
Natural Resources Conservation Board Act

Report on Final Cost Awards

Costs Decision respecting Application by the Friends of Lamont County

NRCB Application No. 0702

Alberta Sulphur Terminals Ltd.
Sulphur Forming and Shipping Facility
Lamont County, Alberta

August 13, 2009

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1. INTRODUCTION

Alberta Sulphur Terminals Ltd. (“AST” or the “Applicant”) filed an application with the Natural Resources Conservation Board (“the Board”) to construct and operate a sulphur forming and shipping facility in Lamont County, Alberta. On January 27, 2009, the Board held a Pre-Hearing Meeting in Lamont to hear representations respecting certain aspects of the forthcoming hearing 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 February 13, 2009, the Board issued a *Pre-Hearing Meeting Decision Report* stating that the hearing would commence April 14, 2009, in Fort Saskatchewan. At that time, the Board recognized the Friends of Lamont County (FOLC) as a group that would or might be directly affected by the proposed project and was therefore eligible for intervener funding. Having regard for the proposals of the eligible intervener, the Board directed AST to provide advanced funding where the Board deemed it necessary to assist the eligible intervener with the preparation of its submission. A copy of the *Pre-Hearing Meeting Decision Report* is available from the NRCB upon request or from its website at www.nrcb.gov.ab.ca.

The hearing commenced on April 14, 2009 and continued for four days, concluding on April 17, 2009. Originally anticipated to last four days, the hearing was completed within that time with extended sitting hours.

On July 28, 2009, the Board issued its *Decision Report* on the AST Application. 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 a request for a final cost award from the FOLC. No other requests were received. This *Report on Final Cost Awards* will provide the Board’s decision regarding the final cost award for the FOLC.

2. ELIGIBILITY FOR FUNDING OF THE FRIENDS OF LAMONT COUNTY

The Board emphasizes that its decision set out in this section refers to the eligibility of the FOLC 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 *Natural Resources Conservation Board 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.”

In its *Pre-Hearing Meeting Decision Report* the Panel accepted that FOLC included local residents who live or work within the project area who could be affected by the proposed project. The issue of eligibility was not questioned by AST in its submission responding to the FOLC claim for costs. The Board finds that the FOLC is eligible to apply for costs as the record of the proceeding established that some FOLC members may be directly affected by the AST project.

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.

4. THE FOLC REQUEST FOR FINAL COSTS

The FOLC requested \$203,617.00, including GST, at the January 27, 2009 Pre-Hearing Meeting, to retain legal counsel, provide for honoraria and expenses for members, and retain expert scientific advice regarding sulphur forming and handling, air quality from a worst-case scenario, livestock health, property values, fugitive emissions, and noise. The Board, at that time, recognized a total cost of \$132,997.00, including GST, and provided for an advance of \$66,498.50. With respect to the total cost of \$132,997.00, \$87,570.00 was recognized for legal assistance with the balance anticipated for technical review of impacts and some costs related to facilitating the intervention.

The FOLC has submitted a final cost claim of \$206,938.64. The final request is \$73,941.64 greater than the amount recognized by the Board at the Pre-Hearing Meeting.

The FOLC substantiates its request for increased costs by noting:

- the length of the hearing was essentially a five day hearing because of the extended daily sitting hours;
- the original quotations from its experts were set before they had spent significant time reviewing the AST application materials;
- increased time was required to address information gaps and large volumes of materials provided after the AST application was submitted and even after the date of the Board's *Pre-Hearing Meeting Decision Report*;
- the use of three counsel was the only way the FOLC was able to meet the set timelines;

- the large number of clients and short time frames of the information requests, submissions and hearing made it necessary to prepare written statements on behalf of many of the FOLC members resulting in increased photocopying and disbursement costs.

