ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

SUNCOR ENERGY INC.
APPEAL OF ENFORCEMENT ACTION **Decision 2008-055 Errata**
OF JANUARY 11, 2007 **Proceeding No. 1577698**

The Energy Resources Conservation Board (ERCB/Board) issued *Decision 2008-055* on July 2, 2008. The Board has since discovered an error.

On page 1 of the decision the bottom line in the header reads: "Application No. 1495728." It should read: "**Proceeding No. 1577698**."

Suncor Energy Inc. submitted an appeal to the ERCB on licences issued under the original Application No. 1495728. The Board assigned the appeal of this matter to be Proceeding No. 1577698.

The Board considers that the correction to the header as noted above correctly reflects the number assigned to the appeal application. Therefore, the Board approves the above-noted correction to *Decision 2008-055*.

Dated in Calgary, Alberta, on July 3, 2008.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

B. T. McManus, Q.C.
Presiding Member

Suncor Energy Inc.

Appeal of EUB Enforcement Action of January 11, 2007

July 2, 2008

Energy Resources Conservation Board

ENERGY RESOURCES CONSERVATION BOARD
Decision 2008-055: Suncor Energy Inc., Appeal of EUB Enforcement Action of January 11, 2007

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ENERGY RESOURCES CONSERVATION BOARD
Calgary Alberta

SUNCOR ENERGY INC.
APPEAL OF ENFORCEMENT ACTION OF JANUARY 11, 2007

Decision 2008-055
Application No. 1495728

1 DECISION

Having carefully considered all of the evidence, the Energy Resources Conservation Board (ERCB/Board) grants the appeal and rescinds the High Risk Enforcement Action 1 and replaces it with the 1st EUB Notice of Low Risk Compliance,[1] based on the unique circumstances of this case.

2 INTRODUCTION

On January 11, 2007, the Alberta Energy and Utilities Board (EUB) Facilities Group Audit Section (the Audit Section) conducted an audit of Suncor Energy Inc.'s (Suncor's) Application No. 1495728, application for 10 well licences. The audit was done because the Alberta Department of Energy (DOE) advised the EUB that the mineral rights pertaining to the above-mentioned application should have been for the Wabiskaw-McMurray Formation, and not the McLaren Formation, as was indicated in Suncor's application. In the submission of its audit materials, Suncor provided documentation indicating that it had the rights to the Wabiskaw-McMurray Formation and that the wells had not been drilled.

On the same day, the Audit Section issued a High Risk Enforcement Action 1[2] to Suncor for failing to acquire the rights for the **intended** formation (the McLaren Formation), as required by *Directive 056: Energy Development Applications and Schedules*, and the EUB cancelled the well licences.

On the day it received the High Risk Enforcement Action 1, Suncor requested that the Audit Group review the enforcement action and either downgrade or eliminate it, as Suncor had made an administrative error when it completed the application. Suncor explained that it had entered the McLaren Formation instead of the Wabiskaw-McMurray Formation on the drop-down menu of the EUB's Digital Data Submission (DDS) system. Suncor indicated that it had no intention of accessing or acquiring the rights to the McLaren Formation and, further, that the McLaren Formation does not exist in the applied-for location of the proposed wells. Therefore, it would be impossible for Suncor to enter the McLaren Formation. Also, Suncor submitted that it had the rights to the **intended** formation, the Wabiskaw-McMurray Formation, and that no activity had occurred at the well locations prior to the cancellation of the licences.

[1] Enforcement noncompliance actions are set out in *Directive 019: ERCB Compliance Assurance—Enforcement.*
[2] See page 2 of ERCB Risk Assessed Noncompliances for Directive 056: Energy Development Applications and Schedules, compliance category "Wells Technical," noncompliance event "No rights to substance(s) for the intended formation(s)," risk "High."

On January 13, 2007, the Audit Section refused the Suncor request because Suncor had not provided any new evidence or documentation to show that Suncor had the right to hold well licences for the McLaren Formation at the time the licences were issued.

On February 22, 2007, Suncor appealed to the EUB Enforcement Advisor,[3] restating the reasons set out in its letter of January 11, 2007. On March 29, 2007, the Enforcement Advisor denied the appeal on the basis that Suncor had failed to meet the requirements of Section 16 of the *Oil and Gas Conservation Act* (the *OCGA*) and Section 7.9.11.36(c) of *Directive 056*,[4] as it had not acquired the right to produce from the **intended** formation, the McLaren Formation.

