

IN THE MATTER of a CONTRAVENTION
of the *OIL AND GAS ACTIVITIES ACT*
[SBC 2008] Chapter 36
before
The British Columbia Energy Regulator
Case File 2021-0154

BETWEEN

The British Columbia Energy Regulator

AND

Kelt Exploration (LNG) Ltd.

ADMINISTRATIVE FINDING

Before

Andy Johnson
Vice President, Compliance & Operations

Representing the BC Energy Regulator

John Warner
Compliance & Enforcement Officer

Representing Kelt Exploration (LNG) Ltd.

Daron Naffin
Bennett Jones LLP

Decision Date

July 12, 2023

Introduction:

1. On September 14, 2021, the BC Oil & Gas Commission (Commission) was notified by Kelt Exploration (LNG) Ltd. (Kelt) of unauthorized activity within a permitted archaeological site.
2. A Contravention Report (the Report) was sent to me on October 5, 2022, alleging that Kelt contravened section 21(b)(ii) of the *Oil and Gas Activities Act* (OGAA).
3. The Commission sent Kelt a letter and the Report on November 1, 2022, informing Kelt that I was considering making a finding that it contravened section 21(b)(ii) of the OGAA. The letter informed Kelt of its opportunity to be heard in written form and advised that a finding of contravention could result in the imposition of an administrative penalty in accordance with section 63 of the OGAA.
4. Kelt provided a response in a letter dated December 1, 2022 (the Response).
5. On February 17, 2023, the Commission was renamed the British Columbia Energy Regulator (BCER).
6. The Commissioner of the BCER has delegated me authority under sections 62 and 63 of the OGAA. I will be making a determination with regards to: whether Kelt contravened section 21(b)(ii) of the OGAA; whether to impose an administrative penalty under section 63 of the OGAA; and the amount of the penalty, if any. I have reviewed the Report and Kelt's Response. In making a determination, I rely on these documents, and the applicable legislation.

Applicable Legislation

7. Section 21(b)(ii) of the OGAA states that a person must carry out an oil and gas activity in compliance with a permit issued to the person.
8. Maximum penalties for specific violations are set by regulation. Section 2(1) of the *Administrative Penalties Regulation* (APR) provides that a person who contravenes section 21(b)(ii) of the OGAA is liable to an administrative penalty not exceeding \$500,000.
9. 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.
10. 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.
11. 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

12. Kelt is the permit holder of Pipeline Project Number #00002574 (the Permit) which authorizes Kelt to operate and construct sour oil and sour natural gas pipelines.
13. The Permit contains a condition which requires Kelt to use directional drilling at four archaeological sites. The four sites were identified by an Archaeological Impact Assessment report completed prior the construction of the pipelines. Condition 25 of the permit reads as follows:

Archaeology site(s) s18 must be avoided via directional drill as detailed in the Heritage North archaeological impact assessment report, KE-18-22, dated March 2, 2021.

14. An additional permit condition required the archaeology sites identified in the condition above to be flagged for avoidance by a qualified Archaeologist prior to project commencement. The archaeological sites were recorded with yellow flagged stakes by July 12, 2021, and construction began in August 2021.
15. The pipeline project is located on private land. On August 20, 2021, a request from the occupant of the land was made to remove the stakes from Archaeology site s18 in order to swath canola growing on the site.
16. Stakes were removed by the occupant and Kelt. Once the swathing was completed, Archaeological site s18 was not re-staked.
17. On September 14, 2021, Kelt provided a notice to the Commission that Archaeological site s18 had been impacted by on-going construction activities, including entry of construction vehicles on the site and removal of topsoil. Kelt advised that they stopped activities and erected snow fencing around the site.

Issues

18. The issues which I will decide are:
 - Did Kelt fail to comply with condition 25 of the Permit and thereby contravene section 21(b)(ii) of OGAA?

- Did Kelt exercise due diligence in its efforts to comply with condition 25 of the Permit?
- Was any noncompliance due to an officially induced error?
- Did Kelt contravene section 21(b)(ii) of the OGAA?
- If Kelt is found to have contravened section 21(b)(ii) of the OGAA what if any, administrative penalty to impose?

Did Kelt fail to comply with condition 25 of the Permit and thereby contravene section 21(b)(ii) of OGAA?

19. The Report alleges that Archaeological site s18 was impacted by works prohibited by condition 25 of the Permit, specifically that the sites identified in the permit condition be directionally drilled during pipeline construction rather than conventional stripping and grubbing and open trench.
20. In Kelt's notification to the Commission on September 14, 2021, Kelt reported that construction equipment had stripped away the topsoil from Archaeological site s18 . A photograph submitted by Kelt as part of its notification identifies piles of topsoil that were removed from the archaeological site. Additional photographs submitted in the Report provide evidence of Archaeological site s18 with disturbed and removed topsoil.
21. In its Response, Kelt does not dispute that it stripped topsoil from Archaeological site s18
22. Based on the information contained in both the Report and the Response, I am satisfied that Kelt did not comply with condition 25 of the Permit.