The Views of the Applicant on the Costs Claimed by the FOLC

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

- the FOLC cost claim is excessive and is reflective of an intervention that was not conducted economically and included unnecessary presentations;
- not one of the FOLC parties seeking costs remained within the amount of funding recognized by the Board in its Pre-Hearing Decision;
- Dr. Hyne provided a valuable contribution to further understanding the project's potential impacts on the FOLC members and that his contribution was directly and necessarily related to the preparation and presentation of the FOLC submission, but noted that Dr. Hyne strayed from his area of expertise on numerous occasions and was not fully forthcoming about his relationship with Enersul, a direct competitor of AST. In this regard, AST submitted that any award for his work should be limited to the amount previously recognized by the Board;
- Dr. Batterman's presentation of a worst-case scenario based on the Macassar fire was a wholly unrealistic and inappropriate analogy to apply to the AST proposal and as a consequence the Board should not award any costs for his work; however, if any costs are determined by the Board to be payable, they should be no more than the amount previously recognized by the Board;
- Dr. Kennedy included little evidence of any potential impacts to the health of livestock arising from the project; his views conflict with the WISSA Scientific Advisory Committee, and his evidence focused on background concentrations unrelated to AST's facility. As a consequence the Board should either deny this component of the FOLC claim or limit any award to the \$8,000 amount previously recognized;
- Mr. Gettel's evidence did not contribute to a better understanding of the reviewable issues and consequently the Board should not award FOLC any costs in respect to this component of the intervention;
- AST did not dispute the contribution or reasonableness of Mr. Farquharson's participation to the review and is prepared to pay this component of the claim in full;
- AST stated that the legal component of the FOLC claim should be limited to the amount recognized by the Board in the *Pre-Hearing Meeting Decision Report* as the use of three counsel was excessive and the invoice includes examples of duplication;
- AST disputes the claim for honoraria as the claim includes costs for forming a group when the FOLC was formed in advance of the AST application, the hearing attendance claim is for 22 people and that meal expenses include alcoholic beverages and claims by parties who are not members of the FOLC.

Views of the Board – Assessment

The Panel has considered each component of the final costs claim, having regard for the detailed claims, supporting argument and contribution to the review process. The Panel notes that in some cases the amounts claimed differ substantially from that contemplated in its *Pre-Hearing Meeting Decision Report*. One of the key purposes of the advance funding process engaged in by the Natural Resources Conservation Board is to provide guidance to interveners on whether they are eligible for an award and what costs may be viewed as appropriate in a final cost claim. In providing this direction well in advance of the hearing the Panel also recognizes that some degree of uncertainty always remains. Final cost awards are made having regard to the length of hearing, the contribution of the experts to relevant issues, and recognized budgets determined by the advance funding process. The Board generally expects that final cost claims will closely correlate to the advance funding decision.

In reviewing the claim for work performed by Dr. Hyne the Panel is satisfied that the amount of \$14,800.00 plus GST in the amount of \$740.00 as recognized in the Pre-Hearing meeting report for this expert is adequate and reasonable for the contribution to the review. The Panel notes that some of the expenses incurred in support of Dr. Hyne's participation appear in the invoice submitted by Ackroyd LLP that the Panel has, as it has in all cases, accepted as recoverable.

Dr. Batterman's claim is substantially higher than that approved by the Panel in its *Pre-Hearing Meeting Decision Report*. The Panel notes that the 62 hours accounted for in the final claim exceed the initial budget submitted by Dr. Batterman by 28 hours. The Panel is prepared to recognize that the scope of the work performed by this expert was increased by some of the risk assessment materials filed by AST between the time of the pre-hearing and hearing. The Panel also finds that some of the extensive analysis of the Macassar fire was of limited value. In addition the choice to use other than Alberta standards was not particularly useful. The Panel awards \$18,000.00 (Cdn) in fees and \$477.30 (Cdn) in disbursements for the contribution of this expert to the FOLC intervention (Note: US\$ disbursements have been converted using a rate of 1.20).

In its *Pre-Hearing Meeting Decision Report* the Panel stated that it believed \$8,000.00 was a reasonable award for an FOLC expert to provide a critical assessment of the AST application in relation to potential impacts on the health of livestock belonging to FOLC members. The Panel finds that the claim for the work performed by Dr. Kennedy is excessive when assessed in terms of the contribution to the Panel's understanding of the AST application. Consequently, the Panel has determined that an award of \$8,000, inclusive of GST and disbursements is appropriate.

The Panel is satisfied that the FOLC claim for costs in relation to the work performed by Mr. Gettel and Mr. Farquharson is reasonable and approves those claims in full.

In the *Pre-Hearing Meeting Decision Report*, while stating that its view that \$87,570 was a reasonable award to fund the FOLC's legal representation based on a four day hearing, the Panel stated that "at the close of the hearing, the Panel expects that FOLC's final cost award for legal representation will not exceed this amount, unless the hearing is substantially longer than that proposed." The Panel does recognize that the hearing, while concluded in four sitting days, did

include extended sitting hours. For this reason the Panel is prepared to recognize an increase over the award contemplated in its *Pre-Hearing Meeting Decision Report*. This represents a reduction from the final claim, but awards fees in an amount budgeted by Ackroyd LLP for a five day hearing. The Panel does note certain inefficiencies in the FOLC legal representation, most notably the choice to use three legal counsel and the lengthy oral presentation of pre-filed direct evidence. Therefore the Panel awards \$83,790 for legal fees, GST in the amount of \$4,898.25 and disbursements of \$14,262.28.

