

**EB-2006-0243**

**IN THE MATTER OF** the *Ontario Energy Board Act 1998*,  
S.O.1998, c.15, (Schedule B);

**AND IN THE MATTER OF** an Application by Natural Resource Gas Limited for an Order pursuant to Section 90(1) of the *Ontario Energy Board Act, 1998*, granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Malahide, Municipality of Thames Centre and the Town of Aylmer.

**AND IN THE MATTER OF** Section 19 of the *Ontario Energy Board Act, 1998*.

**BEFORE:** Gordon Kaiser  
Presiding Member and Vice Chair

Ken Quesnelle  
Member

Cathy Spoel  
Member

### **DECISION AND ORDER**

On October 13, 2006 Natural Resource Gas Limited (“NRG”) applied to the Ontario Energy Board under section 90(1) of the *Ontario Energy Board Act, 1998* for an Order granting leave to construct approximately 28.5 kilometers of natural gas pipeline. The pipeline is to be located in Township of Malahide, the Municipality of Thames Centre and the Town of Aylmer and will interconnect with facilities to be constructed by Union Gas Limited (“Union Gas”) as shown in the map attached as Appendix A.

The pipeline will allow NRG to meet the natural gas distribution requirements of an ethanol plant proposed by Integrated Grain Processors Co-operative Inc. ("IGPC"), to be located in Aylmer, Ontario, within NRG's franchise area.

The Board held a hearing in this matter on December 18, 2006. On January 31, 2007, the Board received and reviewed two final executed contracts between IGPC and NRG - the Gas Delivery Contract ("GDC"), and the Pipeline Cost Recovery Agreement ("PCRA"). On February 2, 2007 the Board issued its Decision and Order (as amended December 28, 2007) approving the two agreements and granting NRG leave to construct the pipeline subject to certain conditions. The conditions of approval contained in the Board's Leave to Construct Decision are reproduced in Schedule A to this Decision.

### **The Motion**

On February 8, 2008 the Board received correspondence from IGPC relating to construction delays by NRG and disputes regarding certain provisions of the Pipeline Cost Recovery Agreement ("PCRA"). On February 12, 2008 NRG filed a letter in response to IGPC's claims.

On February 15, 2008 IGPC filed a Notice of Motion with the Board seeking Orders establishing a timetable for the completion of the pipeline by NRG, an Order requiring NRG to pay all third party suppliers on a timely basis and an Order confirming that IGPC was required to provide NRG a Delivery Letter of Credit in the amount of \$5.3 million.

This is the third hearing the Board has held with respect to this project, two of which have been on an emergency basis. The Board is fully aware of the importance of this project to the community. The Board is also aware of the substantial financial commitment by members of the Co-operative, the Federal government and the Provincial government.

In an attempt to resolve the dispute quickly, the Board issued an Order on February 22, 2008 directing both NRG and IGPC to attend before the Board at an oral hearing on February 28, 2008 at the Old Town Hall in Aylmer, Ontario. Both parties were also ordered to produce company witnesses capable of answering questions from the Board regarding the alleged delays in construction, disputes regarding the Delivery Letter of Credit required under the PCRA and the non-payment of suppliers.

**The Issues:**

At the hearing in Aylmer on February 28, 2008 both NRG and IGPC produced company witnesses, as ordered, to answer questions from the Board. The Town of Aylmer was also represented by counsel and participated throughout. The Mayor of Aylmer and various elected officials were also in attendance.

It became apparent that there were six issues in dispute:

1. IGPC's failure to deliver Letters of Credit;
2. The proper amount of the Letter of Credit;
3. Payments by NRG to Union Gas regarding costs related to the pipeline construction;
4. Advance payments by NRG to Lakeside Process Controls Ltd.
5. IGPC's failure to pay NRG for various third party invoices ; and
6. Allegations regarding delay in the pipeline construction.

At the hearing in Aylmer, the parties agreed that the issues with respect to payments by NRG to Union Gas to underwrite the costs borne by Union Gas for the Union part of the pipeline construction could be best dealt with by having IGPC deal with Union Gas directly. The same approach was taken with respect to the advance payments required of NRG to Lakeside Process Controls Ltd. Accordingly, it was not necessary for the Board to deal with these two issues.

The Board's Decision and the parties' agreement to this procedure are set out in the Board's oral decision in the Transcript of February 28<sup>th</sup> at page 138 which is reproduced at Schedule B of this Decision

A related issue concerned allegations by NRG that IGPC had failed to pay NRG invoices. The parties agreed that they would resolve this dispute outside of this process and that any failure to resolve this dispute would not be a basis for delaying the construction of the pipeline.

