



## **Health, Safety and Environment: The Key Differences Between Environmental and Occupational Health and Safety Investigations**

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Recent provincial and federal regulatory developments in the environmental and occupational health and safety (“OHS”) fields have combined to create a new enforcement reality in Alberta; one that is particularly focused upon the oil sands industry, but by no means limited only to those operators. Intensifying public and media scrutiny of regulatory issues have lead those who monitor, investigate and prosecute environmental and OHS offences to increase their capacities. Statutory changes have also dictated a more aggressive regulatory enforcement regime, along with significantly increased penalties for infractions.

All of this will have a direct impact on operators’ bottom lines, in terms both financial and reputational. Accordingly, prudent operators within the oil sands industry and other resource extraction, construction, or heavy industry in Alberta, are well-advised to understand their regulatory obligations, carefully prepare and implement appropriate management systems, and conscientiously train their employees to execute those systems. However, while prevention is always the preferred approach, a prudent operator should also understand and prepare for the worst, by designing and implementing response planning for investigations.

There are many similarities between investigations under environmental regulatory statutes and OHS legislation. However, there are also some critical differences and it is important for Health, Safety and Environment (“HSE”) managers and professionals to understand and appreciate those distinctions, in order to respond appropriately depending on the nature of the investigation.

In this article, we will briefly outline seven critical distinctions between environmental and OHS investigations which HSE managers should understand, appreciate and incorporate into their investigation response planning and preparation.

### **1. Differences in the Enabling Statutes**

Environmental and OHS investigations and inspections are authorized by different statutes. The powers that an investigator or inspector has are determined by the scope of the statute that authorizes their investigation or inspection. For instance, powers to enter premises, seize property, and so on are dictated in large part by the relevant statute. Accordingly, it is critical to understand the statute that authorizes the particular investigation or inspection, and what limits may be placed upon the investigator or inspector. In addition, understanding the reason for the site visit is equally important. A general inspection is to ensure regulatory compliance. On the other hand, an investigation is for the most part an assessment of fault.



In relation to OHS investigations or inspections, the powers of the OHS officer are vast. The powers available under inspections and investigations are very similar, and have overlapping authority. In general, they allow the OHS investigator or inspector to do the following:

- a. inspect any work site at a reasonable hour, or in terms of an accident investigation, attend the scene of the accident and make inquiries to determine the cause of the accident and the circumstances relating to the accident;
- b. except medical reports or records, an OHS officer may require the production of any records, books, plans, or any other documents that relate to the health or safety of workers and may examine them, make copies of them or remove them temporarily for the purpose of making copies;
- c. inspect, seize or take samples of any material, product, tool, appliance or equipment being produced, used or found on the work site that is being inspected or in the context of investigating an accident, involved in or related to the accident;
- d. interview and obtain statements from anyone at the worksite and, in the context of investigating an accident, every person present at an accident when it occurred or who has information relating to the accident shall, on the request of an inspector, provide any information respecting the accident that the inspector requests.

Environmental inspectors and investigators similarly have broad powers, although as there are numerous authorizing statutes that could potentially apply and numerous agencies providing inspectors and investigators, the powers may vary somewhat (for instance, Alberta Environment investigators empowered under the *Environmental Protection and Enhancement Act* or the *Water Act*, or federal investigators under fisheries, endangered species, or migratory birds statutes). Generally, however, the powers are similarly broad as OHS investigators or inspectors, and are similarly differentiated as between inspections for the purpose of ensuring compliance, and investigations for the purpose of assessing fault in the aftermath of an offence or approval violation. Further, in the environmental context these powers are in most cases backstopped by a statutory obligation to cooperate, unlike OHS legislation.

## **2. Different Investigating Agency**

Although it may seem trite, environmental investigations and OHS investigations are conducted by different agencies, with different personnel and different policies and procedures. Accordingly, having an understanding of these distinctions is critical.

A major distinction between an environmental and an OHS incident is the possibility (in some cases likelihood) of managing multiple investigations relating to the same incident. The environmental regulatory agencies involved vary not only based on whether the incident is environmental or OHS in nature, but also by jurisdiction and statutory authority. Understanding these differences is fundamental to the investigative process as distinctions can be significant and requirements many.



For example, if a release of a potentially adverse substance occurs into a watercourse in Alberta, the operator may be required to deal with municipal, multiple provincial, and multiple federal authorities, or even another country's regulators, depending on the nature and location of the waterway, and the substance released. Hypothetically, investigations could be conducted separately by Alberta Environment, the primary environmental regulator in Alberta, and federal fisheries regulators if the water is frequented by fish, or by other regulators if the incident involved a licenced well (provincial) or impacted on migratory birds or endangered species (federal). Other provincial and federal regulators, as well as municipal bylaw officers, could potentially become involved depending on the circumstances. Fortunately, in Alberta the principal federal and provincial environmental regulators (in particular Alberta Environment and Environment Canada) share a common reporting call centre so incidents can generally be reported simultaneously.

In contrast, if an OHS incident occurs at the same location, it is likely that only one provincial authority or one federal authority must be contacted and dealt with. This is entirely dependent on whether the OHS incident triggers the reporting requirement in the first place.

### **3. Investigative Team**

The early establishment of your investigative team is very important. These team members will, in many respects, be similar for both environmental and OHS matters. Two particular investigative team members are sometimes missed in both environmental and OHS matters: technical experts and legal counsel.

