ConocoPhillips Canada Operations Ltd.

Application for Five Well Licences
Pembina Field

Cost Awards

July 18, 2011

ENERGY RESOURCES CONSERVATION BOARD
Energy Cost Order 2011-005: ConocoPhillips Canada Operations Ltd., Application for Five Well Licences, Pembina Field

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1 INTRODUCTION

1.1 Background

ConocoPhillips Canada Operations Ltd. (ConocoPhillips) applied to the Energy Resources Conservation Board (ERCB) for licences to drill five E-610 critical sour wells: three wells from a surface location in Legal Subdivision (LSD) 11 of Section 8, Township 48, Range 8, West of the 5th Meridian; and two wells from a surface location in LSD 15-7-48-8W5M. The maximum hydrogen sulphide (H_2S) concentration was approximately 307 moles per kilomole (30.7 per cent) and the cumulative drilling H_2S release rate was 5 cubic metres per second (m3/s) with corresponding emergency planning zones of 1.98 kilometres (km). The purpose of the wells was to obtain oil production from the Nisku Formation. The proposed wells were to be located approximately 7 km southwest of Violet Grove.

Objections to the applications were filed by various parties, including Cliff and Audrey Whitelock (Whitelocks).

On November 8, 2010, ConocoPhillips notified the ERCB that it was withdrawing the applications pursuant to Section 21 of the *Energy Resources Conservation Board Rules of Practice*, and the Board accepted the withdrawal of the applications. Accordingly, the public hearing was cancelled.

1.2 Cost Claim

On December 9, 2010, the Whitelocks filed a costs claim in the amount of $6952.24. On December 16, 2010, ConocoPhillips submitted comments to the Whitelocks' costs claim. On December 16, 2010, counsel for the Whitelocks requested a time extension until January 14, 2011 to respond to the comments of ConocoPhillips. By letter dated April 12, 2011, the ERCB provided until April 26, 2011 for the Whitelocks to reply to the ConocoPhillips's comments. On April 26, 2011 the Whitelocks responded. Subsequent to receipt of letters from ConocoPhillips on May 4 and May 5, 2011, the ERCB provided ConocoPhillips with an additional opportunity to respond to the Whitelocks' additional information. ConocoPhillips replied on May 16, 2011.

The Board considers the cost process to have closed on May 16, 2011.

2 VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

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

> 28(1) In this section, "local intervener" means a person or a group or association of persons who, in the opinion of the Board,

> (a) has an interest in, or
>
> (b) is in actual occupation of or is entitled to occupy
>
> land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

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

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

Subsection 57(1) of the *Rules of Practice* states:

> 57(1) The Board may award costs, in accordance with the scale of costs, to a participant if the Board is of the opinion that
>
> (a) the costs are reasonable and directly and necessarily related to the proceeding, and
>
> (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board.

3 COST CLAIMS OF THE WHITELOCKS

The Whitelocks were represented by Debbie Bishop of Ackroyd LLP. On December 9, 2010, the Whitelocks filed a cost claim for legal fees in the amount of $4680.00, honoraria in the amount of $1800.00, expenses in the amount of $226.89, and GST in the amount of $245.35, for a total claim of $6952.24.

3.1 Views of ConocoPhillips

ConocoPhillips submitted that there was nothing accompanying the invoice to provide any explanation why costs were claimed for services rendered before the Notice of Hearing was issued. ConocoPhillips submitted that in ECO 2008-008 at Page 10, the Board discussed its usual practice not to award costs before a hearing notice is issued:

> As per Part 7 of Directive 031A, the Board acknowledges that its usual practice is to acknowledge only those costs incurred after a Notice of Hearing has been issued. It is generally the Board's position that until a Notice of Hearing has been issued, there is no certainty that a hearing will be held. This matter is illustrative of that point.

ConocoPhillips submitted that costs claimed in connection with these applications, prior to the October 4, 2010 Notice of Hearing, should not be awarded. ConocoPhillips noted that the costs claimed for pre-hearing notice work included a site visit that took place in October 2009, which was nearly a year before the Board requested hearing binders or had any conversation about hearing dates.