This left two issues. The first was a determination of the proper amount of the Letter of Credit. To be provided by IGPC to NRG. The second was an agreed upon schedule for delivery of the Letter of Credit and undertaking certain steps in the construction process. Each of these matters is considered below.

**The Amount of the Letter of Credit:**

The cost NRG will incur in constructing the pipeline is approximately \$9.1 million of which approximately \$3.8 million is financed by a payment by IGPC to NRG called an Aid to Construction and a Delivery Letter of Credit by IGPC to NRG in the amount of \$5.3 million. The Board in its Decision of February 2, 2007 accepted the estimate of \$5.3 million with respect to the Letter of Credit as follows:

“The PCRA requires IGPC to provide an irrevocable delivery letter of credit in the amount of \$5.3 million, which IGPC must maintain for as long as it continues to receive service. This letter of credit will be reduced annually to an amount equal to the net book value of the assets of this project. This aspect of the PCRA will ensure that NRG can draw on this letter of credit in the event of either a default by IGPC or its ceasing operation prior to the assets are fully depreciated, thereby avoiding the potential for stranded assets. This protects NRG and its ratepayers.”

NRG argued that this amount now appears to be insufficient and fails to reflect seven additional categories of costs. The first four costs are set out below together with the estimated annual costs.

M9 Delivery Costs	\$422, 217
O & M Expense	\$ 50,000
Capital Tax	\$ 25,935
Property Taxes	\$ 58,405

NRG states that these are annual costs that will be incurred during each of the seven years of the contract, regardless of whether or not IGPC is still a customer of NRG

At the hearing in Aylmer, NRG and IGPC agreed on the procedure to resolve the dispute with respect to these costs. Each of the parties will make written submissions. The Board will make a decision and that decision will be binding on the parties. This Decision is set out in the Transcript of February 28<sup>th</sup> at page 140 (see Schedule "B").

There are three additional costs which NRG claims are not reflected in the \$5.3 million Delivery Letter of Credit. First, there is the cost of decommissioning the pipe in the event that the ethanol plant closes. Secondly, there is a potential income tax liability in the event NRG has to draw down on the Delivery Letter of Credit. Thirdly there is a break out fee or penalty that NRG would incur if as a result of the ethanol plant closing NRG is required to repay its loan to the bank earlier than contemplated under the existing loan agreement. Those three issues were decided by the Board in its oral decision of February 28<sup>th</sup> and are recorded in the Transcript at pages 141 and 142 (see Schedule "B").

### **Amendments to the Leave to Construct**

Disputes in this proceeding arose as to whether NRG was delaying certain aspects of the construction. NRG in response indicated that it had not received the Delivery Letter of Credit. At the hearing, the parties agreed to a schedule that sets out mutual obligations and the timing of certain events. They have agreed that this Schedule will be

added to and form part of the existing Leave to Construct Decision and that in the event of non-compliance, either party may apply to the Board for termination of that Leave to Construct Decision. In the event of termination, it would be open to other parties to apply for a leave to construct for this facility.

The wording of this new condition in the Leave to Construct Decision is attached to this Decision as Schedule C. It will form a new paragraph 6 in the Conditions of Approval, reproduced in Schedule A of this Decision.

**IT IS THEREFORE ORDERED THAT:**

1. The Board's Decision granting Leave to Construct the natural gas pipeline dated February 2, 2007, as amended on December 28, 2007 is hereby amended, on consent of Natural Resource Gas Limited and Integrated Grain Processors Co-operative Inc., by adding the additional conditions set out in Schedule "C" of this Decision;

