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Subject: FW: NL - Cost Overruns
Date: Wednesday, November 20, 2013 12:05:12 PM
Attachments: [image001.gif](#)
[image002.gif](#)
[DM_MTL-#3183447-v1-Compare_3183188v1-v3.DOCX](#)
[DM_MTL-#3183188-v3-Cost_Overruns_Clauses.DOCX](#)

Auburn,

Attached is the Cost Overruns language, clean and black lined to Canada's original text.

Best,

Xeno

From: Louise Bisson
Sent: November-20-13 10:10 AM
To: Xeno Martis
Subject: NL - Cost Overruns

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Louise Bisson | Adjointe juridique de Xeno Martis et Felix Gutierrez

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FMD Draft
dated November 20, 2013

COST OVERRUNS / CLAUSES

Proposed Language

~~"Cost Overruns" means in respect of the Project, on any date, an amount equal to: (A) the aggregate remaining project costs to achieve completion of the Project including (i) the remaining costs and payment obligations payable pursuant to the contracted items of the Project Budget including the cost of work completed but not yet paid for, plus (ii) any amounts set out in the Project Budget for non-contracted items of the Project Budget, plus (iii) all other remaining project costs including owners costs (included in the Project Budget but not covered by contract costs) and (iv) any appropriate contingencies and adjustments to such contingencies and escalation amounts and reasonably expected savings payable pursuant to the contracted items and non-contracted items of the Project Budget all as determined by the Independent Engineer, plus (iv) finance costs estimated to be payable to the Commissioning Date in excess of the amount specified for that item in the DG3 Project Budget — less (B) (i) total project costs in the DG3 Project Budget (\$[6.2] billion) less Cumulative Project Costs Incurred to date by the Project plus (ii) any cash deposits contained in the Escrow Account.~~

"Cost Overruns" means, on any date following the date upon which the Available LIL Construction Facility is equal to nil and the balance on deposit in the Working Capital Reserve Account is equal to nil (the "Cost Overruns Trigger Date"), an amount equal to the Cost to Complete.

To be added as covenants to the Project Financing Provisions:

- ~~1. 1. On the Closing Date and concurrent~~Concurrently with the delivery of each Funding Request or request for a Change Order [during the LIL Construction Period], Report from and following the Cost Overruns Trigger Date up to the Commissioning Date, the Partnership shall cause Devco to deliver to the Collateral Agent a certificate (the "Cost Overruns Certificate"): ~~(a) updating-);~~
- ~~(a) reporting on the Project Budget including the Costs~~Cost to Complete ~~[the Project], (b) ;~~
- ~~(b) advising of any changes to the Project Schedule and the expected Commissioning Date, (c) ;~~
- ~~(c) confirming the amount of Cost Overruns, if any, and (d) as at the date of such certificate; and~~
- ~~(a)(d)~~(d) confirming that any such Cost Overruns have been funded in accordance with the terms hereof. The amounts set forth in the Cost Overruns Certificate shall be confirmed by the Independent Engineer in a certificate delivered to the Collateral Agent concurrently with the Cost Overruns Certificate which shall include comments by the Independent Engineer on the adequacy of the funding of the Cost Overruns. ~~For certainty, the Costs to Complete [the Project] set out in the~~

COST OVERRUNS / CLAUSES - PAGE 2

~~Cost Overruns Certificate to be delivered on the Closing Date shall equal the amount set out in [the DG3 Capital Cost Estimates].~~

2. ~~2.~~—The Partnership hereby covenants and agrees that any ~~Costs~~ Overruns shall be funded as follows:
- (a) ~~(a)~~—on or prior to the ~~date of the first advance pursuant to the Project Finance Agreements following Financial Close~~Cost Overruns Trigger Date, an amount equal to the aggregate Cost Overruns, calculated as at ~~Financial Close~~the Cost Overruns Trigger Date, divided by the number of calendar years remaining to the expected Commissioning Date (the ~~"Initial Cost Overrun Payment"~~) shall have been funded;
- (b) ~~(b)~~—~~on or prior to the date of the first advance pursuant to the Project Finance Agreements in each calendar year anniversary of the Cost Overruns Trigger Date up to the Commissioning Date, if the Cost to Complete as at such date plus the Project Costs incurred and paid for since the Cost Overruns Trigger Date exceed the Cost Overruns reported as at the Cost Overruns Trigger Date, an amount equal to the aggregate Cost Overruns, calculated as of the end of the prior year such excess, divided by the number of calendar years remaining to the expected Commissioning Date (the "Annual Cost Overrun Payment") shall have been funded. (Example: if aggregate Cost Overruns were \$300 million as at December 2014 the Annual Cost Overrun Payment calculated in January 2015 would be \$300 million divided by 3 years (assuming Commissioning in December 2017) or a \$100 million payment — the Annual Cost Overrun Payment would be calculated again as at Decemebr 31, 2015 and December 31, 2016, assuming no additional cost overruns or savings in 2015; and 2016, additional payments to the escrow account of \$100 million would be required in each of January 2016 and January 2017); and~~
- (c) ~~(c)~~—the Initial Cost Overrun Payment and Annual Cost Overrun Payments shall be funded by way of an advance of cash by the Partnership into ~~an escrow account~~the Escrow Account. The ~~escrow account~~Escrow Account will be under the control of the Collateral Agent for the purpose of funding Cost Overruns and ~~subject~~ shall form part of the Security. Funds shall be released from the Escrow Account in a manner similar to that contemplated in Section [7.8] in connection with WCR Releases;
- (d) while any amount remains on deposit in the Escrow Account, all Eligible Project Costs shall be funded by the use of the amounts so deposited in the Escrow Account. If at any time between the Cost Overruns Trigger Date and the

