Review Decision R-2024-01

In the matter of a request for review under section 70 of the *Energy Resource Activities Act* of Administrative Finding 2021-0194 issued to Canadian Natural Resources Limited

Decision Date: September 16, 2024

Introduction

[1] Canadian Natural Resources Limited ("**CNRL**") has requested a review of the administrative monetary penalty ("**AMP**") attached to a finding of contravention issued by a British Columbia Energy Regulator ("**BCER**") official (the "**Official**") to CNRL on February 9, 2024 (the "**Contravention Decision**").

[2] The Contravention Decision held that CNRL contravened section 37(1)(a) of the *Energy Resource Activities Act*[1] ("**ERAA**") and imposed an AMP of $40,000.

[3] AMPs are issued pursuant to section 63(1) of the ERAA. Prior to issuing an AMP, the decision maker must consider the factors set out in section 63(2) of the ERAA.

[4] CNRL disputes the application of three of the enumerated factors set out in section 63(2) and the amount of the AMP. CNRL does not dispute the finding that it contravened section 37(1)(a) of the ERAA or the Official's conclusion that CNRL did not exercise due diligence to avoid the contravention.

[5] The Commissioner of the BCER has designated me as the review official for the purpose of reviewing the AMP.

[6] Section 71(1)(a) of the ERAA gives me the power to confirm, vary or rescind the AMP.

[7] I have reviewed all the materials provided by the Parties.

Issue

[8] The issue before me is whether the AMP should be confirmed, varied or rescinded.

Background

[9] On September 20, 2021, an operator at a CNRL site located at d-93-E/94-P-1 intentionally vented a pig barrel to atmosphere which caused fluid contaminated with hydrocarbons to spray into the air and cover a portion of the lease (the "**Incident**").

[10] A report dated April 2023 detailing the Incident (the "**Contravention Report**") was provided to the Official for a decision pursuant to section 62 of the ERAA. The Official gave CNRL an opportunity to

[1] SBC 2008, c. 36.

respond to the Contravention Report and CNRL provided a response on December 11, 2023 (the "**Response**").

[11] After considering the Contravention Report and the Response, the Official concluded in the Contravention Decision that CNRL failed to prevent spillage in contravention of section 37(1)(a) of the ERAA.

[12] Section 63 of the ERAA requires that a decision maker consider the following factors prior to imposing an AMP:

> (a) previous contraventions by, administrative penalties imposed on or orders issued to
> (i) the person,
> (ii) if the person is an individual, a corporation for which the individual is or was an officer, director or agent, and
> (iii) if the person is a corporation, an individual who is or was an officer, director or agent of the corporation;
> (b) the gravity and magnitude of the contravention;
> (c) the extent of the harm to others resulting from the contravention;
> (d) whether the contravention was repeated or continuous;
> (e) whether the contravention was deliberate;
> (f) any economic benefit derived by the person from the contravention;
> (g) the person's efforts to prevent and correct the contravention;
> (h) any other matters prescribed by the Lieutenant Governor in Council

[13] The Contravention Decision states the following with respect to the application of those factors:

> 30. There have been four findings of contravention made against CNRL and 16 orders issued.
>
> 31. The gravity and magnitude of the contravention was moderate with an impact on the environment. Although the environmental report submitted by CNRL identifies that remaining hydrocarbons will naturally attenuate over time with minimal risk, hydrocarbons currently remain present above and below ground infrastructure, which presently pose an impact on the environment.
>
> 32. The contravention was not repeated nor continuous.
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> 33. There is no evidence that the contravention was deliberate.
>
> 34. I find no evidence that there was economic benefit from the contravention.
>
> 35. As soon as CNRL was notified of the spill, they promptly began cleanup efforts.

[14] CNRL argues that the Official improperly applied and weighed the factors set out in 63(2)(a), (b) and (g) and, as a result, the penalty imposed was disproportionately high.

Analysis

[15] CNRL identified the Official's application of sections 63(2)(a), (b) and (g) of the ERAA as the basis for its request for review. I will focus my analysis on those provisions.

i. 63(2)(a) Previous contraventions by, administrative penalties imposed on or orders issued to CNRL

Position of CNRL

[16] CNRL submits that the Official did not provide details on previous contraventions and orders that they considered and therefore it was unable to adequately respond to its alleged compliance history.

