



# Petro-Canada Oil Sands Inc.

Application to Construct and Operate an Oil Sands  
Upgrader in Sturgeon County

Cost Awards

July 13, 2009

**ENERGY RESOURCES CONSERVATION BOARD**

Energy Cost Order 2009-006: Petro-Canada Oil Sands Inc., Application to Construct and Operate an Oil Sands Upgrader in Sturgeon County

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# ENERGY RESOURCES CONSERVATION BOARD

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Calgary Alberta

**PETRO-CANADA OIL SANDS INC.**

**APPLICATION TO CONSTRUCT AND OPERATE AN  
OIL SANDS UPGRADER IN  
STURGEON COUNTY**

**Energy Cost Order 2009-006  
Application No. 1490956  
Cost Application No. 1583639**

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## 1 INTRODUCTION

### 1.1 Background

On December 8, 2006, Petro-Canada Oil Sands Inc. (PCOSI) filed Application No. 1490956 with the Alberta Energy and Utilities Board (EUB), the predecessor of the Energy Resources Conservation Board (ERCB/Board), for approval to construct and operate a 54 000 cubic metres per day (m<sup>3</sup>/d) oil sands bitumen upgrader. The ERCB assumed jurisdiction over the PCOSI application on January 1, 2008, pursuant to Section 80 of the *Alberta Utilities Commission Act*.

On March 14, 2008, a prehearing meeting was held in Fort Saskatchewan, Alberta, before Board Members J. D. Dilay, P.Eng., G. J. Miller, and B. T. McManus, Q.C. with respect to matters arising from the prehearing meeting, the Board issued *Decision 2008-024: Petro-Canada Oil Sands Inc., Application to Construct and Operate the Sturgeon Upgrader*.

The Board held a public hearing in Fort Saskatchewan, Alberta, which commenced on June 23, 2008, and concluded on July 4, 2008, before Board Members J. D. Dilay, P.Eng. (Presiding Member), and J. D. Ebbels and Acting Board Member J. G. Gilmour. Interveners at the proceeding included the Northeast Sturgeon County Industrial Landowners and the Citizens for Responsible Development (NESCIL/CFRD), Stuart Shaw and Karen Shaw (the Shaws), and Dr. Rudolf Hoehn.

The Board reopened the hearing on October 21, 2008, to consider additional evidence regarding PCOSI's plans to construct work camps at the upgrader site. The Board considers that the record was completed on November 10, 2008. On January 20, 2009, the ERCB issued *Decision 2009-002: Petro-Canada Oil Sands Inc., Application to Construct and Operate and Oil Sands Upgrader in Sturgeon County* with respect to Application No. 1490956.

### 1.2 Cost Claim

On August 19, 2008, NESCIL/CFRD filed a cost claim totalling \$242 005.62. On September 3, 2008, PCOSI submitted comments regarding the cost claim. On September 10, 2008, NESCIL/CFRD submitted a response. On October 30, 2008, NESCIL/CFRD filed an additional cost claim of \$24 378.98, for a combined total of \$526 384.60. On November 12, 2008, PCOSI submitted comments regarding the October cost claim. On November 20, 2008, NESCIL/CFRD submitted a response.

On October 30, 2008, Dr. Hoehn filed a cost claim totalling \$905.00.

On January 22, 2009, the Shaws filed a cost claim totalling \$163 392.78. On February 9, 2009, PCOSI submitted comments regarding the cost claim. On February 23, 2009, the Shaws submitted a response.

The Board considers the cost process to have closed on February 23, 2009.

## **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*, 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 application in question.

When assessing costs, the Board refers to Part 5 of the *Energy Resources Conservation Board Rules of Practice* and Appendix D: *Scale of Costs* in *ERCB Directive 031A: Guidelines for Energy Costs 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.

On March 12, 2009, the ERCB issued a revised *Directive 031*. However, *Directive 031A* applies to this proceeding as the Notice of Hearing was issued prior to April 1, 2009.

The Board finds that NESCIL/CFRD, Dr. Hoehn, and the Shaws all qualify for local intervener funding, pursuant to Section 28 of the *Energy Resources Conservation Act*.

### **2.1 Mileage Claims**

The Board notes that a number of interveners filed claims for mileage that exceeded that specified in the *Scale of Costs*. The Board has adjusted those claims and awarded mileage costs based upon the rate established by the *Scale of Costs*.

### 3 NESCIL/CFRD

NESCIL/CFRD submitted a cost claim that included legal fees in the amount of \$157 281.75, expert fees in the amount of \$302 264.00, honoraria in the amount of \$11 950.00, expenses of \$40 521.96, and GST of \$14 366.89, for a total claim of \$526 384.60.

#### 3.1 Views of PCOSI

PCOSI submitted that the costs claimed by NESCIL/CFRD were significantly higher than costs awarded in similar proceedings. PCOSI noted in particular the following:

- In the EUB proceeding for the proposed upgrader by BA Energy Inc., the Northeast Strathcona County Residents anticipated that total costs would amount to \$303 214.00 and were awarded less than half this amount in advance costs.
- In the EUB proceeding held in connection with the proposed upgrader and oil sands mine by Suncor Energy Inc., the highest claims for costs were submitted by the Mikisew Cree First Nation and the Regional Municipality of Wood Buffalo. These claims were for \$374 785.44 and \$363 446.95, respectively. The ERCB awarded total costs in the amount of \$276 840.44 and zero.

PCOSI contended that, taking into account the nature of the hearing, there was no justification for the increased costs given the similarity to the proceedings mentioned above.

#### Legal Fees

PCOSI did not submit any comments in relation to the legal fees claimed by NESCIL/CFRD.

#### Consultant Fees

##### Department of Chemistry, University of California (Dr. Donald Blake)

PCOSI submitted that the total preparation time incurred by Dr. Blake and his staff was excessive at a total of 363 hours. PCOSI was of the view that these hours were well beyond the benchmark set in *Energy Cost Order (ECO) 2003-013: Dynamic Oil & Gas Inc.*, wherein the Board stated that for a hearing at the top of the *Scale of Costs*, one would generally only require two to three times the total number of hearing days to adequately review the application and prepare for the hearing. PCOSI submitted that Dr. Blake's preparation time should be capped at 180 hours, roughly three times the total hearing hours.

