



Albian Sands Energy Inc.

Application to Expand the Oil Sands
Mining and Processing Plant Facilities at the
Muskeg River Mine

Cost Awards

ALBERTA ENERGY AND UTILITIES BOARD
Energy Cost Order 2007-003: Albian Sands Energy Inc.
Muskeg River Mine Expansion
Application No. 1398411

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ALBERTA ENERGY AND UTILITIES BOARD

Calgary, Alberta

**Albian Sands Energy Inc.
Muskeg River Mine Expansion
Cost Awards**

**Energy Cost Order 2007-003
Application No. 1398411
Cost Application No. 1483339**

1 INTRODUCTION

Albian Sands Energy Inc. (Albian) applied to the Alberta Energy and Utilities Board (EUB or Board), pursuant to Section 13 of the *Oil Sands Conservation Act* (OSCA) for an amendment to EUB Approval No. 8512. The amendment is to allow Albian to access and develop new mining areas to support 30 years of expanded capacity, add new bitumen extraction facilities, and debottleneck the existing Muskeg River Mine (MRM) facilities.

The EUB and Government of Canada established a joint review panel (Joint Review Panel) to consider the application. The Joint Review Panel consisted of J. R. Nichol P.Eng. (Presiding Member), J. D. Dilay, P.Eng., and L. Cooke. A public hearing was held in Fort McMurray during September 5 to 7, 2006, and in Nisku, Alberta during September 11 to 14, 2006, and on September 18, 2006. The EUB and Government of Canada issued decision [2006-128](#) on December 17, 2006. On February 27, 2007 the Board issued Decision 2006-128 Errata.

On October 18, 2006, the Board received two claims for this proceeding. The Northern Lights Health Region (NLHR) submits a claim totaling \$143,907.16, and the Regional Municipality of Wood Buffalo (RMWB) submits a claim totaling \$236,457.97.

On November 7, 2006 the EUB received comments from Albian concerning the cost claims of NLHR and RMWB. On November 21, 2006, NLHR and RMWB each filed a response to Albian's comments.

For the purposes of this Cost Order, the Board considers the cost process to have closed on November 21, 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 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 PARTIES

3.1 Albian Sands Energy Inc. (Albian)

On November 7, 2006, Albian filed comments regarding the two cost claims. Albian submits that the cost claims filed by RMWB and NLHR should be dismissed based on the following.

The Board has definitively determined that neither a municipality nor a health region is entitled to local intervener status when their respective statutory duties require them to participate in a Board process. That decision, Cost Order 2005-014 is both current and directly on point. Both the RMWB and NLHR participated in the Albian hearing based on their statutory obligations. Accordingly, neither the RMWB nor the NLHR are local interveners and therefore are not entitled to receive local intervener funding.

Albian submits that RMWB and NLHR describe their legislative mandates in their evidence when they describe their purposes for intervening. With respect to RMWB, Albian references volume 5, page 920 of the transcripts.

To provided good government, to develop and maintain safe and viable communities, and to provide services and facilities that are necessary or desirable for all or a part of the municipality.

With respect to NLHR, Albian cites Mr. Fitzner's evidence from volume 4, page 765 of the hearing transcripts, and is of the view that he is referring to the statutory mandate set out in section 5 of the *Regional Health Authorities Act*.

We have both a moral and ethical responsibility to deliver adequate health care. That is a mandate that I accepted and that every member of the Board in a governance capacity has undertaken. And it's the shoes that anyone in management and anyone that signs an employment contract with the Health Authority signs up for when they come aboard.

Albian is of the view that the RMWB and NLHR interventions are directly comparable to the interventions the Board considered in Energy Cost Order [2005-014](#). Albian references the following from Energy Cost Order 2005-014.

The City of Calgary (City), Calgary Health Region (CHR), and MD of Rockyview (MD) are all statutorily created bodies with specific mandates granted to them by the legislature. It is the Boards' view that the cost recovery sections of the ERCA were not meant to award costs to such bodies when their respective statutory duties require them to participate in a Board process.