Depending on the specific incident, special knowledge may be needed in an investigation. The reasons for including such a member are many – new process, suspected equipment failure, use of hazardous material, a complex situation, need for sampling and testing, and many others. Whatever the reason, a technical expert may need to be retained. Retention of a technical expert should be sought early in the investigative process as he or she may require specific evidence, not necessarily considered by the rest of the investigation team, to perform his or her work. As such, if the scene is disturbed or the evidence is gathered inappropriately, the use of a technical expert may be limited or even lost entirely. Limiting or losing an opportunity to use a technical expert can be troublesome, especially if the evidence gathered is fundamental to a future defence.

One other member of the investigative team that is often overlooked is legal counsel. There are two benefits to retaining legal counsel. First is the establishment and maintenance of privilege. There is no distinction between establishing and maintaining privilege in an environmental or OHS context. Once privilege has been established, it protects certain information from being disclosed to third parties, like government investigators or even Crown Prosecutors. Depending on the nature of the evidence, this could be very important to any defence. However, privilege can be lost, and so having experienced regulatory counsel on your team will enable the team to receive competent advice on the maintenance and preservation of privilege.

A second advantage to retaining appropriate legal counsel as part of your investigative team is experience. Legal counsel who specialize in OHS or environmental investigative process can assist the investigative team in identifying all post-incident legislative obligations, dealing with government



investigators, gathering and properly preserving evidence, and properly framing and disclosing findings of the investigative team.

#### **4. The Warrant**

A significant difference between environmental and OHS investigations lies in the use of search warrants authorizing entry into premises, search and seizure. While employed in the environmental context, in particular by federal regulators, search warrants are very rarely encountered in OHS investigations.

In the event that a search is authorized by a warrant, it is critical that counsel for the investigated party be able to review and assess the terms of the warrant as soon as possible. As the warrant is the foundation upon which the authority to enter the premises, search and seize is based, it provides parameters within which the investigative agency must operate. Understanding those parameters, in consultation between the site coordinator (discussed further under the next subheading) and legal counsel, is critical and may lead to future opportunities to disqualify improperly seized evidence.

#### **5. Role of Site Personnel**

In the environmental context, our recommendation is generally that the designated environmental site coordinator be identified and made known to all employees well in advance of any potential investigation. This should be accomplished through the use of an environmental investigation response plan. Further, we recommend in the environmental investigation context that the government investigator be accompanied by the environmental site coordinator or another person familiar with site operations. In our view, this is important to ensuring that the operator remains apprised of materials testing and sampling done by the investigator. Also, it is essential that the site coordinator ensure that the investigator abide by all safety policies and procedures of the operator's site. In the event that the search is authorized by a warrant, the site coordinator should carefully review the terms and parameters of the warrant, and discuss them as soon as possible with legal counsel, to ensure that unauthorized seizure does not occur.

In the OHS context, our advice varies little from environmental investigations. However, in this context, statements from the injured worker, workers in the area where the incident occurred, and/or workers with certain technical skills are extremely important to understanding how the incident occurred. Given this importance, a site coordinator's role, inclusive of everything above, is to keep track of who the government investigator is interviewing or even talking to. We usually recommend to our clients that they follow up with these workers to find out what information they conveyed to the investigator or what questions the investigator asked. This is one of the best ways, early on in the investigative process, to understand what direction the investigator is taking his or her investigation. Similarly, pictures are equally important: including confirming the same direction, angle, and so on.

In general, and in either context, it is important to be aware of everything that the government investigator identifies or missed. This requires diligent efforts by the site coordinator to understand what information the investigator has collected.



## 6. First Response

In the context of an environmental emergency, our recommendation is that immediate safety concerns be dealt with, then emergency contacts called while efforts are made to limit or contain the environmental impact of the incident, with a secondary concern relating to securing the incident scene for the investigator's review. The key is to avoid firstly any injuries, and secondly to the extent possible, to contain or manage any environmental damage.

By contrast, in the context of an OHS incident, the injury or loss has already occurred. In that event, the focus in the immediate aftermath is on the prevention of any further injuries, and then securing the incident scene. In many cases, proper preservation of the incident scene is essential to understanding how the incident occurred. Understanding the circumstances of the incident is fundamental to any future corrective action and identifying liability.

## 7. Legal Representation During Investigator Interviews

Legal representation while being interviewed by an investigator is a controversial issue. Currently, a court in Alberta has ruled that you do not have a right to legal counsel while you give a statement to an OHS investigator. The reasoning provided by the Alberta court is that even though the OHS legislation does not express this specific authority, the agency responsible for monitoring the OHS legislation, Alberta Workplace Health and Safety, has the jurisdiction to govern its interview process -This includes the ability to exclude legal counsel from interviews. This is a concern because of issues of self incrimination and a person's right to legal counsel. The Alberta court recognized these concerns and stated the gathering of information in the course of an OHS investigation does not violate any personal rights of the interviewee. Once more, this is a controversial issue and will likely be litigated again in the future.

The ruling provided by the Alberta court may not affect investigative practices in other provinces, as OHS legislation differs from province to province. However, this is a very persuasive ruling and should not be overlooked or underestimated.

In the environmental investigation context, a common issue which arises is whether company counsel may observe employee interviews conducted by government investigators. Historically, as a matter of practice and convenience, counsel for the company was allowed to sit in and observe the investigator's interviews of employees of the investigated company. However, the trend in recent years by some environmental investigative agencies is to insist that the employee be interviewed alone, or in the presence of their own (as opposed to company) counsel only if the employee may be subject to personal liability. It appears that overall, the ability for interviewees to have counsel present is significantly lessening.

These are some differences between an environmental investigation and an OHS investigation. However, every investigation is different and should be approached accordingly. Whether it is developing and implementing controls to prevent future occurrences, or possibly defending yourself or your organization from charges, everything rests on the quality of your initial investigation.