



When things go south, where does the liability fall?

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Overview

- Overview of the *Integrated Pest Management Act* (IPMA)
- Compliance under the IPMA
 - Role of Due Diligence
- Prohibitions and Offences under the IPMA
- Environmental Appeal Board Decisions

Overview of the IPMA

- In 2004, the *Pesticide Control Act* was repealed and replaced with the *Integrated Pest Management Act*
 - Regulates the sale, storage, disposal, transport and use of pesticides as well as the training and certification of individual applicators and dispensers.
- The IPMA incorporates principles of ‘integrated pest management’ as opposed to focusing only on pesticide control

Recent Amendments to IPMA

- S. 11 – Inspectors
 - Broaden the information a person subject to the IPMA must provide an inspector during compliance audit
- S. 23 – Administrative Penalties
 - Shift in language from “issuing an administrative penalty notice” to “making a determination” to pay an administrative penalty
- S. 26 – Offences and Penalties
 - Remove requirement for act to be “intentional” to be an offence

Compliance – Inspections

- Inspections are compliance and enforcement tool under IPMA
- Inspector may enter land or premises for purposes of ensuring compliance at any reasonable time if inspector has reasonable grounds to believe that:
 - Pesticide is located on or in the land or premises
 - The land or premises is the site of an activity for which a licence, certificate, permit or confirmation is required
 - A container or equipment that is or may be used for pesticide is located on the land or premises

Compliance – Inspections

- Inspectors have broad powers, for example:
 - Investigate the manner in which a pesticide has been, is being or may be used, sold, stored, transported or disposed of
 - Inspect records that relate to a pest management plan or the use, sale, storage, transportation or disposal of a pesticide
 - Take away a sample of anything; take photographs or make audio or video records
 - Record or copy any information related to the use, manner of application, storage, sale, transport or disposal of pesticide
 - Make seizure and prevention orders

Duty of Persons Being Inspected

- A person who is or was a director, receiver, receiver manager, officer, employee, banker, auditor or agent of a person who is the subject of an inspection under this section must, on the request of the inspector:
 - Produce for examination any licence, certificate, permit, pest management plan, confirmation or record of pesticide use or sale, and any other record
 - Provide the inspector with information relevant to the purposes of the inspection.
- A person must not interfere with an inspector's rights of entry and inspection
- On the request of an inspector, a person on the land, premises or vehicle and who the inspector reasonably believes is involved in the use, activity or equipment being inspected must provide proof of identity

Administrative Penalties

- Administrator can serve determination requiring person to pay administrative penalty if administrator is satisfied, on balance of probabilities, that person has:
 - Contravened prescribed provision of the IPMA or regulations
 - Failed to comply with order under the IPMA
 - Failed to comply with a requirement of a licence, certificate, or permit issued or pesticide use notice given
- Administrator and person liable for penalty can enter agreement that reduces or cancels penalties subject to terms and conditions administrator considers necessary or desirable
 - This agreement cannot be appealed

Administrative Penalties

- Before making a determination in respect of alleged contravention or failure, administrator must provide written notice and provide person with opportunity to make representations
 - Notice must include description of circumstances that gave rise to alleged contravention or failure
 - Person has 30 days to make request to provide representations
 - Administrator will then conduct written or oral hearing
- Administrator will then make a determination that includes reasons for the decision and amount of the penalty
- List of factors that go into determining the amount of administrative penalty in *Administrative Penalties Regulation* (s. 7)
 - Maximum penalty is based on provision of the IPMA and regulations contravened
 - Maximum penalty: \$75,000 (contravention of s. 3(1)(a) of the IPMA)

Administrative Penalties

- Prosecution for an offence cannot be brought for the same contravention or failure on which an administrative penalty is based (and vice versa)

Role of Due Diligence

- A requirement that a person pay an administrative penalty applies even if the person exercised due diligence to prevent the contravention or failure
- But, whether the person issued the penalty exercised due diligence is a factor in considering the amount of the administrative penalty

What is Due Diligence

- Two paths to due diligence:
 - The person reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent
 - The person took all reasonable steps to avoid the particular event

Due Diligence Factors

- To determine whether a due diligence standard has been met, the decision-maker will consider:
 - The preventative systems in place
 - The industry standards
 - Matters beyond the control of the accused
 - The foreseeability of the incident or harm

Corporate Due Diligence Systems

- Strong documentation is key to establishing due diligence
- To be effective, due diligence systems will generally include:
 - Written programs and policies, general and specific
 - Active steps to control and address issues
 - Training and testing to ensure employees understand policies and procedures
 - Follow up and supervision of employees
 - Discipline employees (through measures ranging from retraining to termination) for non-compliance and rewarding employee for performance
- An effective management system should include reminders, accurate record keeping, audits, and initiatives to review policies

Documents for Due Diligence

- Types of documents that can support or undermine a due diligence defence include:
 - Orientation Records
 - Worker and Supervisor training records
 - Regulatory meeting minutes / Crew talk meeting minutes
 - Copies of Inspection Reports
 - Internal investigations and corrective actions
 - Supervisor notes and logs
 - Observations
 - Records of progressive discipline to regulatory compliance
 - Committee minutes
 - Equipment logs
 - Forms and Checklists
 - Rules and Procedures (and amendments made to Rules and Procedures)
 - Statistics on frequency and severity of incidents
 - Statistics on frequency of employee training
 - Audit Reports and statistics

