



## Suncor Energy Inc.

Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area

Cost Awards

**ALBERTA ENERGY AND UTILITIES BOARD**

Energy Cost Order 2007-001: Suncor Energy Inc.

Application for Expansion of an Oil Sands Mine  
(North Steepbank Mine Extension) and a Bitumen  
Upgrading Facility (Voyageur Upgrader) in the  
Fort McMurray Area

Application Nos. 1391211 and 1391212

Cost Application No. 1479611

Published by

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# ALBERTA ENERGY AND UTILITIES BOARD

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Calgary, Alberta

**Suncor Energy Inc.  
Application for Expansion of an  
Oil Sands Mine (North Steepbank Extension)  
And a Bitumen Upgrading Facility  
(Voyageur Upgrader)  
Fort McMurray Area**

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## 1 INTRODUCTION

Suncor Energy Inc. (Suncor) applied to the Alberta Energy and Utilities Board (EUB/Board), pursuant to Sections 10 and 13 of the *Oil Sands Conservation Act (OSCA)*, to amend Approval No. 8535 to construct, operate, and reclaim an oil sands surface mine (North Steepbank Mine Extension [NSME]) in the Fort McMurray area. Suncor also applied pursuant to Sections 11 and 13 of the *OSCA*, to amend Approval No. 8535 to construct, operate, and reclaim a bitumen upgrading facility (Voyageur Upgrader [VU]) in the Fort McMurray area.

The Board considered the applications at a public hearing in Fort McMurray, Alberta. The oral portion of the hearing commenced on July 5 and concluded on July 20, 2006, before Board Members J. D. Dilay, P.Eng. (Presiding Member), J. R. Nichol, P.Eng., and T. M. McGee. On November 14, 2006 the Board issued [Decision 2006-112](#).

The Board received cost claim applications from five participants as shown in Appendix A attached. The claims total \$980,296.00. On October 6, 2006, counsel for Suncor submitted comments regarding the cost claims. On October 19, 2006, the Board received responses from the following parties:

- Mikisew Cree First Nation
- Northern Lights Regional Health Authority
- Oil Sands Environmental Coalition
- Regional Municipality of Wood Buffalo
- Wood Buffalo Metis Locals Association (filed by the Fort McMurray Metis Local 1935)

For the purposes of this Cost Order, the Board considers the cost process to have closed on October 19, 2006.

## 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 in part 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.

- (2) On the claim of a local intervener or on the Board's own motion, the Board may, subject to terms and conditions it considers appropriate, make an award of costs to a local intervener.

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 Part 5 of the *Rules of Practice* and to its *Scale of Costs*.

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 Mikisew Cree First Nation (MCFN)**

The Board notes that Suncor did not take issue with MCFN's eligibility under section 28(1) of the ERCA for a local intervener cost award. Based on that and the MCFN's costs submissions, the Board considers that the MCFN qualifies as a local intervener under the ERCA.

MCFN submitted a cost claim totaling \$374,785.44. The claim includes costs for legal services provided by Prowse Chowne LLP, and for other services provided by the following consultant corporations and individuals:

- BK Associates
- Integrated Environments Ltd.
- David Walker
- Fish Creek Consulting
- WDA Consulting Inc.
- Applied Aquatic Research Ltd.
- David Taplan

MCFN's claim also includes honoraria and expenses for R. Waquan, D. Tuccaro, S. Courtorielle, and R. Martin.

### Prowse Chowne LLP

Prowse Chowne incurred legal fees of \$135,530.50 and expenses of \$19,983.05, for a total of \$155,513.55. Three lawyers assisted with the MCFN intervention, including senior counsel Donald Mallon, Q.C., junior counsel Anita Floden, and articling student Jodie Currie. Suncor submitted that the MCFN is a registered first nation with reserve land, and is GST exempt. Therefore, the MCFN should not be awarded GST on approved fees and expenses. With respect to MCFN's legal services, Suncor takes issue with the costs claimed for Ms. Floden being in attendance at the hearing. Suncor stated that it is only in exceptional circumstances, where the intervention and issues are complex, that the EUB will consider it necessary for two lawyers to be in attendance. Suncor stated that Ms. Floden's role at the hearing did not include the filing of direct evidence or conducting cross-examination. Suncor also submits that the combined preparation time (475.55 hours), for Mr. Mallon, Q.C. and Ms. Floden exceeds the EUB's benchmark set out in [Utility Cost Order 2003-013](#). Suncor submitted the following with respect to the benchmark.

The Board stated that for a typical proceeding it considered that experienced legal counsel and a general consultant team, at the top of the Scale of Costs, would generally require 2 to 3 times the total number of hearing days to adequately review the application, prepare information requests, review client evidence and responses to information requests, prepare cross-examination, prepare client witness panels to attend the hearing and prepare argument and reply.

On October 19, 2006 the MCFN responded to Suncor's comments. With respect to GST, the MCFN agreed that the services provided to the MCFN should be considered exempt from GST, and formally withdrew this portion of the cost claim. The Board recognizes that this portion of the MCFN's claim is withdrawn and accordingly GST does not appear in the summary of the MCFN's claim in [Appendix A](#) attached.

With respect to second counsel, MCFN submitted that it was reasonable for two lawyers to have provided services for this intervention. MCFN noted the complexity of the project, the significant impacts it will have on the MCFN, and the extensive intervention that the MCFN put forward. It stated that Ms. Floden undertook the following tasks:

- Preparation of submission for intervention.
- Witness preparation.
- Document preparation.
- Preparation for cross-examination of the Suncor and Alberta panels.
- Preparation of cross-examination questions regarding socioeconomic issues.
- Assisting with the coordination of reports and presentations by MCFN's expert witness.

