

REPLY TO: VANCOUVER OFFICE

VIA EMAIL: kari.bondaroff@prrd.bc.ca

April 8, 2020

Kari Bondaroff
Environmental Services Manager
Peace River Regional District
P. O. Box 810
1981 Alaska Avenue
Dawson Creek, BC V1G 4H8

Dear Ms. Bondaroff:

Re: Invasive Plant Control on Abandoned Sites
Our File No. 00033-0508

You have asked us for our opinion regarding the Peace River Regional District's ("PRRD") legal options for the control of invasive plants on oil and gas activity sites.

BACKGROUND

The PRRD is home to a significant amount of oil and gas activity. Unfortunately, due to the volatility of the energy sector, this translates into a significant number of companies ("Operators") not being able to complete their extensive obligations under the *Oil and Gas Activities Act*, SBC 2008 c 36 ("OGAA") once their sites have ceased being profitable. The BC Oil and Gas Commission (the "OGC") has a process where it may designate sites to be orphans ("Orphan Sites") when an Operator is insolvent or not able to be found. The OGC takes responsibility for Orphan Sites, including performing invasive plant control and other maintenance on the sites.¹ However, in the interim period between when a site is designated an Orphan Site and the Operator essentially ceases to perform its obligations with regard to the site (both to the OGC and to the landowner), the site's status sits in a limbo between active and being designated orphaned. For the purposes of this opinion we will call these sites "Abandoned Sites", which is not to be confused with the term "Abandonment" used in the OGAA as part of the decommissioning process of oil and gas sites.

¹ BC Oil and Gas Commission, *2017/18 and 2018/19 Orphan Site Reclamation Fund Annual Report*, page 11. Other site administration includes surface water pump off, berm and/or erosion repair, garbage cleanup and weed spraying.

A further complicating factor is the way property rights are distributed with oil and gas activity on private land. In order to begin such activity, an Operator is required to obtain both subsurface and surface rights. The OGC issues the permits for the subsurface rights and the Operator must obtain surface rights from the landowner. Usually surface rights are negotiated and are governed by a surface lease, but if no agreement can be made a party can apply to the Surface Rights Board or the land can be expropriated. This means individual landowners could have very different terms in their individual arrangements, and this opinion may not apply to every possible relationship between landowner and Operator. That said, we will proceed on the assumption that the majority of surface leases include the following terms:

- (a) Exclusive occupation by the Operator of the leased area;
- (b) Obligation for the Operator to conduct invasive plant control;
- (c) Right for the Owner or Operator to terminate the lease due to non-payment; and
- (d) Continuing obligation of the Operator to restore the land even if the lease is terminated.

The current issue facing landowners is that they face the ongoing issue of invasive plants but are not able to enter onto land leased and occupied by Operators. In the case of Abandoned Sites, Operators for their part are not fulfilling their obligations, which include a failure to control invasive species.

ISSUES

We have identified and understand the issues as follows:

1. Which level of government has jurisdiction to enforce control of invasive plants on Abandoned Sites; and
2. What are the issues with enforcement of invasive plant laws on Abandoned Sites?

SUMMARY OF ADVICE

1. Jurisdiction to control invasive plants

Both the Province and the PRRD share in the enforcement of the *Weed Control Act*, RSBC 1996 c 487 (the “Weed Control Act”). The PRRD also has the ability to pass a bylaw under section 325 (e) of the *Local Government Act* requiring owners to clear property of noxious weeds, which the PRRD has done with the Invasive Plant Control Bylaw 2121, 2014 (the “Control Bylaw”). The PRRD is regulating invasive plants under the Control Bylaw and doesn’t appear to have adopted the Weed Control Act regime.

Both the Weed Control Act and the Control Bylaw have similar enforcement mechanisms. They create a duty for the owner or occupier of a property to prevent the growth of invasive plants² and allow for a wide range of enforcement options, up to and including allowing inspectors to enter onto land and control invasive plants themselves. If that action is taken, the costs can be added to the owner's property taxes.

