

**Bashaw Oil Corporation**  
**Applications for Proximity**  
**Critical Sour Wells**  
**Nisku Formation, Drayton Valley Area**

**Costs Awards**

June 12, 2018

**Alberta Energy Regulator**

Costs Order 2018-01: Bashaw Oil Corporation, Applications for Proximity Critical Sour Wells, Nisku Formation, Drayton Valley Area

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## Contents

Introduction.....	1
Background.....	1
Costs Claims.....	2
The AER’s Authority to Award Costs .....	3
Costs Claim of the Drayton Valley Landowners.....	4
Costs Factors and Principles.....	4
Legal Fees .....	5
Legal Disbursements.....	7
Experts’ Fees and Expenses.....	9
Participants’ Honoraria and Expenses .....	12
Costs Claim of Brazeau County .....	16
Entitlement to Costs .....	16
Order .....	18
Appendix 1   Summary of Costs Claimed and Awarded .....	19



**Bashaw Oil Corporation  
Applications for Proximity  
Critical Sour Wells  
Applications 1842705, 1851246,  
1851250, and 001-00400207**

**Costs Order 2018-01  
Costs Application 1905494**

## **Introduction**

### **Background**

[1] Bashaw Oil Corporation filed application 1842705 on October 29, 2015, and applications 1851246 and 1851250 on February 2, 2016, under section 2.020 of the *Oil and Gas Conservation Rules*, to drill and operate three proximity critical sour wells on a multiwell pad in Legal Subdivision 9, Section 35, Township 49, Range 7, West of the 5th Meridian, about 2.3 kilometres east of Rocky Rapids, Alberta.

[2] On December 20, 2016, the Alberta Energy Regulator (AER) issued a notice of hearing. The panel granted full participation rights to 49 landowners who subsequently chose to collaborate as the Drayton Valley Landowners (the landowners), which at the time of the hearing was comprised of 41 members, and partial participation rights to Brazeau County (the County) and the Eagle Point-Blue Rapids Park Council (Parks Council).

[3] The panel held a prehearing meeting on March 13, 2017, in Drayton Valley to hear the parties' views on the scope of the hearing and participation, and procedural matters. On June 2, 2017, the panel issued a notice that the hearing would commence on September 6, 2017, in Drayton Valley.

[4] On June 14, 2017, Bashaw advised the AER that it had new data on the expected hydrogen sulphide (H<sub>2</sub>S) content and release rate for the well. As a result, on June 19, 2017, the AER advised the parties by letter that the proceeding would be placed in abeyance until Bashaw had updated all materials associated with the well applications. The panel issued an amended notice of hearing on July 25, 2017, noting the revisions to the well applications and setting a new deadline for submitting requests to participate in relation to the application revisions.

[5] On October 4, 2017, the AER rescheduled the hearing for December 13, 2017, and incorporated Bashaw's *Water Act* application (001-00400207) related to construction of the wells, filed on August 31, 2017, into the proceeding. Hereafter, the *Water Act* application and the well applications are collectively referred to as the applications.

[6] On October 3, 2017, the landowners submitted a motion to compel Bashaw to provide full and complete responses to 60 of their information requests. In response to the motion, the panel directed Bashaw to provide complete answers to 19 of the landowners' requests. On October 26, 2017, Bashaw filed a motion to strike portions of the expert evidence filed by the landowners. The panel declined to strike the evidence, ruling that it would determine the relevance and weight of the evidence at the end of the hearing.

[7] After an oral hearing, before hearing commissioners H. Kennedy (presiding), B. Zaitlin, and C. McKinnon, the AER issued its decision denying the applications on March 28, 2018, in *Decision 2018 ABAER 002: Bashaw Oil Corporation; Applications for Proximity Critical Sour Wells, Nisku Formation, Drayton Valley Area*.

### Costs Claims

[8] On May 10, 2017, the landowners filed an application for \$185 753.50 in advance funds. On May 23, 2017, the AER awarded the landowners \$30 000.00 in advance funds for their participation in the hearing.

[9] On July 5, 2017, the landowners filed an application for interim costs of \$113 107.42 or \$113 689.32.<sup>1</sup> In a decision dated July 27, 2017, the AER panel determined that it would not exercise its discretion to award interim costs to the landowners.

[10] After the hearing, the AER received costs claims of \$443 062.10 from the landowners and \$82 235.11 from the County. No costs claim was filed by the Parks Council. The cost process was closed on March 14, 2018.

