



Natural Resources Conservation Board Act

Report on Final Cost Awards

Costs Decision respecting Applications by the Northeast Strathcona County Residents Group, Sturgeon County Residents, and Mr. Ken Smulski

NRCB Application No. 03-01

Agrium Products Inc.
Extension of a Phosphogypsum Storage Area
Redwater, Alberta

October 22, 2004

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1. INTRODUCTION

Agrium Products Inc. (“Agrium” or the “Applicant”) filed an application with the Natural Resources Conservation Board (“the Board”) to extend the existing phosphogypsum storage area at its fertilizer plant at Redwater, Alberta. On December 17, 2003, the Board held a Pre-Hearing Meeting in Fort Saskatchewan to hear representations respecting certain aspects of the hearing to be conducted to consider the Application. These included requests from potential interveners to be considered as interveners eligible to receive intervener funding and an advance award of funding. On December 29, 2003, the Board issued a *Report of Pre-Hearing Meeting* stating that the hearing would commence February 23, 2004, in Fort Saskatchewan. At that time, the Board recognized certain individuals or groups of individuals who, in the Board’s view, were or might be directly affected by the proposed project and were therefore eligible for intervener funding. Having regard for the proposals of the eligible interveners, the Board directed Agrium to provide advanced funding where the Board deemed it necessary to assist eligible interveners with the preparation of their submissions. A copy of the *Report of Pre-Hearing Meeting* is available from the NRCB upon request or from its website at www.nrcb.gov.ab.ca.

The hearing commenced on February 23, 2004 and continued for six days, at which time it was adjourned until March 11, 2004. The hearing concluded on March 12, 2004. Originally anticipated to last three days, the hearing took eight hearing days with extended sitting hours to conclude. The Board requested further clarification of Agrium’s evidence on May 13, 2004, and received submissions from interveners responding to Agrium’s clarifications in June.

On August 9, 2004, the Board issued its *Decision Report* on the Application by Agrium. Copies of the *Decision Report* are available from the Board upon request or at the NRCB website.

Pursuant to its Act and Regulations, the Board has received requests for final cost awards from those parties determined to be directly affected at the Pre-Hearing Meeting of December 17, 2003. It has also received cost requests from parties who were not deemed to be directly affected at the time of the Pre-Hearing Meeting. Such parties must establish that they are eligible for intervener funding. This *Report on Final Cost Awards* will provide the Board’s decisions regarding the final cost awards for all interveners who requested funding.

2. ELIGIBILITY FOR FUNDING OF THOSE MAKING REQUESTS

The Board emphasizes that its decisions set out in this section refer to the eligibility of interveners for funding. Having standing and participating in the Board’s review of an application does not mean that a party is automatically entitled to an award of costs. To receive an award of funds to assist it in intervening, a party would first have to qualify under Section 11(1) of the Act which states:

“Individuals or groups of individuals who, in the opinion of the Board, are or may be directly affected by a reviewable project are eligible to apply for funding under this section.”

3. BOARD VIEWS REGARDING FINAL COST AWARDS

There are a number of general issues the Board typically deals with in determining final cost awards. The Board believes these issues should be reviewed in this report to assist interested parties in understanding the approach the Board has taken with respect to cost awards.

General Issues

Intervener funding is intended to assist with expert and legal assistance for individuals to enable them to understand an application and test its reasoning and conclusions with respect to potential direct effects on them.

The Board has indicated that in any consideration of intervener funding, the Board expects that the party requesting funding does so to assist in the preparation and presentation of an intervention. In most cases, interveners contribute a significant amount of time and effort to voluntarily assist the Board in considering the public interest. In some cases, expert assistance is required. The Board has consistently stated that interveners may expect to bear a reasonable proportion of the costs of the preparation and presentation of an intervention. Any funding for interveners should enable them to provide information that would not otherwise be available to the Board in determining whether the project is in the public interest.

