

Recent Decisions on Odours

Air & Waste
Management
Association

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EPA - Contaminant (s. 1(1))

- “contaminant” means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect;

EPA – Adverse Effect (s. 1(1))

- “adverse effect” means one or more of,
 - impairment of the quality of the natural environment for any use that can be made of it
 - injury or damage to property or to plant or animal life
 - harm or material discomfort to any person
 - an adverse effect on the health of any person
 - impairment of the safety of any person
 - rendering any property or plant or animal life unfit for human use
 - loss of enjoyment of normal use of property, and
 - interference with the normal conduct of business;

EPA – ECAs required

- No person shall, except under and in accordance with an environmental compliance approval,
 - use, operate, construct, alter, extend or replace any plant, structure, equipment, apparatus, mechanism or thing that may discharge or from which may be discharged a contaminant into any part of the natural environment other than water; or
 - alter a process or rate of production with the result that a contaminant may be discharged into any part of the natural environment other than water or the rate or manner of discharge of a contaminant into any part of the natural environment other than water may be altered.

EPA – Prohibited Discharges (s. 14(1))

- Person shall not discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment, if the discharge causes or *may* cause an adverse effect

Newmarket v Halton Recycling (2006)

- Halton ran organic waste processing facility in Town
- 1,069 odour complaint between 2004 and 2006
- Halton had taken action to control odours - \$8M in 2003/2004
- About to implement final part of plan – had applied to MOE for C of A amendment
- Also needed Town building permit, etc.
- Town applied under s. 447.1 of Municipal Act to shut down plant for 2 years

Halton Recycling

- Court must be satisfied on a balance of probabilities that: (1)
 - activities constitute a public nuisance in vicinity of premises
 - public nuisance has detrimental impact on use and enjoyment of property in vicinity
 - owner knew or ought to have known that activities were taking place and did not take adequate steps to eliminate public nuisance

Halton Recycling – Detrimental Impact

- Includes:
 - trespass to property
 - interference with use of highways and other public places
 - increase in garbage, noise or traffic or creation of unusual traffic patterns
 - significant impact on property values
 - increase in harassment or intimidation
 - presence of graffiti

Evidence on Odours

- putrid, very foul, dirty, musty, and gross
- identifiable and unforgettable
- garbage-like odour, an earthy mixture of rotting material
- bad, putrid, pungent, sickening, horrendous, foul, obnoxious, smelling like feces
- caused gagging, penetrated homes spoiling meals and social events and use and enjoyment of homes
- garbage-like dump smell, disgusting, horrendous, once made eyes burn, frustrating, interfered with work, affected sleep

Halton Recycling - Decision

- Court ordered facility closed for 9 months
- Stayed order for 90 days to give Halton chance to meet C of A requirement of 1 odour unit based on Halton's expert's time frame
- Limited to 10 truckloads per week
- Leave to Halton to move to suspend or discharge order if Halton could show continued operations not likely to cause nuisance

Halton Recycling #2 (2007)

- Motion by Halton to suspend injunction
- At original application, town evidence that had received and processed building application and only now needed a signature
- Halton said that Town dragging feet in issuing building permit and also was withholding information.
- Court agreed
- Permanently suspended earlier closure order

West Coast (BC EAB 2010)

- Director has power to amend conditions of existing air permits where on reasonable and probable grounds it is considered necessary for protection of the Environment
- West Coast ran an animal by-products rendering operation since 1964
- In urban industrial area with nearby residential
- Director of Greater Vancouver Regional District imposed conditions regarding odour in an existing air approval
- Imposed limit based on odour units

West Coast – Air Contaminant

- Means substances emitted to air that
 - Injure or capable of injuring human health or safety, property or any life form
 - Interfere or capable of interfering with visibility or normal conduct of business
 - Causes or capable of causing material physical discomfort
 - Damages or capable of damaging environment
- Can't emit AC unless have permit

