

# Administrative Penalty Director’s Decision

**Named Party:** CST Canada Coal Limited **BA Code:** A7PZ

**File No.** 2023-018

## Preliminary Penalty Assessment

Number of Counts Identified	Base Assessment Amount	Factor Variance(s)	
Count 1	\$3 500	+\$1 000	
Count 2	\$3 500	+\$2 500	
<b>Total Counts: 2</b>	<b>Total Base Assessment: \$7 000</b>	<b>Total Variance:</b>	<b>\$3 500<sup>1</sup></b>

**Preliminary Penalty Assessment: \$10 000**

## Director’s Decision Summary

On December 12, 2024, I, Tyler Callicott, Director, Enforcement and Orphaning, for the Alberta Energy Regulator (AER), spoke with Mitch Clegg, Manager, Environmental and Regulatory Affairs, for CST Canada Coal Limited (CST) to discuss the Preliminary Administrative Penalty Assessment (PA). Mr. Clegg declined meeting in person to discuss the investigation findings and PA and chose instead to review the PA and respond back in writing by January 10, 2025, if CST had any additional information to provide.

The PA identified the following contraventions and penalty assessments.

<sup>1</sup> 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 this, the factor variance amounts are applied only up to the \$5000 maximum with the assessment of the factors and factor variances remaining in the preliminary administrative penalty assessment as the evidence supports the increased amounts described in the factors table.

**CONTRAVENTION 1**

On or about March 4, 2023, in the Province of Alberta, CST Canada Coal Limited did contravene section 4.2.12 of Approval 155804-01-00 which states, “Subject to 4.2.13, the release of any substances from the major ponds and plant site settling pond, shall not exceed the limits specified in TABLE 4.2-C”, thereby contravening section 227(e) of the *Environmental Protection and Enhancement Act*.

		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

**Type of Contravention: Major**

The primary purpose of the *EPEA* is the protection of the environment. The requirements mandated by the *EPEA* ensure that activities undertaken pursuant to the Act, such as those required in an approval, are conducted in a manner that mitigates impacts to the environment.

The purpose of condition 4.2.12 in Approval 155804-01-00 is to ensure substance releases from CST’s ponds meet specified parameters to mitigate any potential impacts to the environment. Any failure to adhere to the limits set forth in the approval has the potential to cause adverse environmental impacts. Accordingly, the type of contravention is assessed as “Major”.

**Potential for Adverse Effect: Moderate**

On March 4, 2023, mine wastewater was found to have been releasing from the ponds into the Smoky River while exceeding the discharge parameters for the TSS concentration and visible sheen. Water quality sample data and observations by CST staff verify the release did not meet discharge criteria between approximately 9 a.m. and 6 p.m. CST estimated the duration of the TSS exceedance to be 17 hours, between 7:00 a.m. and 11:00 p.m. The volume of coal fines which contribute to the TSS concentration was estimated by CST to be 8,945 kg.

A Senior Limnologist/Water Quality Specialist at AER assessed the impacts from the release and confirmed that TSS exceeded approval thresholds. The long-term impacts may be minimal but the settled sediment could be a risk to aquatic life if it continues to release harmful substances. A Senior Fisheries Biologist assessed the impacts from the release and stated that fish species in the Smoky River near the release site can be harmed by fine sediments through gill abrasion and behavioural changes. Arctic grayling and bull trout are particularly sensitive or threatened but fish are likely to avoid sediment plumes, potentially reducing some impacts. Accordingly, the potential for adverse effect is assessed as

“Moderate”.

**Base Assessment:** \$3500

*Environmental Protection and Enhancement Act*

**CONTRAVENTION 2**

On or about March 4, 2023, in the Province of Alberta, CST Canada Coal Limited did contravene section 2.1.1 of Approval 155804-01-00 which states, “The approval holder shall immediately report to the Director by telephone any contravention of the terms and conditions of this approval at 1-780-422-4505”, thereby contravening section 227(e) of the *Environmental Protection and Enhancement Act*.