PCOSI submitted that it was unnecessary for NESCIL/CFRD to retain Dr. Blake to take and analyze air samples. PCOSI argued that there was already an extensive air monitoring network in place and that the information it produced was available publicly. PCOSI contended that none of the samples taken by Dr. Blake were inconsistent with the information collected by the system in place. PCOSI submitted that the Board should not award full costs for this duplicative sampling.

##### Faszer, Farquharson & Associates Ltd. and FDI Acoustics Inc.

PCOSI did not dispute the fees claimed by Mr. James Farquharson, including his hourly rate; however, PCOSI noted that Mr. Farquharson acknowledged that *Directive 038: Noise Control*

regulates noise levels from energy facilities and must be complied with. PCOSI submitted that based on this information, Mr. Farquharson's evidence was not required for the Board's deliberations, and therefore his fees claimed should be reduced by 10 per cent to \$6647.00.

### **Benya Lighting Design**

PCOSI submitted that James Benya's hourly rate of \$250.00 was excessive. PCOSI argued that there was no justification for Mr. Benya charging \$110.00 per hour more than Mr. Farquharson. In addition, PCOSI took issue with Mr. Benya's claim for 92 hours of preparation and 8 hours of travel time considering that Mr. Farquharson claimed only 69 hours in total, which included 16 hours of travel time. PCOSI requested that Mr. Benya's claim be reduced to 70 hours for preparation at \$140.00 per hour and 8 hours for travel at \$70.00 per hour.

### **Dr. Shuming Du**

PCOSI submitted that Dr. Du's claim should be reduced by 50 per cent or 119 hours due to the fact that during the hearing, Dr. Du admitted that he failed to take certain air modelling data into account, which affected the validity of his conclusions. PCOSI also noted that Dr. Du admitted that his expertise did not include the use of concentration ratios typically associated with human health risk assessment, a subject that was discussed in Dr. Du's evidence.

### **Doug McCutcheon & Associates Consulting, Tracy Engineering & Risk Management Services Inc., and EGT Enterprises Inc.**

PCOSI noted that no representative from these companies attended the hearing, and therefore they should be awarded only moderate costs for their participation prior to the hearing. PCOSI was also of the view that the evidence submitted by these companies was of little, if any, assistance to the Board. Therefore, PCOSI submitted that the EGT Enterprises Inc. (EGT) claim be reduced from \$18 000.00 to \$6000.00. With respect to Doug McCutcheon & Associates Consulting and Tracy Engineering & Risk Management Services Inc., PCOSI submitted that their claims should be awarded in full as they were quite modest.

### **V. M. Goodwin Research and Consulting Ltd.**

PCOSI submitted that out of the 257 hours claimed at \$210.00 per hour, Ms. Veronica Goodwin should only be entitled to 28 hours as they relate to carrying out volatile organic compound (VOC) sampling on behalf of Dr. Blake. Ms. Goodwin was sworn in as a witness, but she did not give any substantial or useful evidence that was of assistance to the Board. The Board had previously determined that costs should not be awarded for a consultant that played a coordinating role that supplemented the role of legal counsel. PCOSI also referred to *Directive 031A*, wherein it states:

For cost purposes, one expert should not duplicate the specialty and services of another for the same intervener. Further, an expert's assistance with a submission must be related to that person's expertise. A person may appear as an expert witness to support his or her report or submission. Normally, an expert need not attend the whole hearing.

PCOSI was of the view that Ms. Goodwin's assistance was not related to her area of expertise and did not support her submission because she did not make an expert submission. PCOSI



submitted that Ms. Goodwin's claim should be reduced to 28 hours at \$100.00 per hour, for a total of \$2800.00.

### **Treeline Ecological Research (Dr. Kevin Timoney)**

PCOSI was of the view that Dr. Timoney should not be awarded any costs for his role in the hearing. PCOSI noted that Dr. Timoney is a botanist, not a professional biologist, climatologist, or toxicologist, and argued that he gave "alarmist" evidence regarding potential health effects associated with air quality. PCOSI also pointed out that Dr. Timoney did not conduct an independent survey before making accusations about people who worked on the vegetation sections of PCOSI's application. PCOSI submitted that neither Dr. Timoney's report nor his presentation had anything to do with the proposed upgrader and that the sampling used to form his report and presentation was carried out in 1999 and took place 25 kilometres (km) from the proposed location of the project.

### **Northwind Land Resources Inc.**

PCOSI did not submit any comments in relation to the fees claimed on behalf of Northwind Land Resources Inc. by NESICL/CFRD.

### **Applications Management Consulting Ltd (Darryl Howery)**

PCOSI submitted that Mr. Howery should not be awarded any costs because Mr. Howery did not participate in the hearing and his submission did not contain his curriculum vitae.

### **Honoraria**

PCOSI referred to Section 6.2.3 of *Directive 031A* wherein it states:

If a number of interveners form a group to present a submission with the assistance of a lawyer, two representatives of the group may each receive an honorarium of \$50 for each half day actually present at the hearing to work with the lawyer, even if the two representatives do not appear in support of the submission.

If the lawyer presents a panel of interveners as witnesses, the two representatives assisting the lawyer and up to six witnesses may each receive \$50 for each half day during which it is necessary for them to actually appear in support of their submission.

PCOSI was of the view that the intervention relied heavily on the work of legal counsel and technical witnesses. Only 9 of the 25 members of NESICL/CFRD were actually sworn in as witnesses. Therefore, PCOSI submitted that honoraria should be awarded for only six witnesses appearing for two half-days and two additional representatives for ten half-days, for a total of \$1600.00.

With respect to the honoraria claim of Ms. Anne Brown in the amount of \$3150.00, PCOSI submitted that Ms. Brown should be entitled to only \$650.00, which represents the 13 half-days she attended the hearing. PCOSI further submitted that Ms. Brown was not entitled to an honorarium for forming a group as NESICL/CFRD was already formed and appeared at a previous hearing.

PCOSI submitted that NESCIL/CFRD should only be awarded honoraria in the amount of \$450.00 for the three witnesses who appeared when the hearing was reopened.

