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November 4, 2024

The AER's Proposed Amendments to Closure Liability Management Directives: Much Ado about Not Much

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Matter Commented On: Bulletin 2024-25, Invitation for Feedback on Revised Liability Directives

On 8 October 2024, the AER issued Bulletin 2024-25, Invitation for Feedback on Revised Liability Directives, announcing the AER is taking public comments on a proposal to restructure AER directives relating to the closure liability management framework. The AER's description of the changes, and a video presentation describing the changes, are here. At a high level:

- Four directives are being amended: Directive 001: Requirements for Site-Specific Liability Assessments; Directive 011: Estimated Liability (previously Licensee Liability Rating (LLR) Program: Updated Industry Parameters and Liability Costs); Directive 068: Security Deposits; Directive 088: Licensee Life-Cycle Management.

- Three directives are being rescinded as their contents are either being reorganized into the four amended directives or are no longer necessary: Directive 006: Licensee Liability Rating (LLR) Program; Directive 024: Large Facility Liability Management Program; Directive 075: Oilfield Waste Liability (OWL) Program.

We have reviewed the proposed changes. Our conclusion is that changes to the closure liability management framework are much less substantial than they initially appear from the number of directives impacted. This is effectively a small administrative step in the continuing saga of replacing the disastrous licensee liability rating (LLR) program with the new "Licensee Life-Cycle Management" program. It has now been almost 5 years since the 'new' liability management framework was announced by the Alberta government in January 2020.

The AER is accepting public comments on the proposed changes until November 8. Comments can be submitted to the AER in its requested form (found here), sent via email to inquiries@aer.ca – or by mail to the Alberta Energy Regulator, Suite 1000, 250 – 5 Street SW, Calgary, Alberta T2P 0R4).

Objectives

Bulletin 2024-25 sets out a lengthy list of objectives for this suite of amendments to AER Directives, including:

- provide greater clarity on estimating liability and liability management programs;

- better organization of information;
- improved alignment between energy developments;
- position regulatory requirements for future updates that will include changes to security requirements for the oil and gas sector;
- simplify and clarify how liability is estimated;
- incorporate transitional requirements to support liability management programs while the transition to a new security approach is made;
- clarify who contributes to and what is covered by the orphan fund; and
- clarify what estimated liability information will be made available to the public.

What follows is our assessment of how the proposed changes meet these objectives.

Clarify What Estimated Liability Information Will be Made Available to the Public

As we have previously explained (with co-author Professor Martin Olszynksi) in our 2023 paper A Made-in-Alberta Failure: Unfunded Oil and Gas Closure Liability (and summarized here), the absence of meaningful transparency is one of three core failures of Alberta's regulatory framework governing unfunded closure liabilities. A culture of secrecy has significantly impaired democratic accountability and made it too easy for industry to influence the design and implementation of the liability management regime away from serving the public interest (aka 'regulatory capture').

Secrecy is so pervasive that the AER refuses to disclose liability information even to "directly affected" landowners who oppose project applications. The Faculty's Public Interest Law Clinic recently assisted a landowner in obtaining a judgement from the Alberta Court of Appeal to quash an AER refusal to disclose liability information. In *Judd v Alberta Energy Regulator*, 2024 ABCA 154 (CanLII), the Court of Appeal ruled that the AER is legally required to disclose liability management information it holds which is relevant to issues scoped in a regulatory hearing.

The proposed changes in the draft directives on making more information on closure liabilities public, including some licensee-specific information, appear to be a partial response to this recent Court of Appeal decision. The information disclosure changes are explained in the video presentation starting at the 24:40 minute, and these changes are set out in Part 10 of the proposed Directive 011:

> The AER will make available through liability management reporting the magnitude of estimated liability for industry and licensees. This includes the following:

> • Industry total estimated liability, including a sum of multiple site-specific liability assessments or components of the total estimated liability based on active, inactive, and marginal liability.
>
> • Industry total estimated liability based on different levels of financial distress or components of the total estimated liability based on active, inactive, and marginal liability.
>
> • Licensee-specific total estimated liability including site-specific liability or components of total estimated liability based on active, inactive, and marginal liability.
>
> Additional reporting on the magnitude of estimated liability will continue to be developed as the AER implements the liability management framework.

In addition, section 6 of the proposed Directive 088 states some liability assessments by the AER will be publicly available:

> The information submitted by a licensee to the AER will remain confidential; however, some of the findings or results generated from the AER assessments using the financial and reserve information will be made available through liability management reporting and compliance and enforcement responses, including the following:
>
> • publicly available summary of licensee capability to meet regulatory and liability obligations
>
> • licensee-specific mandatory closure spend
>
> • summary of licensee-specific reported closure spend
>
> • licensee compliance with AER requirements such as administrative levy, the orphan fund, and its mandatory closure spend
>
> Each licensee will have access to their own information, including its licensee capability assessment.

Providing the public with more information on the closure liability management situation generally and in relation to specific licensees is a welcome change and a useful start to addressing the secrecy problems that have plagued the closure liability problem in Alberta.

However, in our view, the directives are missing clarity on exactly what closure liability information will be available to the public when an application for a new license or a license transfer is made. We know from AER Manual 023 that the AER has a detailed process and format for collecting and assessing liability management information on licensees (see also here at page 14). While an improvement from the current situation, the proposed changes to information disclosure should be far more specific and precise and could, for example, set out a template of what this information will look like.