2. Issues with enforcement

In the case of an Abandoned Site, the Operator is not fulfilling their obligations and enforcement action against them is likely not effective. The result is landowners would incur the expense – through their property taxes—of the Operator's failure to control invasive plants on the land they are leasing from the landowner. Until a site is designated an Orphan Site, the OGC bears no responsibility for an Abandoned Site. There is, however, the ability for a landowner to apply for compensation—once a site is designated—for the loss of use of their property before a site is designated an Orphan Site. The legislative framework is not clear whether a landowner would be eligible for compensation for costs levied against them for invasive plant control and clarification from the OGC would be very helpful in informing the PRRD's decision.

The core issue of enforcement for the PRRD is that the only party it can ultimately collect from is the landowner, who must then either attempt to collect from the Operator or seek reimbursement from the OGC if the site is designated an Orphan Well. We are therefore of the opinion that a prudent first step would be to determine how the OGC would treat a request for reimbursement from a landowner who either conducted invasive plant control on their own behalf or had costs of plant control added to their taxes by the PRRD due to the default of the Operator on their land.

OPTIONS

The PRRD has limited options to address the issue of invasive plants at Abandoned Sites.

1. Take enforcement action under the Control Bylaw

This option would involve PRRD staff inspecting and taking action against the occupier of the Abandoned Site, which in this case is the Operator. The Control Bylaw also allows for action to be taken against the owner. As per the Control Bylaw this could include a prosecuting the Operator for a fine of up to \$5,000, levying a fine of \$200, or entering onto the property in question and controlling the invasive plants, with the costs being added to and forming part of the taxes of that property.

² These are defined differently in both pieces of legislation, and the lists of invasive plants are different under the Weed Control Act and the Control Bylaw. For the purposes of this opinion, we will simply use the term "invasive plants" to refer to any unwanted weed or plant the PRRD has an interest in controlling.

Taking this action would allow the PRRD to attempt to take some action against the Operator while preserving the ability for the PRRD to undertake the invasive species work itself. If it did decide to do that and add those costs to the property taxes of the landowner, that landowner may be eligible to have those costs reimbursed by the OGC.

The risks associated with taking this course of action are that the PRRD incurs significant costs in performing invasive species control with limited ability to recover those costs from the Operator. One way or another, landowners end up paying for PRRD's control costs (either by being charged individually for actual costs, or by funding the Invasive Plant Control Service). It may be that any landowners who have costs of invasive plant control placed on their property taxes would have a better chance of recovering that cost from the OGC if and when the Abandoned Site on their Property becomes an Orphan Site. If on the other hand no assessment is made against individual property owners, and the PRRD simply operates the Invasive Plant Control Service in the normal course on a cost recovery basis, then reimbursement from the OGC for those sites that are eventually designated Orphan Sites is unlikely as the landowners are not directly bearing the cost of the operator's default.

2. Issue notices against landowners and Operators but do not take enforcement action

This option would involve the PRRD using its powers under the Control Bylaw to issue notices to landowners and Operators to comply with the Control Bylaw. If the Operator does not comply, it would then be up to the individual landowners to make a decision on whether to enter onto the Abandoned Site and conduct invasive plant control themselves.

The advantage of this course of action is it removes the PRRD from becoming involved in a complex dispute between landowners, Operators, and the OGC. It also means the PRRD does not make a premature assessment of whether a site is an Abandoned Site or not. The risks are that individual landowners do not comply and no invasive plant control is done, or that they do conduct invasive plant control on land they do not have a right to enter and face potential liability from the Operator.

3. Work with the OGC and the Province to develop a joint solution

A landowner is eligible for reimbursement from the OGC for costs caused by a delinquent Operator if their site is designated an Orphan Site for the time period before that site is designated. That eligibility could possibly include either the direct costs of invasive plant control by the landowner, or costs added to that landowner's property taxes by the PRRD taking their own invasive plant control action. It may therefore be helpful for the PRRD to ask for confirmation from the OGC that invasive plant control is something that will be covered retroactively by the OGC if a site is designated an Orphan Site.

If such a confirmation could be disseminated in a policy document, or if some agreement could be come to between the PRRD and the OGC for reimbursement, it would add some certainty to the limbo many rural landowners experience with abandoned sites.

