



Suncor Energy Inc.

Appeal of ERCB High Risk
Enforcement Action 1

December 15, 2009

ENERGY RESOURCES CONSERVATION BOARD

Decision 2009-065: Suncor Energy Inc., Appeal of ERCB High Risk Enforcement Action 1

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Published by

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ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

SUNCOR ENERGY INC. APPEAL OF ERCB HIGH RISK ENFORCEMENT ACTION 1

Decision 2009-065
Proceeding No. 1622240

1 DECISION

The following is the decision of the Energy Resources Conservation Board (ERCB/Board) regarding the appeal by Suncor Energy Inc. (Suncor) of the decision of the ERCB Enforcement Advisor on the of ERCB High Risk Enforcement Action 1 dated June 22, 2009 (enforcement action).

Having considered the evidence and submissions from the parties, the Board hereby allows the appeal and rescinds the enforcement action.

The Board panel also recommends that the Board considers reviewing the Commercial Scheme Approval No. 8535F (approval) under Section 39 of the *Energy Resources Conservation Act (ERCA)*.

2 BACKGROUND

Suncor has approval to operate a scheme for the recovery of oil sands and production of oil sands products from the Athabasca Wabiskaw-McMurray Oil Sands Deposit in the Mildred Lake area. On May 28, 2009, Alberta Environment (AENV) informed the ERCB Calgary office that it had received a report of smoke and small fires occurring at the CCS Janvier landfill owned by HAZCO Environmental Services (HAZCO). AENV discovered during its initial investigation that molten sulphur was being transported from Suncor's Mildred Lake area site (Mildred Lake site) and disposed of at the Janvier landfill.

On June 22, 2009, the ERCB issued High Risk Enforcement Action 1 against Suncor relating to its sale (at negative prices) of sulphur generated at its facility located at the Mildred Lake site to a third party (HAZCO). Specifically, the ERCB found Suncor in violation of the requirement to apply and obtain approval for the disposal of sulphur and failing to minimize the discard and waste of sulphur, as it is a valuable resource and disposal of it in a landfill is considered a waste.

While the ERCB did not suspend Suncor's approval for the facility, it did require Suncor to immediately cease transferring sulphur product to the Janvier landfill for waste disposal and to send sulphur to appropriate storage facilities or market it. Further, the ERCB required Suncor to develop and submit a sulphur storage plan that complies with Sections 48 and 49 of the *Oil Sands Conservation Regulations (OSCR)* within 60 days. The action plan was required to include the steps Suncor will take to ensure that storage and disposal of sulphur complies with Sections 48 and 49 of the *OSCR* and an analysis of options for on-site sulphur storage.

On July 17, 2009, Suncor appealed the enforcement action to the Enforcement Advisor and requested a suspension of the ERCB staff's direction to stop sending sulphur products to

HAZCO and to submit a sulphur storage plan within 60 days of the date of the enforcement action. The Enforcement Advisor adjourned the appeal for a number of weeks to permit Suncor and ERCB staff to discuss the matter further. By letter dated August 11, 2009, ERCB staff requested that the appeal proceed directly to the Board for consideration because the appeal raised a unique policy issue regarding interpretation of applicable legislation and the Board's conservation mandate.

On August 14, 2009, the Enforcement Advisor referred the appeal to the Board for determination given the nature of the issue (interpretation of policy). Both Suncor and ERCB staff concurred with the Enforcement Advisor's decision to refer the matter to the Board.

In determining whether to uphold, vary, or overturn the enforcement action, the Board must determine whether the transfer of sulphur by Suncor to a third party for disposal purposes violated Suncor's existing approval, Sections 48 or 49 of the *OSCR*, and/or the ERCB's conservation mandate.

The Board considered written submissions from Suncor dated July 2, 9, and 17, and September 11, 2009. The Board also considered submissions from ERCB staff dated August 27, 2009. Written submissions closed on September 11, 2009. Following consideration of the parties' written submissions, the Board requested additional submissions from Suncor to support the suspension request. Suncor provided those written submissions by letter dated November 11, 2009.

3 APPEAL TO THE BOARD

By letter dated July 22, 2009, Suncor appealed the enforcement action to the Enforcement Advisor. The Enforcement Advisor did not make a decision on the appeal and referred the matter to the Board for consideration.

A three-member Board panel, consisting of Board Members M. J. Bruni, Q.C. (Presiding Member), G. Eynon, P.Geol., and W. A. Warren, P.Eng. (Acting Board Member), was assigned to make a decision on this appeal based on the written submissions from the parties.

4 ISSUES

The Board considered two issues on this appeal:

- whether the enforcement action should be upheld or overturned, and
- whether the suspension request should be granted.

5 SUBMISSION OF THE PARTIES

5.1 Views of Suncor

Suspension Request

Suncor submitted that the ERCB has required that Suncor move as much sulphur as possible off site. Suncor asserted that the ERCB's requirement that Suncor cease transferring sulphur to HAZCO could have significant adverse impacts on its operations. Suncor pointed out that it had numerous commercial arrangements in place for the transfer of ownership and removal of sulphur generated at the Mildred Lake site and that these arrangements were consistent with Suncor's approval and the direction of the Board. Suncor maintained that it had limited ability to store sulphur on site and used its commercial arrangements with various parties to comply with the Board's direction to minimize on-site sulphur storage.

Appeal of the Enforcement Action

Suncor argued that it had not violated the *OSCR* by selling sulphur to HAZCO for transfer to the Janvier landfill and that it was authorized under its approval to handle its sulphur in the manner it currently employed.

5.2 Views of ERCB Staff

ERCB staff consider sulphur to be a resource, the recovery of which must be maximized and the disposal or discard of which must be minimized unless the Board approves otherwise. Board approval is required for the storage and disposal of sulphur. Suncor does not have such approval.

6 FINDINGS OF THE BOARD

6.1 Decision on the Appeal

The Board finds that it is not clear whether the transfer by Suncor of sulphur to the Janvier landfill violated the *OSCR* or the approval.

Because it is not clear whether Suncor was in technical compliance with ERCB requirements, it would not be appropriate or fair to Suncor to uphold the enforcement action. Based on the foregoing, the Board hereby allows Suncor's appeal and overturns the enforcement action.

The Board is mindful of the uncertainty as to whether the activities of Suncor that gave rise to the enforcement appeal violated the *OSCR* and/or the Board's conservation mandate. This position is reinforced by both parties' agreement that the issues raised in this appeal present larger policy implications.

For the foregoing reasons, the panel recommends that the Board consider initiating a review of the approval under Section 39 of the *ERCA*.

6.2 Decision on the Suspension Request

In light of the Board's decision to overturn the enforcement action, it is not necessary to make a decision on the suspension request. The Board expects that Suncor will comply with all applicable requirements with respect to any transfer of sulphur products from the Mildred Lake site. The Board also expects that Suncor will ensure that parties that receive its sulphur have the requisite approvals to do so.

Dated in Calgary, Alberta, on December 15, 2009.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

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

<original signed by>

G. Eynon, P.Geol.
Board Member

<original signed by>

W. A. Warren, P.Eng.
Acting Board Member