In addition, MCFN noted that legal costs would have been higher if Mr. Mallon, Q.C., was responsible for these tasks, given his higher hourly rate. With respect to the preparation time incurred, MCFN submitted that to fully understand the numerous technical issues and to prepare an intervention that covered a broad range of technical issues, the hours incurred were reasonable.

### Views of the Board - Prowse Chowne LLP

The Board has considered the comments and responses provided. With respect to the expenses incurred in relation to legal services, the Board recognizes that the amounts claimed are in accordance with the Board's Scale of Costs. In the Board's view, the expenses were reasonably incurred in order to provide the legal services, and the Board approves that portion of the MCFN's claim in full.

The Board has considered the claim for legal fees and finds that the fees were reasonably incurred. In particular, the Board believes that the sharing of responsibility between senior and junior counsel that was described in the cost claim was appropriate, given the nature of the Applications, the conduct of the hearing, and the scope of the MCFN's intervention. The Board therefore approves the legal fees claimed by MCFN in full.

### MCFN Technical Witnesses

The following table summarizes the fees and expenses claimed by the MCFN's consultants and experts.

<b>Company</b>	<b>Fees</b>	<b>Expenses</b>	<b>Total</b>
BK Associates	\$48,500.00	\$4,613.81	\$53,113.81
Integrated Environments Ltd.	\$60,060.00	\$5,679.57	\$65,739.57
David Walker	\$27,600.00	\$2,519.37	\$30,119.37
Fish Creek Consulting	\$3,675.00	\$1,547.09	\$5,222.09
WDA Consulting Inc.	\$54,225.00	\$4,677.13	\$58,902.13
Applied Aquatic Research Ltd.	\$1,265.00	\$0.00	\$1,265.00
David Taplan	\$4,800.00	\$0.00	\$4,800.00
<b>Sub-Total</b>	<b>\$20,125.00</b>	<b>\$19,036.97</b>	<b>\$219,161.97</b>

With respect to assessing costs associated with technical witnesses, Suncor submitted the following discussion.

The Board is to assess an expert's evidence when determining the appropriateness of a cost claim to determine whether the person was properly qualified and if his or her evidence assisted the Board. The quality of an expert's submissions must also be considered [EUB Decision 2004-04]. Even where an expert is well known and has many years of experience in a given field, if his or her evidence did not assist the Board with the relevant issues, or if his or her evidence was self-evident, the Board may reduce the costs claimed [EUB Decision 2004-04]. The Board will reduce claimed fees where the work is broad in scope and not focused on the impacts of the project where the project is located. The Board has stated "that expert testimony, in order to be of value to the Board, must assist in the resolution of the issues before the Board at that particular hearing." [EUB Decision 2004-04 at p. 12] The Board is concerned with whether the costs incurred by the expert are reasonable and directly and necessarily related to the proceedings and were incurred in a manner as to assist the Board with a better understanding of the issues before it. [EUB Decision 2004-04 at p. 8]

In addition to the general discussion, Suncor made particular observations regarding specific witnesses and individuals for whose services a claim was made.

With respect to Dr. Kienzle, Suncor submitted that his evidence was not credible and was of poor quality. Dr. Kienzle criticized the HSPF model but admitted he did not use the model himself. He was unable to credibly explain why his 7Q10 values for the same years that he presented in evidence in the CNRL Horizon hearing in 2003, differed from the calculations he produced for the Suncor hearing. Suncor noted that Dr. Kienzle confirmed he did not request information from Suncor justifying the parameters that were set, and he acknowledged that United States Technical Note 6 does allow for parameter values to be set outside of those minimal and maximum values, contrary to his original evidence.

MCFN was of the view that Dr. Kienzle's testimony provided evidence of valid concerns regarding a number of anomalies with respect to both the modeling and the decisions made on the scope of the studies to be undertaken in the EIA. Dr. Kienzle also provided assistance to counsel in preparing cross-examination.

With respect to Dr. Byrne, Suncor submitted that Dr. Byrne's evidence was not in respect of the Applications, and was instead very general in nature and did not provide any useful information. Suncor noted that in the hearing Dr. Byrne could not offer suggestions how Suncor could achieve greenhouse gas neutrality as he did not have expertise in this area. Dr. Byrne also confirmed that he was not familiar with the CEMA Acid Deposition Framework. Suncor also questioned whether Dr. Byrne claimed his travel time within the EUB's Scale of Costs.

MCFN submitted that while some evidence provided by Dr. Byrne was broad in nature, his evidence on the cumulative effects of ongoing development of the oil sands was relevant to the application. Dr. Byrne also commented on specific design elements of the project. With respect to travel time, MCFN confirmed that Dr. Byrne's rate is within the EUB's Scale of Costs.

With respect to Mr. Wells, Suncor submitted that his presentation was not useful. Suncor noted that Mr. Wells confirmed that he did not have up to date information regarding the status of the Smoky River Coal and Colomac projects, and that he also confirmed he did not have enough time to ascertain what portion of the liability estimate for the Colomac Mine was allocated to reclamation. Suncor also questioned whether Mr. Wells claimed his travel time within the EUB's Scale of Costs.

MCFN noted that in addition to his own presentation, Mr. Wells was the coordinator for the MCFN team of science experts. Mr. Wells' coordination and management of the team allowed for a more efficient intervention, and the evidence he prepared assisted the Board. With respect to Mr. Wells' travel time, MCFN accepted Suncor's concern over the claim exceeding the EUB's Scale of Costs and amended the cost claim accordingly.

