

Polluter Pays Principle in Alberta

Where to from here?

June 24, 2020 Presented by Jason Unger



Environmental
Law Centre

Polluter Pays Principle

Outline

- The principle
 - What it means
 - How it operates
 - Challenges
- How it is applied in Alberta
- Barriers
- What happens when money runs out?

THE POLLUTER PAYS PRINCIPLE IN ALBERTA LAW

An Introduction & Survey



Environmental
Law Centre

Prepared By
Environmental Law Centre (Alberta)
December 2019

<https://elc.ab.ca/wp-content/uploads/2019/12/The-Polluter-Pays-Principle-in-Alberta-Law-December-2019.pdf>

CLEAN SLATE, CONTAMINATED LAND:

The "untidy intersection" of insolvency
and the Polluter Pays Principle
and
Recommended reforms to the
Bankruptcy and Insolvency Act and
the *Companies' Creditors Arrangement Act*

Environmental Law Centre
Authored by Jason Unger
March 2020



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<https://elc.ab.ca/wp-content/uploads/2020/06/ELC-Insolvency-and-Polluter-Pays-PrincipleFinal.pdf>

Defining the principle

Organization for Economic Co-operation and Development (OECD)

- *The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays Principle". This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.*
 - OECD, Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, OECD/LEGAL/0102.

Defining the principle

“The ‘polluter pays’ principle is the commonly accepted practice that those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment” London School of Economics and Political Science <http://www.lse.ac.uk/GranthamInstitute/faqs/what-is-the-polluter-pays-principle/>

European Union –Environmental Liability Directive.

- *an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.*
- Includes species and natural habitats

You might pay:



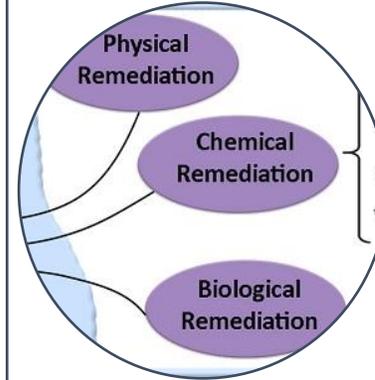
To avoid
pollution
(alternatives)



To prevent or
mitigate
pollution
(typically
through
technology)



