

## Review Decision R-2023-02

In the matter of a request for review under section 70 of the *Energy Resource Activities Act* of Administrative Finding 2019-041 issued to AQT Water Management Inc.

**Decision Date: December 12, 2023**

### Introduction

- [1] This matter involves a request for review of a finding of contravention issued by a British Columbia Energy Regulator (“**BCER**”)<sup>1</sup> official to AQT Water Management Inc. (“**AQT**”) on July 12, 2023 (the “**Contravention Decision**”) (the BCER official and AQT, collectively, the “**Parties**”).
- [2] The Contravention Decision held that AQT contravened section 82 of the *Energy Resource Activities Act*<sup>2</sup> (“**ERAA**”) and imposed an administrative penalty of \$50,000 (the “**Contravention Decision**”). Section 82 requires a person subject to an order under ERAA to comply with that order.
- [3] The Commissioner of the BCER has designated me as the review official for the purpose of reviewing the Contravention Decision.
- [4] Section 71(1)(a) of ERAA gives me the power to confirm, vary or rescind the Contravention Decision.
- [5] I have reviewed all the materials provided by the Parties.

### Issue

- [6] The issue before me is whether the Contravention Decision should be confirmed, varied or rescinded.

### Background

- [7] The following facts are not in dispute:
- AQT is the permit holder for Well Authorization 3010 (the “**Well**”), which is approved for produced water and non-hazardous waste disposal pursuant to an ERAA section 75 special project order dated January 22, 2016.
  - On July 12, 2019, the BCER issued General Order 2019-007, which required AQT to:
    1. Submit a proposal for a preliminary groundwater assessment to the BCER for review and approval by August 15, 2019. The proposal was to be as described in Appendix A, which included a

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<sup>1</sup> Previously known as the BC Oil and Gas Commission and referred to as the Commission in some of the materials included in submissions.

<sup>2</sup> SBC 2008, c. 36.

requirement to collect baseline groundwater samples from domestic water wells located within 600m of the Well pad boundary.

2. Conduct the approved preliminary groundwater assessment proposal and submit a report to the BCER by December 2, 2019.
- On August 9, 2019, AQT requested a review of General Order 2019-007.
  - On August 12, 2019, the BCER received a preliminary groundwater assessment proposal pursuant to item 1 of General Order 2019-007.
  - On August 22, 2019, the BCER amended General Order 2019-007, in part, because AQT's proposal did not meet the requirements of the previously issued July 12, 2019 Order Appendix A (the "**Amended Order**").
  - The Amended Order required AQT to:
    1. *On or before September 30, 2019 submit to the Commission for review and approval, a detailed proposal prepared by a qualified professional with expertise in hydrogeology for a preliminary groundwater assessment as described in the attached Appendix A.*
    2. *Unless the domestic water well land owner does not consent, **complete** the collection of baseline groundwater samples from all existing domestic water wells located within 600 metres of the well pad boundary of AQT Ft St John, WA# 03010 located at 11-12-084-19W6M (the Subject Well) by October 31, 2019. The suite of analytical parameters for baseline testing shall include routine water quality parameters, including total dissolved solids, pH, major cations and anions, total and dissolved metals, and dissolved gases (C1-C3).*
    3. *Submit the results of the domestic water well sampling, as required by Item 2, to the Commission by December 31, 2019, including a consultation record of all domestic water well land owners that were contacted in response to this requirement.*
    4. *Employ a qualified professional with expertise in hydrogeology to conduct the preliminary groundwater assessment as per the proposal approved by the Commission, and submit a preliminary groundwater assessment report (as described in Appendix A) to the Commission on or before December 31, 2019, unless an alternative submission date is authorized by the Commission.*

**[emphasis added]**

- AQT requested a review of the Amended Order on September 23, 2019.
- On August 12, 2020, a BCER review official confirmed the Amended Order except that the date for submission of a proposal for a preliminary groundwater assessment was revised to September 21, 2020 and the date for submission of domestic water well sampling and the preliminary groundwater assessment report was revised to December 31, 2020 (the "**Review Decision**"). The Review Decision noted that AQT did not dispute the condition for domestic groundwater sampling.

