



Canadian Natural Resources Limited

Application for an Oil Sands Mine,
Bitumen Extraction Plant, and Bitumen Upgrading
Plant in the Fort McMurray Area

Cost Awards

ALBERTA ENERGY AND UTILITIES BOARD

Energy Cost Order 2004-07: Canadian Natural Resources Limited
Application for an Oil Sands Mine, Bitumen Extraction Plant, and
Bitumen Upgrading Plant in the Fort McMurray Area
Application No.1273113

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**CANADIAN NATURAL RESOURCES LIMITED
APPLICATION FOR AN OIL SANDS MINE,
BITUMEN EXTRACTION PLANT, AND
BITUMEN UPGRADING PLANT
IN THE FORT MCMURRAY AREA**

**Energy Cost Order 2004-07
Application No. 1273113**

1 INTRODUCTION

Canadian Natural Resources Limited (CNRL) filed Application No. 1273113 with the Alberta Energy and Utilities Board (Board / EUB), pursuant to Sections 10 and 11 of the *Oil Sands Conservation Act* (OSCA), for an oil sands mine, a bitumen extraction plant, and a bitumen upgrader and associated facilities in the Fort McMurray area. The project would also receive third-party oil sands material (mined ore or intermediate process streams, such as bitumen) for processing at its site and would produce and ship oil sands material (mined ore or intermediate process streams, such as bitumen) from its site for processing at third-party facilities. In support of its proposal and as part of its application to the EUB, CNRL also submitted an environmental impact assessment (EIA) report to the Director of the Regulatory Assurance Division, Alberta Environment, pursuant to the *Environmental Protection Enhancement ACT* (EPEA).

CNRL also applied to DFO for approval under Section 35(2) of the *Fisheries Act* for the alteration, disruption, or destruction of fish habitat. Prior to DFO issuing an authorization, an environmental assessment of the project under the *Canadian Environmental Assessment Act* was required.

On June 26, 2003, the Honourable Robert Thibeault, Minister of Fisheries and Oceans, referred the environmental assessment of the project to a review panel, pursuant to Section 21(b) of CEAA.

On July 30, 2003, the Canadian Environmental Assessment Agency (CEAA) announced that it was proposing to establish a joint environmental assessment panel for the project. Following a 21-day public comment period, The Honourable David Anderson, Minister of the Environment, and Neil McCrank, Q.C., Chairman of the EUB, signed an agreement to establish the Panel.

The Panel consisted of J. D. Dilay, P.Eng. (Presiding Member), R. Houlihan, P.Eng., Ph.D., and G. Kupfer, Ph.D. The Panel considered the application at a public hearing held in Fort McMurray, Alberta, during September 15-19, 22-26, and 29, 2003. Accordingly, the Panel considers that the record was completed on September 29, 2003. On January 27, 2004, the Board and the Government of Canada issued Decision [2004-005](#).

With respect to the cost process for this proceeding, the Board received its final submission from counsel for the Miskisew Cree First Nation on March 19, 2004 addressing the issue of federal funding. This issue is discussed later in the Cost Order. For administrative purposes, the Board considers the cost process for this proceeding to have closed on March 19, 2004.

2 VIEWS OF THE BOARD – Authority to Award Costs

In determining local intervener costs, the Board is guided by its enabling legislation. In particular, by section 28 of the *Energy Resources Conservation Act* (ERCA) which reads as follows:

- 28(1) In this section, “local intervener” means a person or a group or association of persons who, in the opinion of the Board,
- (a) has an interest in, or
 - (b) is in actual occupation of or is entitled to occupy

land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

It is the Board’s position that a person claiming local intervener costs must establish the requisite interest in land and provide reasonable grounds for believing that such an interest may be directly and adversely affected by the Board’s decision on the project in question.

When assessing costs, the Board will have reference to Guide 31A, Guidelines for Energy Cost Claims ([Guide 31A](#)) and Part 5 of the *Rules of Practice*.

