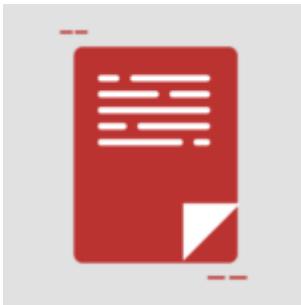


Seven Ways to Minimize Fines for the Environmental Violations You Commit



Environmental violations get companies into trouble. Just how much trouble? It depends, in part, on what they do after the violation. By taking "mitigating" measures, you may be able to limit the damage to both the environment and your liability.

How Sentencing for Environmental Violations Works

The sentencing guidelines courts use to determine how much to fine companies convicted of environmental and other offences incorporate both "aggravating" factors calling for a harsher penalty and "mitigating" factors calling for leniency. Examples of the latter include actions by company officials that demonstrate genuine remorse, commitment to containing environmental damage and making restitution to victims and efforts to identify and correct the problem to prevent recurrence.

1. Assembling a Response Team

First, assemble a team to assess and respond to the

situation. The response team can't be just a showcase body. It should include individuals with the expertise necessary to assess the technical aspects of the problem, as well as senior company officials with authority to incur corporate expenses and direct staff and other resources to initiate response and long-term corrective measures.

Example: A British Columbia shopping center development company pleaded guilty to depositing silt into waters populated by fish in violation of the *Fisheries Act*. Rather than the \$100,000 the prosecutor requested, the court imposed a fine of only \$40,000, citing the center's immediate hiring of experts to develop short-term remedial actions as well as permanent, structural changes to its environmental program [[R. v. First Prince George Developments Ltd.](#), 2006 BCPC 231 (CanLII)].

2. Getting Corporate Leaders Directly Involved

Generally, senior management's responsibility is to oversee and not get involved in the day-to-day details of running the Environmental Health and Safety (EHS) program. But things change when a company discovers an environmental offence. "The message needs to be sent that the company considers the offence a matter of utmost importance justifying the personal involvement of officials at the most senior level," according to an Ontario environmental consultant. Recommended actions that at least one senior official should take:

- Serving on the response team.
- Promptly issuing internal communications expressing the company's concern about and determination to rectify the situation.
- Communicating personally and directly with the regulatory authorities.
- Attending court when and if the matter goes to trial or

a sentencing hearing.

Example: A British Columbia court lauded the president of the company for personally appearing in court "to express genuine regret and the company's future plans to avoid a repetition" in handing down a relatively light sentence (\$80,000) for illegal discharge of 275 kg. of fish oil into fish-populated waters in violation of the *Waste Management Act* [[*R. v. Ewos Canada Ltd.*](#), 2000 BCPC 87 (CanLII)].

3. Reporting Violations and Cooperating with Authorities

The worst thing a company can do is try to conceal or cover up the violation. The second worst is to sit back and wait for the government to ask questions before providing information about the incident. It's imperative not only to let the government know what happened but also to explain what the company is doing to prevent further damage. Ask regulatory officials for input and consult them on actions to take. Keep records documenting how quickly you responded to an incident. "It's a huge advantage to be able to call your EHS coordinator as a witness to testify that he was on the phone with regulators within 60 minutes after the incident occurred," notes an Ontario lawyer.

Caveat: Don't be hasty. Consult your lawyers before contacting public officials for advice on avoiding self-incriminating statements, keeping documents confidential, and protecting other important legal rights.

4. Investigating and Holding Employees Accountable

Launch an internal investigation to determine why the violation occurred. Be prepared to discipline any employees

whose misconduct caused or contributed to the violation. "By holding staff accountable you demonstrate genuine remorse," according to an Alberta consultant.

Caveat: The internal investigation should be fair and not a witch hunt or exercise in scapegoating. Be open to the possibility that the employee committed not a deliberate violation but an innocent mistake. In that case, the problem might lie with your training, policies, or procedures, and you'll need to make corrections to ensure that other employees don't make the same mistake in the future.