With respect to Mr. Scott-Brown, Suncor submitted that he did not carefully review the Applications when preparing his evidence. Specifically, Mr. Scott-Brown confirmed in cross examination that he had not reviewed Suncor's Environmental Management System (EMS) or EPEA Renewal Application. Suncor also stated that Mr. Scott-Brown was evasive in his responses regarding whether Alberta Environment or the EUB could successfully monitor Suncor's compliance with approvals. Suncor also questioned whether Mr. Scott-Brown claimed his travel time within the EUB's Scale of Costs.

MCFN submitted that Mr. Scott-Brown contributed to the Board's understanding of the issues. Specifically, MCFN noted that Mr. Scott-Brown addressed issues regarding the EMS, which given the scope of the project was an issue that was required to be addressed. With respect to Mr. Scott-Brown's travel time, MCFN recognized that the rate claimed exceeded the EUB's Scale of Costs and amended the claim accordingly.

With respect to Dr. Walker, Suncor submitted that the Board should disallow his costs in full. Dr. Walker's evidence was general and he did not review Suncor's *Environmental Protection and Enhancement Act* Approval.

MCFN submitted that Dr. Walker assisted with its understanding of the technical concerns regarding vegetation reclamation. His services assisted counsel to understand the principles and to prepare cross-examination. MCFN submitted that Dr. Walker provided clear and cogent evidence with respect to the reclamation plans of Suncor and the two lift system.

With respect to Mr. Tanner, Suncor submitted that he could not assist the Board with the question of how the EUB should deal with the fact that although Traditional Land Use (TLU) of the MCFN and other First Nations overlap, Suncor had agreements with some First Nations but not with the MCFN.

MCFN submitted that Mr. Tanner was retained to provide verification of the TLU from a western scientific standard. MCFN submitted that it is not Mr. Tanner's place to comment on why other First Nations may have agreements with Suncor.

With respect to Dr. Weyer, Suncor submitted that he failed to diligently review the Voyageur Project Application, and that he provided opinion evidence based on erroneous facts. As an example, Suncor cited Dr. Weyer's misunderstanding about Ponds 4 and 7. Suncor also noted the questioning of Dr. Weyer by the Board regarding the factual basis for Dr. Weyer's position on the presence of sinkholes in the area. Suncor also questioned whether Dr. Weyer's claim for travel time was within the EUB's Scale of Costs.

MCFN submitted that Dr. Weyer was required to prepare his evidence in a very short time period. In addition, there were further challenges when Suncor refused to provide additional information as requested. Dr. Weyer prepared his evidence based on the limited information that was supplied. Ultimately, Dr. Weyer's analysis raised questions and showed that further hydrogeological work is required. MCFN acknowledged that the travel rate claimed exceeded the EUB's Scale of Costs and amended the cost claim accordingly.

With respect to Dr. Taplan, Suncor noted that he did not appear at the hearing and therefore was not available for Suncor to test his evidence by cross-examination. Suncor submitted that Dr. Taplan's participation did not assist the Board in coming to a resolution of the issues. MCFN responded by advising that Dr. Taplan could not attend the hearing due to a conflict of interest that developed after he was engaged to review the EIA. MCFN also submitted that Dr. Taplan assisted MCFN legal counsel to prepare for cross-examination of Suncor's witnesses, and helped counsel understand the key issues relating to tailings management.

With respect to Mr. Barton, Mr. Ellis, and Mr. Truswell, Suncor questioned how they contributed to the efficiency of the MCFN intervention. Suncor was of the view that MCFN did not provide sufficient information to justify a cost award for these individuals.

MCFN submitted that each of these individuals assisted in the understanding of issues specific to their expertise. Mr. Barton provided information regarding the effects on fisheries under several scenarios. Mr. Ellis provided technical support to Dr. Weyer that was detailed in WDA Consulting Inc.'s statement of account. MCFN noted that the fees would have increased if Dr. Weyer performed the tasks undertaken by Mr. Ellis, given Dr. Weyer's higher hourly rate. Lastly, Mr. Truswell was retained to coordinate the technical support for the MCFN intervention.

#### Views of the Board - MCFN Technical Witnesses

The Board has carefully considered the comments provided by Suncor and the MCFN, and has decided to approve in part the portion of the MCFN cost claim that relates to its expert and technical witnesses. Suncor indicated that the evidence provided by the witnesses was, generally speaking, broad in nature and did not address the Applications specifically. The Board agrees with this statement to a limited extent. The Board has recognized in previous cost orders dealing with oil sands mine applications that the dividing line between the specific impacts of a particular project and its contribution to regional cumulative impacts is often difficult to define. The Board has therefore considered the evidence provided by the witnesses and, where appropriate, reduced the amount awarded for professional fees. Such a reduction will not, however, be applied to expenses as those costs would have been incurred in any event.

With respect to BK Associates, the Board was assisted by the evidence provided by each of Dr. Kienzle and Dr. Byrne. The Board believes that a portion of their evidence addressed broad issues that were not related to the development proposed in the Applications. The Board has therefore determined that it would be appropriate to award seventy-five per cent of the professional fees claimed for each of Dr. Kienzle and Dr. Byrne, being an award of \$36,375.00.