3 APPEAL TO THE BOARD

On April 12, 2007, Suncor filed an appeal to the EUB of the March 29, 2007, decision of the Enforcement Advisor in which the Enforcement Advisor upheld the High Risk Enforcement Action 1.

Effective January 1, 2008, the EUB was replaced by the Energy Resources Conservation Board (ERCB/Board) and the Alberta Utilities Commission. This application is within the jurisdiction of the ERCB. In accordance with the transitional provisions of the *Alberta Utilities Commission Act*, the decision on this appeal is made by the ERCB.

A division of the Board consisting of B. T. McManus, Q.C., Presiding Board Member, and J. D. Dilay, P.Eng., and G. J. Miller, Board Members, was assigned to make a decision on this appeal based on the written materials filed by the parties.

4 DECISION

4.1 Views of Suncor

Suncor stated that it did not take issue with the facts set out under the heading “Background” on page 1 of the decision of the Enforcement Advisor. In particular, Suncor noted that DOE “advised the EUB that the mineral rights should have been for the formation Wabiskaw-McMurray and not McLaren.” The DOE recognized that there had been an error in identifying the correct formation and also recognized, because of the location applied for, that the formation Suncor intended to refer to was the Wabiskaw-McMurray Formation. Suncor pointed out that this was consistent with its assertion that it had no intention to access the McLaren Formation as that formation does not exist in the northeast plains. The reference to the McLaren Formation was an administrative error caused by the incorrect use of a drop-down menu on the EUB DDS system. Suncor submitted that it had never had any intention to access or acquire rights to the McLaren Formation.

[3] See page 7 of *Directive 019: ERCB Compliance Assurance—Enforcement.*
[4] Section 7.10.11.38 in the May edition of *Directive 056.*

Suncor stated that Section 7.9.11 of *Directive 056*, Right to Produce or Operate (September 2005 edition) states:

> 36) Prior to submitting a well licence application, the applicant must
> c) acquire the right to produce from the **intended** formation for the complete drilling spacing unit (DSU).

Suncor argued that the term "intended" must be given meaning, pointing out that it suggested an intention to produce from a given formation. In this case, Suncor had no intention to produce from the McLaren Formation and it would have been physically impossible to produce from the McLaren Formation, taking into account the location Suncor applied for. Therefore, Suncor submitted that the Board ought to exercise its discretion and rescind the High Risk Enforcement Action 1 and issue a 1st EUB Notice of Low Risk Compliance instead. Suncor added that this course of action, taking into account all of the circumstances, would be consistent with the EUB's Compliance Assurance Risk Assessment Matrix[5] (the matrix).

Suncor argued that the pertinent consequence categories in the matrix were "Conservation" and "Stakeholder Confidence in Regulatory Process." Suncor maintained that regardless of which category was relied upon, the level assigned in this case would be A(1), because the potential for a limited waste of resource did not exist, since it was impossible to produce from the McLaren Formation given the location Suncor applied for. Moreover, Suncor submitted that no localized concerns, media attention, or loss of confidence in the regulatory process would result because of Suncor's administrative error. Suncor added that the qualitative measure of likelihood was unlikely, which was assigned a level of I(1). Suncor argued that this was an isolated incident and was unlikely to recur. Suncor submitted that, accordingly, the matrix suggested that a risk rating of 2 and therefore an enforcement level of Low Risk were appropriate in this case.

Suncor relied on the above submissions to request that the High Risk Enforcement Action 1 be rescinded and a 1st EUB Notice of Low Risk Compliance be issued instead. Suncor advised that regardless of whether the Board granted the appeal, it would honour the commitment made in its letter of January 23, 2007, which was to have the accuracy of future applications reviewed by an individual other than the originator to allow for a controlled redundancy.

On May 24, 2007, in reply to the submissions of the Enforcement Advisor, Suncor noted the Enforcement Advisor's position that he lacked the discretion to depart from the predetermined risk categories as set out in the matrix. Although Suncor appreciated that the Board had developed the predetermined risk categories to ensure that enforcement was applied consistently and fairly, Suncor submitted that when a High Risk Enforcement Action 1 was assigned to "failure to acquire the rights to the intended formation," this was done on the assumption that unscrupulous operators would attempt to produce from formations for which they knew they did not have rights to. Suncor added that an obvious administrative error was not contemplated. In addition, Suncor submitted that rigid application of the predetermined risk categories in this case, taking into account all of the circumstances as outlined in its letter of April 12, 2007, would be unfair and excessively harsh.