ANALYSIS

1. Jurisdiction to control invasive species

Control of invasive species is a shared responsibility between regional districts and the Province. The primary piece of legislation is the Weed Control Act, which creates a duty for an occupier to “control noxious weeds growing or located on land and premises, and on any other property located on land and premises, occupied by that person”. Both the province and municipalities³ share enforcement of the Weed Control Act and have the ability to appoint inspectors. Once an inspector has identified noxious weeds and sent a notice complying with the Weed Control Act, they are entitled to enter onto a property and control weeds. The costs of doing that work then becomes a debt owed by every occupier of that property. In the case of property that is in a Regional District, the Weed Control Act allows for the debt to be collected pursuant to the *Taxation (Rural Area) Act*, RSBC 1996 C 448, but does not appear to outline that costs incurred by a Regional District in controlling invasive plants are remitted back to that Regional District by the Province. Given it doesn’t appear the PRRD is relying on the Weed Control Act for its power to control invasive plants, we have not considered this issue in greater detail. Failure to follow an inspector’s order or otherwise contravenes the Weed Control Act are also liable under the provincial *Offence Act*.

Separate from the Weed Control Act, the PRRD is also entitled under section 325(e) of the *Local Government Act*, RSBC 2015 c1, to pass a bylaw requiring owners or occupiers of real property, or their agents, to clear the property of brush, trees, noxious weeds or other growths. The PRRD has passed the Control Bylaw which creates a standalone bylaw offence for any occupier or owner who allows noxious weeds to grow on real property. The Control Bylaw also allows for designated PRRD staff to enter onto property and control invasive plants, with the costs of that action to be added to taxes in arrears on that property if unpaid. The PRRD has also created an Invasive Plant Control Service and has included a fine of \$200.00 in its Bylaw Notice Enforcement Bylaw.

The Province and the PRRD share jurisdiction for the control of invasive plants within the boundaries of the PRRD, and both regimes share a similar enforcement mechanism of ticketing

³ Defined to include Regional Districts in the Act.

and the ability to enter onto property and control invasive species at that property owner's expense.

2. **Issues with enforcement on Abandoned Sites**

The critical fact in both the Weed Control Act and the Control Bylaw is both place the onus on the individual owner or occupier of a property or land to control and prevent the growth of invasive species. Any enforcement action (by either the Province or the PRRD) would be targeted at the occupier.

The definition of occupier in the Weed Control Act is a person who is:

- (a) is in physical possession of land, premises or property, or
- (b) is responsible for, and has control over, the condition of, the activities conducted on and the persons allowed to enter or use, land, premises or property.

The definition of occupier in the Control Bylaw is:

- a person who is in physical possession of land, premises or property or is responsible for and has control over the condition or activities and is allowed to enter to use the land, premises or property

Where an Operator is active and following the terms of their right of occupancy to the oil and gas activity site, the enforcement regime of either the Weed Control Act or the Control Bylaw works well. Most surface leases require Operators to perform invasive plant control, and if they fail to do so, the landowner has a private cause of action against the Operator or can make a complaint against the Operator and enforcement action can be taken against the Operator by the PRRD (or the Province). If the Operator still fails to control the invasive plants, the PRRD may perform the work itself and charge the Operator for the actual costs incurred in controlling those plants. If the Operator fails to pay, the Control Bylaw states that the costs "shall" be added to and form part of the taxes applicable to the property in question. The landowner, being the person who is responsible for paying property taxes, will then be forced to recover those costs from the Operator.

This situation is even more pronounced with Abandoned Sites. Even if PRRD staff enter onto the Abandoned Site and conduct invasive plant control, then it will be the landowner that will still be stuck with the cost of invasive plant control as it's unlikely they will be able to recover from the Operator.

