

# Environmental Tools:

## Legal Liability (Statutory Liability)

### What is legal liability?

Legal liability can be an effective approach to resolving environmental issues and minimizing environmental impacts by making polluters responsible for the damage their activities cause to the environment. The purpose of this tool is twofold: firstly it provides incentive for actors to make careful decisions in their operations as they relate to the natural environment; and second, it can provide a mechanism to compensate parties that are victims to environmental degradation.

Liability establishes a legal obligation for polluters that can be imposed through statutory or civil processes, providing a financial incentive to avoid harming the environment. The incentive is created when an entity recognizes the fiscal value of avoiding potential fines, sentences, court fees, and compensation and remediation costs from failing to comply with a jurisdiction's environmental legal framework. By setting potential legal consequences, governments can encourage regulated organizations to take steps to plan their actions and operations to ensure compliance with environmental laws and thus avoid legal liability risks.

Those steps may include:

- Using the best available pollution abatement technologies;
- Developing environmental operating plans and procedures;
- Ensuring plans and procedures are implemented, for example, by having an environmental management system in place to monitor implementation;
- Implementing training for new and existing staff; or,
- Identifying a senior management position in charge of environmental policies and practices.

### Liability Types

- **Criminal** – liability arises from breach of statutes where prosecution can occur.
- **Civil** – liability arises from a statutory provision or common law.
- **Tort** – people may seek compensation for harm to their property or person.

The potential consequences of a federal or provincial court ruling of liability include damages, administrative penalties, fines, creative sentencing conditions imposed by a judge, compensation awards and jail time. Often the outcomes are publicized in newspapers and trade publications.

Criminal liability is generally spelled out very clearly. It is relatively easy for an entity to mitigate, or at least to plan for, the potential financial consequences. Government takes the lead in prosecuting statutory offences.

Civil law and tort law liabilities are very difficult to estimate in advance and to plan for. Individuals or governments may take the lead in prosecuting civil and tort law cases.

Liability under Alberta Environment's acts and regulations is joint and several (i.e. each party named in an order is responsible for 100 per cent of the costs to comply with the order, irrespective of their proportional share of the responsibility). Under the Alberta Energy and Utilities Board's acts and regulations, parties are held accountable for their share of the costs based on the portion of ownership.

### **Where is it used?**

The *Environmental Protection and Enhancement Act* and the *Water Act*:

- Identify offences that can result in fines and jail time. The maximum amount of the fine and the length of jail time are dependent on whether the offence was committed knowingly (*mens rea*) and whether the offender is an individual or a corporation.
- Provide for strict liability (i.e. the person is guilty of an offence without regard to whether the person acted negligently) for *mens rea* offenses and a due diligence defence for other offences.
- Provide a limitation period of two years from the date of the offence or the date on which evidence of the offence came to the attention of the Director within which a prosecution may be commenced.
- Provide for a court ordered fine in an amount equal to the court's estimation of the financial benefit obtained by commission of an offence. This fine is in addition to the fines noted above.
- Provide that no persons shall be convicted of an offence if they can demonstrate that they took all reasonable steps to prevent its commission (due diligence defense).
- Provide for the issuance of administrative penalties. A person who pays an administrative penalty may not be convicted of an offence in respect of the same contravention.
- Provide ability for government to recover any costs incurred while prosecuting and convicting the defendant.
- Provide for liability of directors, officers and agents of a corporation for an offence even if the corporation has not been convicted of the offence.
- Provide for liability of the corporation for acts done or omitted by a director, officer, official, employee or agent of that corporation.
- Provide that civil remedies available under common law or any other act of Parliament or of a provincial legislature are not affected by the fact the action is an offence or gives rise to a civil remedy under the act.
- Provide that any person who suffers loss or damage as a result of the conduct of an offence may sue for an amount equal to the loss or damage.
- Specify the nature and extent of court orders upon conviction of an offence. This provides for creative sentencing by a judge. Creative sentences to date have focused on providing funding for education and research designed to prevent future occurrences of the offence.

## **Tool Performance:**

### **Pros**

- Potential financial penalties and jail terms encourage better behavior.
- Transparent reporting of offences provides assurance to the public and warns regulated parties that environmental offences are taken seriously and will be dealt with.
- Liability is generally seen as fair because it directs the costs of environmental damage to those who caused it (“polluter pays” principle).

### **Cons**

- These tools are reactive in nature (i.e. the environmental damage has already occurred).
- There is significant cost for government to undertake prosecutions and for private citizens to undertake civil actions.
- If the public as a whole benefits from a cleaner environment, there is seldom a sufficient incentive for any individual to undertake the relevant litigation.
- Establishing the degree of environmental damage or personal and/or property harm, as well as the chain of causation, can be very complex, particularly if the damage develops over a long period.
- The maximum fines and jail terms can only be amended by a change to the acts, and are therefore inflexible in nature compared to other market-based instruments