Disproving Due Diligence

- Incomplete systems and missing elements
- Lack of policies
- Poor hazard identification and written procedures
- Inadequate training
- Failure to follow-up and audit compliance
- Past record of violations and non-compliance
- Implementation failures
- Not following company policy
- Fail to identify hazard
- Fail to implement training
- The person put in charge not capable because of lack of education, experience or training
- Stale – no improvement

Offences under the IPMA

- There are both specific and general offences under the IPMA
- Specific offences include:
 - Using a pesticide that causes or is likely to cause an unreasonable adverse effect
 - Selling or using a pesticide without the required licence
 - Using or authorizing the use of a prescribed pesticide without a pest management plan and pesticide use notice
 - Interfering with an inspector's rights of entry and inspection
- General offences include:
 - Obstructing, hindering or resisting the exercise of powers or duties under the IPMA
 - Failing to comply with an order under the IPMA
 - Making false statements or misleading the Administrator, an inspector, or the Appeal Board in the exercise of their powers or duties under the IPMA

Liability under the IPMA

- The IPMA distinguishes between offences committed by individuals and corporations
- Each carry separate penalties under section 26 of IPMA
 - An **individual** who is convicted of an offence under this Act is liable to a fine of not more than \$200 000 or to imprisonment for 6 months, or to both, and if convicted of a subsequent similar offence, to a fine of not more than \$400 000 or to imprisonment for 6 months, or to both
 - A **corporation** that is convicted of an offence under this Act is liable to a fine of not more than \$400 000, and if convicted of a subsequent similar offence, to a fine of not more than \$800 000

Liability under the IPMA

- For offences committed by corporations, the employee, officer, director or agent who authorized, permitted or acquiesced in the offence commits the offence, whether or not the corporation is convicted
- It is sufficient proof of the offence to establish that the offence was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless:
 - The accused establishes that the offence was committed without the accused's knowledge or consent or
 - That the accused exercised all due diligence to prevent the commission of the offence.

Appeals under the IPMA

- Statutory right of appeal that allows for any “decision” to be appealed to the Environmental Appeal Board, who has the prescribed power to either:
 - Send the matter back down for review, with directions;
 - Confirm, reverse or vary the decision being appealed; and
 - Make any decision that the person whose decision is appealed could have made, and that the board considered appropriate in the circumstances.
- “Decision” is a defined term and includes revoking a licence, specifying terms and conditions in a licence, and imposing an administrative penalty
- 30 day time limit to commence an appeal

EAB Decisions

Robert Todd Lang v. Administrator, IPMA

- Certified applicator hired to treat invasive weeds on a private property
 - Hot temperatures combined with the pesticide mix rate contributed to a vapour drift to the adjacent properties and caused damage to vineyard and trees
- Administrator determined applicator had contravened s. 3(1)(a) and (c) of the IPMA; issued administrative penalty of \$3,500
- Applicator appealed to Environmental Appeal Board
- Applicator and Administrator reached negotiated agreement, effected through consent order
 - Contravention of s. 3(1)(a) only
 - Penalty reduced to \$3,200

EAB Decisions

Western Aerial Applications Ltd. v. Administrator, IPMA

- Herbicide application by helicopter on private lands followed by application of Rinsate to area outside of the permitted area
- The Administrator applied a penalty for applying pesticide outside the area where it was permitted to do so, contrary to section 6(1)
 - Administrator issued penalty of \$20,750
- On appeal, EAB upheld penalty amount
 - Nature of the contravention was “major”
 - Medium actual or potential adverse effects
 - Contravention not deliberate or repeated, no economic benefit
 - No due diligence, no attempts to correct contravention, insufficient steps to prevent recurrence

EAB Decisions

Caryl and Jeff Jones v. Administrator, IPMA (Minister of Forests and Range, Permit Holder)

- Administrator issued permit to BC Minister of Forests and Range to conduct up to four aerial applications of a pesticide over parts of Richmond to eradicate European gypsy moth population
- Jones' appealed to EAB, seeking rescission of permit
- EAB denied the appeal
 - Section 14 of Act does not allow appeal of issuance of the permit itself, but does allow appeal of terms and conditions in the permit
 - EAB then applied two part test to determine if terms and conditions were appropriate: (1) whether the conditions in the permit would have an adverse effect on humans, animals or the environment; and (2) if there will be an adverse effect, whether that adverse effect is reasonable based on a cost-benefit analysis
 - EAB held that there were no unreasonable adverse effects from the use of the pesticide because potential adverse effects did not outweigh potential harm to enviro and economy if gypsy moth population became established

EAB Decisions

Margaret Hurst v. Administrator, IPMA

- Ms. Hurst (a third party) requested that Administrator amend a pesticide user non-service licence to exclude the Koksilah River watershed from pesticide application
- Administrator refused to amend the licence and Ms. Hurst appealed to the EAB Appellant
- Board found that the Administrator's refusal to amend the licence upon Ms. Hurst's request was not appealable – not a “decision” under s. 14
 - IPMA does not grant the Administrator the authority to amend a license in response to an application by a third-party
 - IPMA only permits an Administrator to amend, or refuse to amend, a license on application by the permit holder or on their own initiative

Questions?



THANK YOU FOR LISTENING



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