May 26, 2021

Responding to Concerns that Alberta Does Not Collect Enough Security for Environmental Remediation the AER Chooses to Collect Less Security

By: Drew Yewchuk

Document Commented On: Mine Financial Security Program Standard, dated May 6, 2021

On May 6, 2021, the Alberta Government announced they would review and modify the Mine Financial Security Program (MFSP). The MFSP is Alberta's system for ensuring (purportedly at least) that companies pay for the reclamation of their mines, both oilsands and coal. At first glance, a review and modification sounds like a good idea, since the MFSP has been criticized as severely deficient since at least 2015 when an Auditor General report identified numerous significant problems concluding that in the event that "a mine operator cannot fulfill its reclamation obligations… the province may have to pay a potentially substantial cost for this work to be completed" (at 2). Since then, the Alberta Energy Regulator (AER) has improved its administration of the program, but Alberta Environment and Parks (AEP), the primary department responsible for the policy and design of the MFSP, has not addressed the overall structure of the program (see the Auditor General's 2019 report). Under the MFSP, the province held $1.57 billion in security against estimated reclamation liabilities of $20.8 billion in December 2014 and $1.46 billion in security against $28.35 billion in estimated reclamation liabilities in June 2018. So reform is long overdue, especially if Alberta is considering approving new coal mines.

Unfortunately, the cause of the sudden reform is not concern about the risk to the public identified by the Auditor General. The low oil prices in 2020 prompted the reform, which would have required some oilsands operators to post additional security for the eventual clean-up of their mines in the next three years. You may be asking yourself: wouldn't requiring the oilsands operators to post security deposits have helped solve the problems with the MFSP that the Auditor General identified? and the answer is: yes, it would have. Unfortunately, the changes to the MFSP prevent that from happening and ensures that the risk of Albertans ending up paying for the reclamation of oilsands mine sites remains very high. The AER has swung into action and snatched defeat from the jaws of victory.

This post focuses on oilsands mines because they have higher reclamation costs than coal mines and because Alberta's existing coal mines have all adopted the full security option under the MFSP and therefore these changes do not affect them.

Details of the Changes

The MFSP uses the same basic approach as Alberta's equally troubled system for obtaining security for the clean-up of traditional oil and gas assets (see here for a post on the recent reform efforts to that system). The MFSP uses an asset safety factor, such that if a mine's resource assets are worth more than three times the total anticipated reclamation costs (3:1), nothing beyond an initial (and wholly inadequate) 'base deposit' is required – so long as the planned reclamation is conducted as scheduled. What this omits, of course, is that the value of these assets can plummet due to market condition changes. For instance, if society widely acknowledged that the assets contribute to a threat to human life because they are causing climate change (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII) at para 2), or if two undemocratic regimes on the other side of the planet end up in a price war.

The first change modifies sections 3(1) and 3(2) of the Mine Financial Security Program Standard to allow the Director to use a 'deemed netback' rather than the actual netback. 'Netback' is the three-year average of the Annual Netback, calculated as "(Gross Revenues - Operating Costs) / annual sales volume" (at 10). The three-year average rule is why a year of low revenue could have increased security payments for the next three years. Those sections now read:

> 3(1) The Approval Holder, or an Applicant
>
> > (a) shall submit a request in writing to the Director for a Deemed Netback when an Annual Netback as specified in Section 1 of Schedule 1 cannot be calculated, or
> >
> > (b) may submit a request in writing to the Director for a Deemed Netback where the Director has determined,
>
> and posted the determination, that a Deemed Netback is appropriate under subsection (2).
>
> (2) The Director may on the Director's own initiative, in consultation with the Government of Alberta, determine that a Deemed Netback is appropriate based on short-term anomalous market or economic conditions.

This change effectively allows the AER to cancel the normal netback calculation process for the MFSP and replace it when they see fit. This is exactly what the AER has done, as otherwise, the low oil prices would have required some oilsands operators to post a security deposit (specifically those operators with low Asset Safety Factors in their Annual MFSP Submissions). Calculating the exact amount is not possible without actual numbers from the oilsands operators, but it might have run into the several billion-dollar range, but likely no more than one-tenth of the total estimated reclamation costs of the oilsands mines.

The new Guide to the Mine Financial Security Program gives some details on how the 'deemed netback' number will be calculated: the company will generate the number based on their forecasted annual netback for the following three years. Rather than being based on actual information, the oilsands operators' claims about their future profitability will be the base for the calculations.

One other change was made to the Mine Financial Security Program Standard: the reporting requirements under schedule 2, the "Mine Financial Security Program Annual Report" were decreased, so that approval holders no longer need to provide detailed financial security deposit information, detailed "Outstanding Reclamation Deposit Information" calculations, or "MFSP

Asset Information". The press releases and explanations from the AER give no hint at why this information has been removed from Schedule 2 (see the old Schedule 2 here). The Auditor General's recommendations to the AER did not ask the AER to collect less information from operators. If anything, the Auditor General was critical that the information provided was insufficient: "The MFSP asset calculations do not incorporate a discount factor to reflect risk, use a forward price factor that underestimates the impact of future price declines, and treat proven and probable reserves as equally valuable." (at 25). Although I would like to provide an explanation for this change, none of the press releases even mention the change, much less provide any justification for it.

Commentary

There are no two ways about it; the changes to the MFSP are misguided, contrary to the recommendations of the Auditor General, and increase the risks to the environment and the risk that Albertans will end up paying for massive oilsands reclamation projects. This was a situation where doing nothing and allowing the MFSP (as poorly designed as it is) to collect the calculated security would have been better than making these changes that weaken the MFSP even further.

The two government press releases (here and here) were deceptive about the basic facts of what these changes mean. Neither of them notes that the swing in oil prices would have *increased* the security approval holders would have to post or that the changes to the MFSP *lower* the amount of security the operators must post. A casual reader not familiar with the MFSP calculations would have assumed the government was making sure enough security was collected, not that the government was making sure to collect less.

Both press releases say "the Government of Alberta is making a change in the interim to the calculation while the review is underway, to ensure security amounts align with the intent of the program." So what is the intent of the program? In September 2016, the program held $939 252 679 from oilsands approval holders. In September 2020, the program still held $939 252 679 from oilsands approval holders. On that basis, I suggest the intent of the MFSP is to collect no security from oilsands operators.

The Auditor General recognized a huge and growing concern for Albertan citizens in 2015 and reported it to the AER and AEP, who ignored it for six years. When oilsands operators had a concern about the program, AEP and the AER changed the MFSP for them immediately. On that basis, Albertans should have major concerns about whose interests will be served by the upcoming review of the Mine Financial Security Program.

This post may be cited as: Drew Yewchuk, "Responding to Concerns that Alberta Does Not Collect Enough Security for Environmental Remediation the AER Chooses to Collect Less Security" (May 26, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/05/Blog_DY_MFSP_Securities.pdf

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)