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AER Decides to Prosecute Imperial Oil for the 2023 Kearl Oilsands Berm Overflow

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Decisions Commented On: [AER News Release 2025-01-17](#)

On January 17, 2025, the Alberta Energy Regulator (AER) announced they were laying nine charges against Imperial Oil Resources Limited (Imperial Oil) related to a berm overflow that occurred in February 2023. Unlike the previous AER regulatory penalties for Imperial Oil in August 2024, this means Imperial Oil faces a prosecution before the Alberta Court of Justice, bringing a different procedure and set of potential penalties than AER enforcement using the administrative penalty mechanism.

Recent Kearl Mine Contraventions and AER Enforcement

In August 13, 2024, the AER closed investigation [file 2023-085](#), which related to a December 6, 2023 incident where [Imperial Oil staff hit a bear den with a bulldozer](#). The bulldozer cut into the bear and appeared to sever the bear's spine. A Fish and Wildlife Officer euthanized the bear on site. The investigation was closed without penalties, apparently because the AER concluded that Imperial Oil had performed the required wildlife sweeps.

On August 22, 2024, the AER issued Imperial Oil [AER Notice of Administrative Penalty 202408-009](#) and [AER Administrative Sanction 202408-010](#), which I described in [a previous post here](#). That administrative penalty and sanction addressed the industrial wastewater shallow seepage problem at the Kearl Oil Sands Processing Plant and Mine (Kearl mine) that occurred from May 2022 to February 2023 – one of two incidents that made headlines that month.

The January 17, 2025 charges that are the subject of this post relate to the second release of wastewater that occurred on February 4, 2023, when an industrial wastewater storage pond overflowed. The AER previously issued order [202302-02](#) relating to the same incident, which required Imperial Oil to take remedial actions but did not set any penalties.

Two other regulatory issues at the Kearl mine remain open. First, the AER has not yet announced any enforcement decisions about the large problem of deep groundwater seepage at Kearl mine. Second, 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*, [RSA 2000, c F-25](#) to disclose without delay information about risks of significant harm (see the University of Calgary Public Interest Law Clinic's [summary here](#)). That issue is the subject of an ongoing investigation by the Office of the Information and Privacy Commissioner, [announced in March 2023](#).

Maximum Penalties for AER Administrative Penalties and AER Prosecutions

A prosecution, like the one announced January 17, 2025, has a different set of maximum penalties than administrative penalties at the AER. The maximum amounts of AER administrative penalties, like those in the previous Kearl mine enforcement, are set by section 237 of *Environmental Protection and Enhancement Act*, [RSA 2000, c E-12 \(EPEA\)](#) and the *Administrative Penalty Regulation*, [Alta Reg 23/2003](#). These provisions provide a lower set of maximum penalties connected to a more expeditious process (see the discussion of the maximums in [my previous blog](#)). A prosecution carries a different set of maximum penalties.

The first six charges relate to penalties under *EPEA*. Below is the list of charges and what I believe to be the *EPEA* sections contraventions (based on the language of the charges):

- (1) One count for releasing a substance into the environment that caused or may have caused a significant adverse effect.
(*EPEA*, s 109(2) Prohibited release where no approval or regulation)
- (2) One count for failing to report a release as soon as they knew or ought to have known of the release.
(*EPEA*, s 110(1) Duty to report release)
- (3) One count for failing, as soon as they became aware or ought to become aware of the release, to take all reasonable measures to repair, remedy and confine the effects of the substance.
(*EPEA* s 112(1)(a)(i) Duty to take remedial measures)
- (4) One count for failing, as soon as they became aware or ought to become aware of the release, to take all reasonable measures to remediate, manage, remove or otherwise dispose of the substance in such a manner as to prevent an adverse effect or further adverse effect.
(*EPEA*, s 112(1)(a)(ii) Duty to take remedial measures)
- (5) One count in contravention of approval number 46586-01-00, condition 4.2.1, for releasing substances from the plant to the surrounding watershed.
(*EPEA*, s 227(e) Offences, contravenes a term or condition of an approval)
- (6) One count in contravention of approval number 46586-01-00, condition 2.1.1, for not immediately reporting to the AER Director by telephone at 1-780-422-4505.
(*EPEA*, s 227(e) Offences, contravenes a term or condition of an approval)

The maximum penalties for *EPEA* prosecutions are found in sections 228 of *EPEA*. *EPEA* section 228(1)(b) sets the maximum penalty for specified offences done knowingly by corporations at \$1,000,000 and *EPEA* section 228(2)(b) sets the maximum penalty for specified offences derived from less deliberate or severe contraventions by corporations at \$500,000. Based on the AER's description of the six *EPEA* charges, all six appear to fall into the second category subject to the \$500,000 maximum penalty (*EPEA* ss 109(2), 110(1), 112(1)(a)(i), 112(1)(a)(ii), and two charges under section 227(e)).

The maximum penalties are subject to the ‘continuing offences’ provision that reads “Every person who is guilty of an offence under this Act is liable on conviction for each day or part of a day on which the offence occurs or continues.” (*EPEA*, s 231).

The final three charges are for three contraventions of the *Public Lands Act*, [RSA 2000, c P-40](#), (*PLA*)

- (7) One count for the accumulation of waste material, debris, refuse, or garbage on public land.
- (8) One count for causing the loss or damage of public land.
- (9) One count for causing activities on, or the use of, public land that is likely to result in loss or damage to public land.

All three are contraventions of *PLA* section 54(1), which reads:

Prohibitions

54(1) No person shall cause, permit or suffer

- (a) the accumulation of waste material, debris, refuse or garbage on public land,
 - (a.1) loss or damage to public land,
 - (a.2) activities on, or the use of, public land that is likely to result in loss or damage to public land,
- ...

Section 59 of the *PLA* sets the maximum penalty for specified offences done knowingly by corporations at \$1,000,000 and the maximum penalty for specified less deliberate or severe contraventions by corporations at \$100,000. Contraventions of section 54 fall into the higher penalty category. I note that sections 174(m) and 175 of the *Public Lands Administration Regulation*, [Alta Reg 187/2011](#) prescribe contraventions of *PLA* section 54 for the purposes of section 59(3), so the maximum penalty limit of \$100,000 in section 59(1) might apply, but I find that argument unconvincing, as the purpose of those provisions in the regulation is to establish a due diligence defence and not to lower potential penalties.

The maximum penalty will be limited by the rule against multiple convictions for offences arising out of the same transaction (see *Kienapple v R*, [1974 CanLII 14 \(SCC\)](#), see the application of *Kienapple* in *R v Inland Machining Services Ltd.*, [2023 ABCJ 224 \(CanLII\)](#) at paras 10-11).

Altogether, Imperial Oil potentially faces a maximum penalty in the range of at least several million dollars, but I cannot calculate an exact figure, and calculating maximum penalties is somewhat unhelpful as the actual application of statutory maximums is extremely rare. More important is the penalty amount the AER intends to seek, and the AER news release provides no details and says: “As this matter is now before the court, the AER will not be providing any additional information.” Albertans will have to wait and see.

The defence of due diligence applies to all six charges at issue under *EPEA* (*EPEA*, s 229) and all three charges at issue under the *PLA* (*PLA*, s 59(3)(b) and *Public Lands Administration Regulation*, s 174(m) and 175). If Imperial chooses to plead not guilty, their defence will likely focus on the

question of due diligence (see [this timely Alberta Law Review article on the development of the due diligence defence](#)). Imperial Oil’s first court appearance is set for February 26, 2025, when Imperial Oil will enter a plea or seek an adjournment.

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