To insure
against
pollution

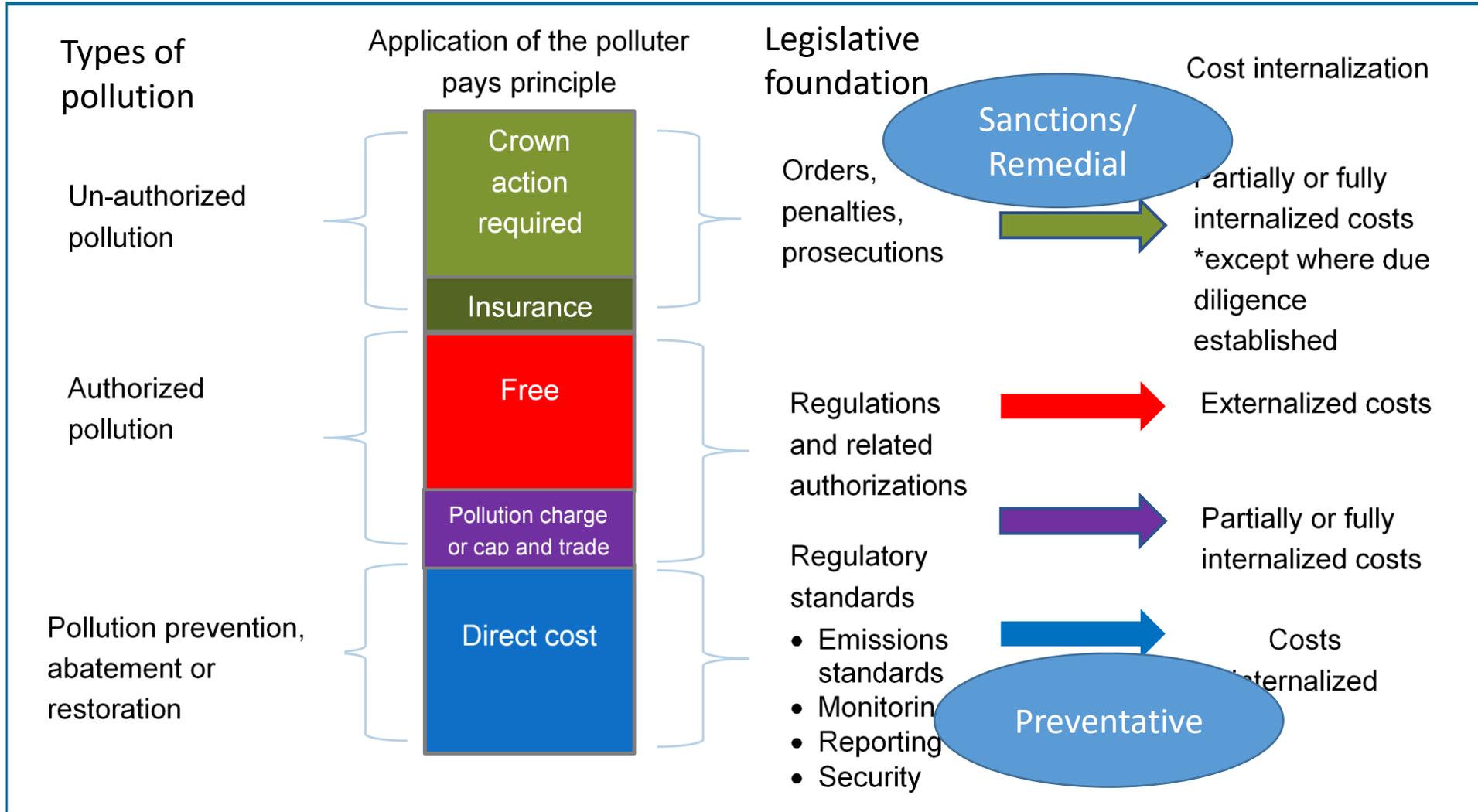


To remedy
pollution



Penalty for
polluting

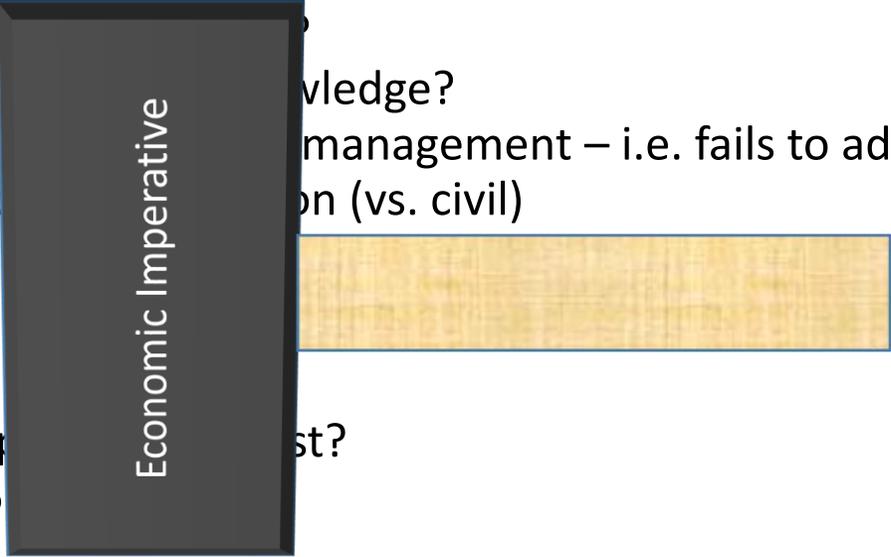




Polluter Pays Principle

Challenges

- Standards
 - Is there a level of acceptable risk?
 - Is the standard responsive to new knowledge?
 - Project based risk assessment vs. cumulative risk management – i.e. fails to address cumulative effects
 - Level of remediation and enforcement (vs. civil)
- Who pays?
 - Consumer?
 - Producer?
 - Can the polluter simply pass up the cost?
- When is payment made?
- Avoidance
 - Corporate structures
 - Piercing the veil?
- Letter of the law versus administration of the law (an unfortunate recurring theme)



