

## Review Decision R-2022-03

In the matter of a request for review under section 70 of the *Oil and Gas Activities Act* of Administrative Finding 2021-0107 issued to AQT Water Management Inc.

**Decision Date: January 13, 2023**

### Introduction

- [1] This matter involves a request for review of a finding of contravention (“**contravention decision**”) made by the Oil and Gas Commission (“**Commission**”) on July 15, 2022 which found that AQT Water Management Inc. (“**AQT**”) contravened section 82 of the *Oil and Gas Activities Act* (“**OGAA**”). The Commission imposed an administrative penalty in the amount of \$20,000.
- [2] Pursuant to section 70(6) of OGAA, on receipt of the request for review, payment of the administrative penalty was stayed.
- [3] I have authority to review the contravention decision under section 70 of OGAA through my designation as the review official for this review by the Commissioner of the Commission. I have confirmed that the contravention decision is subject to review as it is a “determination” and AQT is an “eligible person” as both are defined in section 69 of OGAA, and the request for review was submitted within the 30 day time limit specified in section 70(3) of OGAA. Section 71 of OGAA gives me the power to confirm, vary or rescind the contravention decision.
- [4] For the purposes of the review, AQT and the Commission submitted an Agreed Statement of Facts and Admissions (“**ASOF**”) on September 28, 2022. On October 3, 2022, the Commission and AQT provided email correspondence correcting minor errors in the ASOF. AQT provided a written submission on October 5, 2022. The Commission official provided reply materials on October 12, 2022. AQT provided a final reply submission on October 19, 2022.

### Background

- [5] The following facts are not in dispute.
- [6] On September 11, 2020, the Commission issued Order 20-02-007 Amendment #1 to AQT designating an area in the Sunrise field, Bluesky formation, as a Special Project under section 75 of OGAA (“**Special Project Order**”), for the operation and use of a storage reservoir for the injection of produced water.
- [7] AQT began injection into the well in September 2020.
- [8] On March 21, 2021, the Commission received a “Drilling Incident – Kick” report from an off-setting well. AQT ceased disposal operations on March 21, 2022.
- [9] On March 26, AQT provided the Commission with records of wellhead pressure from the disposal well which indicated a pressure of 29,820 kPa at the datum depth of 1,415.5 mKB TVD. AQT and the Commission agree that this pressure significantly exceeded the maximum reservoir storage pressure limit of the well.

- [10] On March 26, 2022, the Commission suspended the Special Project Order to prevent further disposal injection into the Bluesky formation.
- [11] On June 25, 2021, the Commission issued General Order 2021-0107-01 (“**General Order**”). The General Order required AQT to reduce the measured reservoir pressure to 15,400 kPa or less and provide a reservoir pressure test to the Commission to demonstrate that the reservoir pressure test was at or below 15,400 kPa at 1,415.5 mKB TVD. AQT was required to comply with the terms of the General Order by September 30, 2021.
- [12] A pressure analysis submitted by AQT to the Commission on September 25, 2021 indicated an estimated formation pressure of 23,100 kPa.
- [13] On October 18, 2021, the Commission requested that AQT submit a plan to “outline how AQT, on or before April 1, 2022, will achieve the pressure contained in the Order.” On October 21, 2021, AQT reply that it agreed that the data indicated that the reservoir pressure “likely exceeds 15,400 kPa at measurement depth”.
- [14] On November 12, 2021, the measured reservoir pressure was 20,600 kPa.
- [15] On July 15, 2022, the Commission issued a contravention decision that found that AQT contravened section 82 of OGAA because AQT did not comply with the General Order to reduce the reservoir pressure to at or below 15,400 kPa at 1,415,5 mKB TVD by September 30, 2021. The Commission further concluded that AQT did not demonstrate that it exercised due diligence and observed that AQT could have developed a detailed plan to ensure the reservoir pressure was at or below the maximum allowable pressure by the prescribed time outlined in the General Order, including sufficient pressure testing to track progress in real time.
- [16] The contravention decision imposed an administrative penalty in the amount of \$20,000.

### **Position of the Parties**

- [17] AQT requests relief from the contravention decision on the grounds that the Commission erred when it concluded that AQT did not act with due diligence to prevent the contravention.
- [18] The Commission official submits that the steps taken by AQT do not demonstrate that AQT took all reasonable steps to comply with the Order.

### **Issues**

- [19] The only issue to be address in this review is whether AQT exercised due diligence in its efforts to comply with the Order.

### **Discussion and Analysis**

- [20] AQT submits that its specific conduct and responses to the Commission’s General Order demonstrate that AQT acted reasonably and with due diligence. Before considering each circumstance that AQT submits

demonstrates its due diligence, I must first address AQT's submissions regarding the standard that applies to its conduct.

[21] AQT submits that the Commission official has incorrectly stated in its submissions that the standard is whether AQT "demonstrate[d] they took all reasonable steps to comply with the Order" whereas the correct standard is to "act with due diligence".