West Coast - Facts

- West Coast spent millions on odour control
- Reduced impacted area from 12 km² to 3 km²
- Community campaign to stop odours – posters urging to call Region when odours = dramatic increase in complaints
- Since 2006, permit required measurement of odours in odour units, but no limits
- Unpleasant, offensive
- Not all odours from West Coast

West Coast – Basis for Appeal

- West Coast appealed and argued no reasonable grounds to find necessary to protect environment since based solely on public complaints
- Odour not an Air Contaminant
- Introduced “odour units’ into BC w/o any consultation
- OUs were inappropriate compliance and enforcement standards given their subjective nature and lack of accuracy and precision

West Coast - Findings

- Reasonable person would not have found necessary for protection of environment and could not be properly determined based on complaints
- Really just an attempt to appease public, not protect environment
- Small number of people resulted in most complaints. No analysis of cause/sensitivity, spatial distribution, etc
- Odour is not air contaminant since not “substance” but is at least capable of causing material discomfort and can require measurement

West Coast – Findings – Odour Units

- Director had jurisdiction to impose new standard based on new concept into permit and doing so did not conflict with provincial jurisdiction
- Evidence was that OU is imprecise and subject to great variability: can't be accurately calculated
- Found OU “too flawed” to use for compliance purposes
- No credible support for assumption that sensitivity to n-butanol is proportional to sensitivity to environmental odours

West Coast – Findings - Odour Units

- Bias and subjectivity exist in many stages of capture and analysis – no measure of true odour unit value due to human variability; must distinguish between samples from lab and samples from field, not comparable; possibility of residual odour in panellist's nose: solvent from odour bags could interfere with detection
- Variability – 300% between labs: between different odour panels in same lab: 11 - 77% in same odour panel with duplicates: 500% among same odour panel; 700% in single panellist over time – not acceptable

West Coast - Findings – Odour Unit

- OU can't be relied on as meaningful, particularly for enforcement
- Typically used for system design purposes rather than compliance
- Imposing such an imprecise measurement in permits is not reasonable given sanctions for non-compliance

West Coast - Aftermath

- GVRD considering amending air emission by-law to adopt OU standard in by-law
- No appeal of by-laws to EAB
- EAB can't interfere
- May be open to court challenge on basis of uncertainty?

Willis v. Halifax Region (2010)

- In 1989, Halifax built STP near P's property
- Caused odours that made P close windows, etc.
- Manager and employee of plant said only periodic odours. Found that they may have become used to odour and did not notice.
- While recognized public value of STP, Halifax not show only way could operate/design was to cause odour, so no statutory authority (new plant did not cause odour)
- \$55,000 in damages

R. V. Sault Ste Marie (2008)

- Charged with emitting odour from landfill site contrary to EPA
- “Rotten garbage mixed with sewage”: Like ammonia or propane: skunk
- Did cause adverse effect – caused headaches, had to stay inside, felt sick to stomach, couldn’t barbecue, close windows and stay in house
- Due diligence – yes – City believed working with MOE to solution. Did all reasonable things to prevent.
- Dismissed

St Lawrence Cement v. Barrett (2008)

- SLC operated cement plant under statute
- Caused dust, odours and noise in neighbourhood
- Quebec class action
- Court found “no-fault” liability under art 976 of Quebec Civil Code
- SLC liable even though no fault and meant standards
- Given difficulty in assessing environmental problems and annoyances, award of average damages for owners in different zones correct

Observations

- Odour is variable and dependent on individual attributes and perceptions, especially in determining if offensive
- Odour units – subject to large variability in detection, up to 700% in some cases. Also, no statistical significance in process. May be “junk science”. Not for enforcement but may be okay for relative measurement
- 1 OU = level when odour detected: ridiculous enforcement standard
- Public evidence sometimes better, but susceptible to campaigning/circumstances
- Often better positioned if legitimately trying to control

Information

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