### **3.2 Views of NESCIL/CFRD**

NESCIL/CFRD referred to *Decision 2008-024: Large Facility Liability Management Program*, in which the Board was prepared to award NESCIL/CFRD advance funding totalling \$260 000.00. This amount was about 33 per cent of the estimated fees for EGT and V.M. Goodwin Research and Consulting and about half of the budgeted amount for the remaining consultants.

NESCIL/CFRD referred to *ECO 2007-008: West Energy Ltd.*, wherein the Board stated:

With respect to attendance, the Board recognizes and understands the importance of the RRCC members attending the hearing. The Board appreciates the efforts to convene for long hours, and be available when requested by the Panel. The Board finds it appropriate to exercise its discretion and approve attendance honoraria at \$100.00 per day for the pre-hearing and hearing. The Board also approves \$50.00 to those members who attempted to attend the October 13, 2006 pre-hearing which the Board cancelled due to poor weather conditions.

NESCIL/CFRD also referred to *ECO 2008-005: Highpine Oil and Gas Ltd.*, in which the Board stated:

While the RRCC had counsel who was primarily responsible for representing the intervention, the Board recognizes that the RRCC is comprised of nine members and the duration of the hearing was 8 days. Therefore, the Board is of the view that this is an appropriate instance to exercise its discretion and recognize the efforts of members of the RRCC by awarding attendance and preparation honoraria.

Additionally, NESCIL/CFRD referred to Section 6.2.1 of *Directive 031A*, wherein it states:

The EUB recognizes that the organization of a group of local interveners may require considerable time, efforts, and expenses on the part of the organizers who coordinate and represent the group. Depending upon the size of the group and the efforts required to organize it, one to four organizers may receive honoraria in recognition of their efforts. While such awards are generally \$300 to \$500, in exceptional cases when the necessary preparation time is substantial, honoraria in excess of \$500 to a maximum of \$2,500.00 may be considered.

### **Consultant Fees**

#### **Department of Chemistry, University of California (Dr. Blake)**

NESCIL/CFRD submitted that *ECO 2003-013* was a utility cost order and noted that the Board had stated that it was a unique matter. NESCIL/CFRD questioned whether a fair comparison could be drawn between the two proceedings, especially in relation to Dr. Blake's work.

NESCIL/CFRD maintained that it was reasonable to hire Dr. Blake given the circumstances. NESCIL/CFRD pointed out that the inadequacy of local air monitoring was extensively debated at the hearing. It further noted that the monitoring system that PCOSI was relying upon had not been active since 2005. NESCIL/CFRD submitted that Dr. Blake's work was relevant and very important to this matter and that his fees should be allowed in full.

**Faszer, Farquharson & Associates Ltd. and FDI Acoustics Inc.**

NESCIL/CFRD was of the view that Mr. Farquharson should be awarded the fees claimed. It noted PCOSI's statement at the hearing that it was willing to accept any recommendations that Mr. Farquharson might have. NESCIL/CFRD also pointed out that Mr. Farquharson's account came in under budget by roughly \$4000.00.

**Benya Lighting Design**

NESCIL/CFRD pointed out that PCOSI took no issue with Mr. Benya's hourly rate in its prehearing submission and that Mr. Benya's claim was on budget. NESCIL/CFRD, therefore, saw no reason to suggest that it should be reduced. Regarding PCOSI's comment that there was no justification for Mr. Benya charging \$110.00 more per hour than Mr. Farquharson, NESCIL/CFRD noted that Mr. Benya and Mr. Farquharson work in entirely different fields and have varying levels of expertise. NESCIL/CFRD concluded that the higher hourly rate of Mr. Benya was appropriate and fell within the guidelines set out in *Directive 031A*.

**Dr. Du**

NESCIL/CFRD submitted that it was not clear how PCOSI justified its proposed 50 per cent reduction to Dr. Du's claim. NESCIL/CFRD did not agree with the argument that Dr. Du failed to take into account certain air modelling data provided by PCOSI. NESCIL/CFRD stated that PCOSI was at fault for this confusion as it did not make it clear that vehicular traffic emissions were included in its modelling. NESCIL/CFRD also contended that during Board counsel's questioning, Dr. Du confined himself to his area of expertise. NESCIL/CFRD submitted that Dr. Du's claim should be awarded in full.

**Doug McCutcheon & Associates Consulting, Tracy Engineering & Risk Management Services Inc., and EGT**

NESCIL/CFRD submitted that the costs of Bernard Ennis of EGT should not be reduced as he provided a valuable service to NESCIL/CFRD and kept his costs to a minimum. NESCIL/CFRD argued that Mr. Ennis reviewed PCOSI's application materials, submitted information requests to PCOSI, assisted counsel in understanding complex engineering aspects of PCOSI's application, and prepared an expert report. NESCIL/CFRD argued that it was inappropriate to reduce Mr. Ennis's costs solely because he did not attend the hearing and noted that this decision helped to reduce the overall costs for Mr. Ennis.

**V. M. Goodwin Research and Consulting Ltd.**

NESCIL/CFRD was of the view that Ms. Goodwin's participation was extremely valuable to legal counsel and the group. Ms. Goodwin reviewed PCOSI's application materials, identified suitable and appropriate experts for subject areas with large deficiencies in PCOSI's application, prepared a report, and attended the hearing to assist Dr. Blake.

NESCIL/CFRD noted that the Board had previously approved Ms. Goodwin as a general consultant, and Ms. Goodwin had already reduced her hourly rate from \$250.00 to \$210.00. NESCIL/CFRD was of the view that Ms. Goodwin's costs should be awarded in full.

### **Treeline Ecological Research (Dr. Timoney)**

NESCIL/CFRD submitted that Dr. Timoney has extensive education and is the principal investigator of Treeline Ecological Research and that he gave expert evidence on how lichens located in the Strathcona County area are already showing signs of stress from air pollution. Dr. Timoney's opinion was that the results of the lichen study indicated that current air quality guidelines are inadequate for the protection of lichen. NESCIL/CFRD contended that Dr. Timoney's evidence was not defamatory to people who work in regulatory agencies.

NESCIL/CFRD explained that Dr. Timoney's final account was higher than the budget of \$4138.00 because he prepared an expert report, PowerPoint presentation, attended three days of the hearing, underwent rigorous cross-examination, and responded to an undertaking given by the Board. NESCIL/CFRD was of the view that the costs claimed by Dr. Timoney were reasonable given the assistance he provided and should be awarded in full.