With respect to Integrated Environments Ltd., the Board believes that a portion of its witnesses' evidence was general in nature and therefore should be subject to a reduction. Additionally, in the Board's view, Mr. Scott-Brown's evidence concerning environmental management systems provided limited assistance. The Board has therefore decided to award one-half of the professional fees claimed for Mr. Scott-Brown<sup>13</sup>, being \$4,950.00. Mr. Wells provided evidence on reclamation liability and security that was also only of limited assistance to the Board. MCFN indicated that Mr. Wells was also responsible for coordinating the technical witnesses, and provided that as an explanation for the 241.5 hours (\$34,725.00) of preparation time claimed for Mr. Wells. The Board considers that any coordinating role that Mr. Wells may have played would have supplemented the coordinating that was done by MCFN's legal counsel. It is not apparent to the Board that Mr. Wells, or any other of the technical witnesses for that matter, would necessarily be required to also play a substantial coordinating role. Given that, and the Board's previous comments on the limited assistance of Mr. Wells' evidence, the Board has decided to award \$7,500.00 on account of professional fees claimed for Mr. Wells, which is equivalent to 50 hours. The Board approves the attendance time in full, being \$7,500.00. This award encompasses his dual roles as a technical witness and as a coordinator of the MCFN technical witness panel. The Board finds Mr. Truswell's fees to be appropriate and those are approved in full, being \$5,760.00.

In summary the Board approves professional fees for Integrated Environments Ltd. in the amount of \$25,710.00 together with expenses of \$5,679.57.

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<sup>13</sup> Mr. Scott-Brown incurred fees of \$9,900.00

With respect to Dr. Walker, his evidence did assist the Board but it was to some extent general in nature. The Board is also concerned that the 136 hours of professional fees claimed appears out of proportion to the issues addressed in Dr. Walker's evidence, when considered in the context of the proceeding as a whole. The Board has therefore decided to award seventy-five per cent of the professional fees claimed for Dr. Walker, being \$20,700.00. The Board approves Dr. Walker's expenses of \$2,519.37 in full.

With respect to Fish Creek Consulting, the evidence provided by Dr. Tanner was useful to the Board, and the relatively modest amount of the claim is reasonable. The Board therefore awards all of the professional fees claimed for Fish Creek Consulting, being \$3,675.00. The Board also approves the expenses of \$1,547.09 in full.

With respect to WDA Consulting Inc., the Board found only limited value in the evidence provided by Dr. Weyer. While Dr. Weyer appeared well prepared to address the hydrogeology principles that he discussed in his evidence, the Board is concerned that his evidence was not founded upon a thorough review of the area of Suncor's existing and applied-for projects. The Board is also concerned that the total of Dr. Weyer's time<sup>14</sup> and the time claimed by Mr. Ellis<sup>15</sup>, far exceeds what the Board would consider to be reasonable and necessary in order to adequately address the issues that were presented in Dr. Weyer's evidence. The Board also notes that Mr. Ellis did not appear as a witness in the hearing. For these reasons, the Board has decided to award \$10,000.00, which is approximately twenty-five per cent of the professional fees claimed for Dr. Weyer. This award applies to the entire claim for professional fees of WDA Consulting Inc., as the Board considers that Mr. Ellis' efforts are reflected in Dr. Weyer's evidence, and the award made is in respect of the entirety of that evidence. The Board approves the expenses of \$4,677.13 in full.

MCFN claimed professional fees for Bruce Barton (Applied Aquatic Research Ltd.) and David Taplan, neither of whom appeared as a witness in the hearing. The Board is therefore not able to state that either of those individuals provided evidence that assisted the Board and should be recognized with an award of costs. However, the Board has in other cost proceedings made modest awards to a local intervener where a qualified expert does not attend the hearing but assists the overall intervention in a general way. In this case, MCFN has indicated that Mr. Barton assisted MCFN and its counsel to better understand aquatics issues arising from the Applications. MCFN also stated that Dr. Taplan assisted it and counsel to better understand the tailings management issues arising from the Applications. The Board has decided to award MCFN the equivalent of eight hours professional fees for each of Mr. Barton and Dr. Taplan, on account of the general assistance they provided to the MCFN's intervention.

Therefore, the Board awards Mr. Barton professional fees in the amount of \$920.00, and Dr. Taplan is awarded professional fees in the amount of \$1,200.00.

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<sup>14</sup> 272.70 hours

<sup>15</sup> 148 hours

### MCFN Members' Honoraria and Expenses

The following members of MCFN claimed attendance honoraria:

Mary Rose Waquan	\$600.00
Darrell Tuccaro	\$300.00
Steve Coutoreille	\$600.00
Rita Martin	<u>\$600.00</u>
<b>Sub-Total</b>	<b>\$2,100.00</b>

In addition to the honoraria, these members have also claimed accommodation expenses totaling \$1,609.92.

Suncor advised the EUB on September 14, 2006, that it agreed to pay these participants a total of \$4,738.80. Suncor recognized that this amount exceeds the amount claimed by these participants; however, Suncor advised that it intends to honour its commitment. While MCFN noted Suncor's commitment, MCFN did not withdraw this portion of the cost claim.

The Board considers the attendance honoraria and accommodation for each of these participants to be reasonable. The Board approves this portion of the MCFN cost claim in full, being \$3,709.92.

### **3.2 Regional Municipality of Wood Buffalo (RMWB)**

Suncor submitted that no costs should be awarded to the RMWB because of the well-established principle that the cost recovery provisions of the ERCA were not meant to award costs to statutorily created bodies when their statutory duties require them to participate in a Board process. Suncor cited [ECO 2005-014](#), which considered cost claims filed by the City of Calgary, the Calgary Health Region, and the Municipal District of Rocky View, as authority for the principle that the EUB's local intervener cost process is not intended to award statutorily created bodies that participate by reason of the specific mandates given by the Legislature. Suncor stated that the RMWB is a municipality established through an Order in Council under the *Municipal Government Act*, and that the principle applies to the cost claim filed by the RMWB in this proceeding.