5. Mobilizing Your Contractors and Other Agents

Identify any contractors, consultants, business partners, or other outsiders who might have been involved. Were any contractors or subcontractors doing the work that led to the offence? Did any consultants or engineers provide advice about the environmental implications of the work? The immediate need is to involve any culpable outside parties you identify in your mitigation efforts. Going forward, you should also review your agreements and make any modifications necessary to ensure they require contractors to comply with all environmental laws and participate in efforts to remediate damage.

6. Offering Restitution to Victims

One of the best ways to demonstrate genuine remorse for an environmental offence is to offer not only apologies but real help to the victims. That might include covering costs the victim incurs as a result of the offence.

Example: An Alberta court found that a company's willingness

to clean up an affected site "at its own expense" and voluntary agreement to pay "all costs associated" with the violations was a mitigating factor calling for a lower fine for an environmental violation [[*R. v. Terroco Industries, Ltd.*](#), 2005 ABCA 141 (CanLII), 2005 ABCA 141].

Example: A British Columbia court handed down a \$30,000 fine for an oil spill in violation of *Migratory Birds Regulations* carrying at the time, a maximum \$100,000 fine, citing as a mitigating factor the fact that the company covered the costs of emergency response measures taken by the BC Wildlife Rescue Association to contain the spill [[*R. v. Neptune Bulk Terminals \(Canada\) Ltd.*](#), 2001 BCPC 64 (CanLII)].

7. Addressing the Problems in Your EHS Program

Upon completing your internal investigation, take concrete steps to address the problems you identify to ensure that whatever went wrong doesn't happen again. That may include a combination of engineering and administrative measures such as improving containment systems, emergency response procedures, and training. Keep records documenting that you immediately revised your policies and training programs in response to weaknesses brought to light by the incident.

Takeaway

One more thing to consider: The longer a company waits to respond to the violation, the bigger the fine is likely to be. Conversely, judges usually reward companies that react quickly to fix the problem and contain the damage. So, as an EHS coordinator, you may need to light a fire under your company's officials and impress upon them the need to act fast to minimize the company's liability exposure.

Checklist For Responding To Environmental Offences

A. Assemble Response Team

- ☐ Assemble a team of experts (senior executives and technical experts).
- ☐ Investigate cause and extent of problem.
- ☐ Assess severity of the offence and harm caused.
- ☐ Develop short- and long-term remedial action plans.
- ☐ Communicate response and remedial action plans to Board and senior management.

B. Upper Management Participation

- ☐ Issue press release and/or hold press conference.
- ☐ Direct communication with authorities.
- ☐ Written communication or internal meeting discussing company response.
- ☐ Senior executives' court appearance.
- ☐ Community outreach or public relations efforts to keep public informed.

C. Communication with Authorities

- ☐ Voluntarily report incident (after consulting counsel).
- ☐ Express company's commitment to cooperate.
- ☐ Designate contact person to liaise with authorities.
- ☐ Solicit government feedback on appropriate remedial

actions.

- Inform authorities of progress of remediation efforts.
- Document all oral communication with authorities and maintain copies of written communications.
- Obtain legal advice.

D. Mobilization of Contractors, Employees & Agents

- Assess role of internal employees or outside entities in causing and remediating incident.
- Review contracts with outside contractors relevant to incident.
- Send written message to contractors about need to mitigate damage.
- Revise contracts as needed to address incident and response plan and prevent recurrence.
- Discipline employees involved, if appropriate.

E. System Improvements

- Review company policies relevant to incident.
- If appropriate, revise policies to prevent recurrence.
- Educate employees about incident and/or changes to policies.
- Review and, if necessary, correct employee training program and materials.
- Implement necessary engineering controls.
- Document all actions relevant to incident, response, and

remedial action.

7 Ways To 'Mitigate' Environmental Offences

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1. Assembling a Response Team.
2. Directly Involving High Corporate Officials.
3. Reporting Violation & Cooperating with Authorities.
4. Holding Employees Accountable.
5. Involving Contractors in Response.
6. Offering Restitution to Victims.
7. Identifying & Fixing Problems to Prevent Recurrences.