		BASE PENALTY TABLE		
		Type of Contravention		
Potential For Adverse Effect		Major	Moderate	Minor
	Major	5000	3500	2500
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	Minor to None	2500	1500	1000

**Type of Contravention: Major**

The primary purpose of the *EPEA* is the protection of the environment. The requirements mandated by the *EPEA* ensure that activities undertaken pursuant to the Act, such as those required in an approval, are conducted in a manner that mitigates risks to the environment. The subject requirement to report any contravention of the terms or conditions of the approval immediately is necessary to ensure appropriate regulatory oversight and an appropriate response from the company.

The evidence shows that CST was aware of the release on March 4, 2023, at approximately 9 a.m. but did not report the release until about 7 hours and 26 minutes later. By not reporting the contravention immediately, CST did not give the opportunity to discuss with AER timely and appropriate mitigating measures to limit any adverse effect to the environment. Accordingly, the type of the contravention is assessed as “Major.”

**Potential for Adverse Effect: Moderate**

There was potential for an adverse effect in the delayed contravention reporting by CST as the AER did not have the opportunity to immediately discuss mitigation measures or deploy AER staff to the site in a timely manner. In this case, CST sampled the release numerous times and commenced with mitigation measures as the various levels of CST staff were eventually made aware, but prior to notifying the AER. If the AER would have been notified immediately upon discovery of the release, it is likely that CST would have had to accelerate their internal communications, thereby allowing for regulatory oversight and potentially leading to a faster resolution of the release and mitigation of the potential adverse effects. Accordingly, an assessment of “Moderate” is appropriate.

**Base Assessment:** \$3500

**Factors to be Considered to Vary the Assessment**

- (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.

**Factors Applicable to this Case**

Factor from above	Amount Varied	Description/Comments
(a)	+\$1000	Following approval conditions is a cornerstone of the regulatory scheme. In particular, following <i>EPEA</i> approval conditions is essential in preventing or mitigating impacts to the environment (\$1000 added).
(b)	+\$2500	<p>There are no written procedures to restore functionality when the decant window is frozen (\$500 added).</p> <p>There was no equipment positioned by the settling ponds for ice removal during periods when a train blocks access (\$500 added).</p> <p>CST did not assess the cause of the noncompliant release until several hours after it was first noted as senior staff were not initially available on site (\$500 added).</p> <p>Even though CST said they followed their reporting procedure, and it was effective in ensuring immediate reporting to the AER, the evidence supports the case that multiple delays occurred in reporting (\$500 added).</p> <p>The AER subject matter expert found that CST did not adhere to approval application plans, nor with commitments for mitigation, nor are the internal CST communication procedures sufficient for timely incident management and reporting (\$500 added).</p>
(c)	Neutral	Factor not applied.

(d)	Neutral	Factor not applied.
(e)	Neutral	Factor not applied.
(f)	Neutral	Factor not applied.
(g)	Neutral	Factor not applied.

## Discussion

On January 9, 2025, the AER received a written submission from CST in response to the PA in connection with the March 4, 2023, release of mine wastewater from the plant site settling pond into the Smoky River. CST did not dispute that the release exceeding approval limits occurred and was not reported in alignment with AER requirements. The Director considered the entire submission, including the request to remove each of the five factors assessed pursuant to section 3(2)(b) of the *Administrative Penalty Regulation*, to consider adding a Factor (c) for the steps CST took to control the release, and to also consider adding a Factor (d) for the steps CST has taken to prevent a recurrence of the incident. A summary of these issues and the AER’s responses is provided below.

### **Factor (b), Degree of willfulness or negligence in the contravention**

CST’s response stated the application of Factor (b) for willfulness or negligence in five separate instances is unfair and incorrect, and is not supported by the evidence in the PA.

For the AER’s assessment of administrative penalties and applicable factors, negligence is assessed based on factors beyond failure to comply, and includes those actions or omissions contributing to, causing, or leading to the contravention. Negligence under Factor (b) may be defined as unreasonable conduct and could be an unintentional contravention. Willfulness includes recklessly committing actions or omissions that the person reasonably ought to know would lead to a contravention. The PA presents the AER’s findings that on the balance of probabilities, there are instances where CST was willful or negligent in the contraventions that occurred.