Section 55(1) of the *Rules of Practice* reads as follows:

- Section 55(1) The Board may award costs in accordance with the Scale of Costs, to a participant if the Board is of the opinion that:
- (a) the costs are reasonable and directly and necessarily related to the proceeding and;
 - (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board.

3 VIEWS OF THE BOARD – Cost Claims

3.1 DASTOUS, Claude and Maureen

The Board has determined that Mr. Dastous and Ms. Dastous have both met the requirements of section 28 of the ERCA and therefore qualify for cost recovery pursuant to Guide 31A. Mr. Dastous submitted a cost claim consisting of an attendance honorarium of \$1,000.00, accommodation expenses of \$719.04, meal expenses in the amount of \$400.00, and mileage expenses in the amount of \$480.00 for a total claim of \$2,599.04. Ms. Dastous submitted a cost claim consisting of a preparation honorarium of \$500.00, attendance honorarium of \$1,000.00, meal expenses in the amount of \$400.00, long distance telephone charges in the amount of \$15.00, and photocopying charges in the amount of \$7.00 for a total claim of \$1,922.00.

The Board has reviewed the costs submitted by both Mr. and Ms. Dastous, bearing in mind the principles set out in Guide 31A and the Board's Scale of Costs. The Board finds that the intervention presented was effective and assisted the Board in its deliberations with respect to the issues before it. The Board also notes the complexity of the issues before it and acknowledges that Mr. and Ms. Dastous presented a clear intervention without legal assistance or expert assistance.

Based on the foregoing the Board approves Mr. Dastous' and Ms. Dastous' claim in full as outlined in Appendix "A" attached.

3.2 Mikisew Cree First Nation (MCFN)

MCFN submitted a claim totaling \$326,278.65, details of which are outlined in Appendix "A" attached. By letter dated March 19, 2004 the MCFN advised the Board that its claim should be reduced by the amount of \$12,287.00, being the amount MCFN received through CEEA's funding process. MCFN did not provide the Board with details as to which specific portion of the cost claim should be reduced and as such the Board finds it appropriate to reduce the total cost award by \$12,287.00 rather than adjusting the claim itself.

MCFN's claim includes the amount of \$21,345.34 as total GST due or paid in respect of all fees, honoraria, disbursements and expenses claimed by MCFN. The EUB notes that the federal *Indian Act* and *Excise Tax Act* provide Indian bands with certain exemptions from taxation. Canada Revenue Agency's GST/HST Technical Information Bulletin B-039: *GST Administrative Policy Application of GST to Indians*, provides that services acquired on or off reserve by an Indian band for band management activities are not subject to GST. One exception is that Indian bands will pay the GST on off-reserve purchases of transportation, short-term accommodation and meals; however the band may file a General Rebate application to recover the GST paid on these purchases when the services are purchased for management activities. Band management activities are activities or programs undertaken by a band that are not commercial activities for which the band would otherwise be entitled to an input tax credit.

It appears to the Board that all or a portion of the GST claimed by MCFN may be subject to an exemption, or may be eligible to be recovered through a General Rebate application. The Board is therefore not prepared at this time to grant an award in respect of the GST claimed by the MCFN; however it is not disallowing that portion of the claim. The Board intends to ask MCFN and CNRL to comment on whether the GST exemptions or rebates afforded to Indian bands under federal legislation apply to eliminate or rebate all or a portion of the GST claimed by the MCFN. If appropriate, the Board will issue a further Cost Order with respect to the GST claimed by the MCFN.

The Board notes that MCFN counsel, Prowse Chowne, claimed for airfare expenses in the amount of \$3,755.16 between the period May 2, 2003 and August 26, 2003. Guide 31A states that the Board will recognize claims for airfare at economy rates or less that are restricted to the hearing phase of the proceeding. As the hearing for this proceeding commenced on September 15, 2003 the Board does not find that these particular airfare expenses have been claimed in accordance with Guide 31A and therefore disallows this portion of the MCFN claim.