### **Northwind Land Resources Inc.**

NESCIL/CFRD did not submit any comments in relation to the cost claim of Northwind Land Resources Inc.

### **Applications Management Consulting Ltd. (Mr. Howery)**

NESCIL/CFRD submitted that Mr. Howery provided a valuable service to NESCIL/CFRD given that the condensed timeline made it challenging for NESCIL/CFRD to retain a socioeconomic expert that could prepare a report and/or attend the hearing. NESCIL/CFRD referred to *ECO 2007-008*, wherein a comparable issue was addressed by the Board as follows:

The Board notes that Dr. Thrasher's evidence was not budgeted.

In considering Dr. Thrasher's portion of the claim, the Board notes that Dr. Thrasher did not file evidence, nor did he attend the hearing, or file his curriculum vitae...

The Board considers that West put the interveners in an awkward situation given their submission of rebuttal evidence. The Board considers that West easily had the opportunity to present evidence in advance of the filing of RRCC's evidence given that the RRCC's intentions about the evidence to be submitted was clearly identified in their advanced intervenor funding submission of December 19, 2006. Accordingly, the Board considers that West created some of its own difficulties in the costs for this expert. Given this circumstance, the Board considers that it was reasonable for the RRCC to get additional expert advice to review the evidence and to assist the RRCC in preparation for cross examination.

NESCIL/CFRD also provided a copy of Mr. Howery's curriculum vitae with its correspondence. NESCIL/CFRD submitted that Mr. Howery's costs should be awarded in full.

### **Honoraria**

NESCIL/CFRD was of the view that the \$9800.00 claimed for honoraria was reasonable given the 25-member group's participation in the nine-day hearing.

In response to the comments submitted by PCOSI on November 12, 2008, NESCIL/CFRD submitted that the Board had used its discretion in a number of cost decisions namely, *ECO 2007-008*, *ECO 2008-005*, and *ECO 2008-011: West Energy Ltd.* NESCIL/CFRD noted that the

Board was consistent in awarding almost all of the interveners in those matters preparation and attendance honoraria. NESCIL/CFRD submitted that the Board use its discretion in this case when addressing the attendance honoraria. NESCIL/CFRD also pointed out that PCOSI did not object to the preparation honoraria being claimed in the amount of \$1200.00 and therefore requested that the Board award this amount in full.

With respect to the honoraria claim of Ms. Brown, NESCIL/CFRD was of the view that she was entitled to an honorarium for forming a group as the group that was previously formed was not as large as the one involved in this hearing. In addition, NESCIL/CFRD submitted that Ms. Brown did a lot of organizational work for the members of NESCIL/CFRD and her efforts should be recognized.

### **3.3 Views of the Board**

#### **Legal Fees**

The Board finds the costs claimed on behalf of Ackroyd LLP to be reasonable and commensurate with the NESCIL/CFRD's participation. The Ackroyd firm was responsible for coordinating the intervention, engaging numerous experts, reviewing expert reports, preparing expert witnesses, cross-examining the PCOSI panel, and preparing final argument and reply. The Board considers that Mr. Secord and Ms. Chipiuk provided significant assistance to the Board and ably represented their clients.

In relation to the disbursements claimed by Ackroyd LLP, the Board has reviewed the forms submitted as well as the supporting information provided and compared it with the *Scale of Costs*. The Board does not take issue with the expenses claimed and therefore awards the full amount claimed of \$21 487.90 including GST.

#### **Consultant Fees**

##### **Department of Chemistry, University of California (Dr. Blake)**

Dr. Blake and his associates at the university claimed \$69 800.00 in fees for 339 hours of work performed on behalf of the NESCIL/CFRD. These experts prepared and conducted an ambient air monitoring program, prepared an expert report, and provided expert evidence at the proceeding.

In *Decision 2009-002*, the Board expressed the following concerns regarding the work performed by Dr. Blake:

The Board finds that the ambient air monitoring done by Dr. Blake provided little assistance in determining the potential impacts of the project on air quality. Further, the Board finds that there was no credible evidence before it to support Dr. Blake's suggestion that the air quality in the AIH is comparable to Mexico City. To the contrary, the limited air monitoring results presented by Dr. Blake showed emission levels below the AAAQO, and where there were elevated levels of some of the pollutants, these were readily explainable by proximity to industry, such as Shell's chemical plant.

The Board notes that Dr. Blake's monitoring were one-minute samples and cannot be used to characterize the overall air quality in the area. As well, the Board saw no evidence to suggest that the sampling followed appropriate protocols. While Dr. Blake stated that he regretted anything alarmist about his work, the Board notes that the public could easily make the inference that the air quality in

the AIH was comparable to Mexico City, especially if his follow-up clarifying remarks were not available to them.

The air monitoring program designed by Dr. Blake provided a “snap-shot” assessment of the air quality in the project area. However, absent from this evidence was any meaningful analysis of the results of the information gathered. From the Board’s perspective, the usefulness of this study would have been significantly enhanced had Dr. Blake investigated the source of the unusual air quality readings that led him to compare the air quality in the Alberta Industrial Heartland to that of Mexico. Such context, from the Board’s perspective, was essential to establishing the relevance of the information provided.

Having regard to the foregoing, the Board is of the view that a 40 per cent reduction to the fees claimed is appropriate. In the Board’s view, the resultant award appropriately recognizes the contribution of these experts. Accordingly, the Board awards a total of \$41 880.00 for Dr. Blake’s fees. With respect to Dr. Blake’s expenses, the Board finds that they are reasonable for the most part but note that the claim for meals is in excess of the *Scale of Costs* and has adjusted it accordingly, resulting in a total award for expenses of \$2101.91.

#### **Faszer, Farquharson & Associates Ltd. and FDI Acoustics Inc.**

The Board considers the work performed by these experts to have been useful and notes that their evidence contributed to a better understanding of the issues before the Board. The Board finds the fees claimed to be reasonable and directs that they be approved in full.

The Board also notes that the amount for accommodation claimed by FDI Acoustics Inc. exceeds the amount allowed by the *Scale of Costs* by \$63.00. Having regard for this reduction and adjustments to mileage based on the rate established by the *Scale of Costs*, the Board approves expenses \$559.85 plus GST for FDI Acoustics Inc.