### **Argument 1**

In the written submission, CST argued that the PA does not provide evidence that a written procedure to restore functionality of the decant window would have prevented the overflow event, or assisted staff to identify the problem and restore functionality sooner. CST stated it never previously had an incident as a result of a frozen decant window, nor was it reasonably foreseeable, nor meets the standard of negligence. CST would like to “be afforded a complete defence of due diligence”.

## **AER Response**

As the settling ponds are an integral part of the routine year-round mine processing activities, the AER would find it reasonable for CST to have procedures in place for a variety of possible scenarios, including for when a decant window is frozen. This factor is not just about restoring functionality of the decant window, it is about CST understanding the consequences of a wastewater system that is not operating as intended and to react accordingly.

CST did not have written instructions, manuals or procedures for staff with regards to keeping the decant window functioning or how to restore functionality when the window is frozen. Given that not all staff have the same level of experience, written instructions should be available to staff to ensure problems are identified early and corrected as quickly as possible in a manner that is effective. Having a procedure would allow for staff to trouble shoot the problem efficiently and consistently every time.

Due diligence is a defence to a contravention. Where a complete due diligence defence is found, no enforcement response is taken by the AER. Thus, due diligence is not relevant to Factor (b).

CST responded to the AER investigator that the frozen decant window on Tailings Pond 1 was frozen and staff “were unable to partially close the window. This likely contributed to an increase of coal fines discharging into the settling pond”. The development of a written procedure may have led to a more holistic approach by CST on how to manage wastewater under the circumstances at the time and have allowed its personnel to proactively respond. This is the basis for the finding of negligence in this case. This Factor (b) shall remain as is under contravention 1.

## **Argument 2**

CST argued that it was inaccurate for the PA to state equipment capable of removing ice was not positioned by the settling ponds during periods when a third party train blocks access. CST stated they had equipment on the plant site in close proximity to the settling ponds that was temporarily restricted from accessing the ponds until the train moved. CST argued it was not reasonably foreseeable to keep equipment positioned at the ponds for ice removal when a train blocks access nor does it demonstrate negligence or wilfulness.

## **AER Response**

Both CST and the AER agree that ice removal equipment was not positioned at the settling ponds across the train tracks from the plant site. As the settling ponds are a routine part of year-round mine processing activities, it would be reasonable to expect CST to have personnel and equipment readily available to provide support for any type of response at the settling ponds at all times, not just for ice removal. CST told the investigator that heavy equipment is used to remove ice from the settling ponds as needed, but it is not proactively scheduled.

In this case, the AER recognizes that having equipment at the settling ponds may not have significantly contributed to an improved outcome. The lack of a procedure to manage the consequences of having a frozen decant window as noted above, and CST not assessing the cause of the noncompliant release until several hours after it was first noted as noted below, were of greater significance than a lack of available equipment at the settling ponds. Based on these points, this Factor (b) is no longer applied under contravention 1.

### **Argument 3**

CST argued any delay to identify the cause of the release is unrelated to whether CST acted wilfully or negligently. CST requested application of Factor (c) as neutral or a mitigating factor for their actions taken to control the release and that Factor (b) should be omitted.

### **AER Response**

This factor speaks to the apparent unavailability of qualified senior staff to assess the cause of the release in a timely manner. As the mine operates continually throughout much of the year, it is critical to have fully qualified personnel reasonably available at all times to identify the causes of noncompliant releases in order that corrective actions can be taken. The investigation found that several hours had lapsed from the time the contravention was first identified by the less experienced Environmental Technician to the time more qualified senior staff arrived on site to further assess and respond to the release. The unavailability of senior staff with the skillsets and authorities required to assess and understand the cause of the release in order to respond appropriately, demonstrates negligence around a potential personnel scheduling issue on the part of CST. This Factor (b) shall remain as is under contravention 1.

Factor (c) can be applied to the mitigation relating to the contravention, after the contravention has started, to mitigate the adverse impacts. If steps are taken to mitigate the impacts of a release in accordance with the legislated duty of section 112 of *EPEA*, credit is not warranted. If no mitigation is possible, the factor can be assessed as neutral. If steps are taken that go above or beyond what would reasonably be expected, then a credit may be given under this factor.