The Board has reviewed the remaining legal fees and expenses claimed by Prowse Chowne and finds them to be reasonable given the scope and nature of the proceeding and the information presented. Subject to the reduction regarding federal funding, airfare, and GST, all as noted above, the EUB approves the remaining costs for Prowse Chowne as outlined in Appendix “A” attached.

The MCFN have claimed \$9,738.84 for the materials prepared and presented by Dr. David Schindler. The Board carefully reviewed Dr. Schindler’s evidence and is of the view the materials prepared and presented were of assistance to the Board and that the costs claimed in that regard are reasonable. The Board finds Dr. Schindler’s disbursements to be reasonable and related to the proceeding. Subject to reduction for the GST claimed as noted above, the Board approves costs for Dr. Schindler as claimed.

The MCFN claimed \$41,560.78 for the activities performed by Northern Lights Environmental and Mediations Services Inc. (NLEMSI). The Board has reviewed the evidence prepared and presented by NLEMSI and is of the view that NLEMSI’s review of CEMA activities was of assistance to the Board. The Board also recognizes that NLEMSI’s role was not limited to work relating to CEMA minutes; NLEMSI also provided assistance to MCFN’s legal counsel during cross-examination and apparently assisted counsel in preparing for cross-examination when other MCFN experts were not available. The Board is of the view that costs claimed in respect of NLEMSI are reasonable. The Board also finds NLEMSI’s disbursements to be reasonable and related to the proceeding. Subject to the reduction for the GST claimed as noted above, the Board approves costs for NLEMSI in the amount claimed.

The MCFN claimed \$68,636.61 for the activities performed by BK Associates (BK). The Board is of the view the materials prepared and presented by BK were of assistance to the Board and that the costs claimed in respect of BK are reasonable. The Board finds BK’s disbursements to be reasonable and related to the proceeding. Subject to reduction for the GST claimed as noted above, the Board approves costs for BK as claimed.

The MCFN claimed \$35,514.36 for the activities performed by Inuvialuit Environmental & Geotechnical Inc. (IEGI). The Board is of the view the materials prepared and presented by IEGI were of assistance to the Board and that the costs claimed in respect of IEGI are reasonable. The Board finds IEGI’s disbursements to be reasonable and related to the proceeding. Subject to reduction for the GST claimed as noted above, the Board approves costs for IEGI as claimed.

The MCFN claimed \$12,632.18 for the activities performed by Tumbleweed Consulting (Tumbleweed). The Board is of the view that Ms. Evan’s participation in the hearing was of assistance to the Board, in particular during the testimony of the MCFN panel of Elders who appeared to rely on her experience and advice, and that the costs claimed in respect of Tumbleweed are reasonable. The Board finds Tumbleweed’s disbursements to be reasonable and related to the proceeding. Subject to reduction for the GST claimed as noted above, the Board approves costs for Tumbleweed as claimed.

The MCFN claimed disbursements or expenses for each of Chief Archie Waquan; Mary Rose Waquan; Reggie McKay; Willie Courtorielle; Steven Courtorielle; and Terry Marten who acted as interpreter. In addition the MCFN claimed attendance honoraria for each of Mary Rose Waquan, Reggie McKay and Terry Marten. The Board finds that the participation of each of these individuals was effective and assisted the Board in its deliberations with respect to the

issues before it. The Board also finds that the disbursements and expenses claimed are reasonable and related to the proceeding. Subject to the reduction for the GST claimed as noted above, the Board approves the costs as claimed for each of Chief Archie Waquan; Mary Rose Waquan; Reggie McKay; Willie Courtorielle; Steven Courtorielle; and Terry Marten.

Taking all of the foregoing into account, the total amount approved for MCFN is \$288,891.15 as outlined in Appendix “A” attached.