The Board has also stated that, in its view, it is an Applicant's responsibility to conduct the studies and research necessary to assemble and present the information needed to determine whether or not a proposed project is in the public interest. The Board does not believe that interveners should receive funding to conduct parallel studies to that of the Applicant or to embark on original data gathering exercises. This is not to say that there may not be circumstances when the Board determines that certain information not provided by the Applicant will assist the Board in making its decision. In such a case, the Board would take steps to ensure that such information is brought before it. Because the Board would normally make conservative assumptions in the face of either a lack of reliable information or a significant degree of uncertainty about a matter, the risk in failing to provide adequate information is the Applicant's. Experts' work, on behalf of an intervener, for which costs may be recognized would normally include reviewing an application and supporting documents and, to the extent necessary, the related published literature, and preparing and asking questions at the public hearing.

In determining if a final award of costs for a particular item is appropriate, the Board will normally take into account the extent to which that item assisted the Board in reaching its decision. An objective of the Board is that intervener funding, when awarded, should result in a positive contribution to a review and assist the Board in reaching a decision. Applicants and interveners should be aware that such determination cannot be completed until after the public hearing when final cost awards are adjudicated.

Legal Assistance

In previous Board decisions respecting costs, the Board indicated that it had no objection to interveners being represented by legal counsel. However, it believes that cost awards should only cover legal costs for hearings that are legally complex, and only for functions that require legal expertise. Costs for legal assistance that may be recognized would normally include preparing lay and expert witnesses to give evidence, reviewing or assisting in the preparation of any written submissions to ensure they are legally proper, leading evidence, asking questions at the hearing and dealing with specific legal issues. The extent to which legal assistance is required will depend on the circumstances, primarily the complexity of the intervention. The Board does not believe that such assistance would be necessary in all interventions or for all parts of any given intervention. The Board has previously stated that, in its view, it would be unfair to the Applicant to award costs incurred due to the inappropriate use of legal counsel for functions which could have been undertaken in an equally effective and efficient manner by others, such as the executive of the group or association. The Board believes that legal costs related to preparing and making a request for intervener funding should not normally be paid by the Applicant. In this particular Application, the Board is prepared to allow time for legal counsel to review instructions from and co-ordinate representations of multiple clients.

Co-ordination of Efforts Amongst Intervenors

The Board has stressed in its *Guide to Intervener Funding*, its *Report of Pre-Hearing Meeting*, and reports on final cost awards in other applications, the importance of co-ordination of efforts amongst intervenors and avoidance of overlap in expert assistance. The Board has strongly encouraged intervenors with related interests to form groups or coalitions in order to pool resources and make for shorter, more efficient and cost effective hearings. In the Board's view, attaining this objective can result in substantial cost savings for the Board, the Applicant, and intervenors.

4. REQUESTS FOR FINAL COSTS FROM THOSE DIRECTLY AFFECTED

4.1 Northeast Strathcona County Residents Group (“NSCRG”)

The NSCRG requested \$140,484.00 at the December 17, 2003 Pre-Hearing Meeting, to retain legal counsel and expert scientific advice regarding atmospheric emissions (including fluoride and particulate matter), industrial hygiene, public health, animal health, noise, water and radioactivity. The Board, at that time, recognized a total cost of \$88,873.00 and provided for an advance of \$49,000.00. With respect to the total cost of \$88,873.00, \$29,350.00 was recognized for legal assistance with the balance anticipated for technical review of impacts and some costs related to facilitating the intervention.

NSCRG has submitted a final cost claim of \$193,310.87 made up as follows:

Participant	Role	Amount Claimed
Interveners	Directly Affected Residents	\$11,769.37
Ms. Jennifer J. Klimek	Counsel	\$78,709.51
Dr. Jim Baker	Air Quality	\$22,317.93
Ms. Verona Goodwin	Public Health and Industrial Hygiene	\$19,265.58
Dr. Hardy Limeback	Human Health and Effects of Fluoride	\$12,856.37
Dr. Lennart Krook	Animal Health and Effects of Fluoride	\$17,482.14
Farquharson & Assoc.	Industrial Noise	\$6,845.74
Dr. David Schindler	Water	\$2,140.00
Dr. Martin Resnikoff	Radioactivity	\$21,924.23
	TOTAL:	\$193,310.87

The final request is \$104,437.87 greater than the amount recognized by the Board at the Pre-Hearing Meeting.