[...]

Each of the City, CHR, and MD were acting in accordance with their statutory mandates in participating in the Compton Hearing. The Board does not agree that these bodies were forced to unnecessarily participate by the actions or inactions of Compton. However, the Board wishes to be clear that it considers that the participation of all of these 3 organizations was of significant value and assistance to the Board.

3.2 Regional Municipality of Wood Buffalo (RMWB)

On November 21, 2006, RMWB filed a response to Albian's comments. RMWB provides discussion in the following areas:

- Definition of "local intervener";
- The level of assistance of Energy Cost Order 2005-014;
- Statutory interpretation; and
- Cost awards for groups representing common interests.

RMWB submits that it meets the definition of "local intervener", pursuant to section 28 of the ERCA, and is therefore eligible to recover costs. In that regard, RMWB submits the following.

First, there is no question that the RMWB has the requisite interest in land. The RMWB and the residents which it represents own and occupy land which may be directly and adversely affected by the Joint Panel's decision. The Muskeg River Mine Expansion project (the "Project") is situated squarely within the RMWB.

Second, the evidence at the hearing established that the RMWB and its residents will be directly and adversely affected by the Project and therefore, by the Joint Panel's decision respecting the Project. In its application and at the hearing, Albian acknowledged that the Project will directly and adversely impact the RMWB and its residents. In particular, Albian stated that "[t]he communities in the Wood Buffalo already experience the impacts of oil sands industry expansion" and that the Project will further contribute to these impacts, which include:

[...]

Finally, the RMWB does not fall within the exception to the definition of “local intervener” set out in s. 28(1) of the ERCA, which is persons, groups or associations of people whose business includes the trading in or transportation or recovery of energy resources.

With respect to Energy Cost Order 2005-014, RMWB submits that this decision is of limited assistance to the Board. RMWB provides the following discussion.

In ECO 2005-014, the Board determined that the City of Calgary, Calgary Health Region, and the MD of Rockyview were acting in accordance with their statutory mandates in participating in the Compton Hearing. Albian states, at page 2 of its submissions respecting costs, that “[t]hose entities intervened in the Compton applications on the basis of their statutory mandates” and purports to outline what those mandates were. However, nowhere in that decision does it state that those were the statutory mandates that these entities were relying upon. In fact, the decision does not state what those statutory mandates were at all, or what facts led the Board to conclude that those parties were acting in accordance with those mandates. Further, in that decision, the Board did not refer to any legislation or case law in support of its conclusion, nor did it attempt to determine the Legislature’s intent respecting the scope of the term “local intervener”.

With respect to statutorily created bodies, RMWB submits that neither s. 28 of the ERCA, nor s. 55 of the Rules of Practice, nor Directive 031A, provides for an exception to a cost award for a statutorily created body. If the legislation intended for such an exception it would have included such language, as it did for those whose business is the trade in or transportation or recovery of energy resources.

RMWB submits that the Board must apply the principles of statutory interpretation in order to determine the legislature’s intent. RMWB references the following from *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, para.37.

Today there is only one principal or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and intention of Parliament.

RMWB supports its analysis with the maxim *expressio unius est exclusion alterius*: to express one thing is to exclude another. It further stated that *Driedger on the Construction of Statutes*, states that “the legislature’s failure to mention the thing becomes grounds for inferring that it was deliberately excluded¹.”

With respect to groups representing the common interests of many, RMWB notes that the Board has granted local intervener status to the Oil Sands Environmental Coalition and the Fort McMurray Medical Staff Association. RMWB references the following from Energy Cost Order [2003-02](#).

