

IN THE MATTER of a CONTRAVENTION
of the *OIL AND GAS ACTIVITIES ACT*
[SBC 2008] Chapter 36
before
THE OIL AND GAS COMMISSION
Case File 2018-090FSJ

BETWEEN

The Oil and Gas Commission

AND

Kelt Exploration (LNG) Ltd. ("Kelt")

ADMINISTRATIVE FINDING

Before

Vice President, Operations, Andy Johnson

Representing the Oil and Gas Commission:

Compliance & Enforcement Officer, Ken McLean

Representing Kelt

Vice President of Operations, Doug MacArthur

Decision Date

May 21, 2020

Introduction:

1. On May 15, 2017, the Oil and Gas Commission (Commission) received a report from Kelt Exploration Ltd. (Kelt) that the Inga Lake Road was washed out at 3.5 km. An investigation into the washout revealed that Kelt had reinstalled the original culverts with two additional overflow culverts on May 23, 2017.
2. A Contravention Report (the Report) dated August 2019 was sent to me alleging that Kelt contravened section 6(1)(c) of the *Oil and Gas Road Regulation* (OGRR) and/or section 11(b)(i) of the *Environmental Protection and Management Regulation* (EPMR).
3. On January 31, 2020, a copy of the Report and a letter were sent to Kelt informing it the Commission was considering making a determination, pursuant to section 62 of the *Oil and Gas Activities Act* (OGAA) that Kelt contravened section 6(1)(c) of the OGRR and section 11(b)(i) of the EPMR. The letter informed Kelt of its opportunity to be heard in written form and advised that a finding of contravention could result in the Commission imposing an administrative penalty in accordance with section 63 of the OGAA.
4. Kelt provided a response in a letter dated February 28, 2020 (the Response).
5. Pursuant to my delegated authority under sections 62 and 63 of the OGAA, I will be making a determination regarding whether Kelt contravened section 6(1)(c) of the OGRR and/or section 11(b)(i) of the EPMR; whether to impose an administrative penalty under section 63 of the OGAA to Kelt; and the amount of the penalty, if any. I have reviewed the Report and the Response. In making a determination, I rely on these documents, and the applicable legislation.

Applicable Legislation

6. Section 6(1)(c) of the OGRR states:

6(1) Subject to subsections (2) to (4), a road permit holder may not construct or install a bridge or culvert on an oil and gas road unless all of the applicable following requirements are met:

(c) the bridge, if it will cross a stream or a fish stream, or the culvert, if it will be in a stream or a fish stream, is designed to pass the highest peak flow of the stream that can reasonably be expected within the return periods set out in column 2 of the following table for the period the road permit holder anticipates the bridge or culvert will remain on the site, as set out opposite in column 1 of the table:

Column 1 Anticipated period bridge or culvert will remain on site	Column2 Peak flow period
bridge or culvert, 3 years or less	10 years
bridge other than a bridge within a community watershed,	50 years

more than 3 years but less than 15 years	
bridge within a community watershed, more than 3 years	100 years
bridge, 15 years or more	100 years
culvert, more than 3 years	100 years

7. Maximum penalties for specific violations are set by regulation. Section 8(1) of the *Administrative Penalties Regulation (APR)* provides that a person who contravenes section 6(1)(c) of the OGRR is liable to an administrative penalty not exceeding \$250,000.

8. Section 11 of the EPMR states, in part, that a person who carries out an oil and gas activity on an operating area must, for each crossing of a stream, wetland and lake, ensure that the crossing does not prevent the movement of fish.

9. Section 3 of the APR provides that a person who contravenes section 11(b)(i) of the EPMR is liable to an administrative penalty not exceeding \$500,000.

10. Section 62(1) of the OGAA states that, after providing an opportunity to be heard to a person who is alleged to have contravened a provision of the Act, the regulations, a permit, an authorization or an order, the Commission may find that the person has contravened the provision.

