EnCana Corporation

Appeal of ERCB High Risk Enforcement Action 1

December 8, 2009

Energy Resources Conservation Board

ENERGY RESOURCES CONSERVATION BOARD
Decision 2009-066: EnCana Corporation, Appeal of ERCB High Risk Enforcement Action 1

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ENERGY RESOURCES CONSERVATION BOARD
Calgary Alberta

ENCANA CORPORATION
APPEAL OF ERCB HIGH RISK ENFORCEMENT ACTION 1

Decision 2009-066
Proceeding No. 1622336

1 DECISION

Having considered the evidence and submissions from all parties, the Energy Resources Conservation Board (ERCB/Board) grants the appeal and rescinds the High Risk Enforcement Action 1 dated March 10, 2009, issued by the ERCB against EnCana Corporation (EnCana).

2 BACKGROUND

EnCana holds ERCB Licence No. F20208 for a gas facility at Legal Subdivision 6, Section 18, Township 74, Range 6, West of the 6th Meridian. During an inspection on March 4, 2009, ERCB staff determined that a flame arrester at the facility did not comply with the requirements of Section 8.090(5) of the *Oil and Gas Conservation Regulations* (*OGCR*), Section 2.1(c)(5)(a) of *Directive 064: Requirements and Procedures for Facilities*, and Section 5(9) of Appendix 1 of *Directive 064* because it was missing a bolt and was located less than 25 metres (m) from a process vessel. By letter dated March 10, 2009, the ERCB issued a High Risk enforcement action against EnCana in relation to its finding that the flame arrester was missing a bolt.

By letter dated April 28, 2009, EnCana appealed the enforcement action to ERCB staff. ERCB staff advised by letter dated May 5, 2009, that it would not rescind or vary the enforcement action. EnCana appealed to the ERCB Enforcement Advisor on May 8, 2009. By letter dated July 6, 2009, the ERCB Enforcement Advisor denied EnCana's appeal of the enforcement action.

By letter dated August 5, 2009, EnCana appealed the matter to the Board. EnCana argued that the regulations referred to in the enforcement letter did not support taking enforcement action in this circumstance and the applied risk level was out of alignment with the actual risk.

3 APPEAL TO THE BOARD

M. J. Bruni, Q.C., was assigned to make a decision on this appeal based on the written submissions of the parties.

4 SUBMISSIONS OF THE PARTIES

4.1 Views of EnCana

EnCana provided written submissions dated August 5 and September 15, 2009, in support of rescinding or reducing the enforcement action to Low Risk. They are summarized as follows:

Unreasonable interpretation of regulation

- The regulation cited is inadequate and inappropriate to support enforcement of a missing bolt on a fire-tube inlet flange.

- The flame-type equipment at issue is equipped with an adequate/workable flame arrester with all bolts in place, is not saturated with oil, appears to be properly fitted, and has a gasket in place. The missing bolt on the fire-tube inlet flange is not associated with the flame arrester itself, but rather is one of many components of the overall piece of equipment in question. It is common knowledge that a flame arrester is typically cylindrical in shape and generally finely packed with corrugated metal too narrow for the passage of flame.

Inappropriate risk ranking of the noncompliance

- The High Risk ranking is based on an inadequate flame arrester, but has been inappropriately applied to a different component of the flame-type equipment, and there is no mechanism to adjust the risk level or apply any discretion.

- The missing bolt on the fire-tube inlet flange is quite obviously low risk in nature, but to firmly establish the actual risk, EnCana engaged a third-party engineering firm (DPH Focus) and received an expert opinion from the manufacturer of the equipment in question (ALCO Gas and Oil Production Equipment Ltd. [ALCO]).

- DPH Focus determined that on this particular flange design, even if every second bolt were missing (six missing bolts), an adequate seal would still be provided. It concluded that the risk of leakage caused by a missing bolt is low.

- The Vice President of Operations at ALCO was of the view that there was no safety hazard posed by the missing bolt.

- The Enforcement Advisor did not appear to give any weight to this expert opinion.

No regulation requiring inspection and maintenance of flame arrester

- There is no regulation requiring inspection and maintenance of a flame arrester in accordance with the manufacturer's specifications, and no risk ranking has been done for such noncompliance.

