



ConocoPhillips Canada Operations Ltd.

Applications for a Crude Oil Well and Associated
Pipeline
Pembina Field

Cost Awards

January 17, 2012

ENERGY RESOURCES CONSERVATION BOARD

Energy Cost Order 2012-001: ConocoPhillips Canada Operations Ltd., Applications for a Crude Oil Well and Associated Pipeline, Pembina Field

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CONTENTS

Introduction.....	1
Background.....	1
Cost Claim	1
Authority to Award Costs	2
Cost Claim of the MacKenzies	2
Views of ConocoPhillips	2
Views of the MacKenzies	3
Analysis and Findings.....	4
Order	5
Appendix A Summary of Costs claimed and awarded.....	6

ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

**CONOCOPHILLIPS CANADA OPERATIONS LTD.
APPLICATIONS FOR A CRUDE OIL WELL
AND ASSOCIATED PIPELINE
PEMBINA FIELD**

**Energy Cost Order 2012-001
Applications No. 1632981 and 1643646
Cost Application No. 1684601**

INTRODUCTION

Background

[1] ConocoPhillips Canada Operations Ltd. (Conoco) applied to the Energy Resources Conservation Board (ERCB/Board) for licences to drill an E-610 critical sour well and construct an oil effluent pipeline. The well was to be drilled from a surface location in Legal Subdivision (LSD) 15 of Section 28, Township 49, Range 8, West of the 5th Meridian (W5M). The maximum hydrogen sulphide (H₂S) concentration would have been approximately 219.7 moles per kilomole (21.97 per cent) with a cumulative drilling H₂S release rate of 2.76 cubic metres per second (m³/s) and a corresponding emergency planning zone (EPZ) of 2.96 kilometres (km). The purpose of the well was to obtain oil production from the Nisku Formation. The proposed pipeline was for transportation of oil effluent, with an H₂S content of 310 moles per kilomole (31 per cent), from the proposed well to a tie-in point at LSD 7-33-49-8W5M; the corresponding EPZ for the pipeline was 1.93 km. The well and pipeline were to be located approximately 8 kilometres northwest of Drayton Valley.

[2] Ken and Janina MacKenzie (MacKenzies) objected to the applications and were found to have standing in the matter, as set out in correspondence from the ERCB dated November 10, 2010.

[3] On November 18, 2010, the applicant notified the ERCB that it was withdrawing the applications pursuant to Section 21 of the *Energy Resources Conservation Board Rules of Practice*, and the Board accepted the withdrawal of the applications.

Cost Claim

[4] On December 17, 2010, the MacKenzies filed a costs claim in the amount of \$2077.98. On December 20, 2010, ConocoPhillips submitted comments to the costs claim of the MacKenzies.

[6] On April 5, 2011, Debbie Bishop (Bishop; counsel) requested that the matter be held in abeyance pending a decision of the Court of Appeal in Action No. 1003-0333AC, Kelly v. Alberta (Energy Resources Conservation Board), 2011 ABCA 19. However, on December 2, 2011, Bishop requested that, since there was some question of when this appeal would be completed, the ERCB consider the cost application submitted on December 17, 2010. Bishop advised that she would not be making further submissions.

[8] The Board considers the cost process to have closed on December 2, 2011.

AUTHORITY TO AWARD COSTS

[9] In determining local intervener costs, the Board is bound 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.

[10] 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 application in question.

[11] When assessing costs, the Board refers to Part 5 of the *Energy Resources Conservation Board Rules of Practice* and Appendix E: Scale of Costs in *ERCB Directive 031: Guidelines for Energy Proceeding Cost Claims*. Subsection 57(1) of the *Rules of Practice* states:

57(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.

COST CLAIM OF THE MACKENZIES

[12] The MacKenzies were represented by Ackroyd LLP. On December 17, 2010, the MacKenzies filed a cost claim for legal fees in the amount of \$1464.00, honoraria in the amount of \$500.00, expenses in the amount of \$38.83, and GST in the amount of \$75.15, for a total claim of \$2077.98.

Views of ConocoPhillips

[13] ConocoPhillips provided a response to the cost claim on December 20, 2010.

[14] ConocoPhillips submitted that as a general matter, there was nothing accompanying the invoice that provided any explanation why costs have been claimed for services rendered before the notice of hearing was issued. ConocoPhillips noted that on page 10 of ECO 2008-008, the Board discussed its usual practice not to award costs before a hearing notice is issued:

As per part 7 of Directive 031A, the Board acknowledges that its usual practice is to acknowledge only those costs incurred after a Notice of Hearing has been issued. It is

generally the Board's position that until a Notice of Hearing has been issued, there is no certainty that a hearing will be held. This matter is illustrative of that point.

[15] ConocoPhillips submitted that the notice of hearing was issued on November 12, 2010, and that costs claimed prior to November 12 should not be awarded in connection with these applications. ConocoPhillips stated that in connection with those costs that were incurred on or after November 12, the time entries on the invoice were too vague to determine the work that was actually performed. For instance, the 0.7 hour time entry on November 15 indicating “p/c Ken Mackenzie, review correspondence” does not provide any further details. ConocoPhillips, thus, took the view that the requirements of Section 55(1) of the *Rules of Practice* had not been met. Section 55(1) permits the Board to “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.” ConocoPhillips did not believe the invoice entries demonstrated that the claimed costs were necessary or contributed to a better understanding of the issues before the Board. ConocoPhillips submitted that costs claimed on or after November 12 should not be awarded in connection with these applications.

