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Administrative Penalties at the Alberta Energy Regulator: Regulatory Penalties for the Kearl Oilsands Leak

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Decisions Commented On: AER Notice of Administrative Penalty 202408-009, AER Administrative Sanction 202408-010, and AER News Release 2024-08-22

On August 22, 2024, the Alberta Energy Regulator (AER) issued notice of administrative penalty 202408-009 (penalty decision) and administrative sanction 202408-010 (administrative sanction) (together, the 'enforcement decisions') imposing terms and conditions to Imperial Oil Resources Limited (Imperial Oil). The AER also issued a news release about these two enforcement actions. This post assesses the AER's enforcement decisions and the justifications provided for them.

This is the third post in an ongoing series on AER enforcement decisions. See the first post here and the second post here.

The Contraventions Addressed by the August 2024 Enforcement Decisions

The August 2024 enforcement decisions address only a specific shallow groundwater seepage problem at the Imperial Oil Resources Kearl Oil Sands Processing Plant and Mine (Kearl mine). From May 2022 to February 2023, industrial wastewater seeped out from a tailing's storage area in the northeast corner of the Kearl mine, through shallow groundwater, and off the Kearl mine lease site. Imperial Oil anticipated seepage of wastewater at the Kearl mine and designed a seepage interception system to capture and return seeping wastewater to the Kearl mine site. The contraventions resulted from a shallow permeable sand fill layer that enabled seepage that was not captured by Imperial Oil's seepage interception system (penalty decision at 9).

Other issues at Kearl remain under AER investigation and are not the subject of the AER's August 2024 enforcement decisions. On February 4, 2023 there was a secondary release of wastewater when an industrial wastewater storage pond overflowed. The Kearl mine also has a problem with deep groundwater seepage (administrative penalty at 2). Those issues are not addressed by the AER's August 2024 Kearl enforcement decisions.

Both Imperial Oil and the AER failed to inform affected communities and the public about the seepage and I previously argued that the AER did not fulfill their obligations under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 to disclose without delay information about risks of significant harm. That issue is the subject of an Office of the Information and Privacy Commissioner investigation and not addressed by the AER's August 2024 enforcement decisions.

The AER's enforcement action addresses two closely related contraventions by Imperial Oil of their approval to operate the Kearl mine. Count 1 was a release of a substance contrary to their approval and count 2 was a failure to contain a substance contrary to their approval. Pursuant to section 227(e) of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*) it is an offence to contravene "a term or condition of an approval, a code of practice, a certificate of variance, a reclamation certificate, a remediation certificate or a certificate of qualification". Count 2 is the subject of the administrative penalty and count 1 is the subject of the administrative sanction imposing terms and conditions (penalty decision at 1). The precise separation of the two counts is unimportant, as an administrative penalty under *EPEA* and administrative penalty under the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (*OGCA*) could have been imposed for a single contravention.

The Administrative Penalty to Imperial Oil

Administrative penalty decision 2024008-009 contains three related documents: a 3-page cover letter, an 11-page penalty decision, and a 26-page Preliminary Administrative Penalty Assessment (preliminary assessment). The AER sent the preliminary assessment to Imperial Oil for comments on April 26, 2024 and held several meetings with Imperial Oil before issuing the final penalty. Each document has separate page numbering. The penalty decision and preliminary assessment are similar, with only some changes to the description of the facts to reflect Imperial Oil's framing of the facts (penalty decision at 3-6).

The penalty decision is based on section 237(1) and (2) of *EPEA*:

> **Administrative penalties**
>
> 237(1) Where the Director is of the opinion that a person has contravened a provision of this Act that is specified for the purposes of this section in the regulations, the Director may, subject to the regulations, by notice in writing given to that person require that person to pay to the Government an administrative penalty in the amount set out in the notice for each contravention.
>
> (2) A notice of administrative penalty may require the person to whom it is directed to pay **either or both** of the following:
>
> > (a) **a daily amount for each day or part of a day** on which the contravention occurs and continues;
> >
> > (b) a one-time amount to address economic benefit where the Director is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention.
> > (emphasis added)

And section 3(1) of the *Administrative Penalty Regulation*, Alta Reg 23/2003:

Penalty assessment

3(1) Subject to subsections (2) and (3), the amount of an administrative penalty for each contravention that occurs or continues is the amount set out in the Base Penalty Table but that amount may be increased or decreased by the Director in accordance with subsection (2).