ConocoPhillips stated that the time entries on the invoice that were on or after October 4, were too vague to determine the work that was actually performed. For instance, the 1.4 hour time entry on October 6, which indicated "p/c potential experts and consultants for the hearing" did not provide any details about the number of experts that were contacted or the nature of the discussions. ConocoPhillips was of the view that the requirements of Section 55(1) (*sic* 57) of the *Rules of Practice* had not been met. ConocoPhillips noted that Section 55(1) (*sic*) permits the Board to "award costs in accordance with the Scale of Costs, to a participant if the Board is of the opinion that: (a) the costs are reasonable and directly and necessarily related to the proceeding and; (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board." ConocoPhillips submitted that the invoice entries did not demonstrate that the claimed costs were necessary or contributed to a better understanding of the issues before the Board, and should not be awarded in connection with these applications. ConocoPhillips argued that there was no substantiation provided for the $1800.00 landowner claim and noted that it was not even clear when the costs were claimed.

ConocoPhillips referred to ECO 2008-008 as standing for the proposition that the Board's view is that compensation for negotiations should be dealt with in the context of the negotiations themselves and not through the Board's recovery process. ConocoPhillips submitted that a failure to negotiate compensation for pre-hearing discussions should not result in a default to the Board's recovery process. ConocoPhillips further argued that unlike in ECO 2008-008 where costs were awarded for pre-hearing work due to the approach taken in responding to questions from residents and landowners, no initial consultation took place (i.e., questions were not asked).

ConocoPhillips raised concerns with the Whitelocks' reply submission. ConocoPhillips stated that the Whitelocks bootstrapped their claim by including claims that ought to have been included in the original claim. Principles of administrative fairness require a claimant to set out the particulars of its claim in the first instance so that the respondent can make a full reply. ConocoPhillips also argued that the filing requirements of Directive 31 were disregarded as the reply submission was the Whitelocks' real cost claim.

3.2 Views of the Whitelocks

The Whitelocks requested that special consideration be granted to their submission for costs. The Whitelocks argued that despite the fact that no Notice of Hearing was issued, an application was filed and the ERCB had advised Ms. Bishop of such on the phone when discussing possible scheduling of the hearing. In addition, on August 20, 2010, the ERCB had issued a letter to ConocoPhillips, requesting hearing binders and copied Ms. Bishop with same. The letter stated, "In preparation for the public hearing which is to be scheduled to consider the subject applications..."

The Whitelocks submitted that correspondence from ConocoPhillips dated May 17, 2010 confirmed that two of the applications that were to be heard in an oral hearing placed the Whitelocks' lands in a setback. The Whitelocks submitted that there was no question that their lands would have been affected by the applications and that they would have had standing as local interveners.

The Whitelocks submitted that there was correspondence sent to Ackroyd LLP, by both the ERCB and ConocoPhillips, requesting additional information that was time sensitive and required a response.

The Whitelocks believed they had no choice but to begin preparation for a hearing into this matter when they did. Ms. Bishop required a site visit and a meeting with her clients, phone calls were exchanged, and application materials were reviewed; and experts were consulted about potentially retaining them on this matter.

The Whitelocks submitted that the costs they requested were minimal. The Whitelocks argued that in order to meet the timelines that have been set historically by the ERCB for hearings in similar matters, preparation prior to the Notice of Hearing was necessary to ensure that legal and expert assistance were secured.

The Whitelocks pointed out that they and their legal counsel should not have to bear the costs even though ConocoPhillips chose to abandon its application shortly before the Notice of Hearing was to be issued. They submitted that it would have been prudent of ConocoPhillips to ensure that its business plan was sound before causing the Whitelocks to waste their time in considering the applications and engaging consultants and legal counsel.

The Whitelocks noted that the ERCB has awarded costs in situations such as this one, and referred to ECO 2008-008 – Berkley Resources Inc., where the ERCB awarded costs before a Notice of Hearing was issued, and acknowledged that it was clear to the parties that a hearing was imminent. That application was also subsequently withdrawn. In ECO 2007-008, the Board awarded 115 hours of legal time prior to the issuance of a Notice of Hearing where the parties considered a hearing to be imminent.

Regarding ConocoPhillips's concerns with the Whitelocks' April 26, 2011 reply submissions, the Whitelocks noted that ConocoPhillips could have asked for a further reply, and that the Grizzly Decision (*ECO 2010-007*) is a valid reason for the Whitelocks to make further submissions which they had a right to do and did. Whitelocks submitted that the ERCB *Rules of Practice* allow the ERCB to set its own process, which it has done.