[17] It also suggests that previous contraventions and orders that it has been subject to are insufficiently similar and therefore those non-compliances should be given little to no weight when determining an appropriate AMP in this instance.

[18] Further, CNRL argues that the Official only looked at the number of previous contraventions and orders and failed to consider the underlying facts of each, including whether the action reflected a compliance issue or whether some of the orders and contraventions resulted from the same factual scenario and therefore reflected "double counting".

Position of the BCER Official

[19] In response, the Official identifies four contravention decisions and 16 orders that it considered. They argue they were not required to provide details of the orders and contraventions as part of the Contravention Decision, in part, because those decisions were sent directly to CNRL at the time of issuance.

[20] The Official submits that section 63(2)(a) allows the decision maker to consider the entire compliance history of a party and is not limited to compliance matters that are "sufficiently similar" to the contravention at hand.

[21] The Official argues that they were not required to exclude consideration of orders that related to the same facts as a contravention.

Discussion

[22] Section 63(2)(a) requires a decision maker to consider "previous contraventions", "administrative penalties" or "orders". This language does not necessarily limit a decision maker to consideration of prior contraventions or orders only where the circumstances of those previous compliance actions were sufficiently similar. I compare the language of 63(2)(a) of the ERAA with other legislation, such as section 74(2)(a) of the *Forest and Range Practices Act*[2] which requires the minister to consider "previous contraventions of a similar nature by the person". The legislature could have limited the section 63 decision maker to only considering similar circumstances and did not do so.

[23] It is insufficient, however, to simply consider the number of previous orders and contraventions; the details of the previous orders and contraventions are important and will go to weight. For example, a short history of non-compliance that includes a recent contravention of a similar

[2] SBC 2002, c.69.

nature is likely more aggravating than a compliance history with multiple historic contraventions but nothing recent or related to the contravention.

[24] The Official identified that 16 orders and 4 contraventions were considered in assessing the AMP:

- General Order 2013-08, dated May 30, 2013
- General Order 2013-28, dated November 18, 2013
- General Order 2014-010, dated June 6, 2014
- General Order 2014-012, dated September 15, 2014
- General Order 2015-007, dated April 29, 2015
- General Order 2015-005, dated April 21, 2015
- General Order 2015-033, dated October 9, 2015
- General Order 2015-009, dated May 8, 2015
- General Order 2017-005, dated March 3, 2017
- General Order 2017-006, dated May 23, 2017
- General Order 2017-010, dated April 7, 2017
- General Order 2018-019, dated November 6, 2018
- General Order 2019-012, dated October 2, 2019
- General Order 2021-0056-01, dated April 30, 2021
- General Order 2022-0121-01, dated March 16, 2023
- Section 38 Order 2021-0097-01, dated January 4, 2022
- BCER Case File 14-23
- BCER Case File 2017-057
- BCER Case File 2017-004
- BCER Case File 2019-092

[25] I was able to locate background information in relation to all the orders and contraventions identified by the Official except General Order 2022-0121-01. Instead, I found General Order 2023-0031-01, which was identified by CNRL.

[26] It is a reasonable expectation of CNRL that it would be provided information regarding the orders and contraventions that were considered by the decision maker. While I recognize that CNRL would have been sent the orders and contraventions at the time of issuance, without further clarity, CNRL would not know which specific orders and contraventions were considered or how they were considered. At the very latest, the information should have been identified in the decision so that CNRL could understand the analysis undertaken and the reasons for decision. I note that there is a discrepancy between the numbers identified in the Contravention Report (14 orders and 5 contraventions) and the Decision (16 orders and 4 findings of contravention). I was also unable to locate one of the orders referenced by the Official. It is evident that there was no clear understanding regarding what previous orders and contraventions were considered and therefore further specificity was warranted.