RMWB submitted that it meets the definition of local intervener under the ERCA, and is therefore eligible to recover costs incurred for its intervention in the proceeding. RMWB stated that it and the residents it represents own and occupy land which may be directly and adversely affected by the Board's decision. It further stated that the project proposed in the Applications is situated squarely within the RMWB.

RMWB stated that the "well-established principle" asserted by Suncor was not well-established, but instead arose from a single cost order, namely ECO 2005-014. RMWB stated that the order provided limited assistance to the Board in these circumstances, and that in determining the proper application of the section to the RMWB's cost claim, the Board was bound to apply the modern approach to statutory interpretation. In RMWB's view that approach could only lead to the conclusion that it qualified as a local intervener under section 28 of the ERCA. RMWB submitted that its eligibility for a cost award was the same as that of groups and associations of landowners who are similarly affected by a particular project.

### Views of the Board

Subsection 28(1) of the ERCA requires that a local intervener have an interest in, or be in occupation of or be entitled to occupy land that may be directly and adversely affected by a decision of the Board. Subsection 28(2) states that the Board may, subject to terms and conditions it considers appropriate, make an award of costs to a local intervener. The Act is clear that a person meeting the requirements of subsection 28(1) can claim for an award of costs, but that he or she has no entitlement to such an award.

The RMWB stated that it and the residents it represents own and occupy land which may be directly and adversely affected by the Board's decision. Suncor did not respond directly to this assertion. It is difficult for the Board to determine, based on the submissions provided, whether the RMWB in fact meets the requirements of subsection 28(1) of the ERCA. The RMWB does not identify particular lands that may be directly and adversely affected by Suncor's project, nor does it indicate the nature of the RMWB's interest in any such lands. In the Board's view, the fact that Suncor's Application area and oil sands mine project is wholly contained within the boundaries of the RMWB does not, by itself, indicate that the RMWB meets the requirements of subsection 28(1) of the ERCA. Similarly, although the residents of the RMWB may own or occupy lands in a manner that meets the requirements of subsection 28(1), it does not necessarily follow that the RMWB itself would thereby have the status of a local intervener. Although it is difficult for the Board to make a finding that the RMWB has satisfied subsection 28(1) of the ERCA, for the purposes of this cost order the Board has decided to consider whether it should exercise its discretion under subsection 28(2) and grant an award of costs to the RMWB as though it qualified as a local intervener.

In the Board's view, the requirement in subsection 28(1) of the ERCA that a local intervener have an interest in land or an entitlement to occupy land indicates that the Legislature intended that local intervener cost awards would compensate persons who have the potential to be impacted by development in a way that is different from impacts on other individuals or the general public. The element that distinguishes a local intervener from members of the general public is that he or she has a particular right in or to land that will be directly and adversely affected. That right may not be unique to the local intervener, but the Board would not expect it would be a right or entitlement that is widely held. The Board is supported in this view by the Legislature's decision to define an eligible cost claimant as a "local" intervener, consisting of a "person or a group or association of persons".

The history of the local intervener cost provisions of the ERCA also supports the Board's view that the Legislature intended to give the Board discretion to compensate persons who have or exercise a specific interest in particular lands, and not to compensate an extensive group of individuals who share a common or similar interests in a more broad expanse of land. Section 28 (originally section 31) was added to the ERCA in 1978. Hansard from that time states that the purpose of the provision was

*...to help ensure that a resource development project before the ERCB does not place an unjust burden on local landowners, who to protect their interests, find it necessary to appear before the Board and place their position before the Board at some expense.<sup>16</sup>*

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<sup>16</sup> Hansard, October 17, 1978, p. 1363

And

*The principle in this bill is that the ERCB may be able to assist people that have a proprietary interest in lands or minerals and may have to appear before the Board in order to protect their interests and therefore expend certain moneys...<sup>17</sup>*

The Board understands that local intervenor cost awards are intended to benefit persons who have a legally recognized interest in specific lands, and who choose to participate in a Board proceeding in order to safeguard the benefits they are entitled to enjoy by virtue of their ownership of those interests.

RMWB's intervention in the hearing was conducted by elected representatives and administrative leaders of the municipal corporation, on behalf of the residents those officials represent. The thrust of the intervention was to identify impacts from sustained oil sands development on the residents of the RMWB, and to seek the Board's assistance to address these impacts. The RMWB's concerns were voiced on behalf of all of its residents. They were not focused on particular lands or specific rights in or to lands in the same way that the Board would expect a local intervenor to present his or her concerns. In the Board's view, the intervention by the RMWB was undertaken consistent with its statutory mandate to defend and advance the collective interests of the residents that the RMWB Council and other officials represent. That is not the kind of intervention that the Legislature intended the Board to compensate with an award of local intervenor costs. The Board has therefore decided not to grant an award of costs to the RMWB. The Board wishes to make it clear, however, that the participation of the RMWB provided significant and valuable assistance to the Board in relation to the regional socio-economic issues that were the focus of its participation.

### **3.3 Northern Lights Regional Health Authority (NLRHA)**

Suncor submitted that the NLRHA is a statutorily created body established pursuant to the *Regional Health Authorities Act*, with the statutory mandate to promote and protect the health of the population in the health region, and to ensure that reasonable access to quality health services is provided. Suncor stated that the NLRHA is not entitled to a local intervenor cost award, for reasons similar to the argument it provided regarding the RMWB's claim.

