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## **Administrative Penalties at the Alberta Energy Regulator 4: Missing Details in a Penalty for Wastewater Released into the Smoky River**

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**Decisions Commented On:** [AER Administrative Penalty Director's Decision 2023-002](#), and [AER News Release 2024-12-17](#)

On December 16, the Alberta Energy Regulator (AER) issued [AER Administrative Penalty Director's Decision 2023-002](#) (CST Coal Penalty decision) to CST Coal Canada Ltd. (CST Coal) regarding the release of contaminated wastewater from the Grande Cache Coal Mine into the Smoky River in in December 2022. This post assesses the AER's enforcement decision and the justifications provided along with it.

This is the fourth post in an ongoing series on AER enforcement decisions. The previous three instalments addressed: (1) [Ovintiv's too-low flare stack](#), (2) [Tallahassee Exploration's false reporting of Methane Emissions](#), and (3) [Imperial Oil's Kearl oilsands mine tailings seepage](#).

### **The Basics of AER Penalty Decisions**

The statutory background for AER administrative penalty decisions is section 237(1) and (2) of *Environmental Protection and Enhancement Act*, [RSA 2000, c E-12 \(EPEA\)](#):

#### **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.

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

Potential for Adverse Effect	Type of Contravention		
	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.

### The Contraventions and Proposed Penalty

AER administrative penalty 2023-002 relates to a wastewater release that took place from December 29, 2022 to January 2, 2023 at the Grand Cache Coal Mine and Processing Plant. This penalty does not address two subsequent wastewater release incidents at the Grand Cache Coal Mine that occurred in March 2023 and June 2023 (see incident reference No. 20231550 and 20230529 on the [AER compliance dashboard](#)). Future penalties to CST Coal are likely for those incidents.

Count 1 was a contravention of section 227(e) of *EPEA*, under which 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”. Specifically, CST Coal released mine wastewater contrary to [EPEA approval 00155804-01-00](#) for the Grand Cache Coal Mine (see especially section 4.2 on Mine Wastewater). Wastewater should have flowed to settling ponds through a bypass line, but the bypass line froze. An alarm connected to the sump should have sounded, but the alarm failed “due to material buildup against the sensor face” (at 2). Wastewater overflowed into the Smoky River resulting in total suspended solids and metal contamination exceeding provincial guidelines (at 3). The AER classified this as a major contravention with moderate potential for adverse effect, for a \$3,500 penalty based on the Base Penalty Table in the *Administrative Penalty Regulation*.

Count 2 was a contravention of the approval’s requirement to immediately report contraventions. CST Coal was aware of the contravention in count 1 on December 29, 2022, but did not report it until January 2, 2023 (at 3-4). Again, the AER classified this as a major contravention with moderate potential for adverse effect, for a \$3,500 penalty based on the Base Penalty Table in the *Administrative Penalty Regulation*. The AER applied a daily penalty for each of the five days:  $\$3,500 \times 5 \text{ days} = \$17,500$  (at 4).

The AER proposed to increase the total penalty based on the factors in subsection 3(2)(a) and (b) of the *Administrative Penalty Regulation*: a \$1,000 increase because following approval conditions is important to the regulatory scheme of *EPEA*, and a \$1,000 increase because of CST Coal’s lack of written procedures, training, and the failure to comply with internal reporting procedures indicated a level of either wilfulness or negligence (at 5).

### **CST Coal’s Arguments Relating to the Penalty**

The AER provided CST Coal the opportunity to make submissions regarding the proposed penalty. CST’s Coal’s complete arguments are not reproduced in the penalty decision, and instead the penalty decision has the AER’s summary of CST Coal’s four arguments and the AER’s decisions relating to each.

First, CST Coal argued that the AER’s categorization of count 2 (the failure to report a contravention) as “Major” was inconsistent with past AER practice. The AER did not accept the argument, stating “The AER looks at each situation individually to decide how to classify a contravention” and that this situation was “more akin to failure to report a release” (at 6).

Second, CST Coal argued that the penalty exceeded the statutory maximum and was inconsistent with past AER practice. The AER rejected this argument, finding the penalty was appropriate and consistent with previous penalties (at 6).

Third, CST Coal argued that there “was no support for the conclusion that CST Coal acted willfully or negligently” in relation to the contraventions (at 6). The AER accepted this argument and removed the proposed \$1000 penalty for “the degree of wilfulness or negligence in the contravention” (at 4-5).

Fourth, CST Coal argued the penalty was “at the very high end of historical administrative penalties” and did not properly consider the mitigation measures, efforts to prevent recurrence, and cooperation of CST Coal (at 6-7). The AER rejected this argument on the basis CST Coal’s actions “were not considered above and beyond what is required for a regulated activity.” (at 6-7)

In the end, the \$1,000 penalty increase for wilfulness or negligence was removed and the final penalty was \$22,000 (at 7).

## Commentary

First, the AER’s summary of CST Coal’s arguments and the AER’s responses to them is too brief and lacking in detail to understand CST Coal’s arguments or follow the AER’s reasoning responding to them. Notably: the CST Coal penalty decision (1) does not identify the specific past AER penalty decisions that CST Coal referred; (2) does not explain why CST Coal believed the penalty exceeded the statutory maximum (possibly, though I can only speculate, CST Coal made an argument based on the AER’s weird error about maximum penalties in the [Kearl oilsands seepage decision](#)); (3) does not explain why the lack of training of CST Coal employee’s did not amount to any degree of negligence; and (4) lacks details about the wastewater escape, and does not specify how much wastewater entered or is estimated to have entered the Smoky River. The fourth point is particularly odd, [as it has already been publicly reported at 107,000 litres](#). The AER should post the actual submissions of the company arguing about a proposed penalty, because these vague summaries will not assist licensees or approval holders in preparing future submissions or the public in understanding how penalties are set.

Second, the CST Coal penalty decision reveals a difficulty with the AER attempting to correct for past leniency. I cannot fully assess whether CST Coal’s arguments that the penalty is inconsistent with past practice because the specific precedents CST Coal were not identified in the penalty decision – but CST Coal probably has a point. (For one example, compare CST Coal’s \$17,500 penalty for failure to report a contravention for five days with [Ovintiv](#)’s \$3,500 penalty for failure to report a contravention for forty-nine days.) The AER has been extremely lenient in the past, so that suitable penalties today are inconsistent with the lenient past penalties. Although the AER was correct to reject the argument calling for consistency, since accepting it would have the effect of locking in the practice of unreasonably low penalties, the AER should have addressed this issue directly, instead of dodging away from it by not specifying which examples CST Coal provided.

Third, the CST Coal penalty decision omits any discussion of a penalty for economic benefit to CST Coal (*EPEA*, s 237(2)(b)). (For an example of a good economic benefit assessment, see my discussion on [Tallahassee Exploration’s false reporting of Methane Emissions](#).) Not issuing a penalty relating to an economic benefit may be correct in this case. Perhaps CST Coal should have been paying staff to check the bypass line and sump alarm more frequently, but CST Coal did not obviously obtain significant economic benefit from the activity that caused the release. But I should not have to speculate. AER penalty decisions should explain why no penalty under *EPEA* s 237(2)(b) was applied.

To conclude, the final penalty is not as absurdly low as some past AER penalties have been, but the decision is difficult to judge because of the lack of details. Effective deterrence and fairness

rest on stability and predictability in how the AER sets administrative penalties, and stability and predictability cannot be based on leaving details and information out of penalty decisions.

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