Environmental focus	Grade	Summary observations
Air Pollution		
Greenhouse Gas Emissions	C+	Limited # of emitters covered. (Note: federal regulations may apply)
Mercury	C	Regulation and approvals based. Standards do not cover all environmental costs. Limited # of polluters covered.
Cap and Trade for SO ₂ and NO _x	C	Limited # of polluters covered. Cap and trade system may not cover all environmental costs.
Other Air pollutants	**C+	Regulation and approvals based. Standards may not cover all environmental costs. Non-point sources are not regulated.
Water Based Pollution and Habitat Disturbance		
Water Pollution	**C+/B-	Regulation and approvals based. Non-point sources unregulated. Environmental costs not adequately covered.
Aquatic Habitat Disturbance and Loss	C	Regulation and approval based. Standards may not cover all environmental costs.
Instream Flows	D-	No environmental or social costs are covered. Limited and discretionary standards based in recent licences for water diversions.
Wetlands	B-	Wetland offsets required by policy (but not regulation). Environmental costs may not be reflected in compensation and restoration.
Land Based Pollution and Disturbance		
Land Disturbance - Reclamation	B-	Reclamation requirements exist for various activities (but not all). Compliance concerns exist (particularly where no security is required).
Land Pollution – Remediation of contaminated land	B-	Remediation duties are strong. Standards of remediation may allow for ongoing harms. Regulatory assurance that remediation costs are covered are absent in some instances.
Agricultural Land Pollution	C	General standards apply. Scope of environmental costs covered is limited. (e.g. impacts of pesticide use and application of phosphorus)
Reforestation	B-	Impacts on species and other environmental services not considered.
Product Stewardship and Waste Management		
Landfills and Waste	C-	General waste fees apply. Standards may not cover all environmental costs.
Recycling	B-	Scope of materials covered is limited.

Polluter Pays Principle

Grade Legend

A/A+ Strong polluter pays system that covers all relevant activities and costs. Aspirational in nature. (Example: full

social cost of carbon through carbon levy is realized).

B Relative strong laws and standards are applied reflecting application of the polluter pays principle but

there still may be significant limitations in scope of activities and costs covered.

C Some application of the polluter pays principle, typically through regulations or levies that are limited in

scope and application. Costs are not based on an assessment of harms rather they reflect a policy choice.

F/D Few regulatory standards; no or limited functional implementation of the polluter pays principle

Pre-pollution tools - prevention

- Prohibitions
- Regulatory standards & authorization conditions
- Financial security (to meet post pollution duties)

- Underlying conflict with risk based regulation
 - Only the higher risks are regulated
 - Only the higher polluting are required to pay

Regulatory standards & authorization conditions

- Difficult to assess effectiveness as it is applied in highly variable fashion
 - Based on risks and ability to pay
 - E.g. municipal wastewater
- Gaps and standard
 - E.g. Fisheries Act prohibitions versus Environmental Protection and Enhancement Act approvals
- Heavily reliant on enforcement capacity and approach
- System needs
 - Audit
 - Transparency
 - Timeliness
 - Adaptability (knowledge of harm, cumulative harm)

Examples

Gaps in application

- Failure to consider relevant factors – e.g. regulating phosphorus for water quality objectives
- Failure to consider host of harms – Habitat/Instream flow needs

Failures in implementation

- Reclamation effectiveness
 - AEP Draft Report (FOIPed)
 - Land Reclamation Program Evaluation
 - All but one site failed to meet at least one criteria in evaluation
 - Systems of monitoring, evaluation and confirmation success and broader governance concerns identified.
 - <https://www.scribd.com/document/443631534/Draft-Report-An-Evaluation-of-Alberta-s-Land-Reclamation-Program>

Aggregate extraction

- Auditor General
November 2019
- https://www.oag.ab.ca/reports/environment_mgmt_sand_gravel_followup_nov_2019/

Un-reclaimed sand and gravel pits create environmental and financial risks p. 4 & 5
AEP does not do enough to protect Albertans from these risks p. 3

10 years after our original audit, AEP's processes for reclamation monitoring and enforcement are still inadequate, and so is the reclamation security p. 3

715 out of **2,700**
pits are not meeting reclamation requirements

260 of **715**
have been inactive for up to **10 years**

No enforcement actions taken p. 11 & 12

Security collected by AEP does not cover reclamation costs. Albertans will have to cover the shortfall if operators fail to reclaim the land p. 16

Albertans owed \$25 million in uncollected royalties on oil sands sites due to unauthorized exemptions given by AEP p. 17



AEP implemented our recommendations to p. 18 & 19

- verify reported volume and royalties
- assess sufficiency of security

Financial Security

- The risks of inefficient/ineffective application of the polluter pays system.
- Orphan inventory as of June 1, 2020 Source: Orphan Well Association

2953 Orphan Wells for
Abandonment

309 Orphan Facilities for
Decommissioning

3786 Orphan Pipeline Segments for
Abandonment

3085 Orphan Sites for Reclamation

966 Orphan Reclaimed Sites

Security (continued)

AER Liability Management Rating (June 6, 2020)

<https://www.aer.ca/regulating-development/project-closure/liability-management-programs-and-processes/liability-management-rating-and-reporting.html>