[22] In *R. v. Sault Ste. Marie (City)*,<sup>1</sup> the Supreme Court of Canada identified a category of offence known as a strict liability offence. Provincial regulatory offences are generally considered strict liability offences. In a strict liability offence, the doing of the prohibited act constitutes the offence but it is open to the accused to advance a defence of due diligence. The Supreme Court identified that the "defence will be available if the accused... **took all reasonable steps** to avoid the particular event" [my emphasis].<sup>2</sup>

[23] The words "all reasonable steps" inform the content and meaning of a due diligence defence. Therefore, I am satisfied that in order to demonstrate that AQT exercised due diligence, AQT must demonstrate that it took all reasonable steps to comply with the General Order.

[24] AQT advances a number of arguments that it says demonstrates it exercised due diligence.

[25] AQT notes that it followed the requirements of the Special Project Order at all times and had no indication of concerns related to reservoir pressure prior to the drilling kick.

[26] I do not consider compliance with the Special Project Order relevant to assessing AQT's due diligence with the General Order. A defence of due diligence must relate to the particular event that gave rise to the contravention, which in this case, was compliance with the General Order. Compliance with other regulatory obligations and AQT's general standard of care is not relevant to an assessment of due diligence<sup>3</sup>. Such general compliance is expected of anyone who chooses to participate in a regulated industry, such as the oil and gas industry.

[27] AQT also submits that it immediately ceased injection into the Bluesky formation following notification of a drilling kick by a nearby operator and that it has not injected into the Bluesky formation since March 21, 2021. AQT submits that suspending injection and cooperating with the other operator demonstrates that it exercised due diligence in relation to the offence.

[28] As noted above, due diligence must relate to the event that gave rise to the contravention, which was compliance with the General Order.

[29] A drilling kick is evidence of excessive pressure in the formation and if left unaddressed it can result in a well blowout. When contacted by another operator who experience a drilling kick, AQT suspended injection. The Commission also suspended the Special Project Order on March 26, 2021 prohibiting any further disposal.

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<sup>1</sup> [1978] 2 SCR 1299, [*Sault Ste Marie*].

<sup>2</sup> *Ibid*, at page 1326.

<sup>3</sup> *R. v. Imperial Oil*, 2000 BCCA 553 at para. 23 [*Imperial Oil*]

- [30] The actions by AQT following notification of the drilling kick reflect necessary steps that any operator would be expected to take in the circumstances. They were also consistent with AQT's regulatory obligations, including the Commission's decision to suspend the Special Project Order which prevents further disposal into the formation. Adhering to these requirements and taking steps to manage an inherently dangerous set of circumstances reflects the general standard of care expected of AQT. Further, as previously noted, general compliance with regulatory requirements that suspended further disposal is a minimum expectation and not relevant to the assessment of due diligence in relation to compliance of the General Order itself.
- [31] Once the General Order was issued, AQT submits that between July 2021 and September 25, 2021 it removed 2,375 m<sup>3</sup> of flowback fluid which fell within a range that the Commission estimated would be necessary to achieve the desired formation pressure. Thus, AQT suggests that this demonstrates a "reasonable action" and in line with what the Commission would have expected in order reduce the reservoir pressure.
- [32] As the Commission official notes, AQT only became aware of the Commission's estimate as part of the contravention report provided to AQT in April 2022. Thus, at the time of the General Order and the period during which AQT was obligated to reduce the formation pressure, AQT had no knowledge of the Commission's estimate.
- [33] Even if AQT had been aware of the estimate at the time and based its flowback on that information, AQT still had to ensure itself that it was removing sufficient flowback fluid to reduce the pressure by September 30, 2021. However, AQT did not take any additional steps beyond removing 2,375 m<sup>3</sup> of flowback fluid to assess whether the flowback it conducted was progressing in a manner sufficient to meet the terms of the General Order, either through pressure testing or another method. AQT's first pressure test was conducted on September 25, 2021, five days before the requirements of the General Order were to be met.
- [34] A defence of due diligence requires a person to demonstrate that they took "all reasonable steps to avoid the particular event".<sup>4</sup> It means that due diligence contemplates "taking 'all' reasonable steps, not 'some' reasonable steps".<sup>5</sup>
- [35] To comply with the General Order, AQT was required to flowback sufficient volume to achieve a reduction in the formation pressure. To do so, AQT had to take steps to ensure that the flowback was proceeding in a manner that would achieve the requirements of the order, that is, a pressure of 15,400 kPa at 1,415.5 mKB TVD. The fact that the flowback volume falls within an estimated range, unknown to AQT at the time of the General Order, fails to demonstrate that AQT took all reasonable steps to meet the requirements of the General Order.
- [36] In fact, the evidence demonstrates that AQT was aware as early as August 5, 2021 that the flowback rate was declining. A Commission representative identified the option of installing a submersible pump to increase the flowback rate. I agree with the Commission official that a submersible pump would have been an option to help address the requirements of the General Order. In its submissions, AQT does not identify why this was option was not considered or implemented.

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<sup>4</sup> *Sault Ste. Marie* at para. 60.