#### **Benya Lighting Design**

The Board found Mr. Benya’s work useful in its deliberations. The Board finds the fees claimed by Mr. Benya to be reasonable and directly and necessarily related to the proceeding and also finds that the hourly rate he charged is commensurate with his experience and expertise. The Board directs that the costs claimed on behalf of Benya Lighting Design should be awarded in full.

The Board notes that Dr. Benya’s claim for accommodation is in excess of the maximum allowable rate set out in the *Scale of Costs* and therefore has reduced his claim for expenses by \$137.21, for a total expense award of \$3501.43.

#### **Northwind Land Resources Inc.**

The Board considers the work performed by Northwind Land Resources Inc. to have been useful and that its evidence contributed to a better understanding of the issues. The Board finds the fees claimed to be reasonable and directs that they be approved in full.

**Applications Management Consulting Ltd. (Mr. Howery)**

The Board considers the work performed by Mr. Howery was useful and that his evidence contributed to a better understanding of the issues before the Board. The Board finds the fees claimed to be reasonable and directs that they be approved in full.

**Hofelt Consulting Ltd.**

The Board considers the work performed by Hofelt Consulting Ltd. to have been useful and that its evidence contributed to a better understanding of the issues before the Board. The Board finds the fees claimed to be reasonable and directs that they be approved in full.

**Treeline Ecological Research (Dr. Timoney)**

In *Decision 2009-002*, the Board made the following comments with respect to the evidence provided by Dr. Timoney:

The Board does not believe that Dr. Timoney's work, conducted some distance away from the project site in a provincial recreation area, is relevant. The Board believes that it would be reasonably expected that there would be greater biodiversity there than in a primarily agricultural area like the proposed site.

Dr. Timoney is a trained botanist with considerable education and expertise in his field. However, the Board finds that Dr. Timoney's evidence addressed topics outside of botany, including human health impacts and air emissions. Expert evidence is useful to the Board, in part because it is objective evidence. The Board is concerned that Dr. Timoney's evidence lacked the requisite objectivity and finds that he acted more as an advocate than an expert at the proceeding. In the Board's view, this significantly diminished Dr. Timoney's credibility and the value of the evidence he provided.

Having regard for the foregoing, the Board finds that a 50 per cent reduction to the fees claimed by Dr. Timoney is appropriate. Therefore, the Board awards Dr. Timoney \$5468.75 for fees plus expenses in the amount of \$300.32 and GST in the amount of \$273.44. In the Board's view, this award recognizes the value of the evidence provided while accounting for the shortcomings described above.

**Dr. Du**

NESCIL/CFRD sought to recover \$40 824.00 in fees for work performed by Dr. Du. In *Decision 2009-002*, the Board stated the following regarding the evidence provided by Dr. Du:

The Board notes Dr. Du's assertion that emissions of some pollutants from the upgrader have been underestimated by a factor of 13.45. The Board does not agree with this assertion and finds that it was adequately refuted by PCOSI. The Board is seriously concerned that Dr. Du's assertions may have inappropriately and needlessly alarmed the residents. In addition, the Board is concerned that members of the public may have heard or read the assertion but were not privy to the cross-examination that refuted it. The Board expects experts at ERCB hearings to have a better understanding of the material before making definitive and potentially alarmist statements.

The Board finds that the errors and emissions contained in Dr. Du's report were material in nature and affected the credibility of all the evidence that he provided. The Board further notes that some of the evidence prepared by Dr. Du addressed issues that were outside his area of expertise, including the use of concentration ratios. Having regard to the foregoing while recognizing the contribution his evidence did make, the Board finds that a reduction of 40 per cent is appropriate and awards Dr. Du \$24 494.40 for fees plus expenses of \$1352.72.

### **V. M. Goodwin Research and Consulting Ltd.**

The Board has reviewed the budget for Ms. Goodwin's work dated February 21, 2008, and her invoice, which was included in the cost claim. Ms. Goodwin originally stated that her hourly rate was \$210.00; she adjusted it upward to \$250.00 and has since reduced it back to \$210.00. In her February 21, 2008, submission, Ms. Goodwin stated the following with respect to her hourly rate:

Given Petro-Canada has questioned my billing rate implying that I lacked requisite experience, I have for my own reference and defence re-examined my experience and education in terms of the requirements of critiquing these upgrader EIAs and meeting EUB criteria. Upon review of my relevant experience and total years of experience and education, I have been significantly under-billing. I find there is more than adequate justification to set my billing rate at the top EUB rate of \$250 per hour.

My billing rate has been revised upwards to reflect all of my relevant experience and education.

The Board notes that in a cost claim filed in May 2007 for the North West Upgrading project, Ms. Goodwin's hourly rate for services identical to those performed in this proceeding was \$100.00. The Board is concerned that Ms. Goodwin set her hourly rate for this proceeding based on the amount allowed by the *Scale of Costs* and not on the market rate that she normally charges her clients. The Board does not consider that a 110 per cent increase for the cost of her services in less than a year is reasonable or justified.

Having considered the nature and scope of Ms. Goodwin's expertise and the work performed on behalf of the NESCL/CFRD, the Board finds that an hourly rate of \$210.00 is excessive and not reflective of market rates for similar work. Having regard for all of the above, the Board finds that an hourly rate of \$150.00 is appropriate in the circumstances. The Board therefore awards Ms. Goodwin fees in the amount of \$38 550.00<sup>1</sup> plus expenses in the amount of \$1879.92 and GST.

### **EGT**

EGT was retained to find and characterize continuously discharging flows from the proposed upgrader. NESCL/CFRD initially estimated the costs for this review to be \$270 000 and requested advance funding in the amount of \$135 000. In *Decision 2008-024: Petro-Canada Oil Sands Inc., Prehearing Meeting, Application to Construct and Operate the Sturgeon Upgrader, Sturgeon County*, the Board found that such information could be relevant if effectively compiled and could assist the Board in making its determination on the application. However, the Board was concerned that the proposed work included detailed analysis and questioned the

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<sup>1</sup> \$150.00 x 257 hours



value of such information at that stage of the project. Accordingly, the Board approved 33 per cent of the budgeted funding for EGT.