- AQT submitted a proposal for a preliminary groundwater assessment to the BCER on September 21, 2020. AQT's proposal included a plan for sampling and analyzing domestic water wells within 600 m of the Well.
- There was no further communication between AQT and the BCER with respect to the Amended Order until January 7, 2021.
- AQT has not collected baseline groundwater samples from domestic water wells located within 600 m of the Well pad boundary to date.

## **Position of the Parties**

### *AQT*

- [8] AQT argues it submitted its proposal for a preliminary groundwater assessment to the BCER in accordance with the timelines established by the Review Decision. This proposal included a plan for sampling and analyzing domestic water wells and identified that the timelines for completing that work were subject to receiving approval from the BCER.
- [9] AQT states it was not obvious that the conditions contained in the Amended Order were independent of one another and because items 1 and 4 were connected, and items 2 and 3 were connected, it was reasonable to assume that all the conditions were connected.
- [10] AQT submits it would be unreasonable to expect it would commence the work outlined in its proposal without approval from the BCER.
- [11] AQT also suggests that because General Order 2019-007 included the well sampling as part of the proposal, it was reasonable to assume that the requirements were still tied together.
- [12] AQT argues the facts demonstrate that either it exercised due diligence in preventing the contravention or its actions were the result of officially induced error.

### *BCER Official*

- [13] In the Contravention Decision, the BCER official determined that the requirement for AQT to complete the domestic water well sampling in the Amended Order was independent of the requirement to submit a proposal for a preliminary groundwater assessment.
- [14] The BCER official held that AQT did not require approval of the BCER prior to completing the domestic water well sampling.
- [15] The Contravention Decision identified that AQT failed to complete the domestic water well sampling and submit the results by December 31, 2020.
- [16] The Contravention Decision held that AQT did not exercise due diligence to prevent the non-compliance.

[17] The Contravention Decision concluded that AQT failed to comply with items 2 and 3 of the Amended Order.

[18] In its submissions dated October 12, 2023, the BCER official emphasized that the language of the Amended Order was clear that the groundwater sampling requirements in items 2 and 3 were independent from the requirements in items 1 and 4 relating to a preliminary groundwater assessment proposal.

[19] The BCER official highlighted the reasons in the Amended Order which included the need for the water sampling to be conducted in a “timely manner”.

[20] The BCER official asserts that AQT failed to establish the defence of officially induced error.

### **Discussion and Analysis**

[21] The Contravention Decision held that AQT failed to comply with item 2 (complete water sampling of domestic wells) and item 3 (submit results of water sampling to the BCER) of the Amended Order. There was no non-compliance found with respect to items 1 and 4 of the Amended Order. I will therefore focus my consideration on items 2 and 3.

[22] General Order 2019-007 included a requirement for AQT to submit a proposal for a preliminary groundwater assessment that included a plan for collecting samples from domestic water wells. Although AQT submitted a proposal, the proposal did not satisfy the BCER and therefore the Amended Order was issued.

[23] Among the reasons provided for issuing the Amended Order, the BCER decision maker identified the proposal AQT submitted on August 12, 2019 was not satisfactory and that “domestic water well sampling needs to be conducted in a timely manner”.

[24] Although the dates contained in the Amended Order were revised by the Review Decision, the substantive content was not. Further, the Review Decision identified that AQT did not dispute the requirement to complete sampling of the domestic water wells.

[25] In my view, it is clear from the language of the Amended Order the requirement to complete domestic water sampling was separate from the requirement to submit a preliminary groundwater proposal. Each item contained a separate deadline and item 2 was only conditional upon the consent of the land owner. Nothing in the language of item 2 of the Amended Order indicated that the completion of that water sampling was conditional upon any approval of the BCER, or that it was to be included in the proposal.

[26] I am satisfied that AQT did not complete the domestic water sampling as per the requirement set out in item 2. Consequently, I am also satisfied that AQT did not submit the results of the domestic water sampling by December 31, 2020 (as per the revised dates provided in the Review Decision).