**DATED** at Toronto, March 4, 2008

**Ontario Energy Board**

*Original Signed By*

**Gordon Kaiser**

Signed on behalf of the panel

**Appendix A**




**Board File Number EB-2006-0243**

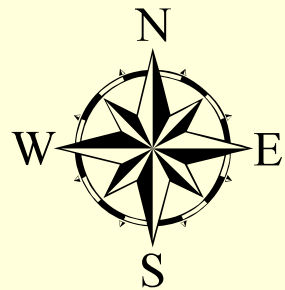
**Dated: March 4, 2008**

**Map of the Proposed Pipeline**

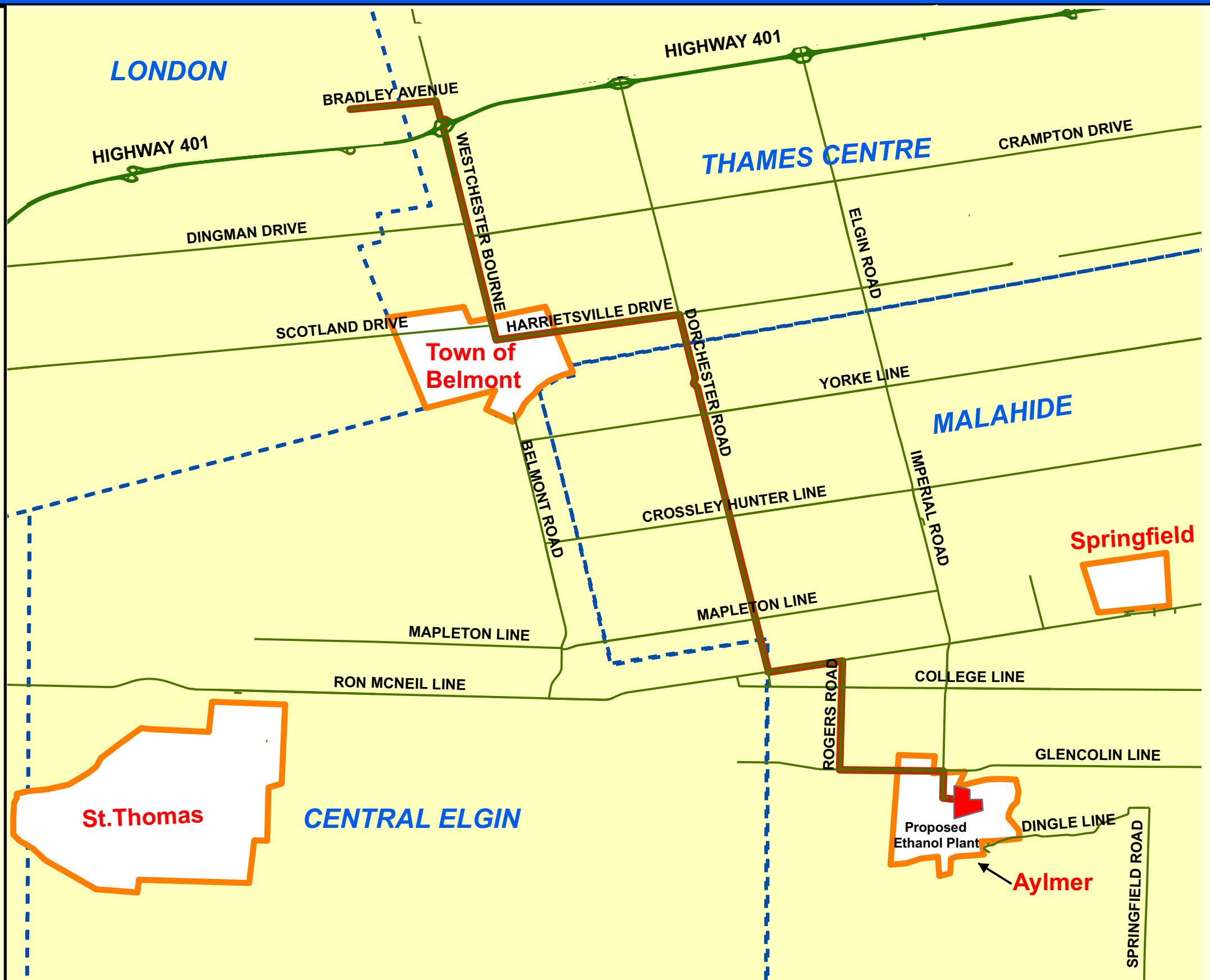
# Proposed NRG Ltd. Gas Pipeline Route

## Legend

-  City/Town
-  Municipal Boundaries
-  Proposed Gas Pipeline Route



0 3,400 6,800 Meters





## **Schedule “A”**

**Board File Number (EB-2006-0243)**

**March 4, 2008**

### **Conditions of Approval**

**Attached to the Board Decision and Order granting Natural Resources Gas Limited Leave to Construct natural gas pipeline  
[February 7, 2007 as amended December 28, 2007]**