EGT conducted its initial review and concluded that it could not perform a detailed review of PCOSI's source information. However, it did review the application and PCOSI's answers to information requests and found them to be satisfactory. EGT's total fees for this service were \$18,000.00, which the Board considers reasonable given the scope and nature of the work performed. The Board therefore directs that these costs be approved in full.

**Doug McCutcheon & Associates, Consulting, Tracy Engineering & Risk Management Services, and Applications Management Consulting Ltd.**

While none of these experts appeared at the proceeding, the Board understands that there are circumstances in which an expert retained to review a specific element of an application does not provide an expert report or provide direct evidence. Usually this occurs when an expert reviews an issue and determines that the matter has been appropriately addressed. Such is the situation for these experts. The Board considers that it was reasonable to retain these experts and that the scope of their work was directly and necessarily related to the proceeding. The Board therefore directs that their costs be approved in full.

**Honoraria**

NESCIL/CFRD sought to recover \$7300.00 in attendance honoraria based on the Board's approved amount of \$50.00 per half day.

*Directive 031A* states the following with respect to attendance honoraria:

If a number of interveners form a group to present a submission without the assistance of a lawyer, one to four members of the group who are necessary to represent the group and present the submission may each receive an honorarium of \$50 for each half day they are actually present at the hearing. The group may present a panel of up to six, including the representatives necessary to appear in support of their submission and each may receive \$50 for each half day of actual appearance.

If a number of interveners form a group to present a submission with the assistance of a lawyer, two representatives of the group may each receive an honorarium of \$50 for each half day actually present at the hearing to work with the lawyer, even if the two representatives do not appear in support of the submission. If the lawyer presents a panel of interveners as witnesses, the two representatives assisting the lawyer and up to six witnesses may each receive \$50 for each half day during which it is necessary for them to actually appear in support of their submission.

The Board exercised its discretion to award attendance honoraria to more members of a local intervener group than is set out in *Directive 031A* in two recent cost awards. This change in practice reflects the Board's recognition of time spent by local interveners to observe a proceeding that has the potential to directly and adversely affect their rights. The Board considers that this approach is appropriate in the circumstances and approves the attendance honoraria claimed on the basis of \$50.00 per half day of hearing attendance.

It has been the Board's long-standing practice to allow persons who do not satisfy the definition of local interveners to participate in a proceeding as members of a local intervener group. In such

situations, the Board has awarded expert and legal fees to the intervener group and awarded honoraria only to those individuals within the group that qualified as local interveners.

Having reviewed the submissions of NESCIL/CFRD, the Board has determined that the following individuals are local interveners as defined in Section 28 of the *Energy Resources Conservation Act*: Ruth Ainley, Toulia Prins, Harvey Prins, Sam Prins, Dora Prins, Wayne Groot, Luzmaria Groot, Don Groot, Pat Groot, William Groot, Bertha Groot, Serge Migneault, and Willoe Craggs. The Board finds that the remaining members of NESCIL/CFRD reside too far away from the project to claim a direct effect on their land. Accordingly, no honorarium is available for those members.

NESCIL/CFRD also claimed an honorarium of \$2500.00 for group formation and organization. The Board considers that the NESCIL/CFRD's intervention was well organized and coordinated and recognizes the challenges associated with such an achievement given the large size of the group. Accordingly, the Board grants this honorarium to NESCIL/CFRD and will leave its allotment among members to the group's discretion.

#### **4 DR. HOEHN**

Dr. Hoehn submitted a cost claim that included an honorarium in the amount of \$700.00 and expenses of \$205.00.

PCOSI submitted that it did not dispute the \$905.00 cost claim submitted by Dr. Hoehn and would pay it upon the issuance of the Board's cost award.

##### **4.1 Views of the Board**

The Board finds this claim to be reasonable and directs that it be paid in full.

#### **5 THE SHAWS**

The Shaws submitted a cost claim that included legal fees in the amount of \$78 632.00, expert fees in the amount of \$62 226.74, honoraria in the amount of \$1700.00, expenses of \$13 134.39, and GST of \$7 699.65, for a total claim of \$163 392.78.

##### **5.1 Views of PCOSI**

###### **Legal Fees**

PCOSI submitted that the cost claim submitted by Prowse Chowne LLP, counsel for the Shaws, was significantly greater than *Directive 031A* permits.

PCOSI pointed out that the majority of the fees claimed by counsel for the Shaws were incurred by Ms. Alexander, who was second counsel to Mr. Mallon. PCOSI noted that the Board generally did not award costs for the attendance of second counsel at a hearing and that it was only in exceptional circumstances that the Board found it necessary for two counsel to be in attendance.

PCOSI noted that Ms. Alexander incurred hours for hearing preparation, attendance, argument, and reply that exceeded the hours of Mr. Mallon. PCOSI was of the view that these were excessive considering the matters at issue and that Ms. Alexander's hours should be reduced by 93.30 hours for hearing attendance, for a total reduction of \$16 794.00. PCOSI was also of the view that a portion of Ms. Alexander's fees relating to hearing preparation and argument should be allowed but at a lesser hourly rate. PCOSI referred to the *Scale of Costs* in *Directive 031A*, wherein it states:

The Board emphasizes that the maximum allowable hourly rates will not be awarded as a matter of course. Rather, the Board will assess each claim upon its individual merits and will only approve the maximum fee when it has been demonstrated that such a charge is warranted by the work performed.

PCOSI noted that although Ms. Alexander's cost claim stated that she has five years of experience, Ms. Alexander was only called to the bar on June 1, 2007. PCOSI submitted that Ms. Alexander should be entitled to a maximum of only \$140.00 per hour, as opposed to the \$180.00 rate claimed.

Based on the above, PCOSI submitted that since Ms. Alexander's preparation time was excessive in light of the matters at issue and her contribution to the proceeding, her claim should be reduced by a total of 50 per cent, for a total of \$5229.00.