11. Section 62(5) of the OGAA states, in part, that the Commission may not find that a person has contravened a provision of the OGAA or the regulations if the person demonstrates to the satisfaction of the Commission that they exercised due diligence to prevent the contravention.

12. Section 63(1) states that, if the Commission finds that a person contravened a provision of the OGAA or its regulations, the Commission may impose an administrative penalty. Section 63(2) of the OGAA sets out the factors that must be considered when determining whether to impose an administrative penalty under section 63(1) and the amount of the penalty. These include:

- (a) previous contraventions by, administrative penalties imposed on, or orders issued to the person;
- (b) the gravity and magnitude of the contravention;
- (c) the extent of 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; and

(h) other prescribed matters.

Background

13. Kelt is the holder of Road Permit #21 for the Inga Lake Road. On May 15, 2017, the Commission received a report from Kelt that the culverts on Inga Lake Road had washed out at 3.5 km. The Inga Lake Road provides access for both residents and industrial operations.

14. On May 15, 2017, Kelt contacted the Commission regarding repairing the road on an emergency basis. On May 16, 2017, the Commission gave Kelt permission to work within the critical timing window for fish to complete repairs and reminded Kelt of the requirements of section 11 of the EPMR. Kelt installed a temporary crossing on May 16, 2017 and a permanent crossing on May 23, 2017.

15. On June 8, 2017, Commission staff requested that Kelt provide the stream classification and documentation to support the design to the 100 year peak flow period. On June 12, 2017, Kelt responded that Gemini Environmental had assessed the stream as an S3 with moderate probability for fish usage and that the design will meet the 100 year peak flow requirement. An email dated June 12, 2017 from Gemini Environmental provided Kelt with additional information – specifically that the stream is named Coplin Creek and a number of fish species are present.

16. On June 15, 2017, Commission staff inspected the crossing installation and noted that the culverts were perched – thus impeding fish movement.

17. In July 2018, the Commission requested that Kelt provide documentation related to stream classification and hydrology. The Commission provided Kelt with a photograph showing that the culverts were not providing fish passage. Kelt responded that they were “unaware that further work was required” but they would obtain a hydrological study and forward it to the Commission.

18. On August 1, 2018, Kelt informed the Commission that a new contact at Kelt had taken on the file. Kelt stated that it was “prepared to collaborate on an action plan with deliverables to meet the required objectives and bring this crossing into compliance.”

19. On August 29, 2018, Kelt provided the Commission with a Fish Habitat Assessment by Prospect Land and Environmental. Among other information, the report confirmed the fish species present and that the current culverts “can be considered an impasse for fish”.

20. Kelt subsequently obtained and provided to the Commission a number of reports regarding various environmental or hydrological factors in relation to the crossing.

Issues

21. The issues which I will decide are:

Section 6(1)(c) of the OGRR:

- Did Kelt fail to ensure that culverts installed were designed to pass the highest peak flow that can reasonably be expected within the return periods set out in column 2?
- Did Kelt exercise due diligence to ensure that culverts installed were designed to pass the highest peak flow that can reasonably be expected within the return periods set out in column 2?

- Did Kelt contravene section 6(1)(c) of the OGRR?

Section 11(b)(i) of the EPMR:

- Did Kelt, in carrying out an oil and gas activity on an operating area, fail to ensure the crossing does not prevent the movement of fish?
- Did Kelt exercise due diligence to ensure that the crossing does not prevent the movement of fish?
- Did Kelt contravene section 11(b)(i) of the EPMR?

Section 63 of the OGAA:

- If Kelt is found to have contravened section 6(1)(c) of the OGRR and/or section 11(b)(i) of the EPMR what if any, administrative penalty to impose?

Section 6(1)(c) of the OGRR:

Did Kelt fail to ensure that culverts installed were designed to pass the highest peak flow that can reasonably be expected within the return periods set out in column 2?

22. On June 8, 2017, the Commission requested that Kelt provide documentation that the culverts installed were designed to the 100 year peak flow period. On June 12, 2017, Kelt responded that repair of the culverts and the installation of the additional culverts will meet the 100 year peak flow period. Kelt did not provide information to support this conclusion.