**EB-2006-0243**

### **Natural Resources Gas Limited–Proposed Pipeline to IGPC Project**

#### **1 General Requirements**

- 1.1 Natural Resources Gas Limited (NRG) shall construct the facilities and restore the land in accordance with its application and evidence, except as modified by this Order and these Conditions of Approval.
- 1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate December 31, 2008<sup>1</sup>, unless construction has commenced prior to then.
- 1.3 Except as modified by this Order, NRG shall implement all the recommendations of the Environmental Study Report filed in the pre filed evidence, and all the recommendations and directives identified in the Ontario Pipeline Coordinating Committee (“OPCC”) review.
- 1.4 NRG shall advise the Board's designated representative of any proposed material change in construction or restoration procedures and, except in an emergency, NRG shall not make such change without prior approval of the Board or its designated representative. In the event of an emergency, the Board shall be informed immediately after the fact.

#### **2 Project and Communications Requirements**

- 2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Facilities Applications.

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<sup>1</sup> The original Decision and Order dated February 2, 2007 included a deadline of December 31, 2007 for start of construction. This was amended on December 28, 2007 extending that deadline to December 31, 2008.

- 2.2 NRG shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. NRG shall provide a copy of the Order and Conditions of Approval to the project engineer, within seven days of the Board's Order being issued.
- 2.3 NRG shall give the Board's designated representative and the Chair of the OPCC ten days written notice, in advance of the commencement of the construction.
- 2.4 NRG shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether the work is being or has been performed in accordance with the Board's Order.
- 2.5 NRG shall file with the Board's designated representative notice of the date on which the installed pipelines were tested, within one month after the final test date.
- 2.6 NRG shall furnish the Board's designated representative with five copies of written confirmation of the completion of construction. A copy of the confirmation shall be provided to the Chair of the OPCC.

### **3 Monitoring and Reporting Requirements**

- 3.1 Both during and after construction, NRG shall monitor the impacts of construction, and shall file four copies of both an interim and a final monitoring report with the Board. The interim monitoring report shall be filed within six months of the in-service date, and the final monitoring report shall be filed within eighteen months of the in-service date. NRG shall attach a log of all complaints that have been received to the interim and final monitoring reports. The log shall record the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.
- 3.2 The interim monitoring report shall confirm NRG's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction.
- 3.3 The final monitoring report shall describe the condition of any rehabilitated land and the effectiveness of any mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and

recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

- 3.4 Within fifteen months of the in-service date, NRG shall file with the Board a written Post Construction Financial Report. The Report shall indicate the actual capital costs of the project and shall explain all significant variances from the estimates filed with the Board.

#### **4 Easement Agreements**

- 4.1 NRG shall offer the form of agreement approved by the Board to each landowner, as may be required, along the route of the proposed work.

#### **5 Other Approvals and Contracts**

- 5.1 NRG shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.
- 5.2 NRG shall not, without the prior approval of the Board, consent to any alteration or amendment to the Gas Delivery Contract or the Pipeline Cost Recovery Agreement as those agreements were executed on January 31, 2007, where such alteration or amendment has or may have any material impact on NRG's ratepayers.

**Schedule "B"**

**Board File Number (EB-2006-0243)**

**March 4, 2008**

**Board's Oral Decision - Hearing, in Aylmer, Ontario**

**February 28, 2008**

**Extracts (pages 138-150) from Transcripts**

1 obviously means we have to provide you with our submissions  
2 very quickly, but we need it very quickly.

3 **DECISION:**

4 The Board has heard submissions today from Natural  
5 Resource Gas Limited ("NRG") and the Integrated Grain  
6 Producers' Cooperative ("IGPC"). This proceeding relates  
7 to a Decision of the Board that was rendered on February  
8 2nd, 2007. That Decision granted NRG a leave to construct  
9 a 29-kilometre natural gas pipeline for the purpose of  
10 providing the gas distribution requirements of an ethanol  
11 plant proposed by Integrated Grain Producers' Cooperative,  
12 to be located in Aylmer. That Decision contained certain  
13 conditions and included a provision that any modification  
14 of the conditions required approval of this Board.

15 We have received submissions, both written and oral,  
16 with respect to non-compliance by both parties. This  
17 relates to the failure to deliver letters of credit and the  
18 failure to proceed with construction. It is not necessary  
19 at this point to go into the details of those delays.