[27] As stated earlier, I leave open the possibility that section 63(2)(a) allows a decision maker to consider the compliance history of a company regardless of the similarity of the previous contraventions or orders. However, absent context, the number of previous contraventions and orders is meaningless. If I were to consider compliance history generally, I would expect information regarding how CNRL's compliance history compares given the size of its portfolio in

British Columbia. This evidence is not before me. As a result, I will focus on those contraventions that I have identified as relevant to the Incident, namely Administrative Finding 2017-004 and Administrative Finding 2019-092. For the purposes of this review decision only, I place no weight on the other orders and contraventions that have been identified.

[28] I attach significant weight to Administrative Finding 2017-004 and Administrative Finding 2019-092. I take issue with CNRL's position that the facts underlying its previous contraventions are "remarkably" different than the circumstances of the Incident. Both Administrative Finding 2017-004 and Administrative Finding 2019-092 also included contraventions of section 37(1)(a) of the ERAA (or what was previously the *Oil and Gas Activities Act*) for failure to prevent spillage. Like the Incident, the spillage in Administrative Finding 2019-092 resulted, at least in part, from the failure of an employee to follow CNRL procedures and processes. I also note that the analysis of the section 63 factors in Administrative Finding 2019-092 resulted in the same conclusions as the Contravention Decision: the decision maker noted CNRL's previous contraventions and orders, determined that the incident was moderate with respect to gravity and magnitude but otherwise there were no aggravating factors and CNRL made positive efforts to prevent and correct the contravention.

[29] The AMP attached to Administrative Finding 2019-092 was $25,000 and the AMP attached to Administrative Finding 2017-004 was $17,500. I find that these previous contraventions of the same provision warrant an increased penalty to achieve both specific and general deterrence.

ii. <u>63(2)(b) the gravity and magnitude of the contravention</u>

Position of CNRL

[30] CNRL suggests that the BC Forest Appeals Commission approach of treating gravity and magnitude as two separate considerations should be followed. In that scenario, gravity refers to the conduct of the offending party and magnitude refers to the resulting damage from the contravention.

[31] CNRL submits that in this instance the gravity should be low because the contravention resulted from a lone employee engaging in rogue conduct.

[32] With respect to magnitude, CNRL assumes that the BCER Official applied the Incident Classification Matrix ("**ICM**") in determining that the contravention was moderate. It argued that in accordance with the ICM, the incident, at most, could be minor.

Position of the BCER Official

[33] The reasons provided by the Official do not explicitly identify whether gravity and magnitude are considered as separate determinations.

[34] The Official relies on the potential damage to the environment in concluding that the gravity and magnitude was moderate.

Discussion

[35] The language of 63(2)(b) suggests that gravity and magnitude are two separate considerations for a decision maker. Both words were used by the legislature and therefore both should be given meaning. The suggestion that gravity refers to the conduct of the offending party and magnitude refers to the resulting damage is a reasonable and practical approach to follow and I have not been provided an alternative approach by the Official.

[36] Although consideration needs to be given to both the gravity and magnitude of the contravention, it is reasonable to look at both and assign an overall assessment to the factor. Given the limited information that was provided in the Contravention Decision reasons, it is not clear to me if the Official applied this approach. I will therefore consider both separately to determine if I agree with the overall assessment of the Official.

[37] CNRL refers to the decision in *R. v. Sault Ste. Marie (City)* to argue that because the Incident resulted from a rogue lone employee, the gravity should be considered low and that "vicarious liability has no application to strict liability offences". This, in my view, is a misapplication of *Sault Ste. Marie (City)*. The references made in the Response to that decision are in the context of the application of the due diligence defence. The Official determined that CNRL did not exercise due diligence to prevent the contravention and that part of the Official's decision was not challenged. In the absence of due diligence, it is reasonable to conclude that the circumstances of the Incident - spraying hydrocarbon contaminated fluid over the lease site - is moderate in gravity. While it may be just one employee that was responsible, it reflects a scenario that enabled the employee to act with disregard for the environment.

[38] With respect to magnitude, CNRL assumes that the Official's use of the word "moderate" is a reference to the BCER's Incident Classification Matrix ("**ICM**"). The Official has confirmed that the ICM was not used in assessing the magnitude of the contravention. If I consider magnitude as the resulting damage from the contravention, a determination that the consequences of the contravention were moderate is not unreasonable. This is not a situation where the contravention was administrative in nature or where there were no impacts to the receiving environment. It is also not a scenario where there was significant, irreparable damage. In this instance, residual hydrocarbons remain at the site and while allowing those areas to naturally attenuate poses "minimal risk", concluding that the magnitude of the contravention was "moderate" is reasonable as there was some impact to the environment.