¹ Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 168

OSEC claimed local intervener status on the grounds that its members reside and work in the area, that the project will contribute to higher housing costs, greater road congestion, and diminished air quality. The FMMSA claimed local intervener status on the basis that the approval of the project will result in additional strain on the local medical system resulting in increased strain on the medical practitioners themselves. They further claimed qualification on the basis that the increase in traffic occasioned by the project will result in more accidents and greater work load for these interveners.
[...]

The Board carefully considered the submissions of the parties in this regard and has determined that both OSEC and the FMMSA qualify as local interveners in this situation. The Board finds that it was reasonable for the constituent members of both groups to believe that they may be directly and adversely affected by the project.

RMWB submits that it is eligible for cost recovery on the same basis.

RMWB also notes that the Board has granted costs to First Nations who have participated in energy proceedings. First Nations, like municipalities, are government bodies. Municipalities are no more mandated to intervene than are First Nations. Both bodies have the responsibility to provide good government, however RMWB argues that this cannot equate to a duty to intervene.

3.3 Northern Lights Health Region (NLHR)

On November 21, 2006, NLHR filed a response to Albian's comments.

NLHR submits that the analysis applied by the Board in Energy Cost Order 2005-014 is not applicable in Albian's application, and that the facts of the two applications are distinguishable. In NLHR's view, the Board concluded in Energy Cost Order 2005-014 that the Calgary Health Region was statutorily obliged to intervene. NLHR referenced the following from that Cost Order.

Given the location of the proposed wells and contents of H₂S, each of these statutorily created bodies had responsibilities in executing their mandates *which necessitated their participation*. (p.20, emphasis added)

NLHR disagreed with Albian's comments, and was of the view that the decision in Energy Cost Order 2005-014 is not meant to be applied in a broad manner. Rather, NLHR believes that the decision is meant to be restricted to instances where a statutory body is required by statute to act. NLHR provides the following reference from that Cost Order.

It is the Board's view that the cost recovery sections of the ERCA were not meant to award costs to such bodies *when their statutory duties require them to participate in a Board process*. (p.20, emphasis added).

With respect to NLHR's statutory mandate, NLHR submits the following.

In making its decision to intervene, the NLHR was not acting pursuant to any formal statutory duty, nor was it statutorily required to act. Rather, the NLHR intervened as an interested party that is directly and adversely affected by the Board's decision, as it was entitled to do under the *Energy Resources and Conservation Act*.

The NLHR acknowledges that, as indicated by Albian, the NLHR participated in the hearing in accordance with its statutory mandate. To say otherwise would suggest that the NLHR's actions were outside of its statutory jurisdiction. This does not mean, however, that the NLHR was *required* to act, as was the case for the Calgary Health Region in Energy Cost Order 2005-014. The *Regional Health Authorities Act* gives the NLHR significant discretion in many areas. The fact that the NLHR voluntarily chose to exercise its discretion to intervene in this particular application cannot give rise to the conclusion that it was statutorily obliged to do so.

Regarding Mr. Fitzner's testimony, NLHR submits that his evidence does not refer to section 5 of the *Regional Health Authorities Act*. Mr. Fitzner was referring to those individuals who work for the NLHR as staff or management. Those individuals are expected to show initiative and promote and improve the general health of the public.

NLHR submits that if the Board finds that the NLHR had a statutory requirement to intervene, then the circumstances are appropriate for the Board to exercise its discretion to award costs. In that regard NLHR references the following from Energy Cost Order 2005-014, p.20.

Although the Board ultimately has the discretion to award costs to such bodies, the Board has not been persuaded by the submissions or the various parties that in this case there is a reason to exercise its discretion in favour of these bodies.

4 VIEWS OF THE BOARD

4.1 Background

The cost claims in this proceeding arise from the second of three oil sands mine hearings that took place in 2006. The RMWB and the NLHR participated in all three hearings. On February 21, 2007, the Board issued Energy Cost Order 2007-001, in which the Board declined to make an award of local intervener costs to RMWB or NLHR, in relation to their respective participation in the hearing of Suncor Energy Inc.'s (Suncor) applications for the North Steepbank Mine Extension and the Voyageur Upgrader, which was the first of the three hearings. The Board notes that the comments from the parties in this cost proceeding were provided prior to the Board issuing ECO 2007-001.