23. A field report from Trilogy Crossing Corporation dated September 29, 2018 included a recommendation to replace the crossing structure (existing culverts) with an appropriately designed structure capable of passing Q100 flows. This report does not support the June 12, 2017 response from Kelt that the culverts were compliant with the OGRR.

24. I find that Kelt failed to ensure that culverts installed were designed to pass the highest peak flow that can reasonably be expected within the return periods set out in column 2.

Did Kelt exercise due diligence to ensure that culverts installed were designed to pass the highest peak flow that can reasonably be expected within the return periods set out in column 2?

25. Pursuant to section 62(5) of the OGAA, I may not find that Kelt contravened section 6(1)(c) of the OGRR if Kelt demonstrates to my satisfaction that it exercised due diligence to prevent the contravention. The test to be applied is whether Kelt has demonstrated that it took all reasonable steps to prevent the contravention. Kelt is not required to show that it took all possible or imaginable steps to avoid the contravention. The standard is not one of perfection, but rather of a reasonable person in similar circumstances.

26. Kelt has not presented sufficient evidence to demonstrate that it exercised due diligence to ensure that culverts installed were designed to pass the highest peak flow that can reasonably be expected within the return periods set out in column 2. In its Response, Kelt submits that it was not aware of any issues prior to February 2018, and that non-compliance was not definitively determined with the OGRR until October 2018. Further, the Response states that Kelt assumed that “the two prior culverts installed by the previous operator would have been in compliance with all regulatory requirements.”

27. In its Response, Kelt refers to its Environmental Management Plan. However, I note that plan is a generic document that refers to wildlife habitat and timing windows and does not specifically address OGRR requirements. A reasonable step Kelt could have taken was to establish written procedures to guide crossing construction and repairs to ensure compliance with the OGRR.

28. I note Kelt's submission in its Response that the Commission "approved Kelt's replacement plan shortly after the washout occurred." I find that the Commission gave Kelt a limited permission to work within the critical timing window for fish to complete emergency repairs to the crossing. However, this permission did not relieve Kelt from its obligation to ensure that the crossing met applicable requirements including section 6(1)(c) of the OGRR.

29. I accept that the initial repairs were of an urgent nature to maintain resident and industrial access but this does not alter the requirement to meet existing regulations. A reasonable step would have been to expeditiously complete a post-construction assessment by a qualified professional to verify whether the crossing complied with the applicable regulations and promptly address any deficiencies noted by the assessment.

30. Kelt has failed to satisfy me that it took all reasonable steps to prevent the contravention.

Did Kelt contravene section 6(1)(c) of the OGRR?

31. I find that Kelt has failed to comply with section 6(1)(c) of the OGRR. I am not satisfied that Kelt exercised due diligence to prevent the contravention. As such, I find that Kelt contravened section 6(1)(c) of the OGRR.

Section 11(b)(i) of the EPMR:

Did Kelt, in carrying out an oil and gas activity on an operating area, fail to ensure the crossing does not prevent the movement of fish?

32. Kelt is the permit holder for the Inga Lake Road. For the purposes of the OGAA, the construction or maintenance of a prescribed road is included in the definition of an "oil and gas activity". In turn, section 2 of the OGRR prescribes oil and gas roads (including the Inga Lake Road) for the purposes of the definition oil and gas activity. "Operating area" is defined in the OGAA as an area identified in a permit within which a permit holder is permitted to carry out an oil and gas activity.

33. An inspection conducted by Commission staff on June 14, 2017 noted that the recently installed culverts were perched and thus impeding fish movement. I also note that in an email reply to the Commission of June 12, 2017, Kelt stated it "had Gemini Environmental assess the Inga Lake Road Washout. It was determined to be a Class S3 stream with an average channel width of 2.9 m with a moderate probability for fish usage."