BASE PENALTY TABLE

		Type of Contravention		
Potential for Adverse Effect		**Major**	**Moderate**	**Minor**
	Major	$5000	$3500	$2500
	Moderate	$3500	$2500	$1500
	Minor to none	$2500	$1500	$1000

(2) In a particular case, the Director may increase or decrease the amount of the administrative penalty from the amount set out in the Base Penalty Table on considering the following factors:

(a) the importance to the regulatory scheme of compliance with the provision;
(b) the degree of wilfulness or negligence in the contravention;
(c) whether or not there was any mitigation relating to the contravention;
(d) whether or not steps have been taken to prevent reoccurrence of the contravention;
(e) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;
(f) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention;
(g) any other factors that, in the opinion of the Director, are relevant.

(3) The maximum administrative penalty that may be imposed for the purposes of section 237(2)(a) of the Act is **$5000 for each contravention or for each day or part of a day on which the contravention occurs and continues**, as the case may be. (emphasis added)

The administrative penalty decision was calculated as Major/Major on the base penalty table, (penalty decision at 7-11). The AER then had discretion over whether to apply only a single base penalty: $5,000, or a daily amount for up to the 263 days on which the contravention continued (from May 19, 2022 to February 6, 2023): $1,315,000. The AER dismissed both standard options and decided to apply a monthly rate:

> In this matter, when the seriousness of the contravention and potential for adverse effect is considered, an administrative penalty restricted to the amount of the base penalty is not proportional and not sufficient to achieve the regulatory goals of compliance and deterrence. Similarly, if daily application was applied for each day, a disproportionate

> high response would also result, especially in light of the fact that the actual known environmental impacts of the contravention, to date, appear minimal.
>
> Given this, the AER finds it appropriate and reasonable in this matter to apply a daily penalty but also exercise its discretion and apply section 3(2)(g) of the *Administrative Penalty Regulation* to reduce the penalty to a representative monthly amount. The AER is satisfied that this penalty amount balances the administrative penalty's deterrence value, both to Imperial Oil Resources Limited and industry in general and is proportionate with the contravention.
>
> Accordingly, the administrative penalty for this penalty is assessed as a representative amount and calculated as the number of months or parts of a month starting from when the AER first became aware (May 2022) and ending with the month on which the Environmental Protection Order was issued (February 2023), for a total of 10 months resulting in the calculated base assessment below.
>
> Calculated Base Assessment: $5000 x 10 = $50 000
> (preliminary assessment at 25)

This switch from a daily penalty to a monthly penalty is peculiar – it calculates the penalty as if the contravention went on for ten days instead of ten months. This reduces the penalty by more than 95%. This is like a hotel charging you for a ten day stay after you stayed for ten months. The three paragraphs above are the entire justification for this massive reduction.

In the preliminary assessment, the AER applied two $500 increases under *Administrative Penalty Regulation* s 3(2)(a) and (b) (preliminary assessment at 26). However, the AER made a weird error and cancelled the increases in the penalty decision writing:

> Under section 3(2) of the Administrative Penalty Regulation the AER may increase or decrease the amount of an administrative penalty after considering certain factors. However, per section 3(3) of the Administrative Penalty Regulation the maximum amount cannot exceed $5000 for each day or part of a day on which a contravention occurs or continues.
>
> Given the above, the amount of the administrative penalty associated with the relevant contravention cannot be increased by any factor variance. The assessment of the factors and factor variance will remain as part of the final penalty assessment as the evidence supports the increased amounts described in the factors table.
> (penalty decision at 11, footnote 1)

The error is that $5,000 is the *daily maximum*, but since the AER was calculated by treating *months* like they were days, it was not exceeded. The AER cut the final penalty by $1,000 because they confused days with months.