Better Organization of Information

The AER and its predecessors have never properly consolidated and restated the labyrinth of regulatory enactments issued since the 1970's. As a result, there is no rational organization: there are currently 55 active directives, numbered from 1 to 91 (with exceptions), and roughly 37 inactive directives that had become superfluous and were rescinded without replacement. Some informational letters remain in force even though the format of informational letters was retired by the year 2000 and two documents called 'interim directives' have been in force for thirty years (ID 94-02 and ID 94-05). A total overhaul that repeals all informational letters, interim directives, and re-organizes active directives to be numbered by topic would be beneficial.

The organizational improvements to the seven directives relating to closure liability management are helpful, but do not fully fix the organizational problems with closure liability management directives. For instance, AER Directive 067, "Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals" now contains duplication with the new draft Directive 088. Why Directive 067 was excluded from the scope of the organizational fixes is not clear, and Directive 067 will need to be amended in a future round of redrafting and reorganization.

Provide Greater Clarity on Estimating Liability and Liability Management Programs

A clarification on inaccurate cost figures used to estimate closure liabilities is hardly an improvement. But this is what the proposed amendments to Directive 011 on calculating liabilities essentially amount to. Most of the low closure liability estimates that plagued the LLR have still not been addressed, as only well abandonment costs were updated in June 2024. The estimated regional closure liability costs for well reclamation have not been updated, only moved from Directive 006 to Directive 011 (Draft Directive 011, page 7). The AER is aware these estimates are out of date and significantly too low but is delaying updating these cost estimates. Draft Directive 011 also does not establish *any* closure liability estimate for pipelines (Draft Directive 011, page 9), although a 2018 internal AER presentation suggested an estimate of about $30 billion.

Simplify and Clarify how Liability is Estimated

See above. And why is this objective repeated in the Bulletin?

Improved Alignment Between Energy Developments

This refers to the specialized directives and liability management programs for large facilities (the Large Facility Liability Management Program) and oilfield waste management facilities (the Oilfield Waste Liability Program) being rescinded and the approach to all of those closure liabilities being brought into the new Directive 011. The regulatory treatment has not been completely aligned. There will still be an orphan fund levy for Large Facilities separated from the regular orphan fund levy (Draft Directive 011, pages 14-15) and oilfield waste landfills will still be required to post full security (Draft Directive 011, page 19).

Position Regulatory Requirements for Future Updates that will Include Changes to Security Requirements for the Oil and Gas Sector and Incorporate Transitional Requirements to Support Liability Management Programs While the Transition to a New Security Approach is Made

We are unable to decipher what "position regulatory requirements" means, but we will go on the assumption this is what the amendments in the proposed Directive 068 are intended to accomplish. In addition to receiving the security deposits section from Directive 088, Directive 068 now includes a discussion about how the AER may require security deposits in relation to other liability management programs – such as the mandatory closure spend – and how the AER would determine the need for a security deposit.

However, none of this is new and most of these amendments are pointless. The proposed changes fail to set an overall regulatory approach for collecting security. There is nothing here to suggest security requirements will be imposed by legislation, rather than entirely in the discretion of the AER (which, as noted above and repeatedly demonstrated, is captured by industry). It is impossible to know exactly when and under want circumstances the AER requires security deposits from industry (but it does seem the AER is collecting more security than it did under the previous system). The AER is 'positioning regulatory requirements' and 'incorporating transitional requirements' for future changes instead of actually making the needed changes. The presentation that accompanied Bulletin 2024-25 says an overall strategy on security deposits is forthcoming in fall 2025, but Albertans have been told repeatedly over the past nearly five years that robust and meaningful security requirements are forthcoming. And we continue to wait.

Clarify Who Contributes to and What is Covered by the Orphan Fund

A new Part 9 has been added to the proposed Directive 011 which merely describes how the AER exercises its authority to delegate closure work on orphan sites to the Orphan Well Association and also set the levy paid by industry to fund OWA work. The law on this is already set out in Part 11 of the *Oil and Gas Conservation Act*, RSA 2000, c O-6, and it is unclear why this description is needed in Directive 011. An Appendix was added to Directive 011 showing estimated liability methods, and orphan fund applicability by licence type. Nothing here addresses the significant deficiency in the orphan program, which is that the AER sets the industry levy too low as part of a plan to address the existing orphan problem by 2036 – one of us has written extensively on this, see Drew Yewchuk's post on the planned closure timelines here.

Conclusion

It is difficult to be optimistic on these small incremental changes because, after almost five years of announcements, the AER has not even set out a complete system for managing closure liability. The presentation that accompanies Bulletin 2024-25 notes that the new liability management framework is not "fully operational yet". Because a complete version of the new liability management framework does not exist yet, the public (and expert reviewers) cannot assess whether it will be effective. The new draft directives are small improvements, but the AER's slow process of redesigning the regulatory framework for an urgent issue continues to disappoint. The new framework has to be in place while the conventional oil and gas industry is financially able to pay

for closure or post security, and the AER's glacial pace will seemingly ensure the complete new framework will arrive too late to avoid socializing the losses to the public.

This post may be cited as: Drew Yewchuk & Shaun Fluker, "The AER's Proposed Amendments to Closure Liability Management Directives: Much Ado about Not Much" (31 Oct 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/11/Blog_DYSF_AER_Closure_Liability.pdf

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