The Board Intervener Funding Process Guide establishes guidelines for honoraria and witness fees. This includes fees for the establishment of a group, hearing attendance and appearance as a witness. The purpose of providing honoraria is to provide some financial acknowledgement for the commitment of time and effort individuals put forth in supporting an intervention in the review of an application. Honoraria have been claimed by 22 individuals for hearing attendance, mileage and expenses. The Board recognizes that most individuals who are part of a coalition and have an interest in the outcome of a review will wish to attend the hearing and listen to the evidence. Indeed this is one of the great benefits of the public review process and is encouraged by the Board. However, the Board has established what it believes to be reasonable guidelines related to the award of honoraria to individuals supporting an intervention, including the limitation of the number of eligible individuals. The Intervener Funding Process Guide provides that 2 individuals are eligible in cases where the group is represented by a lawyer at a rate of \$50 for each half day and up to 6 individuals at the same rate for each half day necessary to present as witnesses in support of the group intervention. Given the size of the FOLC group, the Board has determined that it will award an honoraria based on \$2000 for forming a group and 6 individuals attending 10 half day sessions. The Board will also award an amount of \$50 each for the half-day that the 8 additional members of the FOLC appeared at the hearing to provide evidence and answer questions. In addition the Board finds that \$1331.46 of the expenses claimed by FOLC members are recoverable, that being half of the amount requested.

5. ORDER

IT IS HEREBY ORDERED that Alberta Sulphur Terminals Ltd. shall pay intervener costs in the amount of \$102,246.22 (total cost award less directed advance funding) to the Friends of Lamont County.

DATED at Calgary, Alberta this 13th day of August, 2009.

NATURAL RESOURCES CONSERVATION BOARD

Original signed by:

Jim Turner
Division Chair

Donna Tingley
Board Member

Barbara McNeil
Board Member

Natural Resources Conservation Board

Alberta Sulphur Terminals Ltd.

Costs Claimed and Awarded

	Advance Fees Claimed	Advance Fees Recognized	Advance Fees Awarded	Total Fees Claimed	Total Expenses Claimed	Total GST Claimed	Total Amount Claimed	Total Fees Awarded	Total Expenses Awarded	Total GST Awarded	Total Amount Awarded
INTERVENER											
Friends of Lamont County											
Ackroyd LLP	\$93,230.00	\$87,570.00	\$43,785.00	\$88,790.00	\$14,262.28	\$5,148.75	\$108,201.03	\$83,790.00	\$14,262.28	\$4,898.25	\$102,950.53
Dr. Hyne	\$16,159.00	\$16,159.00	\$8,079.50	\$19,150.00	\$0.00	\$0.00	\$19,150.00	\$14,800.00	\$0.00	\$740.00	\$15,540.00
Dr. Batterman	\$13,268.00	\$13,268.00	\$6,634.00	\$23,013.21	\$483.12	\$0.00	\$23,496.33	\$18,000.00	\$477.30	\$0.00	\$18,477.30
Mr. Picard	\$19,530.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Dr. Kennedy (Dr. Coppock)	\$20,905.00	\$8,000.00	\$4,000.00	\$24,555.00	\$1,150.18	\$1,227.75	\$26,932.93	\$8,000.00	included	included	\$8,000.00
Mr. Gettel	\$7,875.00	\$0.00	\$0.00	\$4,750.00	\$92.67	\$242.13	\$5,084.80	\$4,750.00	\$92.67	\$242.13	\$5,084.80
Mr. Farquharson	\$24,150.00	\$8,000.00	\$4,000.00	\$10,240.00	\$1,151.08	\$569.55	\$11,960.63	\$10,240.00	\$1,151.08	\$569.55	\$11,960.63
Members' Honoraria	\$8,500.00	\$0.00	\$0.00	\$9,450.00	\$2,616.36	\$46.56	\$12,112.92	\$5,400.00	\$1,331.46	included	\$6,731.46
TOTAL COSTS	\$203,617.00	\$132,997.00	\$66,498.50	\$179,948.21	\$19,755.69	\$7,234.74	\$206,938.64	\$144,980.00	\$17,314.79	\$6,449.93	\$168,744.72
ADVANCE FUNDING AWARDED			\$66,498.50								-\$66,498.50
TOTAL COSTS PAYABLE											\$102,246.22

NOTE: some or all of the travel expenses for Dr. Batterman and Dr. Hyne are included in the Ackroyd LLP expense award.