In this case, CST took steps to return into compliance with the release limits specified in their *EPEA* Approval and to control the release as would be expected of any regulated party. CST did not demonstrate measures to repair and remediate the impacts of the release from the settling ponds, or to restore the environment. Factor (c) is not applied.

### **Argument 4**

CST argued that AER stating multiple delays occurred in reporting the release in Factor (b) is repetitive of the conclusion provided in the PA under contravention 2. CST stated that its reporting procedures meet or exceed industry standards and their employees are trained to follow these procedures. CST goes on to state the PA does not identify or refer to any deficiencies in CST's policies, training, or employee actions.

## **AER Response**

The investigation found that CST reported the incident over 7 hours after the release was first identified. This delay in reporting potentially speaks to either a reporting procedure that either does not support the regulatory requirements, or was a failure to implement the reporting procedure. As CST stated their reporting procedure was followed, it is apparent to the AER that the procedure was not sufficient to facilitate immediate reporting of the release as is required. The late reporting is the contravention, but the absence of an effective reporting procedure supports the application of negligence for Factor (b). This Factor (b) shall remain as is under contravention 2.

## **Argument 5**

CST disagreed that AER subject matter expert (SME) findings about CST not adhering to application plans, their commitments for mitigation, and that CST's internal procedures were sufficient for incident management and reporting demonstrates negligence or wilfulness for neither contravention 1 or 2. CST describes their concerns that the elements are irrelevant to whether CST acted negligently, that the SME applied the benefit of hindsight in making a determination that communication procedures were not sufficient and that they could have taken additional measures to prevent the release rather than determine negligence, and that the SME used incomplete information to make their determination.

## **AER Response**

Upon review of CST's submission for this argument, I am satisfied in this case, while not a defense to the contraventions, that an increase in Factor (b) is not warranted. Based on this, the Factor (b) is no longer applied to this argument under contravention 1.

## **Factor (d), Steps to prevent reoccurrence**

### **Argument 1**

CST listed the improvements it has taken to improve its facilities and procedures to prevent reoccurrence of the contraventions to support the application of Factor (d) to the administrative penalty assessment. Measures includes the automation of valves on the reclaim pipeline, a new graphic on the human-machine interface in the plant control room along with an additional button to divert reclaimed tailings water, installation of a second "high-high" level alarm float ball, the lowering of the "high-high" alarm threshold, the creation of a preventative maintenance schedule to test the "high" level warning system, implementation of a monthly preventative maintenance schedule, and the installation of a new backup generator to ensure the reclaim system will not be affected during power outages.

## **AER Response**

The AER acknowledges the enhancements that CST has made to operational systems and procedures to help ensure releases do not exceed the specified limits. A Factor (d) reduction can be applied where steps



have been taken, that are above and beyond regulatory requirements, to ensure future compliance. I am satisfied that the measures CST has taken qualify for this factor. A \$500 decrease has been applied to Factor (d) under contravention 1.

**Final Penalty Decision**

I, Tyler Callicott, Director, Enforcement and Orphaning, for the AER, have fully considered all of the information collected in the investigation and the written submission sent to me from CST on January 9, 2025.

I am of the opinion that the contraventions described above did occur, are supported by the evidence, and that there was a lack of due diligence on the part of CST.

I find the total amounts in the base penalty for counts 1 and 2 in the PA are reasonable and remain the same.

In response to CST’s written submission, Factor (b) listed in the PA is adjusted and Factor (d) is applied, as noted above. All other factors assessed in the PA remain the same. For clarity, the adjusted net factors applied total +\$1000 for contravention 1 and +\$1000 for contravention 2.

**Final Penalty Decision**

<b>Number of Counts Identified</b>	<b>Base Assessment Amount</b>	<b>Factor Variance(s)</b>	
Count 1	\$3 500	(a) +\$1 000	
Count 2	\$3 500	(b) +\$1 500	(d) -\$500
<b>Total Counts: 2</b>	<b>Total Base Assessment: \$7 000</b>	<b>Total Variance:</b>	<b>+\$2 000</b>

**FINAL PENALTY ASSESSMENT: \$9 000**

**Date:** February 21, 2025

**Director’s Signature:**                     < original signed by >                      
 Tyler Callicott, Director, Enforcement and Orphaning, AER