Did Kelt exercise due diligence in its efforts to comply with permit condition 25?

23. Pursuant to section 62(5) of the OGAA, I may not find that Kelt contravened section 21(b)(ii) of the OGAA 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.
24. In its Response, Kelt submits that it took all reasonable steps to prevent the contravention and exercised due diligence to avoid impacts to archaeological sites.
25. Kelt submits that it had established an Emergency Management System (EMS) that included directions to comply with protection of archaeological sites. I accept that Kelt's EMS describes the general requirements to protect archaeological sites and the importance of complying with such measures; however, I find that the EMS simply provides an overview of general practices and existing regulatory expectations and requirements.
26. Kelt also identified that it developed and shared its Field Guidelines with its contractors to assist them in avoiding impacts to archaeological sites during construction. Kelt noted that the Field Guidelines were available throughout the construction activities at an office trailer on site and established the need to protect and avoid archaeological sites.

27. Similarly, Kelt submits that it regularly discussed with its crews the importance of protecting archaeological sites and that it took specific steps to identify and protect archaeological sites from disturbance. Kelt points to tailgate meetings which included visits to nearby archaeological sites to familiarize persons with the site and noted that snow fencing and yellow flagged stakes identified sites to be avoided at all times.
28. I accept that the Field Guidelines identify the importance of recording archaeological sites with yellow flagging to avoid disturbance of the site and that it is the responsibility of the contractor to avoid the flagged area.
29. However, in its Response Kelt acknowledges that no orange snow fencing had been erected at Archaeological Site s18 until after the site was disturbed. Kelt further authorized the occupant to remove the required recording of the site with yellow flagged stakes. There is no evidence of any steps that Kelt took to advise personnel that these normal protections had been removed from Archaeological Site s18 or any steps to ensure that the yellow flagged stakes were replaced once the occupant had finished swathing the canola.
30. Furthermore, I do not find the evidence supports Kelt's submission that Archaeological Site s18 was specifically discussed and identified on site with staff. The Daily Construction Reports submitted by Kelt refer to a discussion of Kelt's Chance Find Procedure while the correspondence generally notes that archaeological sites are identified with orange snow fencing and yellow flagged stakes.
31. I must consider whether all reasonable efforts were made to prevent the specific event, which was the disturbance of Archaeological Site s18 after the removal of yellow flagged staking. Kelt submits that it was not foreseeable that the flagging and fencing protocols would be impacted by the occupant's removal of the flagged stakes. I disagree. Kelt was specifically notified and condoned the removal of the flagged stakes at Archaeological Site s18. Knowing of these circumstances, I would expect that Kelt put in place some measures to ensure the re-recoding of the site once the swathing had been completed.
32. Accordingly, I do not agree that with Kelt's submission that the measures described in the Response can be considered as "more than adequate protection for Arch Sites".
33. After reviewing the Report and Kelt's Response, I find that Kelt had general practices in place to identify the need to avoid impacts to archaeological sites, including the recording of archaeological sites with yellow flagged stakes, and orange snow fencing. However, Kelt authorized the occupant of the land to remove the flagged stakes. This required Kelt to take specific steps to ensure that, in their absence, the site would continue to be avoided and re-flagged once the swathing by the land occupant was completed. Kelt did not put in place any measures to address the specific circumstances that led to the disturbance of the archaeological site and simply relied on its general practices and measures that could not be effective in the circumstances. I conclude, therefore, that Kelt did not exercise due diligence in its efforts to comply with the permit condition.

Was any noncompliance due to an officially induced error?

34. In reviewing both the Response and the Report, I find no evidence to suggest any officially induced error in relation to this noncompliance.

Did Kelt contravene section 21(b)(ii) of the OGAA?

35. I find that Kelt has failed to comply with section 21(b)(ii) of the OGAA. I am not satisfied that Kelt exercised due diligence to prevent the contravention. As such, I find that Kelt contravened section 21(b)(ii) of the OGAA.

If Kelt is found to have contravened section 21(b)(ii) of the OGAA what if any, administrative penalty is to be imposed?

36. 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 this contravention.
37. There has been one finding of contravention made against Kelt.
38. Although there is some evidence that artifacts were disturbed, I do not have sufficient evidence to demonstrate that the gravity and magnitude of the contravention was moderate or high.
39. There is no evidence of harm to others resulting from the contravention.
40. The contravention was neither repeated nor continuous.
41. I find no evidence that the contravention was deliberate.
42. I find no evidence that there was any economic benefit from the contravention.
43. After the disturbance of the site was identified, Kelt immediately stopped worked and notified the BCER of the circumstances.

Conclusion

44. I have found Kelt contravened section 21(b)(ii) of OGAA. Based on the above discussion of the various factors set out in section 63(2), I am imposing an administrative penalty of \$5,000.



Andy Johnson
Vice President, Compliance & Operations
BC Energy Regulator

Date: July 12, 2023