34. Further, I note that the Fish Habitat Assessment provided by Kelt from Prospect dated August 2018 confirmed that the culverts "can be considered an impasse for fish". None of the subsequent reports provided by Kelt contain information to the contrary.

35. Therefore, I find that Kelt, in carrying out an oil and gas activity on an operating area, failed to ensure the crossing does not prevent the movement of fish.

Did Kelt exercise due diligence to ensure that the crossing does not prevent the movement of fish?

36. Pursuant to section 62(5) of the OGAA, I may not find that Kelt contravened section 11(b)(i) of the EPMR if Kelt demonstrates to my satisfaction that it exercised due diligence to prevent the contravention. The test to be applied is whether Kelt has demonstrated that it took all reasonable steps to prevent the contravention. Kelt is not required to show that it took all possible or imaginable steps to avoid the contravention. The standard is not one of perfection, but rather of a reasonable person in similar circumstances.

37. In its Response, Kelt states that non-compliance with the EPMR was not definitively determined until August 2018. The Response also states that the Fish Habitat Assessment provided by Prospect was finished approximately one month from the Commission's request and sent to the Commission on August 28, 2018, and that this report was the first conclusive expert information that the culverts were potentially out of compliance. I find insufficient evidence that Kelt assessed whether the culverts complied with the EPMR at or near the time of the crossing repair.

38. In its Response, Kelt refers to its Environmental Management Plan. However, I note that plan is a generic document that refers to wildlife habitat and timing windows and does not specifically address EPMR requirements. A reasonable step Kelt could have taken was to establish written procedures to ensure crossing installations and repairs comply with the EPMR.

39. I note Kelt's submission in its Response that the Commission "approved Kelt's replacement plan shortly after the washout occurred." I find that the Commission gave Kelt limited permission to conduct emergency repairs to the crossing during the critical timing window for fish. However, this permission did not relieve Kelt from its obligation to ensure that the crossing met applicable requirements including under section 11(b)(i) of the EPMR.

40. I accept that the initial repairs were of an urgent nature to maintain resident and industrial access but this does not alter the requirement to meet existing regulations. One reasonable step Kelt could have taken would have been to have a qualified professional verify whether the culvert installation complied with the EPMR on an expeditious basis.

40. Kelt has failed to satisfy me that it took all reasonable steps to prevent the contravention.

Did Kelt contravene section 11(b)(i) of the EPMR?

41. I find that Kelt has failed to comply with section 11(b)(i) of the EPMR. I am not satisfied that Kelt exercised due diligence to prevent the contravention. As such, I find that Kelt contravened section 11(b)(i) of the EPMR.

Section 63 of the OGAA:

If Kelt is found to have contravened section 6(1)(c) of the OGRR and/or section 11(b)(i) of the EPMR what if any, administrative penalty to impose?

42. Section 63 of the OGAA sets out factors that the Commission must take into consideration when determining whether or not to impose an administrative penalty. In the following paragraphs, I consider the applicability of those factors to these contraventions.

43. There have been no previous contraventions or administrative penalties and three previous orders issued to Kelt.
44. The gravity and magnitude was moderate due to the potential impacts of the crossing installation on fish movement.
45. There was no harm to others as a result of the contraventions.
46. The contraventions were not repeated but were continuous from May 23, 2017 to at least February 2020, after which the crossing was replaced.
47. There is no evidence to show the contraventions were deliberate.
48. Kelt did not derive any significant economic benefit but they did delay an estimated expenditure of \$450,000 to install a new crossing.
49. In response to inquiries from Commission staff, Kelt made efforts to correct the contraventions by completing environmental and hydrological studies starting in August 2018, and constructing a new crossing in March 2020.

Conclusion

50. In consideration of the foregoing, I find that Kelt contravened section 6(1)(c) of the OGRR and section 11(b)(i) of the EPMR. I am imposing an administrative penalty of \$20,000.



Andy Johnson
Vice President, Operations
BC Oil & Gas Commission

Date: May 21, 2020