Value	Licencees	Number of licences/approvals	total deemed assets	total Deemed Liabilities	LMR value
0	234	9,408	\$233,574.06	\$627,535,096.63	0
0.01 - 0.49	40	3,084	\$54,489,824.91	\$197,922,613.62	0.28
0.50 - 0.99	74	23,063	\$1,545,064,809.73	\$1,828,098,473.70	0.85
1.00 - 1.49	88	36,613	\$2,721,891,472.50	\$2,164,255,758.92	1.26
1.50 - 1.99	54	61,604	\$7,823,379,537.59	\$4,351,011,481.84	1.8
2.00 - 2.99	65	50,699	\$11,519,294,166.00	\$4,793,459,099.16	2.4
3.00 - 3.99	29	91,901	\$26,019,701,516.55	\$7,561,807,091.08	3.44
4.00 - 4.99	31	10,201	\$3,990,370,839.73	\$889,352,357.15	4.49
5.00 - 5.99	18	16,938	\$11,255,984,959.17	\$2,037,486,517.68	5.52
6.00 - 6.99	10	2,393	\$1,277,367,110.05	\$200,637,376.00	6.37
7.00 - 7.99	9	11,794	\$10,675,240,420.68	\$1,430,615,778.86	7.46
8.00 - 8.99	9	918	\$773,068,951.02	\$89,377,360.81	8.65
9.00 - 9.99	7	5,450	\$7,343,206,781.24	\$755,772,413.62	9.72
10.00 or >	53	23,018	\$62,166,952,456.80	\$3,254,697,918.66	19.1
	721	347,084	\$147,166,246,420.03	\$30,182,029,337.73	

68% of licencees are below 2
Over 9 Billion in liabilities
Security held \$230million

LMR calculation of assets – assessment accuracy (industry netback)

Mine security (Oilsands and Coal)

- https://www.aer.ca/documents/liability/MFSP_Liability.pdf

MFSP liability and security, in billions of dollars

	Reported by June 30, 2015	Reported by June 30, 2016	Reported by June 30, 2017	Reported by June 30, 2018	Reported by June 30, 2019
MFSP liability	22.60	23.19	27.79	28.35	31.39
MFSP security held	1.36	1.38	1.39	1.46	1.47

Standards and Financial security conclusion

- Administration and implementation of polluter pays is just as important as the underlying legal obligation
- Alberta has been and is increasingly becoming a “public pays principle” province

Post harm remedies

- Remediation and reclamation duties
 - E.g., Duty to remediate and reclaim(EPEA), duty to reforest.
- Orders
 - Broad powers to order remediation
 - Historical contamination is a practical and legal challenge
 - *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (26 February 2019), Appeal Nos. 16-055-056, 17-073-084 and 18-005-010-R (A.E.A.B.) (2019 AEAB 1)
<http://www.eab.gov.ab.ca/dec/16-055-etc.-Cherokee-R.pdf>
- Admin penalties
- Prosecutions
 - Role of sentencing in Polluter pays principle
 - Deterrence