NSCRG substantiates its request for increased costs by noting:

1. the unanticipated additional length of the hearing;
2. the complexity of the matters and evidence from an environmental and social perspective;
3. the short time between the Pre-Hearing and the submission deadline;
4. the importance to the NSCRG; and,
5. the necessity for one or more experts to remain at the hearing to hear evidence and assist counsel while others attended only for testimony and then departed;

The Views of the Applicant on the Costs Claimed by NSCRG

Agrium's response to NSCRG's cost award submission was extensive and detailed. The Board has carefully considered those submissions. Here, the Board offers a summary of the more salient points of the position of Agrium with respect to the cost claim of NSCRG. Agrium submitted that:

1. there was a lack of clarity on the calculation of honoraria for intervener members of NSCRG;

2. they objected to the claim of approximately \$3,600.00 for testing and transportation costs associated with Dr. Lennart Krook's work;
3. they disagreed with the suggestion that the testing and gathering of data was required to fill in gaps or deficiencies in the application of Agrium;
4. no position expressed with respect to the claim for legal costs;
5. Dr. Jim Baker provided some evidence of questionable relevance and ignored the information available from Alberta Environment;
6. Ms. Verona Goodwin's assistance to Ms. Jennifer Klimek is acceptable but her testimony should not be accepted as that of an expert witness and did not assist the Board on the issues;
7. Dr. Hardy Limeback went beyond a review and critique of Agrium's evidence and he advocated a result as opposed to remaining an independent expert witness;
8. Dr. Lennart Krook's evidence was not helpful and was unnecessary;
9. Farquharson & Associates and its work were unnecessary;
10. Dr. David Schindler did not assist the Board;
11. Dr. Marvin Resnikoff confused the issues and led to additional rebuttal evidence being necessary from Agrium;

A summary of Agrium's position on costs to be awarded to NSCRG is presented below:

Participant	Amount Claimed	Agrium's Position
Intervenors	\$11,769.37	No amount proposed
Ms. Jennifer J. Klimek	\$78,709.51	No comment offered on claim
Dr. Jim Baker	\$22,317.93	Limit to \$9,000.00 already disbursed from advance cost award
Ms. Verona Goodwin	\$19,265.58	\$10,000.00
Dr. Hardy Limeback	\$12,856.37	Limit to \$6,000.00 already disbursed from advance cost award
Dr. Lennart Krook	\$17,482.14	Opposes any award of costs
Farquharson & Assoc.	\$6,845.74	Opposes any award of costs
Dr. David Schindler	\$2,140.00	Opposes any award of costs
Dr. Martin Resnikoff	\$21,924.23	Limit to \$16,000.00 already disbursed from advance cost award
TOTAL	\$193,310.87	No comment offered on total award

With respect to the NSCRG cost claims the Board has decided and awards costs as follows:

Participant	Amount Awarded	Board's Views
Interveners	<p>\$11,769.37 claimed.</p> <p>\$6,833.61 awarded.</p>	<p>The claim has been reduced to exclude:</p> <ul style="list-style-type: none"> • the costs for testing, • touring Dr. Krook to and from various farm sites, • Dr. Krook's airline ticket, and • the honoraria claimed for attendance at the Pre-Hearing Meeting. <p>Travel expenses for group members have been limited to 4 individuals in keeping with the Board's <i>Guide to Intervener Funding</i>.</p>
Ms. Jennifer J. Klimek	<p>\$78,709.51 claimed.</p> <p>\$73,984.51 awarded.</p>	<p>The amount claimed has been reduced for services related to the Pre-Hearing Meeting.</p>
Dr. Jim Baker	<p>\$22,317.93 claimed.</p> <p>\$9,000.00 awarded.</p>	<p>The Board agrees with Agrium's assessment of the value of Dr. Baker's evidence to the process. Dr. Baker's evidence did not address the matters the Board contemplated that he would address in its <i>Pre-Hearing Decision Report</i>.</p>
Ms. Verona Goodwin	<p>\$19,265.58 in original claim, and \$829.25 claimed in preparation of response to the Board's supplemental questions.</p> <p>\$20,094.83 awarded.</p>	<p>The Board recognized advance costs of \$12,000.00 when it anticipated a shorter hearing. It believes Ms. Goodwin's participation allowed counsel for the NSCRG to focus on legal matters and therefore reduced total costs of the intervention.</p>
Dr. Hardy Limeback	<p>\$12,856.37 claimed.</p> <p>\$10,000.00 awarded.</p>	<p>The Board believes that the award contemplated in the <i>Report of Pre-Hearing Meeting</i> should not be increased.</p>