The NLRHA stated that its intervention was distinguishable from that of the Calgary Health Region in the proceeding that was the subject of ECO 2005-14. NLRHA stated that it was not required to participate in the Suncor hearing, but rather it exercised its discretion to choose to participate in the hearing. It urged the Board to exercise its discretion under the ERCA, and to make an award of costs to NLRHA.

The NLRHA acknowledged that it participated in the hearing in accordance with its statutory mandate. It stated that it did so in response to the Board's request, contained in Decision 2004-009, for more reliable information and input from parties affected by oil sands development. The NLRHA stated that it acted with the best interests of the residents of the health region in mind, that its cost claim was reasonable, and that its participation contributed to a better understanding of the issues.

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<sup>17</sup> Hansard, October 18, 1978, p. 1395

### Views of the Board

In the Board's view, it is questionable whether the NLRHA has or is entitled to an interest in land that may be directly and adversely affected by the Board's decision on the Applications, so as to satisfy the requirements of subsection 28(1) of the ERCA. No such lands or interests were identified in its submissions. Notwithstanding the foregoing, the Board has decided to consider whether it should exercise its discretion under subsection 28(2) and grant an award of costs to the NLRHA as though it qualified as a local intervener.

The NLRHA acknowledged that its participation in the hearing was in accordance with its statutory mandate, and stated that it acted with the best interests of the residents of the health region in mind. That is the Board's view as well: that the NLRHA's intentions were to identify for the Board the difficulties the NLRHA faced meeting its statutory obligation to provide health care services to the residents of the region in the face of (and in competition for workers with) sustained oilsands development.

The Board reiterates its views on the Legislature's intentions for local intervener cost awards that are set out in section 3.2 of this cost order. Like the RMWB, the NLRHA's participation in the proceeding was not focused on particular lands or specific rights in or to lands. The NLRHA presented its views on responsible development in the region to the Board, in particular the challenges the NLRHA faced providing effective health care services to residents of the region. In this regard it participated on behalf of all the individuals, resident in the region or not, for whom it has a responsibility to provide health care services. While the Board wishes to be clear that the participation of the NLRHA provided significant and valuable assistance on the issues that were addressed by its witnesses, in the Board's view the NLRHA's participation is also not the kind of intervention that the Legislature intended the Board to compensate with an award of local intervener costs. The Board has therefore decided not to grant an award of costs to the NLRHA.

### **3.4 Oil Sands Environmental Coalition (OSEC)**

The Board notes that Suncor did not take issue with OSEC's eligibility under section 28(1) of the ERCA for a local intervener cost award. Based on that and OSEC's costs submissions, the Board considers that OSEC qualifies as a local intervener under the ERCA.

OSEC submitted a cost claim totaling \$47,889.15. The following table summarizes the fees, expenses, and GST claimed by this group.

Ackroyd LLP	\$6,663.90
Dr. Karen MacDonald	\$7,398.52
Ft. McMurray Environmental Ass.	\$2,000.00
Toxics Watch	\$6,413.08
Pembina Institute	\$25,413.65
<b>Sub-Total</b>	<b>\$47,889.15</b>

### Ackroyd LLP

The Board has considered the legal costs of \$6,663.90. The Board notes that Suncor does not take issue with the amount claimed. The Board recognizes that Ms. Buss's hourly rate and expenses are in accordance with the Board's Scale of Costs. The Board also recognizes that Ms. Buss organized the OSEC witnesses and expert evidence in the course of the proceeding. The Board finds that all legal costs claimed were reasonably incurred and it approves those costs in full.

### Dr. Karen MacDonald

The Board has considered the claim for Dr. MacDonald in the amount of \$6,413.08. The Board notes that Suncor does not take issue with the amount claimed. The Board found Dr. MacDonald's evidence to be of assistance and it therefore approves the claim relating to Dr. MacDonald's participation in full.

### Fort McMurray Environmental Association

Ms. Dort-McLean claims professional fees at an hourly rate of \$100.00. Ms. Dort-McLean attended the hearing as a witness and was available for cross-examination on the issues within her experience. In the cost claim application dated September 18, 2006, Ms. Dort-McLean's background is described as follows.

With respect to Ms. Dort-McLean, she is not an employee of the Pembina Institute. Her work and participation are outside the scope of her employment. Her expertise arises from her 20 years plus experience as a volunteer and community member in numerous organizations in the community, including as a funding member and past president of WBEA and as an active CEMA representative.

Suncor takes the position that it should not be required to pay costs for Ms. Dort-McLean's participation. Suncor submits that she is not a qualified expert, and her evidence was not based on special skill or knowledge recognized by the Board. The evidence submitted was not project specific, and repeated the arguments made by RMWB and NLRHA.

OSEC disagrees with Suncor's position, and submits the following:

With respect to the comments in regard to Ms. Dort-Maclean not being expert, we note that the Courts have recognized that expertise may be gained not only through university degrees, but through experience (R. v. Mohan (1994) 29 F.R. (4<sup>th</sup>) 243 (SCC)). Ms. Dort-Maclean's intimate knowledge and experience with the community of Fort McMurray, as a founding member of the Wood Buffalo Environmental Association and one of the original and longstanding members of CEMA, she qualifies as an expert in the issues before the Board.

The Board appreciates the opportunity to have access to Ms. Dort-Maclean's experience and opinions, and finds that her participation assisted the Board to better understand the issues within her experience. However, the Board does not consider that Ms. Dort-Maclean qualifies as an expert for the purposes of awarding professional fees for her services to OSEC in the Suncor proceeding. The Board agrees to some extent that her evidence was general in nature and duplicated evidence of the RMWB and NLHRA. However, the Board is not prepared on that basis to refuse awarding any costs for Ms. Dort-Maclean's participation.