[27] AQT does not deny that it did not complete the domestic water sampling, rather the focus of its request for review is that either 1) it exercised due diligence to prevent the contravention or 2) its failure to comply was due to officially induced error. The basis for both arguments is that AQT included the domestic water sampling in its proposal for a preliminary groundwater proposal and

if the BCER had approved the proposal or communicated with AQT about its expectations around groundwater sampling, the contravention would not have occurred.

- [28] AQT alleges that after it submitted its proposal on September 21, 2020, it did not hear from the BCER regarding that proposal until January 7, 2021, when a compliance and enforcement officer reached out. This is not disputed by the BCER and I accept that there was no further correspondence from the BCER with respect to the proposal until January 7, 2021.
- [29] AQT has provided information about discussions and actions that occurred after January 7, 2021. I have reviewed that information and concluded it is not relevant for my determination of whether there was a contravention of the Amended Order. In my view, any action to demonstrate due diligence to prevent the contravention or to establish officially induced error would, by necessity, have occurred on or prior to December 31, 2020 when AQT failed to submit the domestic water sampling results as required by the dates set out in the Review Decision.
- [30] The only relevant action to demonstrate due diligence that AQT has referred me to is that it included the domestic water sampling in its proposal and submitted it to the BCER. As identified in the Contravention Decision, the relevant test for determining whether AQT exercised due diligence is whether it has demonstrated it took all reasonable care to prevent the contravention<sup>3</sup>.
- [31] As mentioned above, I have found the language of the Amended Order to be clear that the domestic water sampling did not require the approval of the BCER prior to proceeding.
- [32] If AQT was genuinely confused as to whether it required the approval of the BCER to proceed with domestic water sampling, I would have expected specific inquiries would be made of the BCER to that effect. It was insufficient for AQT to simply send a proposal to the BCER that identified how it wanted to proceed and to ignore the other deadlines contained in the Amended Order (as revised by the Review Decision).
- [33] AQT has failed to satisfy me that it exercised due diligence in preventing the non-compliance.
- [34] With respect to officially induced error, again, I am only considering what occurred on or prior to December 31, 2020.
- [35] I have been referred by the BCER official to the decision in *Levis*<sup>4</sup>, which identifies that the following six elements must be proven to establish officially induced error:
- (1) That an error of law or mixed law and fact was made;
  - (2) That the person who committed the act considered the legal consequences of his or her actions;
  - (3) That the advice obtained came from an appropriate official;
  - (4) That the advice was reasonable;

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<sup>3</sup> *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299 at 1315.

<sup>4</sup> *Levis (City) v. Tetrault* [2006] 1 SCR 420 at 26.

(5) That the advice was erroneous; and

(6) That the person relied on the advice in committing the act.

[36] In its reply submission dated October 20, 2023, AQT sets out the basis for its defence. It is unclear to me what advice AQT is arguing that it relied upon to its detriment. It appears that the advice was a combination of the Amended Order, which AQT argues was unclear, and the lack of a response by the BCER to the submission of its proposal which included the domestic water sampling.

[37] In the *Levis* decision, I note that the Supreme Court of Canada rejected the defence of officially induced error on the basis that “no information regarding the nature and effects of the relevant legal obligations had been requested or obtained”<sup>5</sup>. In the same vein, I struggle to identify any efforts on the part of AQT to seek clarity on the Amended Order if it felt there was any confusion. I do not think it is sufficient to have submitted the proposal and assumed that would alleviate other deadlines without at least further inquiry or discussion.

[38] Similarly, I do not accept that silence on the part of the BCER staff that received the proposal constitutes “advice”. “advice” suggests to me that actual information must be provided by an official; silence is insufficient.

[39] The evidence before me does not support a finding of officially induced error.

## **Decision**

[40] I find that AQT failed to comply with items 2 and 3 of the Amended Order. AQT did not exercise due diligence to prevent the contravention and its actions were not the result of officially induced error. I am satisfied that AQT contravened section 82 of ERAA.

[41] No submissions have been made with respect to penalty amounts. I am satisfied that the penalty amount of \$50,000 is appropriate in the circumstances.

[42] For the reasons provided, the Contravention Decision is confirmed.



Peter Robb,  
Executive Vice President, Resource Management and Stewardship  
BC Energy Regulator

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<sup>5</sup> Ibid at 34.