Dr. Lennart Krook	\$17,482.14 claimed. Claim denied	In the <i>Report of Pre-Hearing Meeting</i> , the Board stated that it did not see the need for the work of Dr. Krook. The Board does not believe the evidence provided by Dr. Krook contributed to the hearing process.
Farquharson & Assoc.	\$6,845.74 claimed. \$6,845.74 awarded.	The Board finds that the evidence provided by this expert was helpful and the cost reasonable.
Dr. David Schindler	\$2,140.00 claimed. Claim denied	On balance the Board believes that adequate information was available to it concerning the impacts of the existing phosphogypsum stack. General comments provided by this expert did not deal with the matter the Board had to decide (i.e. the extension of the gypstack).
Dr. Martin Resnikoff	\$21,924.23 claimed. \$16,000.00 awarded.	The Board expects that experts will take care to ensure analyses are free of error. During the hearing, considerable time was devoted to dispelling erroneous conclusions contained in Dr. Resnikoff's written submission. This was not helpful. The Board did recognize the need for an independent review of potential radiological impacts of the project and is prepared to approve the amount already disbursed by counsel.
TOTAL CLAIMED:	\$193,310.87	
TOTAL AWARD:	\$145,758.69	
LESS ADVANCE AWARD	\$49,000.00	
FINAL COST AWARD	\$96,758.69	

4.2 Sturgeon County Residents

Ms. Anne Brown appeared at the Pre-Hearing Meeting to seek directly affected party status. The Board held, in its *Report of Pre-Hearing Meeting*, that Ms. Brown had not established that she was a directly affected party. Ms. Brown did not request advance funding at the Pre-Hearing Meeting.

At the hearing, Ms. Brown was joined by two couples under the banner Sturgeon County Residents (“SCR”) and was represented by counsel. The SCR did not engage expert witnesses. Its participation consisted of the direct evidence of Ms. Brown, Ms. Diana Gorgichuk and Mr. Claude Lafond and the examination of other participants.

SCR has requested a final cost award of \$15,324.90 with \$1,650 for honoraria, for the formation of the group and for attendance at the hearing. The balance of the claim, \$13,674.90, is for legal representation with \$214.90 of that balance representing disbursements. In its April 19, 2004 costs claim, SCR proposed eight grounds for establishing that its members were directly affected.

Agrium responded by stating that nothing at the hearing should have led the Board to change its mind on the status of Ms. Brown, namely that she is not directly affected by the project. Further, Agrium argued that the interveners had not established a plausible chain of causality, that an effect would likely occur and that the effect would not be trivial. Also, Agrium stated that the contribution of these interveners to the hearing was negligible.

The Board is of the view that costs should be awarded here. The Board holds that view because it is satisfied that the LaFonds may be directly affected by the project, as a result of the modelled fluoride emissions associated with the stack extension. The Board emphasizes that in finding Mr. Lafond may be directly affected, it has relied solely on evidence that ambient fluoride concentrations would increase where he lives. This should not be construed as a finding of adverse effect, because the Board was not prepared to rely on the quantitative results of the fluoride dispersion modeling. The Board does not believe that either the Gorgichuks or Ms. Brown have established that they may be directly affected by the project.

