

RESPONDING TO THE UNEXPECTED

Environmental Conditions At A Construction Site

By David G. Cox

Hello, environmental regulator calling.

Imagine the surprise of a bulldozer operator who moves dirt around at a construction site and accidentally uncovers buried drums containing some type of liquid. Imagine the greater surprise of the dozer's company officers when they get a knock on the door from regulatory authorities informing them that the company has now violated applicable environmental laws and is liable for civil penalties and injunctive relief. Thank goodness the knock on the door was not accompanied by a search warrant from a law enforcement officer initiating a criminal investigation.

Sounds farfetched? Hardly. Construction sites are increasingly becoming the target of regulatory inspectors as they try to impose environmental obligations not only on general contractors but also sub-contractors, corporate owners and even corporate officers. For example, oil/grease from equipment or machinery may runoff from a site into a nearby creek, adversely impacting water quality. Construction and demolition debris may be burned to avoid disposal costs, or sediment may run into a sewer drain adversely impacting the publicly owned waste water treatment plant located downstream. In this day and age of pervasive regulation, it behooves companies and individuals to dot their "Is" and cross their "Ts" when it comes to environmental compliance.

Regulatory authorities have broad discretion in how they enforce the environmental laws, and those laws are very broad in their scope. For example, the hazardous waste laws define waste materials as something that is liquid, solid, or semi-solid. Try to think of a material that is not solid, semi-solid or liquid (other than a gas, of course, which conveniently happens to be regulated as an air contaminant rather than a hazardous waste). Moreover, environmental requirements usually apply to "owners and operators" and their prohibitions against certain activities apply to all "persons" which is defined to include business entities. In other words, the environmental laws impose strict liability, are very pervasive, and difficult to avoid.

Which laws apply?

Which laws apply to construction sites? That depends on the activity involved at the site. To begin, any site that disturbs more than one acre of land is required to obtain a storm water permit from Ohio EPA. This permit ensures that sediments and other contaminants from the construction site do not enter surface water that would adversely impact the water quality of the receiving stream. The process of obtaining a storm water permit is lengthy and can be convoluted depending on whether the receiving stream is designated "high quality" or "state

resource water." Terms and conditions of the permit usually include best management practices such as mulch, vegetation or riprap for erosion controls, silt fencing, berms, settling ponds or filter bags for sediment controls, and site-access controls.

If, as in our example above, buried drums containing unidentified liquids are encountered then the applicable laws may deal with hazardous waste. Under the hazardous waste laws, "no person" shall treat, store or dispose of hazardous waste except in accordance with a permit or at a permitted facility. If you encounter suspicious looking drums that may contain hazardous wastes believe me, you do not want to go through the permitting process. Simply stop work at the site, notify the appropriate authority (Ohio EPA, ODNR,

BUSTR) as well as the architect, the owner, the general contractor, all the sub-contractors, and hope that the liquid is only water. Otherwise, you may be deemed "treating, storing or disposing" of hazardous waste.

Another set of laws that applies to construction sites are the construction and demolition debris laws. Under these laws, "no person" shall dispose of scrap lumber, drywall, rebar, rubble, etc. except at a permitted facility and "no person" shall establish a facility without first applying for and obtaining a permit or license from the appropriate authority, which may include the local health department. Although the CD&D laws apply more to the owners and operators of CD&D landfills, they do impact construction sites if the waste or debris is not managed properly.

In addition, certain air pollution control laws may apply. For example, a large site that has unpaved roadways or storage piles could be subject to the air pollution laws if emissions exceed a certain threshold. If those thresholds are exceeded, a permit to install the "source" of air contaminants (the unpaved roadway or storage pile) would need to be obtained and the appropriate control technology employed. For unpaved roadways, the appropriate control technology is generally spraying water to keep down dust levels. Also, open burning is generally prohibited so avoid doing it at a construction site unless certain conditions are satisfied.



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Finally, demolition and renovation of nearly all buildings first requires an asbestos survey, submittal of a notification to the regulatory authorities, and compliance with work practice requirements.

What are the implications?

Most environmental laws require an entity to obtain a permit and construction sites are not exempted. The purposes of a permit are varied, but most important, it puts the regulatory authority on notice of the activity so that it can be monitored for compliance with the law. Typical permitting requirements involve monitoring, sampling, reporting and recordkeeping. Permits usually last for five years, are renewable and can be transferred. If your activity is potentially regulated, check the laws to see if a permit for the activity is required. If the construction site disturbs more than one acre of land, a storm water permit is definitely required and you will have to be involved in the permitting process.

Assuming your activity is regulated and permits are required, entities usually employ the services of special consultants to help them with the permitting process, such as engineering firms. This involves meetings with regulatory authorities, filling out permit applications and assorted appendices for regulatory review, working out the language of the permit terms and conditions, and appealing any adverse terms and conditions to an administrative tribunal if those terms and conditions are unacceptable.

If your construction activity requires only a general storm water permit, the language is in template form and already established. Some of the terms of such a permit were mentioned above, such as erosion and sediment controls. If air pollution permits are needed at your construction site, this process is a bit more cumbersome but most of the language for storage piles and unpaved roadways is in template format. If, however, you encounter the scenario of our bulldozer operator, you could be in for a long process as a hazardous waste permit includes more stringent requirements.

Once issued, permits must be complied with, or sanctions may be imposed. Civil sanctions include penalties of up to \$25,000 per day and injunctive. Criminal sanctions include imprisonment of two to four years per charge and fines of up to \$10,000 to \$25,000 per charge.

What can you do?

Compliance with the law is a good thing. Companies that think in terms of the "cost of doing business" may be damaged in the long run. For instance, regulatory authorities are more apt to inspect a repeat offender, regulatory

penalties increase for repeat offenders, and the permitting process for a repeat offender is subjected to higher scrutiny. In addition, a repeat offender's public image may suffer and when it comes to a criminal investigation, the authorities are more likely to investigate a corporate officer and charge him or her personally along with the company.

Before beginning work on the site check out which environmental laws apply. Most regulatory authorities have websites and contact lists and many programs, such as the storm water program even have specific "fact sheets" and guidance documents available on line. Regulators are available to answer questions and steer you in the right direction. Remember, however, that the

law recognizes that a person cannot rely on the advice of a government employee, even if that advice is erroneous. It is always best to independently verify what the regulator advises.

Navigating your way through the environmental regulatory thicket can be a nightmare. However, with patience, good advice, and close and constant communication with the regulators, encountering unexpected environmental conditions at a construction site is manageable.



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