20 The central issue is, first and foremost, IGPC's  
21 failure to deliver credit and the dispute as to the proper  
22 amount of that letter of credit. That delivery letter of  
23 credit is now set at \$5.3 million, and that is in the  
24 Decision I referred to. NRG has pointed to additional  
25 costs which they believe should be reflected in that letter  
26 of credit. That is, the letter of credit should be  
27 increased to reflect those additional costs.

1           Those costs are over and above the adjustment that is  
2 contemplated by Section 7.3, of the Pipeline Cost Recovery  
3 Agreement ("PCRA") which indicates that the letter of  
4 credit may have to be increased by any differential between  
5 the actual costs and the estimated costs that were used to  
6 determine the 5.3 million amount.

7           I am going to come to those costs in a moment.

8           The second issue was the Union Gas aid to construct  
9 and the third issue, a related issue, was the Lakeside  
10 Process Controls Limited advance payments. We have now  
11 resolved that the ethanol plant can deal directly with  
12 those suppliers and take NRG out of the loop.

13           There is a further issue related to IGPC's failure to  
14 pay NRG's invoices. The parties have agreed, on consent,  
15 that those disputes will be resolved elsewhere. And that  
16 this issue will not impact construction.

17           So, that leaves us with the matter of the letter of  
18 credit and the interpretation of Sections 7.3 and 7.5. There  
19 are really seven cost issues. Regarding the first four, the  
20 parties agree that the Board will receive written  
21 submissions from the parties. Those four items are the M9  
22 delivery costs that relate to the Union contract, the O&M  
23 expense, the capital tax and property taxes.

24           NRG has filed estimates of ongoing costs related to  
25 those four items that they believe would result in the  
26 event of the plant closing.

27           I should say at this juncture that the Board's

1 mandate, and we have stated it a number of times today, but  
2 repeat it on the record at this time, is that the Board  
3 must assume the worst possible case. We need to make sure  
4 that if the worst thing happens, which is to say everything  
5 gets built but no gas flows, for whatever reason, that the  
6 ratepayers of NRG are kept harmless.

7 That is the guiding rule throughout. So we have NRG's  
8 estimates of those costs. The parties have agreed that it  
9 will be resolved by this Panel that they will accept the  
10 result as binding, and that no further evidence is required  
11 with respect to those four matters. The parties agree that  
12 this can be dealt with by written argument, only. We will  
13 proceed in that fashion.

14 That, then, leads us to the additional three cost  
15 items that have been raised.

16 The first is the question of what decommissioning  
17 costs would be borne by the utility in the event that the  
18 IGPC facility had to be closed down. That is if the pipe  
19 has to be withdrawn from service are costs involved in that  
20 or if the pipe has to be capped or has to be integrated in  
21 the NRG system, are there costs to be considered.

22 The Board did consider this issue. It is not a new  
23 issue. It arose the last time. We received evidence and  
24 submissions from NRG on this. This is a transcript of  
25 February 1st, Volume 3, page 7, and it was to the effect  
26 that in the event this \$9 million asset was no longer  
27 needed and the ethanol plant ceased to exist, the pipe

1 could be integrated into the NRG's facilities. The cost of  
2 that would be some \$600,000 and that cost would go into  
3 rate base. Of course, that cost would also be borne by the  
4 ratepayers but NRG submitted at that time that the cost was  
5 relatively insignificant and the Board has accepted that.  
6 And that is the basis on which we intend to proceed in this  
7 hearing, as well.

8         That, then, takes us to the second issue which has  
9 been raised. This is a new issue. Mr. Bristoll said he  
10 discovered it late in the game after the previous decision.  
11 It is that is to say that there is a break-up fee, if I can  
12 call it that, with respect to the loan that NRG has  
13 arranged to finance this undertaking. That is, if the  
14 ethanol plant ceases operation, the loan will be paid off  
15 prematurely, the bank then wants an additional fee in lieu  
16 of its continuing interest stream, which of course they  
17 wouldn't receive in those circumstances.

18         It is the Board's view that this is a cost for NRG and  
19 for the NRG shareholder, not the ratepayer. It is a cost  
20 of financing this deal. It's a cost that NRG should have  
21 considered in making this proposal. Accordingly, we will  
22 not place this cost on either the ethanol plant or the  
23 ratepayers. The costs will be borne by the utility.

24         That takes us to the third and final issue, which is  
25 that in the event of a closure of the ethanol plant, the  
26 utility would in the ordinary course draw down on the LDC.  
27 The LDC is there for that very purpose. It is intended to



1 supplant, if I can put it that way, the income stream that  
2 would be lost by premature closing, and, as a result of  
3 that, there might be an income tax liability.

