How Courts Decide on Due Diligence in Environmental Prosecutions

The key factors that determine liability for an environmental offence.

Waterfowl died after landing on an Alberta oil company's tailing pond containing hazardous substances, including bitumen. The company was convicted of violations of federal and Alberta environmental law for failing to store a hazardous substance so that it didn't come into contact with animals. The court rejected the company's due diligence defence, ruling that it failed to take all reasonable steps to prevent waterfowl from contacting the hazardous substances [*R. v. Syncrude Canada Ltd.*, [2010] ABPC 229 (CanLII), June 25, 2010].

THE COMPLIANCE CHALLENGE

A company charged with violating an environmental law can avoid liability by showing that it exercised 'due diligence"that is, took all reasonable steps to comply with the law and prevent the violation. One of the best ways to make informed decisions about the specific measures required to establish due diligence is to review what other companies did right and wrong in actual court cases in which due diligence was the decisive issue. The *Syncrude* case is an excellent example of what courts look at in deciding if a

company exercised due diligence in the particular circumstances.

THE EXPLANATION

Due diligence is a concept, not a specific formula. More precisely, it’s a legal defence used in prosecution for an environmental offence. The question of whether a defendant exercised due diligence gets answered one case at a time on the basis of the specific facts involved. And no 2 cases are ever exactly the same. But what all due diligence cases do have in common are the factors the courts look at to evaluate a company’s due diligence defence. All of these factors played a role in the *Syncrude* case, including:

Gravity of the environmental effect. The more severe the potential harm from non-compliance, the greater the efforts a company must make to prevent it. The court said that severe contamination with bitumen has deadly consequences for waterfowl and even relatively mild contamination can have serious long-term adverse consequences.

Complexity of compliance. Experts at the trial testified that deterring birds from the tailings pond is complex, requiring a high level of expertise. For example, the pond in question was the size of about 640 football fields and located under major migratory flyways. The court concluded that the company needed expertise to effectively manage the risk to wildlife. But the team that was overseeing the bird deterrence program had no formal training in managing wildlife.

Preventive system. The company had planned to implement a system to deter birds using sound cannons and human effigies starting April 1, depending on the weather and arrival of birds. But when the birds landed on the pond on April 28, the sound cannons hadn’t yet been deployed on the pond’s perimeter. In addition, the company didn’t have enough cannons to space them 240 metres apart as called for by its plan.

Alternative solutions. The court found that there was ‘no real industry standard for bird deterrence.’ But it noted that oversight of the bird deterrence system by people with appropriate training, more comprehensive written procedures and earlier implementation of the system were ‘reasonable and feasible alternatives’ to the company’s approach.

Foreseeability of incident. The company argued that the incident was unforeseeable because unusual weather conditions prevented it from deploying its bird deterrence system earlier. But the court wasn’t swayed. Adverse weather in early April isn’t uncommon. Plus, bad weather makes it *more* likely that birds will land. So, the company should have anticipated that bad weather might occur and deployed the deterrence system earlier.

Bottom Line: The court concluded that the company didn’t establish a proper system to ensure that wildlife wouldn’t be contaminated in the tailings pond or take reasonable steps to ensure the effective operation of that system.

THE ENVIRONMENTAL COMPLIANCE TAKEAWAY

As the court in *Syncrude* said, companies aren’t required to show that they took **all** possible steps to avoid liability or to ‘achieve a standard of perfection or show superhuman efforts.’ They are, however, required to prove that they have proper EHS systems and that they took all reasonable steps to ensure the effective operation of these systems. Thus, it’s incumbent upon you, as EHS coordinators, and your officers and directors to ensure that the company has an EHS system and that it works effectively to comply with all environmental requirements and adequately protect the environment.