

April 10, 2020

## COVID-19 and the Suspension of Energy Reporting and Well Suspension Requirements in Alberta

By: Shaun Fluker

**Order Commented On:** Ministerial Order [219/2020](#) (Energy)

Section 52.1 of the *Public Health Act*, [RSA 2000, c P-37](#) provides a minister with power to suspend, modify, or effectively amend the application of legislation which they are responsible for under the *Government Organization Act*, [RSA 2000, c G-10](#). Ministerial orders exercising this power are being made with increasing frequency during the COVID-19 emergency, and these orders, together with other public health orders issued by Alberta during this crisis, are published [here](#). One should also keep an eye on the Queen's Printer [website](#) for Orders-in-Council which enact new, or amend existing, regulations to address COVID-19. Readers may recall that I previously commented [here](#) on Ministerial Order [17/2020](#) (Environment and Parks) which suspends routine environmental reporting. This post looks at Ministerial Order [219/2020](#) issued by the Minister of Energy on April 6, 2020 which suspends some reporting and inactive well suspension requirements under energy legislation.

The Minister has declared that there is hardship in complying with certain reporting requirements set out in approvals and energy legislation during the COVID-19 emergency. Specifically, Ministerial Order 219/2020 suspends certain reporting requirements of technical data set out in the *Coal Conservation Rules*, [Alta Reg 270/1981](#), *Oil and Gas Conservation Rules*, [Alta Reg 151/1971](#), *Oil Sands Conservation Rules*, [Alta Reg 76/1988](#) (collectively referred to here as the Rules), and [AER \(Alberta Energy Regulator\) Directives](#), as well as certain reporting requirements set out in the terms of approvals issued under the *Coal Conservation Act*, [RSA 2000, c C-17](#), *Oil and Gas Conservation Act*, [RSA 2000, c O-6](#), or *Oil Sands Conservation Act*, [RSA 2000, c O-7](#).

I will leave readers to investigate for themselves exactly what data will not be reported during this suspension period (in effect until at least August 14, 2020 unless terminated earlier by the Lieutenant Governor in Council or the Minister) in relation to oil sands mines, coal mines, and oil and gas wells. However, I note that suspension of reporting on well logs (I'm not an engineer, geophysicist, or a geologist, but I understand well logs to be data that captures information about the geology encountered in the drilled hole or monitors the integrity of casing (and see [here](#) for a brief overview of well casing)) caught my attention because this includes reporting logs of the surface casing interval (s 3 of [AER Directive 080](#)) which the AER describes as an important tool to ensure a precautionary approach when drilling through nonsaline aquifers – otherwise known as drinking water in rural Alberta. See also [AER Directive 008](#) which describes the importance of surface casing for the protection of domestic water wells in rural Alberta.

The Minister has also declared there is hardship in complying with certain well suspension requirements in the *Oil and Gas Conservation Rules* and [AER Directive 013](#) during the COVID-19 emergency. As Nigel Bankes notes [here](#) in his commentary on the *Liabilities Management Statutes Amendment Act*, [SA 2020, c 4](#), Alberta has a serious problem of inactive wells which have not been suspended in accordance with AER Directive 013, and Ministerial Order 219/2020 suspends this year's compliance deadline (April 1) which will add further delay to the AER's ongoing effort to bring these wells into compliance. And Ministerial Order 219/2020 is actually going to add numbers to this list because the Order suspends initial well suspension and ongoing inspection requirements for wells classified as low risk in Directive 013. See [here](#) for an AER tutorial on well suspension.

It is important to note that Order 219/2020 does not suspend all reporting requirements applicable to operators in the energy industry, and moreover, all other requirements not set out in the Order remain applicable. Nonetheless, and similar to my [previous comment](#) on Ministerial Order 17/2020 and its potential impact on the integrity of Alberta's environmental regulatory system, the significance of Ministerial Order 219/2020 on the energy regulatory system should not be underestimated. Industry reporting is an essential component of the information gathering, monitoring and compliance functions of a regulatory authority, and also helps to ensure non-compliance events are remedied with compliance measures before these events become regulatory offences with serious human health and environmental impacts which require the use of enforcement measures that are too late to prevent the harm.

Ministerial Order 219/2020 also follows in the footsteps of Ministerial Order 017/2020 in failing to include any requirement for operators to substantiate a causal connection between hardship and COVID-19. I note this particularly in relation to the suspension of the compliance deadline of April 1 for inactive well compliance. While it might be possible that COVID-19 is responsible for failure to meet that deadline, the pandemic can only be relevant after March 17 which was merely two weeks prior to the deadline. So causal connection here seems to be somewhat of a remote possibility, and instead this relief will likely be an unwarranted excuse for some operators to further put off having to comply with Directive 013. As an interesting contrast in regulatory approach, I note the Alberta Securities Commission has also provided relief on reporting requirements in the financial market (see e.g. [Temporary Exemption from Certain Corporate Finance Requirements, 2020 ABASC 33](#) and [Relief from Reporting Requirements for Regulated Entities Carrying on Business in the Province of Alberta, 2020 ABASC 34](#)), but has attempted to mitigate the impact of this relief on the integrity of securities regulation by imposing conditions including, in some instances, a requirement to substantiate why compliance with the normal requirement wasn't achievable.

Related to this point and in light of the fact that many of the requirements suspended by this Order are set out in AER Rules and Directives, it is curious that this relief has been granted by the Minister and not the AER. Indeed, it is not entirely clear that section 52.1 of the *Public Health Act* provides the Minister with power to suspend requirements set by the AER as not being in the public interest. Section 52.1(3)(a) provides this power to "the Minister *responsible for the enactment*" (emphasis added). Each of the Acts states it is the AER who makes the Rules (e.g. s 10 of the *Oil and Gas Conservation Act*). And while it may be reasonable to conclude the

Minister is responsible for the Rules by virtue of section 16 of the *Government Organization Act*, which makes her responsible for the Acts under which the Rules have been made, the same cannot be said for AER Directives, which are clearly the responsibility of the AER.

Lastly, it is difficult to make sense of paragraph 6 in Ministerial Order 219/2020 which states: “For greater certainty, the operation of the Acts is modified to the extent necessary, having due regard for applicable PHA orders, including guidelines issued by the Chief Medical Officer of Health.” This appears to be some form of ‘catch-all’ that modifies the operation of the *Coal Conservation Act*, *Oil and Gas Conservation Act*, and *Oil Sands Conservation Act*, as new or amended orders are issued by the Chief Medical Officer of Health. There are serious problems with this provision. Section 52.1 of the *Public Health Act* only provides the power to modify Acts to the Minister of Energy, or in her absence the Minister of Health, and subject to the terms and conditions which the Minister herself prescribes. Paragraph 6 purports to give this power to the Chief Medical Officer of Health, and accordingly is unlawful sub-delegation. The *delegatus non potest delegare* rule in the common law prevents the holder of statutory discretionary power from conferring the exercise of that power on some other person (*Forget v Quebec (Attorney General)*, [1988] 2 SCR 90, [1988 CanLII 51 \(SCC\)](#)). If sub-delegation was not the intention here, one has to wonder why the paragraph is drafted in such vague and uncertain terms which seem to confuse the role of the Minister and the Chief Medical Officer of Health. In any event, this sort of drafting is unfortunate at a time when precision, clarity and transparency in lawmaking is more important than ever.

*Thanks to Nigel Bankes for comments on an earlier draft of this post.*

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