With respect to the disbursements claimed by Prowse Chowne LLP, PCOSI took issue with the internal photocopying charges. PCOSI referred again to *Directive 031A*, wherein it states that the Board allows \$0.10 per page for photocopying, and noted that counsel for the Shaws claimed \$1211.41, which meant that over 12 000 photocopies were made. PCOSI submitted that this was excessive and should be reduced by 50 per cent, for a total photocopying charge of \$605.71

## **Consultant Fees**

### **EcoMark Ltd. (Mark Polet/Michelle Wambold)**

PCOSI was of the view that the cost claim submitted by EcoMark Ltd. (EcoMark) should be reduced significantly due to the fact that the evidence it presented was broad and somewhat self-evident.

In relation to the fees claimed by Mr. Polet for hearing attendance, PCOSI noted that Mr. Polet only provided evidence during the latter half of day seven of the hearing and again briefly on the eighth day of the hearing. Although PCOSI recognized that it may have been necessary for Mr. Polet to familiarize himself with the evidence provided by PCOSI's witnesses, it was of the view that the 50.50 hours claimed for this preparation and attendance was excessive. Mr. Polet claimed nearly double the amount claimed by Dr. Dennis. PCOSI submitted that Mr. Polet should be awarded a maximum of \$4400.00 for hearing attendance, which is equal to three days of attendance (24 hours) at \$185.00 per hour.

PCOSI also noted that Ms. Wambold claimed fees in the amount of \$3250.00 for her participation in the hearing. PCOSI was of the view that Ms. Wambold's attendance at the hearing was unnecessary given that she did not present any evidence. PCOSI submitted that Ms. Wambold's claim for hearing attendance fees should be denied entirely.

EcoMark claimed a total of \$38 342.85 for preparation fees for the first phase of the hearing, which included work being done by fifteen different people for a total of 188.05 hours of preparation. PCOSI was of the view that there was no reason for EcoMark to require the use of fifteen people in order to prepare for the hearing. In addition, PCOSI noted that there was no specification of qualifications for any of those fifteen individuals with the exception of Mr. Polet and Ms. Wambold, and therefore it was impossible to determine if the rates being claimed were reasonable.

Based on the foregoing, PCOSI submitted that the total claim for EcoMark should be reduced by 50 per cent, for a total of \$11 962.25.

With respect to the second phase of the hearing, PCOSI said that the fees being claimed by Ms. Coughlan and Ms. Spencely should be denied in full as no years of experience have been provided.

PCOSI also noted that the meal costs claimed by Mr. Polet were excessive. PCOSI was of the view that Mr. Polet should only be entitled to a total of \$120.00, which would equate to \$40.00 per day, as allowed in *Directive 031A*. In addition, with respect to the mileage claim put forth by EcoMark, PCOSI noted that EcoMark had an office in Calgary, as well as in Edmonton. PCOSI said that it appeared that Mr. Polet resided in Edmonton. Therefore, in accordance with *Directive 031A*, which states that claims for mileage are limited to distances of 50 km or greater, Mr. Polet's mileage claim should be denied.

Finally, PCOSI took issue with the miscellaneous disbursements claimed by EcoMark as there was insufficient detail provided to support the amount claimed. PCOSI was of the opinion that unless further detail were provided, the claim should be denied in full.

### **SolAero Ltd.**

PCOSI was of the view that the fees claimed by Dr. Dennis on behalf of SolAero Ltd. (SolAero) were excessive in relation to the value of the evidence provided.

According to PCOSI, Dr. Dennis appeared to give evidence during the last half of the seventh day of the hearing and also appeared briefly on the eighth day of the hearing but did not provide evidence. Dr. Dennis provided evidence regarding a risk assessment of health impacts of the proposed project. PCOSI found that the hourly rate claimed by Dr. Dennis was reasonable but submitted that Dr. Dennis's claim should be reduced by 20 per cent, for a total award of \$19 949.99, given that the evidence he provided was general in nature and the Board appeared to place little reliance on it in reaching its decision.

PCOSI was also of the view that the miscellaneous disbursements claimed by SolAero should be denied unless more detail were provided to support the amount being claimed.

### **Honoraria**

PCOSI did not provide any comments in relation to the honoraria being claimed by the Shaws.

## 5.2 Views of the Shaws

### Legal Fees

In response to the comments made by PCOSI, the Shaws were of the view that the use of two counsel was justified in this matter on the basis that the application was quite complicated and the Shaws are resident farmers living on the project property line.

The Shaws referred to *ECO 2007-001: Suncor Energy Inc.*, in which the Board stated that “the sharing of responsibility between senior and junior counsel...was appropriate.” In addition, the Shaws also referred to *ECO 2007-007: Bearspaw Petroleum Ltd.*, which PCOSI had also referred to, and noted that in that case the Board found that using a second, more junior counsel ultimately reduced the costs of the senior counsel.

With respect to the issue of preparation time incurred by Ms. Alexander, the Shaws submitted that all of the preparation time was relevant and necessary in preparation for the hearing. In addition, because of Ms. Alexander’s ability to perform these tasks at a lower rate, it ultimately reduced the costs of Mr. Mallon’s attendance and preparation. Ms. Alexander also attended at the hearing on strategically determined hearing days in order to assist Mr. Mallon by conducting same-day research in relation to the application, reviewing the electronic transcripts, and accessing information sources to retrieve answers, allowing Mr. Mallon to provide his full attention to the evidence being presented at the hearing. Ms. Alexander’s work assisting Mr. Mallon through the argument portion of the hearing consisted mainly of conducting legal research; organizing information; drafting, reviewing and editing portions of the argument; and communicating with the experts and the Shaws.

The Shaws pointed out that Ms. Alexander was called to the Ontario Bar in 2003, the British Columbia Bar in 2004, and finally the Alberta Bar in 2007. The Shaws, therefore, are of the view that Ms. Alexander should be entitled to the hourly rate that she was claiming.

With respect to the issue of the photocopying charge submitted by Prowse Chowne LLP, the Shaws submitted that it was reasonable given that it included laser printing and copying for two separate hearing phases.

### EcoMark (Mr. Polet/Ms. Wambold)

The Shaws stated that Mr. Polet acted as the key expert adviser throughout the entire preparation and hearing process and that his evidence addressed a range of issues and technical areas of significant concern to the Shaws that were directly related to the proposed project. Due to the unique circumstances of the Shaws situation, they were in need of someone who could provide adequate advice. In the opinion of the Shaws, Mr. Polet provided strong evidence that left very little room for criticism.