3.3 Views of the Board

With regard to ConocoPhillips's concern with the filing of the Whitelocks' April 26, 2011 submission, the Board notes that it accepted the Whitelocks' submission dated December 9, 2010 as their cost claim, and this claim was filed within the 30-day time period, as required by Directive 31. In response to ConocoPhillips's concern that it did not have an opportunity to reply to the new information in the April 26 submission, the Board provided ConocoPhillips with an opportunity to respond, which it did. The Board is of the view that each party has had a full opportunity to know and respond to the case put forward by the other party. Accordingly, the Board finds that there is no error in procedural fairness with respect to the processing of this cost claim.

As stated above, in order to be eligible for costs, the Whitelocks must be local interveners as defined under Section 28 of the *ERCA*. The Board notes that ConocoPhillips did not raise the Whitelocks' status as local interveners as an issue. According to the information submitted with the applications, the Whitelocks own land that would have been within a setback, and further

information regarding this potential impact was not provided to the Board as the matter did not proceed to a hearing. Based on the foregoing, the Board is prepared to find that the Whitelocks are local interveners for the purposes of Section 28 and are eligible for costs.

The Board notes that on August 20, 2010, the ERCB sent a request to ConocoPhillips, on which the Whitelocks were copied, requesting hearing binders in "preparation for a hearing into these applications." Although the Board's normal practice is only to award costs after a Notice of Hearing is issued, where there is a reasonable expectation that the matter will go to a hearing, the Board has awarded costs for work done prior to the Notice of Hearing where the costs are reasonable and directly and necessarily related to proceeding. The Whitelocks submit that they had no choice but to begin working on the matter in order to meet the timelines that have been set historically by the ERCB for hearings in similar matters.

The Board routinely grants adjournments when necessary to permit parties to prepare and retain experts for a hearing, and the Board finds that it was unreasonable to assume that this practice would not be followed in this case. Prior to August 20, 2010, the Board finds that it was not reasonable to expect that this matter would go to a hearing. With respect to claims for correspondence prior to August, 20 2010, the Board is of the view that it is a reasonable expectation that communications between parties will occur during the early stages of the planning of a project, and these costs will not usually be awarded. Costs for negotiations are to be dealt with in the context of the negotiations themselves and not through the Board's cost recovery process. Accordingly, the Board finds that after August 20, 2010 it was reasonable to expect that a hearing would be held and the costs incurred after August 20, 2010 appear to be related to preparing the intervention and retaining experts with respect to the proceeding.

The Board notes that ConocoPhillips submitted that the claim for the Whitelocks' lawyer contacting experts was too vague in that it did not state the number of experts contacted or the nature of the discussions. In their reply submissions, the Whitelocks did not offer any further information regarding this concern. The Board finds that due to vagueness of information provided by the Whitelocks, it is unable to ascertain whether it was reasonable and necessary for the Whitelocks to contact these experts with respect to their intervention. The Board is not prepared to award costs for the 1.4 hours claimed by the Whitelocks' counsel for contacting experts. The Board is prepared to award the other costs incurred after August 20, 2010 in the amount of $912.00 for legal fees, $111.47 for disbursements, and GST in the amount of $51.17.

With respect to the $1800.00 honoraria and disbursements claimed by the Whitelocks, the Board's practice is to award honororia for preparation and presentation of an intervention by a local intervener and for attending the hearing. In this case, no hearing was held, and the Whitelocks were represented by counsel. The Board notes that the Whitelocks claimed $115.42 in disbursements for mileage. It is not clear how this claim relates to the proceeding given that no hearing was held. The Whitelocks have not substantiated the basis for the claimed honoraria or disbursements. Accordingly, the Board denies these claims.

4 ORDER

It is hereby ordered that ConocoPhillips shall pay intervener costs totaling $1074.64, and payment shall be made to Ackroyd LLP, 1500 First Edmonton Place, 10665 Jasper Avenue, Edmonton, Alberta T5J 3S9.

Dated in Calgary, Alberta, on July 18, 2011.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

Gordon Miller
Presiding Member

<original signed by>

Theresa Watson
Board Member

<original signed by>

Jim Turner
Acting Board Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED

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