[5] ERCB Compliance Assurance Risk Assessment Matrix, Document no: 19676, dated October 21, 2005.

Suncor argued that the Enforcement Advisor's discretion may be limited by the Board. However, the Board's discretion was not limited and, therefore, Suncor asked that the Board rescind High Risk Enforcement Action 1 and instead issue a 1st EUB Notice of Low Risk Compliance.

4.2 Views of the Enforcement Advisor and the Audit Section

On May 17, 2007, the Enforcement Advisor submitted that he understood that the basis for Suncor's appeal was that the noncompliance was the result of an administrative error and that the matter should more appropriately be treated as a Low Risk noncompliance event.

The Enforcement Advisor noted that the EUB did not assign a risk level to each noncompliance event when it occurred; rather, all risk-assessed requirements went through a detailed risk assessment process prior to any noncompliance event taking place. The risk assessment process used a typical scenario for the noncompliance. Thus, the noncompliance *failure to acquire the rights to the intended formation* was predetermined by the Audit Group to be High Risk. The Enforcement Advisor was of the view that he did not have the discretion to provide the remedy sought by Suncor and that he was limited to applying the predetermined risk categories to the specific facts of each noncompliance event. Using the predetermined categories, the Enforcement Advisor stated that he continued to be of the view that his decision was consistent with the stated requirements of *EUB Risk Assessed Noncompliances* under *Directive 056*.

Subsequently, on March 6, 2008, the Audit Group made a further submission to the Board in which it acknowledged that the facts of this case were not in dispute and that, furthermore, no new facts or submissions had been submitted by any of the parties during the various appeal processes to date. The Audit Section added that it accepted that the enforcement action taken in this case was likely triggered by an administrative error resulting from having selected the wrong formation from a drop-down menu on the DDS system. However, it argued that an administrative error was not grounds for avoiding enforcement, particularly when, as in this instance, it resulted in the issuance of 10 well licences to Suncor, which was not entitled to hold any of them.

The Audit Group cited Section 16 of the *OGCA* and Section 7.10.11 of *Directive 056*, which required that an applicant have the rights for the intended purpose of the well. The Audit Group added that Schedule 1 of *Directive 056* began with the wording: "The applicant certifies that the information here and in all supporting documentation is correct…." Therefore, it submitted that it was not simply an administrative error when an applicant identified a formation on an application that it did not have the rights to; it was a contravention of the *OCGA*. The Audit Group further submitted that a fundamental and integral component of the *Directive 056* process was that an applicant was held accountable for the information it provided in its application and that the EUB's application process relied heavily on the statements and declarations that an applicant made in each and every application. Contrary to Suncor's assertion in its April 12, 2007, letter, the Audit Section stated that it considered the intended formation to be what the applicant entered on its application forms and not what it could demonstrate after the fact, with geological assertions and arguments, that the error was "only" a clerical error. The Audit Group submitted that the application process was founded on three principles: licensing, auditing, and enforcement, and if any one of these principles were tampered with, the foundation upon which *Directive 056* was based became eroded.

Furthermore, the Audit Group added that on January 9, 2007, Suncor electronically submitted seven pages of Application No. 1495728 through the DDS system stating that its intended purpose was to produce from the McLaren Formation, not from the Wabiskaw-McMurray Formation. This application was registered and reviewed, and the 10 applied-for well licences were approved that same day, like tens of thousands of other applications every year. The Audit Group stated that this process could be repeated thousands of times every year, with a high level of administrative efficiency and confidence, due to the *Directive 056* application and Audit Section processes in place. The Audit Group added that prior to the existence of the *Directive 056* application process, the DOE reviewed all well applications on an up-front basis to confirm that the mineral rights information contained therein was correct, a process that took three to five days at a time when the EUB considered 5000 to 7000 well applications per year. When the *Directive 056* process was being developed, the DOE agreed to a 100 per cent postapproval review of all well licences on the condition that the EUB take mineral rights failures very seriously.

The Audit Section noted that mineral rights failures of this type were one of the most common failures with respect to well applications. While the most common explanation for such failures was clerical or administrative error, the consequence was that well licences could be issued to applicants that had no rights to the intended formations, further compounding an already problematic situation and possibly leading to such actions as unauthorized drilling, extraction, and the like.