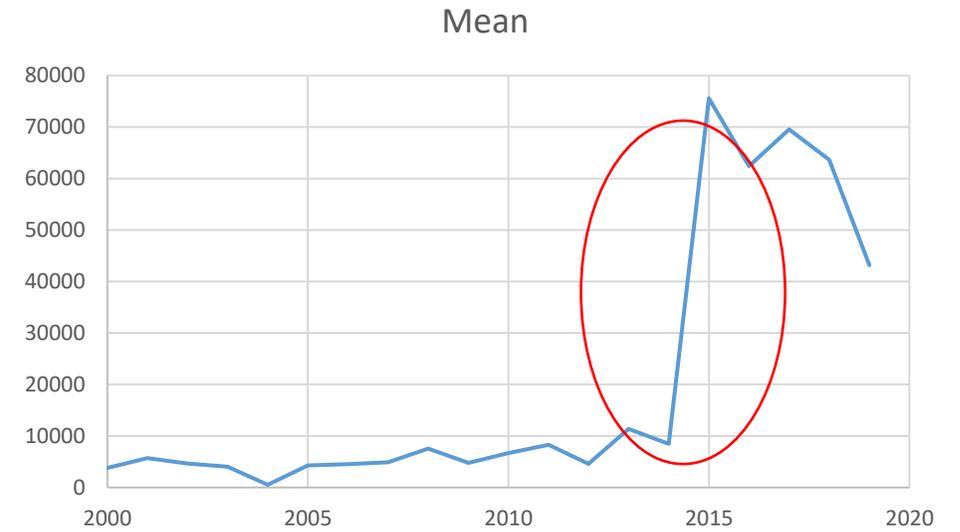
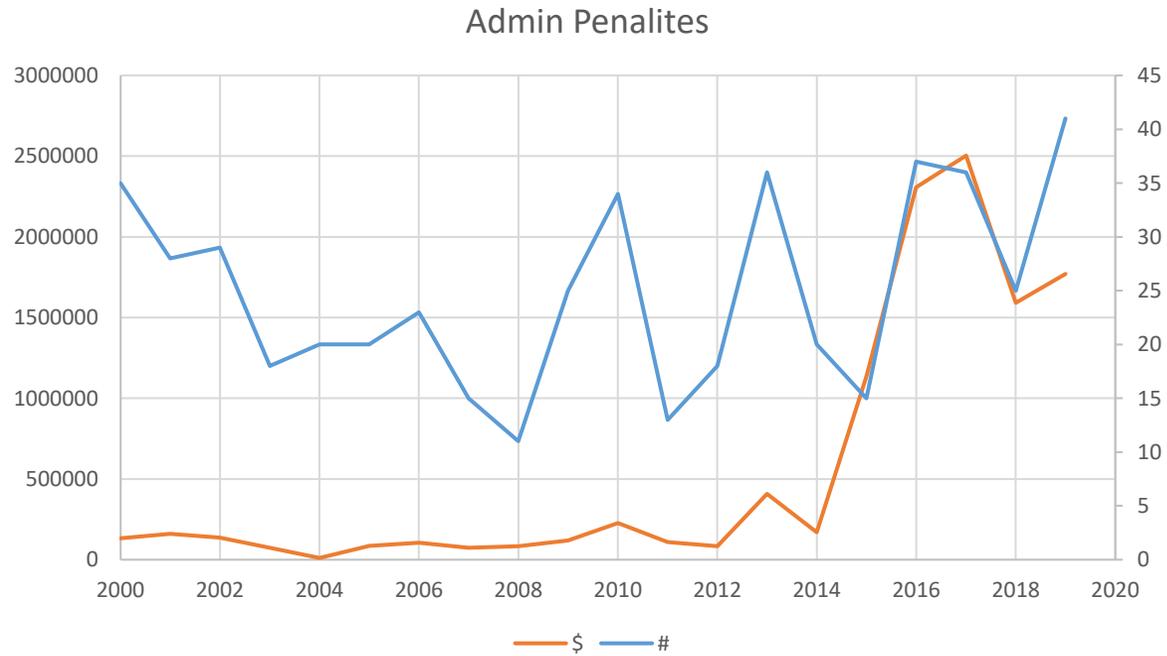
Sentencing R. v. Terroco

- R. v. Terroco Industries Limited, 2005 ABCA 141 (CanLII), <http://canlii.ca/t/1k3n3> - principles of sentencing
 1. culpability,
 2. prior records and past involvement with the authorities,
 3. acceptance of responsibility,
 4. damage/harm, and
 5. deterrence (specific and general)

Deterrence

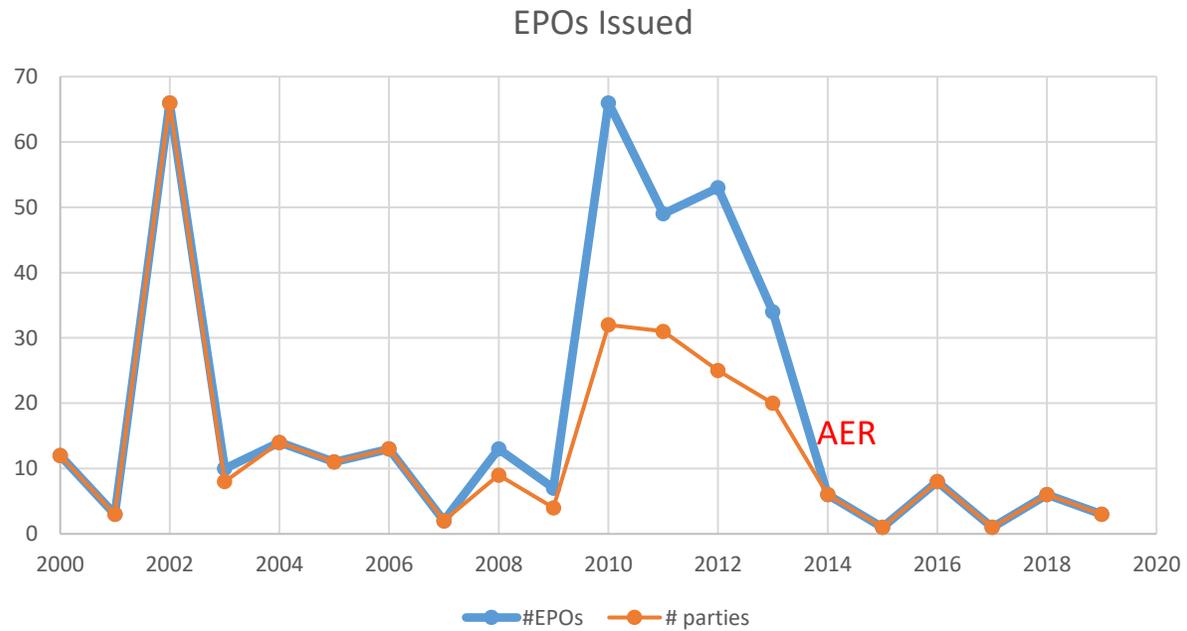
- Specific
 - Specific to individual
 - Remorse?
 - Culpability? (ignores warnings, attempts to evade or hide responsibility)
 - Economic benefit
 - Mere cost of doing business?
- General
 - Relevant to industry as a whole
 - The max fines indicate a legislative intent of general deterrence
 - Need for general deterrence may be higher for self regulated industries (R. v. Lasante, 2019 BCPC 96 (CanLII), <http://canlii.ca/t/j09rp>)
- “The penalty must be more than a slap on the wrist but less than a fatal blow”