4.2 Views of ERCB Staff

By letter dated September 3, 2009, ERCB staff responded to EnCana's submissions, summarized as follows:

Interpretation of requirements

- Section 8.090(5) of the *OGCR* requires an "adequate flame arrester." "Adequate" is not defined in the *OGCR*, suggesting that determination of adequacy would be left to the discretion of the ERCB.

- Section 5.9 of Appendix 1 of *Directive 064* provides notice to industry as to how the ERCB will interpret and apply Section 8.090(5) of the *OGCR* and allows for efficient inspection of flame arresters to ensure integrity. This interpretation is consistent with the discretion provided in Section 8.090 of the *OGCR*, is reasonable, and makes good common sense.

- An "adequate" flame arrester has all of the nuts, bolts, and gaskets that the manufacturer designed it with.

- The portion of the flame-type equipment from which the bolt was missing is an integral part of the unit as a whole. ERCB requirements explicitly state that operators must ensure that flame arresters have all bolts.

- A plain reading of the requirements makes it clear that a workable flame arrester must have all bolts, not be saturated with oil, and have the required gaskets.

- The regulatory requirements for flame arresters imply that all components of flame-type equipment related to maintaining integrity to keep flame isolated from potential combustible materials must be intact in accordance with the manufacturer's specifications, and these requirements have been adequately communicated to industry.

Risk ranking of the noncompliance

- The ERCB cannot reasonably be required to test flame arresters that are missing bolts to determine their continued workability or level of safety risk before issuing any enforcement action. Such an approach is unworkable on a provincial basis, would inevitably lead to inconsistent enforcement processes, and compromises public safety.

- EnCana's own expert had to make a number of assumptions and perform a detailed risk assessment before concluding that the risk was low.

- Staff are entitled to rely on observable features when assessing compliance and should not be required to conduct testing or detailed analysis before making a decision to issue an enforcement action. This is especially so when the requirement regarding what constitutes an adequate flame arrester is outlined in the legislation and available to industry.

- The risk category assigned to a given deficiency is predetermined and field staff have no discretion other than to issue the enforcement action prescribed in the Risk Assessed Noncompliance Matrix in *Directive 019: ERCB Compliance Assurance—Enforcement* if the facts show that the substantive requirement has not been met. The matrix was established with extensive input from a committee comprising industry and the Energy Utilities Board (EUB; predecessor to the ERCB).

4.3 EnCana's Reply

Interpretation of requirement

- The fire-tube inlet flange is not part of the flame arrester.

- EnCana agrees that the term "adequate" in Section 8.090(5) of the *OGCR* is discretionary, but argues that it should only be applied to the flame arrester, not to the fire-tube inlet flange.

- Even if the Board found that the fire-tube inlet flange is part of the flame arrester, EnCana would still argue that the flame arrester in question was adequate, as supported by the third-party engineering assessment and expert opinion of the equipment manufacturer.

Risk ranking of the noncompliance

- The only assumption made in the engineering assessment was that the remaining bolts were tight and installed properly, which was assumed because DPH Focus did not have access to visually confirm this itself.

- EnCana does not agree that accepting its information in this appeal would oblige the ERCB to conduct detailed analyses to determine safety risks prior to issuing enforcement actions. EnCana suggests that a more logical and practical solution would be for the ERCB to accept the submitted information and modify its flame arrester inspection policy such that enforcement would only apply if there were a visible gap that is easily observable. The ERCB should be more willing to reconsider enforcement on a case-by-case basis if sound justification can be provided.

- EnCana believes that the regulation and its associate risk level are being improperly and rigidly applied to a component other than what is commonly accepted as a flame arrester.

5 ISSUES

The Board must determine whether the enforcement action should be upheld or set aside. The particular question raised is whether the ERCB's regulatory requirements support a High Risk enforcement action based on the facts.

In making this determination, the Board has considered all relevant materials constituting the record of this proceeding, including the evidence, argument, and submissions provided by EnCana and ERCB staff. Accordingly, references in this report to specific parts of the record are intended to assist the reader in understanding the Board's reasoning relating to a particular matter and should not be taken as an indication that the Board did not consider all relevant portions of the record with respect to that matter.