In ECO 2007-001, the Board noted that subsection 28(2) of the ERCA states that the Board may, subject to terms and conditions it considers appropriate, make an award of costs to a local intervener. The Board stated 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.

4.2 RMWB

RMWB disagreed with Albian's statement that RMWB's evidence in the Albian hearing was virtually identical to the evidence it filed in the Suncor hearing. RMWB acknowledged that it presented the same expert witnesses, but asserted that its evidence in the Albian hearing was materially different. In the Board's view, while there may have been differences in the evidence presented by RMWB, the main thrust of its participation was the same or substantially similar to its participation in the Suncor hearing. In its cost claim, RMWB summarized the focus of its participation as follows.

The RMWB respectfully submits that its evidence was of assistance to the Joint Panel in understanding the broad range of socioeconomic impacts of the Project together with all oil sands industry development in the region. The RMWB chose to focus on social and economic issues, in recognition of the Joint Panel's duty, when considering whether the Project is in the public interest, to take into account environmental, economic, and social impacts. But for the intervention of the RMWB, there would have been no evidence before the Joint Panel on the broad range of social and economic impacts on the long-term residents of the region, aside from what was contained in Albian's application. [emphasis supplied]

The Board agrees with this statement in so far as it relates to the focus of RMWB's participation in the hearing. The Board also notes that similar to the Suncor hearing, RMWB's intervention in the Albian hearing was directed by elected representatives and administrative leaders of the municipal corporation, on behalf of the residents those officials represent.

In ECO 2007-001 the Board stated that local intervener 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. The Board decided not to grant an award of local intervener costs to RMWB on the basis that its intervention was undertaken consistent with RMWB's statutory mandate to defend and advance the collective interests of the residents that RMWB Council and other officials represent. The Board stated that was not the kind of intervention that the Legislature intended the Board to compensate with an award of local intervener costs. The Board believes those reasons apply equally to RMWB's claim in this proceeding.

The Board has carefully considered the participation of RMWB in the hearing, and the parties' submissions in this cost proceeding. Given the focus of RMWB's intervention and its evidence in the hearing, in particular its emphasis on socioeconomic impacts on the long term residents of the region as opposed to more site specific issues arising directly from the Albian application, the Board has decided not to grant an award of local intervener costs to RMWB. The Board wishes to be clear though, that RMWB's participation provided valuable assistance on the regional socioeconomic issues that RMWB addressed in the hearing.

4.3 NLHR

NLHR acknowledged that its participation in the hearing was in accordance with its statutory mandate; however, it also stated that it was not required to participate but instead chose to participate as an interested party that would be directly and adversely affected by the Board's decision on the application. The Board accepts NLHR's statement that it acted with the best interests of the residents of the health region in mind. In the Board's view, NLHR's intentions were to identify for the Board the difficulties NLHR faced providing health care services to the residents of the region. Similar to RMWB's intervention, the focus of NLHR's participation was to provide information on regional socioeconomic issues and how those impacted on NLHR's ability to deliver health care services. NLHR also addressed those impacts within the constraints of Alberta's existing health-care funding system.

The Board has carefully considered NLHR's cost claim and its participation in the hearing. The Board notes that NLHR's intervention focused on regional socioeconomic issues arising from the pace and scale of development in the area generally. While NLHR's participation provided assistance to the Board on the issues the intervention addressed, for the reasons discussed above it is the Board's view that it should not grant an award of local intervener costs to NLHR in this proceeding.

5 ORDER

IT IS HEREBY ORDERED THAT:

- (1) The cost claim of the Northern Lights Health Region is denied.
- (2) The cost claim of the Regional Municipality of Wood Buffalo is denied.

Dated in Calgary, Alberta on this 14th day of March, 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