respect to releases/historical contamination?
 - *R v Edmonton (City)* (2006) – case law can expand/clarify the language/words in a statute
 - Failing to report is an offence and can be prosecuted, often goes along with offence of releasing a substance into environment and/or failing to clean up
 - Case examples (immediate releases) – *R v Chem-Security (Alberta) Ltd.* (1998); *R v Shell Canada Limited et al* (2000); *R v Agrium Inc.* (2019)

Limited Scopes & Inheriting Work Products

- With limitations on budgets in this economic climate, companies are often forced to reduce scope and cut costs.
- Often the scopes approved are more limited than we would typically like in order make an well informed conclusion about the site.
- It can lead to a consultant inheriting work from another consultant that we may struggle to rely on when moving forward to the next stage.



Example

- Consultant A does a bare bones tight budget Phase 1 indicating that no Phase 2 is required and the site gets passed to Consultant B for reclamation closure.



Questions?

- How can consultants balance the needs and budget of the client, with the expectations of the regulators and professional institutions?
 - Communicate with the client about:
 - Objectives and purpose of the work;
 - Necessary requirements/components to meet the objectives and purpose based on expertise and knowledge of regulatory requirements; and
 - Prepare scope of work, limitations.
 - Include limitations, where appropriate, that conclusions are based on the scope of work.

Questions?

- Is there guidance available with respect to steps that consultants should take when inheriting sites/work product from other consultants?
 - Review and carefully consider the use of work product.
 - Advise the client of how you can use the work product and what data gaps need to be filled.
 - Incorporate the use of the work product and data gaps to be filled, into the scope of work and cost.
 - Document instructions from your client, in particular, what you are being instructed not to do.
 - Professional Designation resources and Best Practices:
 - APEGA Guideline for Ethical Practice;
 - APEGA Draft Practice Standard for Relying on the Work of others and outsourcing; and
 - Professional Responsibilities in Completion and Assurance of Reclamation and Remediation Work in Alberta.

Environmental Work and COVID-19

- As we navigate these unprecedented times it seems that orders, decisions, and guidance rolled out are vague, evolving, and sometimes confusing.
- Clients and the public are struggling with what is considered essential service and scope/work, including monitoring and reporting requirements.
- And if considered an essential service, is the scope/work essential?



Environmental Work and COVID-19

- It is important to consider Sites where approvals or orders mandate that a scope be completed.
- There has been some relaxation of requirements in this respect. However, the two governing bodies in Alberta (AEP and AER) have provided different direction.
- Example: The AEP ministerial order delayed reporting requirements and the AER decisions allow for some spring monitoring to be suspended.



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M.O. 17/2020

WHEREAS the Lieutenant Governor in Council made Order in Council 080/2020 under section 52.1(1) of the *Public Health Act* (PHA) on March 17, 2020 declaring a state of public health emergency in Alberta due to pandemic COVID-19 and the significant likelihood of pandemic influenza.

WHEREAS Order in Council 080/2020 has effect for 90 days following March 17, 2020 under section 52.8(1)(a) of the PHA.

WHEREAS section 52.1(3) of the PHA authorizes the Minister of Health/the Minister responsible for an enactment (Minister), to make an order without consultation, to suspend or modify the application or operation of all or part of an enactment, subject to the terms and conditions the Minister prescribes, if the Minister is satisfied that the application or operation of all or part of the enactment is not in the public interest.

WHEREAS I am satisfied that the application or operation of parts of the *Environmental Protection and Enhancement Act*, the *Water Act*, and the *Public Lands Act* are not in the public interest in specific circumstances.

WHEREAS there is hardship in having to comply with routine reporting requirements pursuant to the terms and conditions of approvals, registrations, licenses and dispositions during this public health emergency.

THEREFORE, I, Jason Nixon, Minister of Environment and Parks, pursuant to section 52.1(2) of the *Public Health Act*, do hereby order:

The operation of the *Environmental Protection and Enhancement Act*, the *Water Act*, and the *Public Lands Act* is modified to the extent necessary to give effect to the following:

1. *Environmental Protection and Enhancement Act*

Excepting in the case of drinking water facilities, all requirements to report information pursuant to provisions in approvals or registrations are suspended.

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Questions?

- What is the interpretation of ‘Essential Service’ with respect to environmental work?
 - Definition different in each jurisdiction;
 - **Federal Guidance:** <https://www.publicsafety.gc.ca/cnt/ntnl-scr/crtcl-nfrstrctr/esf-sfe-en.aspx>;
 - Developed to assist provinces/territories in creating essential services – look to provincial/territorial requirements; and
 - Critical infrastructure and services to health, safety, security, or economic well-being of Canadians.

Questions?

- **Alberta's List of Essential Services:**
<https://www.alberta.ca/essential-services.aspx>
- **Examples of Non-restricted services**
 - Public safety and security - Environmental emergency response and regulatory enforcement.
 - Energy and Utilities - Coal, solar, wind and alternative energy facilities and staff.
 - Industrial - Businesses and services that:
 - Support security and the safe and reliable operations of high-risk sites and facilities; and/or
 - Supply products to the mining and mineral production and distribution sector.
 - Petroleum, natural gas and coal - Operations for maintenance and emergency response.
 - Other Essential Services:
 - Professional services including lawyers and paralegals, engineers, accountants, translators.
 - Businesses that support the safe operations of residences and essential businesses.
 - Environmental services for agriculture, mining, oil and gas.

Questions?

- What is the current direction from AEP and AER?
 - Comments based on publicly available information.
 - Interesting to see AEP and AER taking different approaches.
 - AEP – Ministerial Orders - reporting requirements delayed, compliance with approvals, and orders for monitoring required.
 - AER – AER Decisions - compliance with monitoring requirement suspended; some indefinitely, others skip spring monitoring.

Questions?

- Alberta Energy Regulator Decisions - May 20, 2020
 - Temporary suspension of some monitoring requirements for operators under the *Oil and Gas Conservation Act* and certain In Situ oil sands projects with *EPEA*, *Water Act*, and *Public Lands Act* approvals, permits, licenses.
 - Soil and groundwater monitoring under EPEA approvals suspended unless monitoring is necessary for protection of human health and ecological receptors.
 - VOC and RSC monitoring, fugitive emissions LDAR programs carried out by 3rd party, surface water quality testing (other than releases), lab testing for water releases (field measurements must be used), QAP Audits and Verifications, and wildlife monitoring.
 - <https://www.aer.ca/documents/decisions/2020/20200520A.pdf>
 - <https://www.aer.ca/documents/decisions/2020/20200520B.pdf>

Questions?

- Will there will be lenience for non-compliance?
 - Expect some lenience for non-compliance **but** will need to provide explanation of why and the plan to get back into compliance.
 - Consider reaching out to the regulator if expect that compliance can/will not be achieved.
 - “Because of COVID-19” will likely be insufficient.
 - For most environmental work, no reason that it cannot go forward by following public health workplace policies:
<https://www.alberta.ca/guidance-documents.aspx>
 - Misunderstanding of the orders internally as examples exist of AEP questioning non-reporting despite their orders.

Questions? We're here to help.



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