Based on her participation at the hearing Ms. Dort-Maclean qualifies for an attendance honorarium. The Board approves attendance honoraria of \$150.00 together with a preparation honorarium of \$500.00, for an overall award of \$650.00.

#### Toxics Watch Society and Pembina Institute

Suncor takes issue with the costs claimed for fees of the Toxics Watch Society (\$6,413.08) and the Pembina Institute (\$25,413.65) from two perspectives. Firstly, Suncor submitted that it should not be required to pay these costs given the Board's past decisions indicating that work performed by internal staff, or consultants hired in lieu of internal staff, is not normally eligible for cost recovery. Suncor cites Utility Cost Order [2003-13](#) in support of this position.

Secondly, with respect to the part of the claim that relates to fees of the members of the Pembina Institute staff, Suncor submitted that those witnesses' evidence was in the nature of policy arguments. Suncor submitted that Utility Cost Order 2003-13 states that "persons representing a party as a policy witness should not be eligible for costs, regardless of whether such persons are employees of the party".

With respect to Suncor's submission regarding the use of internal staff, OSEC stated that the members of the Pembina Institute are not compensated for providing services in the proceeding. Further, if OSEC had instead retained external consultants to provide the same evidence, the hourly rates claimed would likely be much higher than the \$100.00 claimed for the witnesses from the Pembina Institute.

With respect to Suncor's second issue regarding policy witnesses, OSEC submitted that for the purpose of this hearing, characterizing the OSEC witnesses as policy witnesses does not apply. The witnesses provided evidence and analysis regarding the implications of the specific Applications that were before the Board. OSEC stated that the Board has previously made cost awards for the professional fees of the witnesses from the Pembina Institute.

The Board has carefully considered Suncor's and OSEC's comments regarding the professional fees claimed by the OSEC witnesses associated with the Toxics Watch Society and the Pembina Institute. The witnesses were qualified to give evidence within their respective areas of expertise. The Board was assisted by the evidence provided by the witnesses. The Board also notes that the professional fees claimed by these witnesses are among the lowest of all the professional fees claimed in this cost proceeding. In this case, the Board is not prepared to refuse an award of costs for professional fees on the basis that the witnesses are employed by or otherwise are staff internal to the interveners they represented. However, the Board also acknowledges that to some extent the evidence provided by these witnesses was general in nature. As stated previously in this cost order, when dealing with oil sands mine applications, the dividing line between the specific impacts of a particular project and its contribution to regional cumulative impacts is often difficult to define. The Board has therefore considered the evidence provided by the Toxics Watch Society and Pembina Institute witnesses and has decided to award 75 per cent of the professional fees claimed by each of the witnesses.

In summary, the Board approves professional fees for the Toxics Watch Society in the amount of \$3,942.92, and professional fees for the Pembina Institute in the amount of \$15,487.50.

### 3.5 Wood Buffalo Metis Locals Associations (WBMLA)

The Board notes that Suncor did not take issue with the WBMLA's eligibility under section 28(1) of the ERCA for a local intervener cost award. Based on that and the WBMLA's costs submissions, the Board considers that the WBMLA qualifies as a local intervener under the ERCA.

WBMLA submitted a cost claim totaling \$115,852.15. The claim includes costs for legal services provided by Jennifer J. Klimek Professional Corporation, and consulting services provided Sunrope Consulting Services Ltd. The claim also includes fees for members of WBMLA as well as attendance honoraria for certain members.

The WBMLA's witnesses indicated that it was an association of a number of Metis Locals whose members included residents of Fort McMurray, Fort McKay, and other communities within the Regional Municipality of Wood Buffalo. The intervention was made on behalf of the various locals' members, and on behalf of individuals named in the submission. Suncor indicated that it would pay a particular amount to the WBMLA regardless of the Board's decision on the cost claim.

#### Jennifer J. Klimek Professional Corporation

Ms. Klimek and Ms. Bishop, counsel for WBMLA, incurred legal fees in the amount of \$15,040.00, expenses of \$1,496.24, and GST of \$992.17, for an overall cost of \$17,528.41.

Suncor did not provide any specific comments regarding legal counsel's participation in this hearing. Suncor indicated that it was prepared to pay legal costs of \$15,928.41 with or without Board direction. The Board notes that this portion of the cost claim contains a calculation error, specifically, the amount of fees calculated in form E2 are not properly shown on form E1, and therefore the actual legal fees incurred and claimed are \$15,040.00, and the entire cost claim for legal services is \$17,528.41.

WBMLA expressed its appreciation for Suncor's commitment to pay legal costs and certain of the other costs contained in the claim, with or without Board order; however, the WBMLA encouraged the Board make a cost award that was in accordance with the claim that was filed.

The Board has considered the legal costs claimed by the WBMLA. The Board notes that Suncor does not take issue with paying the amount claimed, and the Board assumes this would include the corrected amount of the claim for legal fees as described above. Given Suncor's submissions on legal costs and Ms. Bishop's conduct of the WBMLA intervention, the Board finds that all legal costs claimed were reasonably incurred and it approves those costs in full.

#### Sunrope Consulting Services Ltd. (Sunrope)

Sunrope incurred consulting fees in the amount of \$33,625.00, expenses of \$6,611.47, and GST of \$2,414.19, for an overall cost of \$42,650.66.

