WHEN ODOUR ISSUES CAUSE HEADACHES: UNDERSTANDING THE LEGAL IMPLICATIONS OF A SMELLY OPERATION

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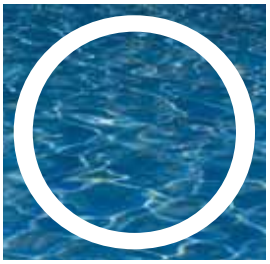

dour complaints can result in a variety of legal or regulatory actions against the owners and operators of a facility.

Where there are odour concerns, neighbours will put pressure on the Ministry of the Environment (MOE) to take action. Under pressure, the MOE will approach you to address the odour issues. This often leads to adversarial relationships all round – between operators, MOE, and neighbours. If neighbours perceive that insufficient actions are being taken and the odour issues are still present, they will be unhappy with MOE. When citizens are unhappy with MOE, MOE becomes unhappy with plant operators.

To avoid the spiral into conflict, the onus is on operators to engage neighbouring residents, businesses and often the local municipality. Creating a system where angry neighbours complain to the facility rather than to MOE is a good start and can avoid MOE enforcement actions.

Concerns about odour can lead to MOE orders, MOE prosecutions and, less frequently, civil claims from neighbours. New or expanding facilities may see their new or amended Environmental Compliance Approvals (ECA) challenged before the Environmental Review Tribunal (ERT).

MOE Orders

The MOE has powers under the *Environmental Protection Act* and the *Ontario Water Resources Act* to issue orders. This is the normal and traditional MOE response.

While facility operators often view regulatory orders with apprehension, a properly written and reasonable order offers some benefits. MOE orders can require the owner and operator of a facility to take steps to address odour issues, including installation of odour abatement technologies and reduced material intake or processing. Orders include deadlines for compliance.

Issuance of an MOE order will normally calm neighbouring complainants and buy time for the facility. An order will provide a process for addressing odours with timelines and local involvement. If the facility does not comply with timelines in the order, or if the odour mitigation measures do not work, expect neighbours to be back on the case.

MOE orders are not without risks to a facility operator. The work required for the order is generally not in the budget, objectives and time frames may be unrealistic, and MOE normally requires facilities to meet a one-odour unit limit. This can be an unrealistic and unattainable limit for many facilities with odour issues.

An order will normally require those people and companies named in the order to

- retain a consultant,
- commission a report that lists and evaluates odour control options,
- select a preferred option and provide a work plan for implementation, and
- provide the report to the MOE director, who will approve or amend and approve the work plan.

After the director approves the work plan, he or she will likely issue a new order requiring implementation, usually with a tight deadline. In our experience, it is generally easier to alter the terms of an order before it is issued. When the order is in draft form, you may be able to negotiate terms such as how odour is measured, whether or not an odour unit standard will be used and the deadlines for compliance.

Once an order is issued, you will need to decide whether to appeal the entire order, the timelines or a specific provision. There is a very short time period available to appeal orders. Appeals must be filed within 15 days.

MOE orders can be issued against the owner and operators, employees, and/or directors and officers. We are

increasingly seeing directors and officers named in orders.

Failure to comply with an MOE order can result in a prosecution.

MOE Prosecutions

In 2011, Halton Recycling Ltd. pled guilty to two counts for discharging odour into the natural environment that caused or was likely to cause an adverse effect under the *Environmental Protection Act*. This is the same Halton Recycling Ltd. facility that was the subject of a civil claim discussed later in this article. Halton Recycling Ltd. was fined $120,000 for the odour discharges.

The MOE can prosecute the owners and operators of a facility that emits odours where

- the odours are above the limits allowed in an Environmental Compliance Approval,
- there are complaints from neighbours, and/or
- an MOE order is not complied with.

Under some circumstances, employees of a facility and the officers and directors of the owner and operator can also be prosecuted.

Prosecutions can result in fines and in some cases, jail time.

Civil Claims

Civil claims by neighbours for odour problems are rare. Municipalities are more likely to take legal action.

The classic Canadian case on private nuisance and odour is *Appleby v. Erie Tobacco Co.*, decided in 1910. Appleby, a neighbouring resident, sought an injunction. The odours were described as sickening, offensive and nauseating. The Ontario Court of Appeal granted the injunction, but allowed a six-month stay of the injunction to allow the company time to abate the odour.

There may also be a claim for public nuisance. In 2009, the Ontario Superior Court found that an organics compost facility was creating a public nuisance. In *Newmarket (Town) v. Halton Recycling Ltd.*, the Town of Newmarket brought a claim against Halton Recycling Ltd. under the *Municipal Act, 2001* seeking an injunction against the composting facility. The *Municipal Act, 2001* allows a municipality to apply for a two-year injunction where the court finds there is a public nuisance. The test for establishing a public nuisance requires a detrimental impact on the use and enjoyment of property and the facility must have failed to take adequate steps to eliminate the nuisance.

In the *Newmarket* case, the Court found that Halton Recycling Ltd. was creating a public nuisance by interfering with the use and enjoyment of property. The Court issued a nine-month injunction, but stated that the injunction would be stayed if Halton Recycling Ltd. could eliminate the odour issues within 90 days.

Appeals to the Environmental Review Tribunal

Where MOE believes that there is a risk of odour-based adverse effects, MOE will likely seek to impose a one-odour unit standard in the ECA. You must assess your ability to comply with this limit. There is usually some limited room for negotiation of the stringency and timing of the standard.

If negotiation is unsuccessful – and you feel that the condition of approval puts your facility in an impossible situation – you will need to appeal.

Neighbours may seek leave to appeal the MOE approval to the Environmental Review Tribunal. If leave to appeal is granted, this approval is automatically suspended until the ERT hearing has concluded.

Avoiding the Headache

Ensuring a proactive program is in place to engage with the local community and address odour issues as they arise is the best strategy to avoid legal or regulatory action. It is almost always advantageous to work with neighbours and the MOE prior to receiving a claim, order, summons or Notice of Appeal to the ERT. ♦

What is an odour unit?

Odour units are a measure of an individual's ability to perceive an odour.

Odour units are established using a panel of trained observers, who have been tested to ensure they have an average sensitivity to odours. The lab will subject each tester to a series of decreasing dilutions of the original odour sample. The lab will gradually increase the concentration until half the panelists can detect an odour, without being able to distinguish it. The other half will still be unable to perceive the odour. This is the perception threshold and establishes the concentration for one odour unit.

A recent case decided by the British Columbia Environmental Appeal Board, *West Coast Reduction Ltd. v. Greater Vancouver (Regional District)* has questioned the reliability of odour units as the basis for a compliance standard for legally enforceable conditions (such as those in an order or ECA).

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