The Audit Group emphasized that it was the applicant's responsibility to submit complete and accurate applications and the onus was on the applicant to have the proper procedures in place within its own operations to ensure that this occurred. It argued that the granting of Suncor's appeal in this matter would likely set a precedent for others to follow, and assuming this to be the case, these errors would be without consequence on a go-forward basis. It noted that the EUB's enforcement processes were in place for valid reasons, one of which was to prevent companies from accessing formations that they did not have rights to, at the expense and detriment of other entitled companies and mineral rights holders. An error resulting in the issuance of 10 well licences to a company that did not have the rights to access the formation could not be treated as a simple clerical error in light of the magnitude of the consequences stemming therefrom.

In reply to Suncor's argument that this incident did not result in a loss of stakeholder confidence in the regulatory process, the Audit Group stated that it was not the primary role of the Audit Section to find and correct errors made by applicants in their application materials, as was the case in this matter. The primary role of the Audit Section was to ensure compliance, thereby increasing and maintaining stakeholder confidence in industry's ability to comply with regulatory requirements, which are clearly set out and known well in advance of the submission of any application. It stated that as a result, Suncor's error decreased the EUB's confidence in Suncor's ability to accurately reflect the intended purposes and submit accurate information regarding its well applications.

The Audit Group added that had Suncor identified and self-disclosed this error on its own, prior to having been told about it, this matter would have been corrected without any enforcement action having been imposed. It noted that 180 days had elapsed since this enforcement was imposed. Suncor obviously took the matter seriously and did not repeat this error in that timeframe. Therefore, in accordance with the EUB's standard protocol, this enforcement was

now only a matter of record and would not contribute to escalating enforcement. The Audit Section believed that the consequences were not out of proportion to Suncor's noncompliance and what was intended to be accomplished with the enforcement action imposed appeared to have been accomplished.

4.3 Views of the Board

Based on the submission of the parties, the Board finds that the facts are not in dispute and the parties agree that an administrative error was made by Suncor when completing the application. The error was that Suncor chose the McLaren Formation instead of the Wabiskaw-McMurray Formation on the drop-down menu in the EUB DDS system. The Board understands that a drop-down menu on a computer screen may result in an error and accepts that the error was inadvertent. However, the Board is of the view that it is the responsibility of an applicant to correctly complete its application, as the timely processing of applications rests on the diligence of applicants to correctly complete the applications. The Board considers that a fundamental and integral component of the *Directive 056* process is that the applicant is held accountable for the information it provides in its application, as the Board's application process relies heavily on the statements and declarations that an applicant makes in each application. The Board is of the view that contraventions of Board requirements attract strict liability. For these reasons, the Board finds that enforcement was warranted.

However, in this case, the Board is not being asked to revoke the enforcement but to consider the unique circumstances of this case and decide whether High Risk Enforcement Action 1 should be changed to 1st Notice of Low Risk Compliance. This case turns on a few specific facts particular to this case.

The Board is of the view that under the rules noted above, neither the Audit Group nor the Enforcement Advisor had discretion to impose an action less than High Risk Enforcement Action 1. However, the Board may review whether an enforcement action was warranted and has the discretion to consider whether the level of enforcement is appropriate to the facts of a case.

To determine the appropriate level of enforcement in this case, the Board considers noteworthy the fact that the DOE had informed the Board that the rights for the applied-for locations for the wells should have been to the Wabiskaw-McMurray Formation, and not the McLaren. The Board is persuaded that Suncor's intended formation for production was the Wabiskaw-McMurray Formation, for which Suncor had acquired the mineral rights. The Board is convinced by the fact that no production could have taken place from the McLaren Formation, as that formation does not exist in the applied-for locations of the proposed wells. In considering the factors set out in the matrix, the Board sets the qualitative measure at A(1) in the specific circumstances of this case; as no trespass of minerals was possible, the potential for a limited waste of resource did not exist. Also, the Board is of the view that this specific noncompliance may raise only localized concerns and should not result in a reduction in stakeholder confidence.

As a result, the Board, in the exercise of its discretion, rescinds the High Risk Enforcement Action 1 and replaces it with a 1st Notice of Low Risk Compliance and directs that the record of the Board with respect to this matter be changed. Also, the Board finds that no further action is necessary in this matter, as Suncor followed the enforcement letter issued on January 11, 2007.

Dated in Calgary, Alberta, on July 2, 2008.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

B. T. McManus, Q.C.
Presiding Member

<original signed by>

J. D. Dilay, P.Eng.
Board Member

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G. J. Miller
Board Member