With respect to Sunrope's participation, Suncor submitted that there was no justification for the costs associated with the services. The WBMLA had the services of competent counsel, and the WBMLA did not file any technical evidence. Suncor stated that it was not prepared to pay any costs associated with Sunrope's participation, unless the Board ordered otherwise.

WBMLA submitted the following response.

Cynthia Bertolin of Sunrope Consulting spent many hours coordinating the efforts of the WBMLA and gathering evidence prior to the WBMLA retaining counsel. She was instrumental in the process of retaining and advising counsel. Cynthia Bertolin has legal training and was called to the Bar in Alberta in 1991. While she no longer chooses to practice law in the traditional sense she is an expert in the area of Metis rights and was recently involved in the negotiation of the Interim Harvesting Agreement in 2004.

In addition, WBMLA submitted that Ms. Bertolin's participation reduced the overall legal fees that were incurred, and when combined together the costs for legal and consulting services are reasonable considering the length of the hearing and the number of interveners.

The Board accepts that Ms. Bertolin provided general assistance to the WBMLA in the course of its participation in the proceeding. The Board also accepts that Ms. Bertolin assisted WBMLA's legal counsel in coordinating and conducting its intervention. The Board understands that although Ms. Bertolin is qualified to practice law, she did not provide legal advice or act as counsel in this proceeding.

The Board is prepared to grant a portion of the professional fees claimed for Sunrope. The Board believes that the 58 hours claimed by Ms. Bertolin for Argument & Reply exceeds what would be reasonable given her role in the intervention. The Board has decided to award fees based on 40 hours for Argument & Reply. In addition, in the Board's view, the hourly rate of \$250 that was claimed for Ms. Bertolin exceeds what is reasonable given the role she played in the intervention and the evidence that was provided by the WBMLA. The Board has therefore decided to award costs for Sunrope's services at the rate of \$100 per hour. The total professional fees awarded will therefore be based on 116.5 hours at \$100 per hour, being \$11,650.00.

With respect to disbursements claimed by Sunrope, the Board finds them to be reasonable and approves this portion of the claim in full.

#### WBMLA – Professional Costs

WBMLA claims fees for 10 members. Of the 10 members, WBMLA identifies 7 of them as experts. The fees for all 10 members total \$49,263.77.

With respect to the professional and expert fees being claimed by members of the WBMLA, Suncor submits the following:

In ECO 2003-02, the Board described expert testimony “to be opinion evidence from one who possesses special skill or knowledge with respect to a matter by reason of specific study or expertise.”[*TrueNorth P. 3.*] The Board does not award costs to local interveners based on an hourly rate but rather recognizes these contributions through an award of an honorarium.[*ECO 2003-04 p.4*] There is no reason to depart from this well established principle in this case and therefore Suncor submits that the Presidents and Elders should be compensated by way of honorarium as opposed to by way of professional fees.

In response, WBMLA provides the following justification for compensating the Fort McMurray Metis Local 1935.

The Fort McMurray Metis Local 1935 have a staff funded by their members to advance the interests of their Local. The Fort McMurray Metis Local 1935 coordinated the efforts of the WBMLA in their intervention in the Suncor hearing but were not compensated by the WBMLA. The coordination of the large number of groups and individuals represented by the WBMLA was undertaken by the Metis Local 1935 because it was more efficient for this process to take place in Fort McMurray by those familiar with the participants.

In the Board's view, the witnesses presented by the WBMLA do not qualify as experts, nor did they give evidence that was in the nature of expert evidence. Their participation was similar to that of the MCFN Members to whom the Board has awarded honoraria for participating in the hearing. The Board is therefore not prepared to award WBMLA any amount on account of the professional fees claimed by the members of Fort McMurray Metis Local 1935.

#### WBMLA - Honoraria

WBMLA claims attendance honoraria for 9 members that total \$900.00. Suncor stated that it would pay honoraria for Presidents and Elders in the aggregate amount of \$2,400.00, and would pay travel, meals, and hotel expenses for Presidents and Elders in the aggregate amount of \$1,754.96, being the total amount claimed by the WBMLA Presidents and Elders. Suncor stated it would pay these amounts with or without a Board order. Suncor would not agree to pay expenses claimed by Brian Fayant and Louise Tuccaro.

The Board is prepared to award WBMLA the entire amount claimed for attendance honoraria. With respect to the total expenses claimed by the WBMLA, \$2,654.09, it is the Board's view that they were reasonably incurred, and the Board will therefore include those amounts as part of the cost award to the WBMLA.

#### **4 ORDER**

IT IS HEREBY ORDERED THAT:

- (1) Suncor Energy Inc. shall pay intervener costs in the amount of \$357,178.89.
- (2) Payments are to be made to the following representatives for each intervening group.

#### WBMLA

Jennifer J. Klimek Professional Corporation  
#240, 4808 – 87<sup>th</sup> Street  
Edmonton, AB T6E 5W3  
Attention: Debbie Bishop

#### MCFN

Prowse Chowne LLP  
1300, 10020 – 101A Avenue  
Edmonton, AB T5J 3G2  
Attention: Donald Mallon, Q.C.

OSEC

Ackroyd LLP

1500, 10665 Jasper Avenue

Edmonton, AB T5J 3S9

Attention: Karin Buss

Dated in Calgary, Alberta on this 21st day of February, 2007.

**ALBERTA ENERGY AND UTILITIES BOARD**

*Original Signed by Thomas McGee*

Thomas McGee

Board Member

## **APPENDIX A – SUMMARY OF COSTS CLAIMED AND AWARDED**



Appendix A