Mr. Polet provided advice to Mr. Mallon on technical evidence presented at the hearing and assisted in the responses to PCOSI. Mr. Polet also contributed to the hearing with respect to monitoring programs.

For the second phase of the hearing, Mr. Polet provided Mr. Mallon with expertise on the issue of work camps.

PCOSI also took issue with the claim put forth by Ms. Wambold. Ms. Wambold is a biologist who assisted Mr. Polet with his report in a coordination and information assembly role, and her attendance at the hearing was a continuation of that role.

According to the Shaws, the remaining staff members of EcoMark acted within their areas of expertise to provide quality and efficiency in terms of time and cost to the Shaws by assisting Mr. Polet in the completion and presentation of his evidence. The Shaws stated that the remaining staff members' hourly rates were in accordance with their levels of experience. The Shaws also provided a list of the names of these staff members, along with their years of experience, and noted that the majority of them claimed an hourly rate between \$65.00 and \$95.00. Mr. Bill Marsh was the exception; he claimed an hourly rate of \$125.00. The Shaws specifically noted the claim for Paul Wagner, who has three-and-a-half years' experience. In accordance with the *Scale of Costs*, he would be entitled to receive an hourly rate of \$100.00; however, Mr. Wagner only claimed an hourly rate of \$80.00.

Regarding the issues raised by PCOSI for the meal charges submitted by EcoMark, the Shaws noted that the costs claimed for those expenses were in accordance with the *Scale of Costs*.

With respect to the dispute of the mileage charge, the Shaws were aware that some of the mileage claimed by Mr. Polet was outside of the hearing dates and should be adjusted accordingly. They did note, however, that Mr. Polet attended six full or partial hearing days and travelled about 80 km each day, totalling around 500 km. The Shaws made reference to *Directive 031A*, which permits mileage claims for intercity travel only to and from the place of the hearing and for distances of at least 50 km. The Shaws asked that the Board use its discretion when determining the suitable mileage award for Mr. Polet.

In relation to the miscellaneous disbursement charge submitted by EcoMark, the Shaws provided the following information in their February 23, 2009, response to PCOSI's comments:

- Digital Services in the amount of \$1 355.25: This is a 5% mark up fee for overhead charges which is calculated on hours worked by employees however only on a few material costs.
- Air Photo Distribution was a disbursement for the purchase of air photos.
- Alberta Registries in the amount of \$16.50 was for an online title search.

### **SolAero**

The Shaws noted that Dr. Dennis was present on the first and last two days of the hearing and stated that this was the minimum amount of time that he was required to be in attendance. Dr. Dennis attended the first day of the hearing to listen to the expert evidence presented by PCOSI in order to provide advice to Mr. Mallon. Dr. Dennis attended the last two days of the hearing to provide direct evidence and to make himself available for cross-examination. There was some uncertainty and delay regarding the Shaws' evidence, and therefore Dr. Dennis was not required until the latter half of the second day. Dr. Dennis was cross-examined on the last day of the hearing.

With respect to the miscellaneous disbursement charge claimed by Dr. Dennis, the Shaws submitted that this was an administration charge as the details were provided in the initial cost claim.

## Honoraria

The Shaws did not provide any comments in relation to the honoraria claim.

### 5.3 Views of the Board

#### Legal Fees

The Board considers the legal fees claimed on behalf of the Shaws to be reasonable and directly and necessarily related to the proceeding. The Board finds that the involvement of Ms. Alexander was appropriate in the circumstances and that her portion of the claim is in accordance with the *Scale of Costs*. In the Board's view, the use of junior counsel was appropriate in these circumstances and likely resulted in lower overall legal fees. The Board directs that these fees be awarded in full.

#### Consultant Fees

#### EcoMark

The fees claimed on behalf of EcoMark are greater than the Board had anticipated. The information prepared and presented by EcoMark's experts, although accurate, was somewhat general in nature. While EcoMark's evidence was of some assistance, the Board finds that its claim of \$23 924.50 for 188.05 hours of preparation time is unreasonable and incommensurate with the value of the evidence provided. Given the nature of the evidence presented, the Board finds that a 20 per cent reduction in preparation fees is appropriate, for a total fee award of \$30 781.40. The Board finds the attendance fees claimed on behalf of EcoMark experts to be reasonable and directs that they be approved in full. Further, the Board considers the fees related to the reopening of the hearing to be reasonable.

In relation to EcoMark's expenses, the Board notes that \$1355.25 has been claimed for "digital services," which represents a 5 per cent overhead charge. As stated in *Directive 031A*, the Board does not allow for a percentage charge for expenses. Therefore, the Board is denying this portion of the expense claim entirely and awards expenses totalling \$782.27 plus GST.

#### SolAero

The Board considers the work performed by SolAero to have been useful and that its evidence contributed to a better understanding of the issues before the Board. The Board finds the fees claimed to be reasonable and directs that they be approved in full.

The Board notes that SolAero has claimed \$712.50 in miscellaneous expenses, which represents a 3 per cent overhead charge. As stated in *Directive 031A*, the Board does not allow for a percentage charge for expenses. Therefore, the Board denies this portion of the expenses in full and awards expenses totalling \$976.34 plus GST.

## 6 ORDER

It is hereby ordered that

- 1) The Board approves total intervener costs in the amount of \$344 708.39.
- 2) Payment in the amount of \$191 102.46 shall be made to Ackroyd LLP, 1500, 10665 Jasper Avenue, Edmonton AB T5J 3S9.
- 3) Payment in the amount of \$905.00 shall be made to Dr. Rudolf Hoehn, Box 143, Bon Accord AB T0A 0K0.
- 4) Payment in the amount of \$152,700.93 shall be made to Prowse Chowne LLP, 1300, 10020 – 101A Avenue, Edmonton AB T5J 3G2.

Dated in Calgary, Alberta, on July 9, 2009.

### **ENERGY RESOURCES CONSERVATION BOARD**

*“Original Signed by J. D. Dilay”*

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

*“Original Signed by J. D. Ebbels”*

J. D. Ebbels  
Board Member

*“Original Signed by J. G. Gilmour”*

J. G. Gilmour  
Acting Board Member



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

**Appendix is available through ERCB Information Services. Contact [infoservices@ercb.ca](mailto:infoservices@ercb.ca)**



Appendix A