6 FINDINGS OF THE BOARD

6.1 Regulatory Requirements

The enforcement letter cited noncompliance with the requirements of Section 8.090(5) of the *OGCR,* Section 2.1(c)(5)(a) of *Directive 064,* and Section 5(9) of Appendix 1 of *Directive 064*.

Section 8.090(1) of the *OGCR* states:

> In this section
>
> (a) "fire" means any unprotected flame or source of ignition;

(b) "flame-type equipment" means any electric or fired heating equipment using an open flame, electric arc or element and includes a space heater, torch, heated process vessel, boiler, electric arc or open flame welder, or an open element electric heater or appliance;

(c) "process vessel" means a heater, dehydrator, separator, treater or any vessel used in the processing or treatment of produced gas or oil.

Section 8.090(5) states:

(5) No flame-type equipment shall be placed or operated within 25 metres of any process vessels unless, where such is applicable, the flame-type equipment is fitted with an **adequate flame arrester**. (Emphasis added.)

Section 2.1(c)(5)(a) of *Directive 064* states:

Equipment spacing must be in accordance with the OGC Regulations, Sections 8.030(2), 8.080(2) (3), and 8.090, and *ID 91-3* and *Guide 60*. (See diagram, Appendix 6).

Section 1.6 of *Directive 064*, entitled "Industry Compliance," states:

The EUB has implemented a four-level enforcement policy to address the business issue of noncompliance with provincial requirements. *Directive 019: EUB Compliance Assurance—Enforcement* spells out the enforcement consequences when operators fail to meet requirements and/or regulations. These consequences only escalate to a higher severity when the operator fails to address EUB requirements and requests.

The criteria for determining the level of each infraction are given in Appendix 1: Possible Unsatisfactory Items. EUB Field Centre inspectors follow these criteria when completing the Facility Check Sheet and determining the resulting enforcement action.

Section 5(9) of Appendix 1 of *Directive 064*, entitled "Possible Unsatisfactory Items," states:

5. [High Risk] 9. Flame-type equipment without a **workable flame arrester** less than 25 m from a process vessel. Check to ensure flame arrester has all bolts, is not saturated with oil, is properly fitted, and has gasket where required.

Section 8.090(5) of the *OCGR* requires that flame-type equipment in proximity to process vessels be fitted with an "adequate" flame arrester. *Directive 064* indicates that flame-type equipment without a "workable" flame arrester is subject to High Risk enforcement. The Board reads the subsequent sentence, "Check to ensure flame arrester has all bolts, is not saturated with oil, is properly fitted, and has gasket where required," as a direction to ERCB inspectors.

6.2 Application of Enforcement

The requirement is to have an "adequate" flame arrester. Industry is notified that flame-type equipment without a "workable" flame arrester less than 25 m from a process vessel will constitute a High Risk noncompliance.

The Board is not persuaded by the evidence before it that the flame arrester at issue was not in an adequate or workable state at the time of inspection. In fact, the staff arguments focused not on the inadequacy of the flame arrester due to the missing bolt, but rather on the stated inspection parameters in the directive and the reasonableness and efficiency of inspecting and enforcing in this manner.

The Board is concerned with such an approach. The primary goal of the ERCB's inspection and compliance assurance program is to ensure that requirements are met, with a focus on ensuring public safety in doing so. In this situation, the primary focus should be to ensure that the matter is remedied by an operator willing to do so as soon as possible (i.e., the missing bolt is replaced). The Board notes that the decision of the Enforcement Advisor dated July 16, 2009, states that the operator took corrective action at the time of the inspection by replacing the missing bolt.

The Board finds that the issuance of an enforcement action was not appropriate here and suggests discretion be used in assessing the adequacy of the equipment in similar circumstances.

Accordingly, the Board hereby grants the appeal and rescinds the High Risk Enforcement Action 1 dated March 10, 2009, issued by the ERCB against EnCana.

Dated in Calgary, Alberta, on December 8, 2009.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

M. J. Bruni, Q.C.
Board Member