Alberta Admin Penalties



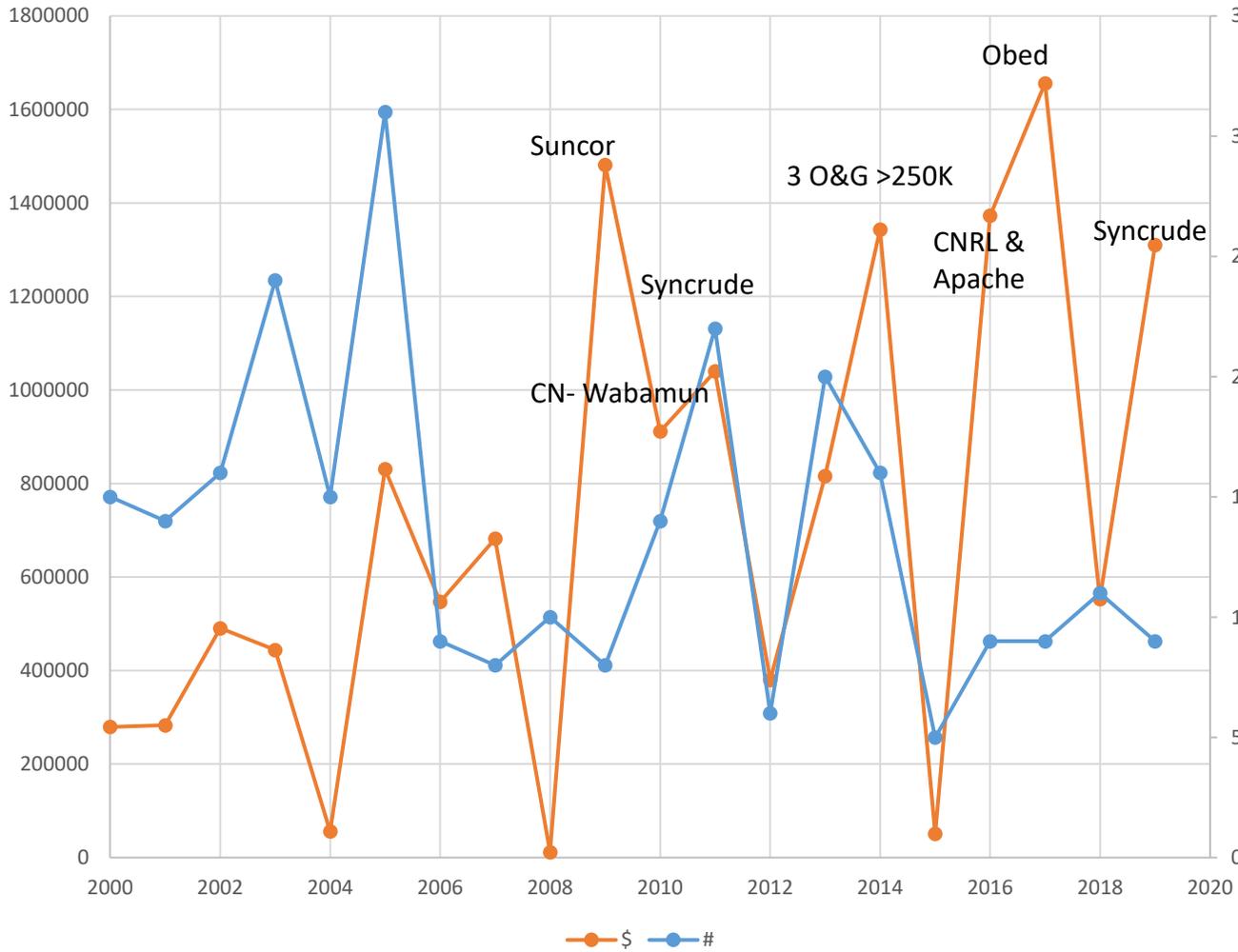
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Environmental protection orders – AEP