4 This, in the Board's view, is speculative. We believe  
5 that the best way to deal with this in the event it should  
6 transpire, is to have it dealt with by a future Panel in  
7 the context of a rate case. We are confident it can be  
8 dealt with adequately at that time.

9 This, then, takes us to the question of the leave to  
10 construct. This is Appendix "B" to the Board's Decision of  
11 February 2, 2007 containing the Conditions of Approval. We  
12 will amend the leave to construct and add a further  
13 condition, which I am going to call "mutual covenants of  
14 NRG and IGPC".

15 This is a schedule, which will form part of the leave  
16 to construct that sets out various dates at which IGPC will  
17 provide certain funding. It also provides certain dates on  
18 which NRG will proceed with different aspects of the  
19 construction.

20 The amended leave to construct which, incidentally, we  
21 will complete before we leave here today, makes this leave  
22 to construct contingent on compliance by the two parties  
23 regarding the undertakings set out in the schedule.

24 It is our understanding that this schedule has been  
25 prepared on consent of both parties. That means that in  
26 the event any of these dates or undertakings are not met,  
27 the leave to construct is null and void. These are

1 conditions of the leave to construct going forward.

2 If the parties want to keep this leave to construct in  
3 place, it is incumbent upon them to meet the commitments  
4 that they have undertaken in this Schedule.

5 There are certain commitments in the Schedule with  
6 respect to Union Gas. Union Gas is not a party to these  
7 proceedings. The Union Gas commitments we take as just  
8 timing incidents. They are obviously not commitments of  
9 Union Gas, and any action by Union Gas will not lead to any  
10 termination of the leave to construct, but the leave to  
11 construct is dependent on compliance with the covenants by  
12 both NRG and IGPC.

13 Any questions?

14 MR. THACKER: As long as it is clear that to the  
15 extent that NRG's commitments depend on Union Gas  
16 providing, for example, an M9 contract, it will be  
17 contingent on Union Gas delivering as according to the  
18 timeline?

19 MR. KAISER: Yes.

20 MR. THACKER: Thank you. That's it.

21 MR. KAISER: Mr. O'Leary?

22 MR. O'LEARY: Just a couple of things, sir.

23 One is that in hopefully the unlikely event that we  
24 end up in a position where leave is struck, I would hope  
25 that, sir, by making the leave contingent upon the  
26 observation of the schedule, that it would be clear to all  
27 parties that some other entity would be entitled to come

1 forward and seek a bypass application, and that NRG will  
2 not be opposing such an application?

3 MR. THACKER: That is not correct at all. There are  
4 other dynamics at play here with Union Gas, and they're not  
5 at issue here and I don't propose to raise them unless my  
6 friend wants to get into it.

7 MR. KAISER: I don't think that is necessary, Mr.  
8 Thacker.

9 This leave to construct will expire if NRG and IGPC  
10 cannot meet their requirements.

11 Once it expires, it will be open to any other party to  
12 apply to the Board for a leave to construct.

13 MR. THACKER: I understand that. As long as it is  
14 understood it is not a matter of consent, it is a term of  
15 the order, and I accept that.

16 MR. KAISER: It's a term of the order.

17 MR. ALKALAY: Mr. Chairman, we do have a problem,  
18 again from the financing perspective, that if the leave to  
19 construct simply expires without a replacement utility, we  
20 are in breach of our credit agreement.

21 We need to ensure that --

22 MR. KAISER: You can ensure this leave to construct  
23 stays in place, then.

24 MR. O'LEARY: Sir, that is the difficulty. If we have  
25 a counterparty that does not live up to it by accident or  
26 deliberately, the deal is dead, and you have a facility  
27 down the street that will go without supply.

1           MR. KAISER: Well, and it is open to you -- I mean,  
2 your client can apply for a leave to construct. If this  
3 utility decides it doesn't want to build this facility, and  
4 the leave to construct expires on its terms, then we have  
5 no doubt somebody else will build it. It could be your  
6 client. It could be Union Gas. It could be whoever. But  
7 there is nothing we can do about that. There is no point  
8 having a leave to construct that isn't a leave to  
9 construct. Either this is a real leave to construct or it  
10 isn't. The parties on consent have agreed to these steps.  
11 We take you at your word. We believe this leave to  
12 construct is going to stay in place. We take Mr. Thacker  
13 at his word that he wouldn't make these commitments if he  
14 didn't think his client could comply with them. We assume  
15 the same thing of IGPC.