[16] Finally, ConocoPhillips noted that the cover letter stated, “Please find enclosed my Cost Claim for legal services in the above noted matter.” (emphasis added by ConocoPhillips) However, \$500.00 of the \$2002.83 claimed relates to a time entry made by Mr. Mackenzie. No details have been provided concerning the 10 hours he is claiming. Again, it is ConocoPhillips' view that the invoice does not demonstrate the claimed costs were necessary or contributed to a better understanding of the issues before the Board.

Views of the MacKenzies

[17] On December 2, 2011, Bishop requested that the ERCB consider the cost application submitted on December 17, 2010.

[18] Bishop pointed out that the ERCB letter, dated November 12, 2010, stated that the MacKenzies were granted standing under Section 26 of the *ERCA*. As no hearing was held, Bishop requested that the ERCB consider the following in a determination on the intervener cost claim of the MacKenzies:

- Application No. 1632981 filed by ConocoPhillips in its entirety including the health information of the effects of H₂S;
- the maps within Application 1632981 showing the MacKenzie's farm adjacent to the proposed well site; and
- the EPZ calculations within Application No. 1632981 showing the MacKenzie's farm within the EPZ based on health-based end points for H₂S.

[19] Bishop noted that the evidence provided with the cost claim shows that the MacKenzies' lands may be affected, their use of their lands may be affected, their livestock grazing on these lands may be affected, and the house attached to the lands may be affected.

ANALYSIS AND FINDINGS

[20] The Board is cognizant of the fact that ConocoPhillips immediately withdrew its applications upon being informed that the matter had been set down for a hearing. ConocoPhillips did not provide a reason for its withdrawal. The Board notes this practice often means that intervenors have committed considerable time and effort to voicing and preparing their objections, and have incurred expenses as a result. The Board expects that applicants fully consider the various options for a project and are fully committed to the applied-for project prior to engaging the Board's formal nonroutine and hearing process. This lack of commitment shows little regard for other stakeholders in the process, including residents and the ERCB, and does not meet the intended spirit of common courtesy towards landowners expected of applicants while conducting their participant involvement programs.

[21] In order to be eligible for costs, the MacKenzies must be local intervenors as defined under Section 28 of the *ERCA*. The Board notes that ConocoPhillips did not raise the status of the MacKenzies as local intervenors as an issue. According to the information submitted with the applications, the MacKenzies own land that would have been within the EPZ and were frequently on that land for their farming operations. However, further information regarding potential impacts was not provided to the Board as the matter did not proceed to a hearing. Based on the foregoing, the Board finds that the MacKenzies are local intervenors for the purposes of Section 28 and are eligible for costs.

[22] Regarding the legal fees, the Board notes that the parties were informed by letter dated November 12, 2010, (Standing Letter) that the MacKenzies had standing in this matter. The Board also notes that a notice of hearing was not issued prior to the applications being withdrawn.

[23] Regarding costs incurred prior to November 12, 2010, the Board notes that the MacKenzies are landowners that occupied land within the EPZ, and finds that their objection to the application created a reasonable certainty that a hearing would be held, as confirmed by the Standing Letter. While the Board notes the vagueness of the submissions regarding the costs incurred prior to November 12, 2010, there is nothing to suggest that these costs were not directly related to the proceeding and contributed to a better understanding of the issues. The Board finds that all costs claimed relate to preparing for the hearing that was going to be held and, accordingly, awards costs for all legal fees at the rate of \$240.00 per hour, excluding GST.

[24] The cost claim includes disbursements for photocopying, long distance phone calls, and an administrative fee of \$25.00. While no information was submitted regarding the administrative fee, and the Board will continue to require appropriate explanation in cost claims, the Board concludes that the nominal amount of the fee is reasonable for the intervention. Accordingly, the Board awards disbursements in the full amount of \$38.85, including GST, for photocopying and long distance.

[25] Finally, regarding the \$500.00 claimed for Mr. MacKenzie's honorarium, the Board usually awards honoraria for attendance at a hearing, for forming a group, or for the preparation by the intervenor in the submission. As set out in Section 5.1.2 of *Directive 031*, the Board's normal practice is that "a local intervenor who personally prepares a submission without expert help may receive an honorarium in the range of \$300.00 to \$2500.00, depending upon the complexity of

the submission.” Although the submissions were not specific with respect to the basis for the honorarium, the Board understands that the MacKenzies retained counsel to help prepare some of their correspondence, and that the MacKenzies prepared the initial submission which provided a thorough discussion of the MacKenzies’ concerns prior to retaining counsel. Accordingly, the Board awards the preparation honorarium of \$500.00.

ORDER

[27] It is hereby ordered that ConocoPhillips pay intervener costs totalling \$2077.98, including GST, to Ackroyd LLP. Payment shall be made to Ackroyd LLP, 1500 First Edmonton Place, 10665 Jasper Avenue, Edmonton, Alberta, T5J 3S9.

Dated in Calgary, Alberta, on January 17, 2012.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

G. Eynon, P.Geol.
Presiding Member

<original signed by>

T. C. Engen
Board Member

<original signed by>

J. G. Gilmour, LL.B.
Acting Board Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED

This appendix is unavailable on the ERCB website. To order a copy of this appendix, contact ERCB Information Services toll-free at 1-855-297-8311.