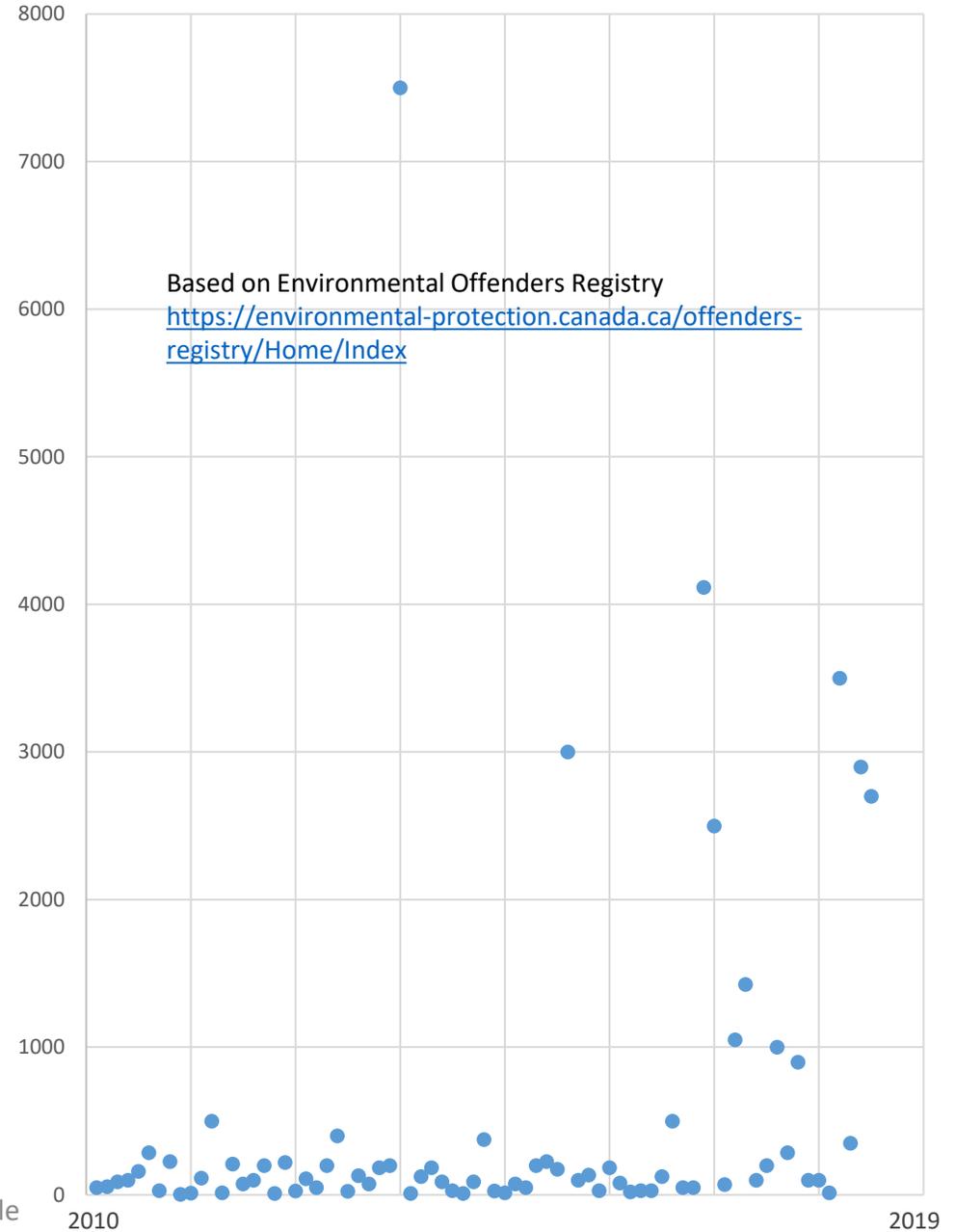
Prosecutions -sentencing

Provincial Fines (AEP (2000-2019
+ AER 2016-2019)