16           MR. O'LEARY: I am just thinking as a compromise, and  
17 the concern being that if, in fact the leave does expire as  
18 a result of conduct which is not of IGPC's doing, that  
19 perhaps the order could indicate that -- and this is what  
20 we need for the purposes of going forward -- that the  
21 contracts that have been entered into between various  
22 suppliers and NRG, the design drawings, and any material  
23 that they have received, which we paid for, that the NRG  
24 would forthwith turn those over to IGPC or to its  
25 contractors at our direction.

26           MR. THACKER: I have to object. Your order made it  
27 absolutely clear if one or both of us do not comply, the

1 leave to construct expires and anyone can come forward.  
2 That is the right time to deal with this. Our concern is  
3 there may be some attempt to -- I will leave it at that.  
4 My submission is that is something to be dealt with if and  
5 when this leave to construct expires because of the non-  
6 compliance of one or the other of both of the parties. To  
7 deal with these contingencies in advance is, in my  
8 submission, not proper. It can be dealt with immediately  
9 upon any expiry.

10 MR. O'LEARY: For example --

11 MR. KAISER: What about this, Mr. O'Leary? I think  
12 this goes to what you say. What about if we add one  
13 further aspect to this? It would be something like this:  
14 In the event either party fails to comply with the terms of  
15 the schedule as set out, either party may apply to the  
16 Board requesting that the leave to construct be terminated.  
17 That will provide you an extra day, as opposed to some  
18 unilateral conduct which would cause your lenders to go  
19 berserk.

20 MR. O'LEARY: And such appropriate conditions and  
21 terms on that, including, for example, if we have provided  
22 NRG with the line of credit, with the letter of credit, 5.3  
23 million, it should be ordered they return it.

24 MR. KAISER: All right. Why don't we do this,  
25 gentlemen? Why don't you see if you can between the two of  
26 you work out some additional language to that effect?

27 It would be to the effect that: Where a breach of the

1 schedule occurs by either party, either party may apply to  
2 the Board for a termination of the leave to construct on  
3 such terms as seems just and appropriate.

4 MR. THACKER: I would agree with that.

5 MR. KAISER: Is that sufficient, Mr. O'Leary? You can  
6 raise whatever concerns you want at that time about  
7 drawings or refunding of payments or whatever.

8 MR. THACKER: Thank you.

9 MR. O'LEARY: Perhaps I could ask Mr. Kovnats to  
10 explain, from a commercial perspective, the difficulties  
11 that some of this presents.

12 MR. KOVNATS: Mr. Chairman, thank you for the  
13 opportunity. I apologize, I am not a regulatory lawyer at  
14 all. I am just a lowly commercial lawyer.

15 I am trying to understand the impact of the loss of  
16 leave to construct. Mr. Alkalay has properly pointed out  
17 that we will be in breach of virtually every one of our  
18 material agreements if the leave to construct expires.  
19 It's just because of the cross-default provisions.

20 The problem, the other problem we have is the leave to  
21 construct, if it is ever going to be cancelled or expire or  
22 terminate -- whatever the right word is, and I apologize  
23 for not knowing the right word -- we can't have a gap in  
24 the process. The process is very tight right now. We're  
25 supposed to be receiving the RFQs next week and then the  
26 shovels are supposed to be in the ground on St. Patrick's  
27 Day, in honour of Mr. O'Leary, of course.

1           If we have a breach after the construction contracts  
2 have been let and construction has started, we need to be  
3 able to have a smooth transition from -- if it is NRG and  
4 they're no longer at the table -- to somebody else. What I  
5 am really looking for is how, in this process, to be  
6 assured that if this circumstance happens -- not  
7 eventuality, sorry -- if it happens, how we can assure the  
8 smooth transition to continue the construction of the  
9 pipeline and the existing contractual arrangements. That's  
10 the only struggle I am having.

11           I appreciate the time the Board has given us today and  
12 I appreciate we're all working together to try and deal  
13 with the what-ifs, but the concern, of course, is that we  
14 are dealing with a scheduling order that is very tight.  
15 We're dealing with a crisis of confidence, as Mr.  
16 Alkalay has pointed out, and because of the confidence  
17 issue, how do we manage a transition if this is going to  
18 occur? That is really the question I was asking Mr.  
19 O'Leary, and I ask the Board. I am unclear how to deal  
20 with that.