COST OVERRUNS / CLAUSES - PAGE 3

Commissioning Date the balance outstanding in the Escrow Account is nil. Eligible Project Costs shall be funded through Contingency Equity Contributions or Additional Debt, as may be permitted under the terms hereof;

- (e) where immediately prior to Commissioning any balance remains outstanding in the Escrow Account, then upon Commissioning, such balance shall be released from the Escrow Account and applied at the Partnership's option; and
- (f) for all purposes of calculating the DER, the amounts deposited into the Escrow Account shall be deemed to form part of the Capital Account.

FMD Draft
dated November 20, 2013

Summary Report

November 20, 2013 9:59 AM

	Document	Location
Original	Cost Overruns @ Clauses	DM_MTL\3183188\1
Revised	Cost Overruns @ Clauses	DM_MTL\3183188\

Change Summary

	Number of Changes	Markup Format
Insertions	22	<u>Sample Text</u>
Deletions	29	Sample Text
Moved from	0	Sample Text
Moved to	0	<u>Sample Text</u>
Formatting	0	<u>Sample Text</u>
Total	51	

Formatted: Font: Not Bold

FMD Draft
dated November 20, 2013

COST OVERRUNS / CLAUSES

Proposed Language

"**Cost Overruns**" means, on any date following the date upon which the Available LIL Construction Facility is equal to nil and the balance on deposit in the Working Capital Reserve Account is equal to nil (the "**Cost Overruns Trigger Date**"), an amount equal to the Cost to Complete.

To be added as covenants to the Project Financing Provisions:

1. Concurrently with the delivery of each LIL Construction Report from and following the Cost Overruns Trigger Date up to the Commissioning Date, the Partnership shall cause Devco to deliver to the Collateral Agent a certificate (the "**Cost Overruns Certificate**"):
 - (a) reporting on the Cost to Complete;
 - (b) advising of any changes to the Project Schedule and the expected Commissioning Date;
 - (c) confirming the amount of Cost Overruns, if any, as at the date of such certificate; and
 - (d) confirming that any such Cost Overruns have been funded in accordance with the terms hereof. The amounts set forth in the Cost Overruns Certificate shall be confirmed by the Independent Engineer in a certificate delivered to the Collateral Agent concurrently with the Cost Overruns Certificate which shall include comments by the Independent Engineer on the adequacy of the funding of the Cost Overruns.
2. The Partnership hereby covenants and agrees that any Cost Overruns shall be funded as follows:
 - (a) on or prior to the Cost Overruns Trigger Date, an amount equal to the aggregate Cost Overruns, calculated as at the Cost Overruns Trigger Date, divided by the number of calendar years remaining to the expected Commissioning Date (the "**Initial Cost Overrun Payment**") shall have been funded;
 - (b) on each anniversary of the Cost Overruns Trigger Date up to the Commissioning Date, if the Cost to Complete as at such date plus the Project Costs incurred and paid for since the Cost Overruns Trigger Date exceed the Cost Overruns reported as at the Cost Overruns Trigger Date, an amount equal to such excess, divided by the number of calendar years remaining to the expected Commissioning Date (the "**Annual Cost Overrun Payment**") shall have been funded; and
 - (c) the Initial Cost Overrun Payment and Annual Cost Overrun Payments shall be funded by way of an advance of cash by the Partnership into the Escrow Account.

The Escrow Account will be under the control of the Collateral Agent for the purpose of funding Cost Overruns and shall form part of the Security. Funds shall be released from the Escrow Account in a manner similar to that contemplated in Section [7.8] in connection with WCR Releases;

- (d) while any amount remains on deposit in the Escrow Account, all Eligible Project Costs shall be funded by the use of the amounts so deposited in the Escrow Account. If at any time between the Cost Overruns Trigger Date and the Commissioning Date the balance outstanding in the Escrow Account is nil, Eligible Project Costs shall be funded through Contingency Equity Contributions or Additional Debt, as may be permitted under the terms hereof;
- (e) where immediately prior to Commissioning any balance remains outstanding in the Escrow Account, then upon Commissioning, such balance shall be released from the Escrow Account and applied at the Partnership's option; and
- (f) for all purposes of calculating the DER, the amounts deposited into the Escrow Account shall be deemed to form part of the Capital Account.