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Federal Fines -FA 36(3) (,000)



Based on Environmental Offenders Registry

<https://environmental-protection.canada.ca/offenders-registry/Home/Index>

Value of species

- *R v The Lake Louise Ski Area Ltd.*, 2018 ABPC 280 (CanLII), <http://canlii.ca/t/hwd8q>
- Cut down Whitebark pine, a federally listed species at risk, in a national park w/out a permit
 - Count 1 under SARA \$1.6 Million
 - Count 2 under Canada National Parks Act \$500,000
- “summer trail crew” had “absolutely no knowledge about” WP
- “Parliamentary intention under [SARA](#) requires the imposition of significant penalties with respect to species protected under the legislation”

VW- diesel gate

- \$188.5 million for 58 importation offences (\$1,450 per vehicle)
 - s.272(1)(a) of the *Canadian Environmental Protection Act, 1999* (max fine of \$250,000 per count)
 - \$8million for two counts of providing misleading information
 - Also could add economic gain or loss s.274.1
 - Consumer buy back \$2.4 billion and civil admin penalty of \$17.5million under the *Competition Act*
- *US* - \$2.8 billion (criminal fine) (\$4,746 per vehicle) under the Clean Air Act.

Legal application of PPP

- Corporate structures
 - Agents and subcontractors
 - Sale/protection of assets
 - Other corporate avoidance approaches
 - Perpetual Energy Inc. and Sequoia bankruptcy - alleged that Perpetual sold Sequoia a variety of wells, some of which had a beneficial ownership retained in Perpetual to avoid AER oversight of transfers (i.e. the LMR still over 1). Subsequently these productive wells reverted to Perpetual and Sequoia left with only bad wells to the tune of \$223 million in liabilities.
 - *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 6 (CanLII), <http://canlii.ca/t/j4jzd> motion to strike - All but BIA claim was struck.
 - *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 36 (CanLII), <http://canlii.ca/t/j4xq3> Security for costs application (\$120,000 against respondent and \$120,000 as against Perpetual)
 - Directors liability – usually not used
- Difficulty in assessing and attributing harm to species and habitat

What happens when the polluter can't pay?

- Reflects a policy failure (from an PPP application perspective)
- Insolvency as a free pass
 - E.g. Manito Energy transfers O&G assets to Persist Energy – same CEO
 - Company goes bankrupt in 2018. Persist Energy and receiver seek additional exclusion of onerous assets from sale in November 2019. Receiver's documents indicate AER is not opposed (also outlined in accompanying affidavit).
https://www.alvarezandmarsal.com/sites/default/files/canada/can_dms_130430723_v1_thirteenth_report_of_the_receiver_filed_november_8_2019.pdf
 - Is this meeting the purpose of directive 67 re: evaluating operators?
 - How should the regulator respond? Indicates negotiations took place to have some cleaned up.

Bankruptcy and Insolvency – Redwater reviewed

Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5, [2019] 1 S.C.R. 150

- Directly impacts ability to regulate provincially in furtherance of polluter pays principle – allows provincial regulations to diminish secured creditors return on insolvent estate.
- Notwithstanding disclaiming or abandoning “onerous assets” the estate may still be liable to meet environmental orders.
- Relies heavily on provincial regulator doing the right thing

Insolvency continued

- Still not clear – should we still have a the Abitibi Bowater test at all? i.e. insolvency process shouldn't dictate the nature of an environmental obligation
- Should the province be able to elect to be a creditor or a “regulator”?
- Should the bankruptcy and insolvency legislation mandate meeting of obligations first (i.e. remove the ability to abandon onerous property from an estate)?
- Should directors and officers be on the hook?

Conclusions

- Clear gaps exist in Alberta law in relation to pathways from polluter to harm
 - Water quality
 - Habitat
 - Water quantity

...not unique to Alberta
- Where administrative (or regulatory) discretion exists in implementation it is failing in certain instances. (security, monitoring and enforcement, timely application)
 - Reforms to narrow discretion or provide assurances are needed

Conclusions continued

- Legal tools are being used to avoid/dump onerous property should be reformed.
- Codification of “who pays next” would add clarity (and better reflect the PPP)
 - (see also *Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (3 February 2020), Appeal Nos. 17-069- 070 and 18-013-R (A.E.A.B.), 2020 ABEAB 6 which recommend a narrow reading of the director’s ability to issue an EPO against a purchaser of contaminated land that knew of contamination)
- Admin penalties, prosecutions and sentencing should be a part of the picture by driving specific and general deterrence (needs further evaluation)

Questions?

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