Section 46 of the OGAA allow for compensation to landowners for loss of use of their land as a result of the failure of a permit holder or former permit holder to restore the land in question, subject to prescribed maximums. Section 29(3) of the *Oil and Gas Activities Act General*

Regulation, BC Reg 274/2010 (the “OGAA Regulation”) states that if a site is designated an Orphan Site under section 45(2) of the Act:

- (a) the maximum compensation to be paid with respect to the period before the designation of the site is \$50 000, and
- (b) the compensation to be paid with respect to the period from the designation of the site to the date of issuance of a certificate of restoration for the site or a determination referred to in section 45 (5) (c) of the Act being made is either
 - (i) the annual payment under the surface lease, or
 - (ii) if there is no surface lease with respect to the land, an annual payment determined by the commission as reasonable compensation for the landowner's loss referred to in section 46 (2) of the Act.

While the amount of compensation a landowner is entitled to after a site is designated an Orphan Site is limited to the annual payment under the surface lease, the compensation before that point appears to be broader. This section could be interpreted to mean that a landowner could apply to be reimbursed for incurred by the landowner on behalf of or directly caused by the Operator, such as costs of invasive plant control on the Abandoned Site. However, this would be dependent on the OGC's interpretation of their statutory regime and likely a policy choice on what is or is not covered by section 29(3)(a) of the OGAA Regulation. We would recommend inquiring whether the invasive plant control costs would be eligible for reimbursement, whether for costs directly incurred by landowners or as costs added to landowner's taxes for control work done by the PRRD under the Control Bylaw.

(a) Is the OGC an occupier of an Abandoned Site?

The OGC is the regulator of oil and gas activity in British Columbia. Up until the point a site is designated an Orphan Site, it does not take responsibility for negotiating or managing surface rights. Under section 45(2)(a) of the OGA, the OGC has to take a positive step of designating a site an Orphan Site, and up to that point would likely take the position that surface rights are a private issue between the landowner and the Operator. This position is likely correct, as the definition of occupier in both the Weed Control Act and the Control Bylaw includes some control over who can enter onto a property and some control over the activities on the property. It may be that the OGC, by virtue of their control over the activities on oil and gas sites could be considered occupiers, but it is unlikely that a court would take that position given it would essentially make the OGC an insurer for any liabilities arising out of an Operator's use of land for oil and gas activity.

(b) Is a landowner entitled to enter onto an Abandoned Site to conduct invasive plant control?

Noting the limitations of general advice to private agreements between Operators and landowners, we are of the opinion that where a surface lease includes terms requiring the Operator to control invasive plants and the Operator has failed to pay their rent due under that agreement, it's likely the landowner would be entitled to conduct the invasive plant control themselves on the leased area of their land. We note that there is still a chance that a landowner would be liable in trespass for entering on an Abandoned Site, and may also be exposing themselves to risk if they damage equipment or individuals injure themselves while entering onto the leased land. Considering this uncertainty, we would recommend the PRRD not take an official stance on landowners conducting invasive plant control.

Yours truly,

YOUNG ANDERSON

A handwritten signature in blue ink, appearing to read 'Ethan Plato', with a long horizontal stroke extending to the right.

Ethan Plato

plato@younganderson.ca

EP/smj

From: Kari Bondaroff <Kari.Bondaroff@prrd.bc.ca>
Sent: Thursday, March 12, 2020 1:31 PM
To: Mike Quattrocchi <quattrocchi@younganderson.ca>
Cc: Paulo Eichelberger <Paulo.Eichelberger@prrd.bc.ca>
Subject: Control of Invasive Plants on Abandoned Well sites

Hello Mike,

The Regional Board has made a resolution for us to seek legal opinion to determine which agency has jurisdiction and responsibility to control invasive plants/noxious weeds on abandoned well sites (oil and gas well sites). I have attached the PRRD bylaws and the provincial legislation if that helps. I do not have the oil and gas regulations on hand.

I am not sure if you have anyone in your office with this type of expertise? If you could assign this to someone for me, that would be wonderful. In the off chance that you do not have capacity for this file, please let me know and I will try to find another firm with this type of experience.

There is a second recommendation that the Regional Board send a letter to the OGC to see what they are doing about these sites. If I had a legal opinion to utilize within the letter, that would be even more helpful, not to mention powerful. I would really like to see the letter go out by mid-April at the latest so if I could have the information by then, that would be wonderful.

Thank-you so much,

Kari Bondaroff, P.Ag., MBA, B.Ed, B.Sc | Environmental Services Manager

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