

Client Alert

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In a recent judgment, the Land and Environment Court of NSW fined the defendant, Borg Panels Pty Ltd, \$58,500 for the offence of polluting waters, even though the pollution was caused by an inadvertent error by one of its employees. The case highlights the need for companies to implement foolproof policies, operating procedures and training programs to prevent inadvertent errors by employees in respect of activities that may pose a risk of harm to the environment.

Background

Borg Panels operates a wood milling and processing facility at Oberon in NSW where it processes woodchips and timber into manufactured wood products. The manufacturing process generates effluent containing organic material and chemical residues. The effluent is treated on site in a wastewater treatment plant that includes a sludge dam with a holding capacity of approximately 10,000,000 litres. The effluent is temporarily stored in the sludge dam before being pumped to another component of the wastewater treatment plant, known as the sequential batch reactors, for further treatment.

The hose through which effluent was pumped out of the sludge dam was long enough to allow the submersible pump to be moved around the dam to avoid clogging by sediment build-up. On occasion, the hose would kink when the pump was moved closer to the sequential batch reactors and the employees would sometimes place the hose outside the dam on top of a nearby earthen bank to prevent kinking. Normally the hose remained connected to the sequential batch reactors when the hose was in this position.

In August 2014, an employee switched on the submersible pump but noticed that there was no flow through the hose. He uncoupled the hose from the sequential batch reactors and determined that the hose was blocked. He then placed the end of the hose down the earthen bank at the edge of a constructed stormwater drainage channel. The employee had intended to return the hose and reconnect it to the sequential batch reactors, but forgot. The pump was subsequently switched on and discharged an unknown quantity of effluent from the sludge dam into the stormwater drainage channel.

The drainage channel flows into a tributary of Kings Stockyard Creek and then into Kings Stockyard Creek. Approximately 2.8 kilometres of the tributary and the Creek were polluted. The effluent contained formaldehyde, nitrogen, ammonia and matter causing chemical oxygen demand at levels that were harmful to the environment, resulting in short-term degradation of the water quality and likely harm to aquatic life.

Borg Panels pleaded guilty to the offence of polluting waters in contravention of section 120 of the *Protection of the Environment Operations Act 1997* (NSW). The Land and Environment Court applied the usual sentencing considerations in accordance with the *Crimes (Sentencing Procedure) Act 1999* (NSW) and section 241 of the *Protection of the Environment Operations Act 1997* (NSW).

Sentencing considerations**Objective seriousness of the offence**

In assessing the objective seriousness of the offence, the Court considered that:

1. The actual harm to the environment was severe on the day of the offence and the following day and the harm persisted for 6 days. The degradation in the quality of the water was likely to have caused an aquatic environment less able to support and accommodate a wider range of aquatic animals than usual.
2. Borg Panels did not have in place any written policies or procedures relating to the submersible pump or the sludge dam and failed to instruct staff to not take the hose outside the sludge dam catchment area under any circumstances.
3. Borg Panels accepted that the harm caused to the environment was plainly foreseeable. The employee knew or ought reasonably to have known that the sludge dam contained a number of substances that, in particular concentrations, are harmful to the environment.
4. Borg Panels had complete control over the causes giving rise to the offence and, although the incident was inadvertent, should have been proactive in preventing pollution events due to employee oversight.

Mitigating factors

The court also took into account mitigating factors in determining the appropriate penalty, including the Borg Panels' lack of prior convictions for environmental offences, its early plea of guilty, expression of remorse, good corporate character, measures taken to prevent similar incidents in the future and its assistance and cooperation with the EPA's investigation.

Looking to other water pollution cases for guidance on sentencing, the Court held that the appropriate penalty was \$90,000 with a 35 per cent reduction for the mitigating factors, particularly the early plea of guilty.

In addition to the penalty of \$58,500, the Court also ordered Borg Panels to pay the EPA's legal and investigation costs totalling \$72,780 and ordered Borg Panels to place notices in local newspapers, advertising the Court's sentence.

Lessons learnt

The offence of polluting waters is a strict liability offence, which means that companies will be liable for the actions of their employees, regardless of whether those actions are intentional or inadvertent. For that reason, it is important that businesses be proactive in ensuring that they carry out a risk analysis in relation to their operation, and that they develop and maintain foolproof operating procedures, policies and training programs to prevent inadvertent errors by their employees in respect of any activities that may pose a risk of harm to the environment.

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