3.3 Wood Buffalo First Nation (WBFN)

WBFN submitted a claim totaling \$32,569.60, details of which are outlined in Appendix “A” attached. For the reasons that follow, the EUB finds that WBFN is not a local intervener, as defined in section 28 of the ERCA, and that its claim must therefore be denied.

At the proceeding WBFN filed argument¹ with respect to its status as a local intervener. WBFN claims that it has rights in or to lands “based upon the applicable statutes governing the hearing and Board, as well as common law principles surrounding native land claims and unextinguished aboriginal title and treaty rights.” WBFN also stated that it enjoys the right to occupy the lands through Treaties 6 and 8. WBFN asserted in the alternative that its members are occupiers of the lands in question and are involved in activities such as trapping and hunting on the lands. WBFN stated that many of its members had registered traplines that would be affected by the project. WBFN also referred to a court action it had initiated challenging the land script process, a process that WBFN stated wrongfully strips some aboriginal people of their rights including land claim rights. The Board notes that at the time of the hearing WBFN’s legal claim had not yet been considered by the court.

Mr. Malcolm stated during cross-examination that WBFN is not recognized by the Government of Canada as an Indian Band under the *Indian Act*, and that it had not entered into any treaty with the Government of Canada.

To qualify as a local intervener under section 28 of the ERCA, the intervener must demonstrate that

- the intervener has the necessary interest in land, and
- the land in question will or may be directly and adversely affected by the Board’s decision on the proposed project.

Based upon the evidence provided the Board finds that WBFN as a group has not established that it has an interest in land that meets the first criterion under section 28. Absent such an interest, the Board cannot recognize WBFN as a local intervener. The Board therefore has no authority to make a cost award in favour of WBFN.

In any event, the Board also finds that the professional fees claimed by WBFN were not reasonably incurred in relation to the proceedings. Mr. Malcolm stated at the commencement of the hearing, and a number of times thereafter, that WBFN did not have legal counsel for the proceeding. No legal counsel appeared on behalf of WBFN. It would be inappropriate for the Board to award costs in respect of legal fees in these circumstances. In addition, with respect to

¹ Exhibit 77

Mr. Malcolm's claim for professional fees the Board notes Mr. Malcolm's own evidence that there was nothing contained in the WBFN's written submission to the hearing that touched on the environmental and technical issues WBFN sought to raise in the proceedings. Mr. Malcolm stated that he only had an opportunity to read the EIA two nights before the hearing commenced, and at that he did not read the whole EIA but only briefed it. Again, there is nothing in the WBFN written submission or direct evidence provided by WBFN to indicate that the professional fees claimed by Mr. Malcolm were reasonably incurred in relation to the proceedings.

4 ORDER

IT IS HEREBY ORDERED THAT:

- (1) Canadian Natural Resources Limited shall pay intervener costs in the amount of \$1,922.00 to Ms. Maureen Dastous, as shown in column (h) of Appendix "A" attached;
- (2) Canadian Natural Resources Limited shall pay intervener costs in the amount of \$2,599.04 to Mr. Claude Dastous, as shown in column (h) of Appendix "A" attached;
- (3) Payment to Mr. and Ms. Dastous is to be made to Box 5333, Fort McMurray AB., T9H 3G4;
- (4) Canadian Natural Resources Limited shall pay intervener costs in the amount of \$288,891.15 to Mikisew Cree First Nation, as shown in column (h) of Appendix "A" attached;
- (5) Payment under this Order to the Mikisew Cree First Nation shall be made payable to Prowse Chowne LLP at 100, 10328 – 81 Avenue, Edmonton, AB, T6E 1X2.

Dated in Calgary, Alberta on this 22nd day of April, 2004.

ALBERTA ENERGY AND UTILITIES BOARD

(Original signed by)

Thomas McGee
Board Member

APPENDIX A – SUMMARY OF COSTS CLAIMED AND AWARDED



"ECO 2004-07
Appendix A (CNRL Hc

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