In assessing the appropriate amount of costs, the Board finds that the legal costs associated with this intervention should not be fully compensated. While the Board recognizes any party's right to retain counsel to assist them with participating in the hearing process, reimbursement for such an expense is only available if the Board considers the legal expense was necessary to the intervention. The Board finds that this intervention did not include expert testimony, nor was the evidence put forward by this intervener complex in nature. In this case, the Board is prepared to accept that the presence of legal counsel was appropriate for portions of the hearing outside of the SCR evidence presentation, most particularly the Agrium direct evidence. There were, however, other portions of the hearing where counsel's attendance was discretionary in the view of the Board, at least in terms of eligibility for a funding award. For this reason the Board awards \$5,214.90 for legal fees and disbursements associated with the claim.

The Board is prepared to include an honoraria award in the amount of \$750 for someone to attend the hearing on Mr. Lafond's behalf plus \$50 for Mr. LaFond's role in presenting the submission. In this case the Board does not believe that the costs associated with forming a group are eligible as the Board finds that only one member of the group qualifies as eligible for funding.

Description of Claim	Amount Claimed	Amount Awarded
Honoraria (forming group)	\$100.00	Claim denied
Honoraria (hearing attendance)	\$1,400.00	\$750.00
Honoraria (presentation at hearing)	\$150.00	\$50.00
Legal fees and disbursements	\$11,924.90	\$5,214.90
TOTAL	\$15,324.90	\$6,014.90

4.3 Ken Smulski

For obvious reasons, costs claims should all be dealt with at the same time. For that reason, and for the need to provide timely decisions to all participants, the regulations provide time limits for the submission of cost claims, a response thereto and a rebuttal.

Cost claims were due on April 11, 2004, which was 30 days from the close of the hearing, as established by regulation (Alberta Regulation 278/91, *Funding for Eligible Interveners*). Counsel for the NSCRG applied by letter dated April 2, 2004 faxed to the Board on April 7, 2004, in advance of the April 11 deadline, for an extension of time, due to a busy schedule and the Easter weekend. Counsel for Agrium did not oppose a brief extension of time to April 19, 2004. The Board acceded to this request and April 19, 2004 became the deadline for all parties. A letter from the Board setting out the decision to extend the deadline was faxed to all parties on April 8, 2004. Mr. Smulski was faxed this letter and in telephone discussions with NRCB staff he was advised of the importance of respecting the deadline.

Mr. Smulski did not request a further extension of the deadline, nor did he provide evidence of extenuating circumstances that would warrant such an extension. Nonetheless, Mr. Smulski was egregiously late in making his cost submission on July 30, 2004. Agrium has taken the position that the cost claim should properly be rejected as being out of time and excessively so. Agrium did not respond to the quantum or makeup of the costs claims expecting to be granted an opportunity to so respond if the Board were to accept the late submission of Mr. Smulski, or in effect grant leave to Mr. Smulski to submit out of time.

While the Board has the discretion to enlarge the time prescribed for the submission of costs claims, in the absence of valid reasons being put forth, it is not prepared to do so to accommodate an unexplained delay of almost three and one-half months.

Section 4(g) of the *Funding for Eligible Interveners* Regulation provides that the Board may deny a costs claim "...for any other reason the Board considers appropriate." In this case, the Board accepts the position of Agrium and is not prepared to accept the claim of Mr. Smulski.

5. SUMMARY OF CONCLUSIONS

The Board is issuing this cost order directing Agrium to make final cost awards as set out in the following table, less the amount of the advance funding that has been provided:

Intervener	Final Costs Claimed	Final Costs Accepted	Advance Funding	Final Cost Award
Northeast Strathcona County Residents	\$193,310.87	\$145,758.69	\$49,000.00	\$96,758.69
Sturgeon County Residents	\$15,324.90	\$6,014.90	none	\$6,014.90
Ken Smulski	\$113,569.52	\$0.00	none	\$0.00

DATED at Calgary, Alberta this 22th day of October, 2004.

NATURAL RESOURCES CONSERVATION BOARD

Original signed by:

William Y. Kennedy
Division Chair

Sheila Leggett
Board Member

Dr. Robert Powell
Acting Board Member