Next, the AER had to exercise their discretion to increase the penalty amount to address any economic benefit obtained by Imperial Oil directly or indirectly as a result of the contravention

(*EPEA*, s 237(2)(b), cited above). Also note that the $5,000 dollar per day limit *Administrative Penalty Regulation* s 3(3) is restricted to section 237(2)(a) of *EPEA* and does not limit penalties under s 237(2)(b). What did the AER decide? Nothing. The penalty decision makes no mention of *EPEA* s 237(2)(b). The sort of economic benefit assessment in the penalty analysis I praised the AER for in their decision on Tallahassee Exploration back in June is completely absent. The AER could have considered: Imperial Oil's savings from saving on staff costs to monitor their tailings areas adequately; the costs savings Imperial Oil got from using the shallow sand fill instead of an impermeable layering; or the costs savings of not installing more monitoring wells at variable deaths. Any of those would have been helpful, but the penalty decision shows nothing.

The Terms and Conditions Imposed on Imperial Oil

The penalty decision should be considered along with the terms and conditions imposed by AER Administrative Sanction 202408-010, which imposes terms and conditions on Imperial Oil under section 22 of the *OGCA.* In explaining why the AER used administrative terms and conditions rather than a monetary penalty for count 1, the penalty decision says:

> a proactive and remedial approach is necessary that incorporates an educational component that includes research and public engagement (including impacted parties) in addition to responding to the contravention in isolation. Accordingly, the AER finds that the appropriate enforcement response is to impose terms and conditions on [Imperial Oil]
> …
> (preliminary assessment at 37)

The AER's use of the word 'proactive' is difficult to understand. To be proactive, this action would have had to take place prior to a problem forming. This is a reactive regulatory approach to a seepage problem that already occurred.

The terms and conditions set out a requirement for Imperial Oil to perform a 'Quality Assurance Project' leading to a report on how to stop seepage from their tailings areas (administrative sanction at para 1), and an 'Industrial Wastewater Release Research Project' on the impacts of tailings on ecosystems, wildlife, and public safety (administrative sanction at para 2). Both projects will result in public reports.

There are two large problems with these required studies. First is that most of the work required by these conditions is not additional – they are not new. Imperial Oil ought to be doing these things under their existing approval to operate the Kearl mine. These projects fall within the sort of commitments to investigate new technologies for tailings facility design Imperial Oil made to get the Kearl mine approved (Joint Panel Report EUB Decision 2007-013 at 41-43)

Second is that the AER puts Imperial Oil in a primary role for the work of producing these studies or selecting the contractors who will perform these studies. Imperial Oil is poorly positioned to carry out any research on these topics that the public or impacted communities will consider credible. Although the AER will supervise Imperial Oil, that will not help inspire confidence because public confidence in the AER is very low because of AER actions like the

ones discussed in this post. These studies are the sorts of work public agencies need to conduct and take responsibility for. If these studies need to be done, Imperial Oil should pay for them but not control the process.

The News Release

AER News Release 2024-08-22 is meant to summarize the enforcement decisions for the public. It includes the phrase:

> A $50,000 administrative penalty will also be imposed on Imperial, representing the maximum base penalty table amount permissible under the regulation and including a representative daily amount.

Taking the sentence at face value, both the CBC and the Globe and Mail reported that the $50,000 administrative penalty was the maximum permitted by law. But the penalty is not even close to the maximum allowed by law. As explained above, the legislation and regulations involved allow for an administrative penalty that could have exceeded $1,315,000. To generate the $50,000 figure, the AER multiplied the maximum daily limit by the number of months the contravention continued. The penalty decision is explicit that higher penalties were permitted by the regulation and the AER exercised their discretion to issue a reduced penalty (preliminary assessment at 25).

In sum, the news release is incredibly misleading. It creates the impression that the AER has been as tough on Imperial Oil as existing law permits, while the administrative penalty decision is clear that the AER applied a reduced penalty. The AER should ensure their news releases do not misrepresent their regulatory decisions, which have enough problems even when described correctly.

This post may be cited as: Drew Yewchuk, "Administrative Penalties at the Alberta Energy Regulator: Regulatory Penalties for the Kearl Oilsands Leak" (4 Sept 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/09/Blog_DY_Kearl_Oilsands.pdf