<sup>5</sup> *R. v. General Scrap Iron & Metals Ltd.*, at para. 102

- [37] AQT also submits that practical circumstances limited its ability to comply with the Order. AQT submits that the amount of flowback fluid that was required to be removed to achieve the required reservoir pressure could not feasibly be disposed of at its operating facility because of its limited capacity and because doing so in the required timeframe would cause “significant hardship”. AQT suggests that disposing in another commercial facility was “not commercially viable.”
- [38] I note as a general principle that the expenses associated with regulatory compliance are not a relevant factor in assessing due diligence.<sup>6</sup>
- [39] Even where the costs of taking steps to avoid a non-compliance can be considered as part of determining whether all reasonable steps were taken, there must be some evidentiary basis to substantiate the argument.<sup>7</sup>
- [40] AQT did not provide me with evidence of any hardship that disposal would have caused to AQT. I also have no evidence that AQT sought out the availability of another facility beyond its own in which it could dispose of the flowback fluid.
- [41] It was open to AQT to consider other commercially available disposal facilities which exist in the region. While I acknowledge that relying on another commercial disposal option would have imposed additional costs on AQT, this alone is insufficient to demonstrate that disposal was economically unfeasible.
- [42] Further, if AQT felt that the timeframe to dispose of the flowback water was unachievable, it could have requested that the Commission amend the Order, with appropriate supporting information. It did not do so.
- [43] AQT also submits that it was a reasonable interpretation of the Commission’s correspondence of October 18, 2021 that the requirement to reduce the reservoir pressure was extended to April 1, 2022. AQT submits that it continued to reduce reservoir pressure through April and May 2022 and achieved a pressure that was a “nominal difference” from the Order. AQT suggests that this demonstrates it had a plan to meet the required pressure.
- [44] By September 30, 2021, AQT had not reduced the reservoir pressure as required by the General Order. AQT only developed a pressure reduction plan after the expiry of the General Order, which still did not result in achieving the required pressure reduction.
- [45] In the contravention decision, the Commission acknowledged the existence of the additional correspondence and concluded that, regardless of whether there was an extension, there was insufficient evidence to establish that the reservoir pressure was reduced to at or below 15,400 kPa by April 1, 2022. Thus, I do not find that this establishes that AQT took “all reasonable measures” to meet the terms of the General Order.
- [46] AQT also submits that “other factors maybe [sic] influencing the pressure in the reservoir” and that this has prevented AQT from achieving the required pressure. AQT submitted no evidence to support this assertion

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<sup>6</sup> *R. v. Alexander*, [1999] N.J. No. 19 (C.A.) at para. 16.

<sup>7</sup> *R. v. Nickel City Transport (Sudbury) Ltd.* at para. 42.

and it is purely speculative. As I have previously noted, it was open to AQT to present any concerns with the General Order to the Commission at any time prior to September 30, 2021.

- [47] AQT suggests that the “intent” of the General Order has been achieved and states that it is unaware of any incidents relating to the well operated by the operator who experience the drilling kick.
- [48] Even if I accept that AQT has met the “intent” of the General Order, which I do not, I do not agree that this would be relevant in assessing the due diligence required of AQT in the circumstances.
- [49] The gravity of the potential harm that may result from AQT’s conduct informs the efforts it would reasonably be expected AQT to undertake to prevent the harm.<sup>8</sup> The disposal of flowback fluid is inherently dangerous and can pose a risk to public safety and the environment. When the formation becomes over pressurized, it can create a significant risk to the integrity of nearby wells and by extension to other operators, the safety of their employees and the nearby public. These consequences are not abstract – the drilling kick experienced by another operator is evidence of the significant risk that can materialize. The absence of additional reported events does not negate future risks.
- [50] The level of skill of an operator will also inform the efforts to be expected of AQT.<sup>9</sup> Disposal of flowback fluid also requires a heightened degree of expertise and skill to perform the activities in a way that mitigates these risks. It is an inherently dangerous activity. AQT is an experienced operator in Northeast British Columbia engaged in a hazardous, highly regulated industry. AQT has chosen to participate in this industry and AQT is obligated to take all measures necessary to comply with regulatory obligations.
- [51] Thus, in light of the above, I am of the view that the level of effort and the steps expected by AQT to prevent the harm were considerable.
- [52] AQT did not complete the required pressure reduction, did not have sufficient mechanisms in place to monitor its progress or to determine if the flowback was sufficient. The submissions raised by AQT relate to its general regulatory compliance record and not the specific event at issue. To the extent that AQT identifies any limited steps it took to meet the terms of the General Order, they fall well short of demonstrating that it took all reasonable steps to meet the requirements of the General Order.
- [53] I am not satisfied that the Commission official erred in his conclusion that AQT failed to take all reasonable steps to prevent the contravention.

## Decision

- [54] For the reasons provided above, the contravention decision, including the administrative penalty, is confirmed. On issuing this decision, the stay of the administrative penalty is terminated.



Mayka Kennedy, P.Eng., C.Dir.

<sup>8</sup> *R. v. Syncrude Canada Ltd.*, 2010 ABPC 229 at para. 103.

<sup>9</sup> *Imperial Oil* at para. 8.