21           MR. KAISER: Well, if there is a problem on your  
22 funding agreements of that nature that a hiatus between the  
23 old leave to construct and the new leave to construct would  
24 create a problem, I am sure there will be a mechanism that  
25 we can deal with that. This is not going to happen  
26 automatically. We have now added the clause which counsel  
27 will draft that provides that it will be on application of

1 either party for termination. They will have a right to  
2 come to the Board, to have the Board declare the leave  
3 to construct terminated by reason of a breach of the  
4 clause, and we will have a finding of fact of whether there  
5 was a breach of the clause and we can introduce an interim  
6 mechanism to take care of that technicality.

7 Obviously, if this happens, it will be serious. The  
8 parties will know this is a real prospect this leave to  
9 construct is going to be terminated, and they better find  
10 somebody else to step in the shoes of NRG if that happens.  
11 So time will be of the essence, but time is of the essence  
12 anyway. So maybe this will keep everyone facing the  
13 schedule that you have agreed upon.

14 So gentlemen, if you could draft up an order and we  
15 can get it signed before the 7:50 train leaves London, that  
16 will be good.

17 MR. ALKALAY: Mr. Chairman, can I get clarification on  
18 one matter please? In terms of written submissions and the  
19 timing of when we're going to hear back, because obviously  
20 that has to happen before the construction agreement is  
21 executed and before the LC is provided and so forth --

22 MR. KAISER: What about if we give you a week? Do you  
23 need a week, Mr. O'Leary? What's the earliest day you can  
24 get your comments in?

25 MR. O'LEARY: We can have them in in two days.

26 MR. KAISER: We will give you two days. We will give  
27 Mr. Thacker two days to reply, and we will give you two



1 days.

2 MR. MILLAR: Perhaps Monday.

3 MR. THACKER: It won't make any difference until about  
4 the 6th, because we don't get the bids in until the 5th and  
5 there will be a few days of evaluation.

6 MR. O'LEARY: I am just a little confused. I thought  
7 we were going to both make submissions. Were you intending  
8 to allow Mr. Thacker to see mine, then comment? Or we file  
9 them at the same time?

10 MR. KAISER: Yes. You come in in two days, he comes  
11 in two days later, and you get a final shot two days after  
12 that.

13 MR. O'LEARY: We can both file at the same time and  
14 make that Tuesday and you could make a decision shortly  
15 thereafter.

16 MR. KAISER: We are in your hands. Why don't you work  
17 that out? You are both experienced counsel. Tell us what  
18 you want.

19 MS. SPOEL: Remember, Mr. Thacker, in your scheduling  
20 you have to give us a day or two to read them.

21 MR. THACKER: Our submission is we give them to you on  
22 Thursday. If you give us a Decision on the Monday or  
23 Tuesday, it wouldn't have any impact on our timing.

24 MR. KAISER: If that is acceptable, can we proceed on  
25 that basis, gentlemen?

26 MR. O'LEARY: That is acceptable, sir.

27 MR. KAISER: We are not going to leave here until this

1 is finalized. So get to work.

2 --- Whereupon the hearing adjourned at 4:20 p.m.

3

## **Schedule "C"**

**Board File Number (EB-2006-0243)**

**March 4, 2008**

### **Additional Condition of Approval**

**[to be added to the Conditions of Approval (see Schedule A to this Decision and Order) attached to the Board Decision and Order granting Natural Resources Gas Limited leave to Construct natural gas pipeline [February 7, 2007 as amended on December 28, 2007]**

#### **6 Mutual Covenants**

- 6.1 NRG and IGPC agree that the schedule ("the Schedule") attached hereto will be adhered to in accordance with its terms and at the times set forth therein by the appropriate party and that the Leave to Construct is contingent upon such compliance by the parties of each aspect of the Schedule.
- 6.2 This condition is not effective as against Union Gas. Any delay by Union Gas of a task identified by Union Gas shall not be a basis for alleging non-compliance or breach of the Schedule by NRG, provided that both NRG and IGPC take all necessary steps to enable Union Gas to perform its tasks in accordance with the Schedule. If there is a delay in the Schedule by reason of a delay by Union Gas and the parties are unable to agree to an amendment of the Schedule, either NRG and IGPC may apply to the Board for a resolution thereof.
- 6.3 Upon an alleged failure to comply with the Schedule, either party may apply to the Board for such order or orders as are appropriate, including a termination of the Leave to Construct and such further or other relief as the Board deems appropriate for the circumstances.