[39] The conclusion of the Official that the gravity and magnitude of the offence was moderate is reasonable and justifiable.

iii. <u>63(2)(g) the person's efforts to prevent and correct the contravention</u>

Position of CNRL

[40] CNRL submits that the Official failed to adequately consider all the efforts that it undertook to prevent future incidents because they failed to reference all the information that was provided by CNRL in its Response.

Position of the BCER Official

[41] The Official relies on the Supreme Court of Canada case of *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 for the position that they were not required to refer to every piece of evidence presented by CNRL.

Discussion

[42] Section 63(2) provides a decision maker with discretion regarding the weight that they apply to each of the factors set out. Although they are required to consider all the prescribed factors, there is no assigned weight that must be accorded to each, and it is not an exact calculation. There are administrative monetary penalty programs that apply a formulaic approach either by policy/guidance or by legislation; this is not one of those programs. The decision maker has discretion in the weight that they apply to each factor. Although the reasons with respect to this factor are very brief, they at least demonstrate that the Official turned their mind to the factor and considered the actions taken by CNRL as favourable.

[43] I am satisfied that the Official's consideration of this factor was adequate.

Decision

[44] The reasons given in the Contravention Decision were insufficient to demonstrate that appropriate consideration was given to section 63(2)(a). The Official did not identify which previous orders and contraventions they considered and how. By simply referencing the number of orders and contraventions, it was impossible to understand the analysis that the Official undertook.

[45] I focused my review on two recent administrative findings issued to CNRL, which both included contraventions of section 37(1)(a). An escalation from the AMP associated with the most recent Administrative Finding is necessary given that it is a repeated non-compliance.

[46] The reasons with respect to section 63(2)(b) were not sufficient to conclude that gravity and magnitude were each adequately considered. However, I found the Official's overall assessment to be reasonable.

[47] I did not find any errors in relation to the application of 63(2)(g).

[48] I am mindful of the contravention decisions that CNRL referred me to and argued included more serious circumstances than the Incident but resulted in smaller penalties. CNRL also highlighted that, with respect to Case File 2021-0026, the subject company appeared to have a lengthier compliance history than CNRL. However, for the same reasons that it was insufficient for the Official to simply consider the number of orders and contraventions in relation to the Incident, it is also inappropriate to simply compare numbers in relation to previous contravention decisions to determine if the quantum of AMP in this circumstance is appropriate.

[49] I agree with the Official that the BCER is not bound by its own previous decisions but also recognize the value in explaining departures from previous decisions to avoid the risk of arbitrary decisions.

[50] A penalty escalation beyond the most recent AMP of $25,000 is required as the penalties to date have not deterred non-compliant behaviour. This was CNRL's third contravention decision involving spillage in a relatively short period of time. I note that all the other factors, apart from gravity and magnitude (63(2)(b)), are favourable or neutral towards CNRL and that significant efforts were made to address the Incident after it occurred. These conclusions mirror the findings in Case File 2019-092.

[51] Case File 2019-092 (AMP of $25,000) resulted in an AMP that was $7,500 more than Case File 2017-004 (AMP of $17,500). In my view, a larger increase is warranted to achieve deterrence. I am satisfied that $40,000 is an appropriate AMP, which represents an increase of $15,000 from Case File 2019-092. Had the circumstances of the Incident been more serious or there were other aggravating factors present, a more significant escalation would have been necessary. I note that section 2(1) of the Administrative Penalties Regulation[3] provides for an administrative penalty "not exceeding $500,000" for a contravention of section 37(1) of the ERAA; $40,000 remains on the low end of available penalties.

[52] While the reasons provided by the Official were inadequate, my analysis leads me to conclude that the quantum of AMP was appropriate.

[53] For the reasons provided, the AMP is confirmed.

Peter Robb
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BC Energy Regulator

[3] B.C. Reg. 35/2011.