[11] In exercising its discretion to make this order, the panel considered original cost estimates set out in the landowners' requests for advance funds and interim costs, the scope of the proceeding as we defined it, and our many reminders about that scope to both the landowners and the County. We have also considered the costs submissions from the landowners and the County, Bashaw's responses to each submission, and the replies of the landowners and the County.

[12] The AER awards the landowners \$166 729.55 for fees, honoraria, expenses, and disbursements, and \$8181.02 for GST, less \$30 000.00, which was the amount of advance funds, for a total of \$144 910.57. The AER denies the County's costs claim and makes no award to the County. Appendix 1 summarizes the costs claimed and awarded.

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<sup>1</sup> The interim costs application contained discrepancies in the amount requested between appendix C and form E1.

## The AER's Authority to Award Costs

[13] The AER has broad discretion in deciding whether and how to award costs. Section 64 of the *Alberta Energy Regulator Rules of Practice (Rules of Practice)* states the following:

The Regulator may award costs to a participant if it finds it appropriate to do so in the circumstances of the case, taking into account the factors listed in section 58.1.

[14] In determining who is eligible to submit a claim for costs, the AER is guided by the *Rules of Practice*, particularly sections 58(1)(c) and 62:

58(1)(c) “participant” means a person or a group or association of persons who have been permitted to participate in a hearing for which notice of hearing is issued or any other proceeding for which the Regulator has decided to conduct binding dispute resolution, but unless otherwise authorized by the Regulator, 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.

62(1) A participant may apply to the Regulator for an award of costs incurred in a proceeding by filing a costs claim in accordance with the Directive.

(2) A participant may claim costs only in accordance with the scale of costs.

(3) Unless otherwise directed by the Regulator, a participant shall

(a) file a claim for costs within 30 days after the hearing record is complete or as otherwise directed by the Regulator, and

(b) serve a copy of the claim on the other participants.

(4) After receipt of a claim for costs, the Regulator may direct a participant who filed the claim for costs to file additional information or documents with respect to the costs claimed.

(5) If a participant does not file the information or documents in the form and manner, and when directed to do so by the Regulator under subsection (4), the Regulator may dismiss the claim for costs.

[15] When assessing costs, the AER is guided by Division 2 of Part 5 of the *Rules of Practice*; *Directive 031: REDA Energy Cost Claims*; and *AER Bulletin 2014-07: Considerations for Awarding Energy Costs Claims and Changes to the AER's Process for Reviewing Energy Costs Claims*. The bulletin advises that parties and applicants are expected to try to resolve costs claims. Where costs are not resolved, costs submissions should address the factors from the *Rules of Practice* that appear relevant to the particular costs claim. The bulletin also advises that the AER will only review the aspects of a costs claim that are identified as being disputed with something more than a bare denial. Costs not disputed

may be awarded by the AER without further consideration because the AER does not necessarily audit costs claims.

### Costs Claim of the Drayton Valley Landowners

[16] The total costs claim of the landowners is \$443 062.10, broken down as follows:

legal fees	\$281 430.50
expert and consultant fees	\$101 048.75
honoraria	\$21 200.00
disbursements and expenses	\$20 470.17
GST	\$18 912.68

### Costs Factors and Principles

[17] The landowners submit that this proceeding was complicated, the application information changed, and the materials were voluminous, and that their costs are directly related to the matters contained in the notice of hearing and the panel’s prehearing decision, and to the preparation and presentation of the participants’ submissions. They also submit that their contribution to the hearing was substantial and robust (marshalling expert and intervener evidence; ensuring timelines were met and matters addressed in a cost-efficient and time-efficient manner) and that the testimony of experts and individual landowners generated significant questions from AER counsel and the panel, and contributed to a better understanding of the issues.

[18] The landowners submit that the steps they took in this proceeding were not improper, vexatious, or unnecessary, or taken through negligence, mistake, or excessive caution. On the contrary, the landowners submit that the costs claimed are reasonable and that their participation was responsible and efficient. They formed a group to better coordinate their overall participation in the proceeding, thus limiting costs and preventing duplication of efforts. They requested information from Bashaw before the hearing, and they put extensive work into the submissions to reduce the amount of cross-examination and examination-in-chief. They also used technologies such as drone evidence and Skype to contribute to the efficiency and efficacy of the proceeding. Additionally, they noted that they were open to dispute resolution.

[19] The landowners submit that they are not able to absorb the costs of their involvement in this proceeding, and no other sources of funding were available.

[20] Bashaw submits that the costs claim by the landowners is excessive and unreasonable. To demonstrate that the overall claim is excessive, Bashaw refers to a costs order related to the last AER proceeding involving sour facilities in the Pembina field: *AER Costs Order 2014-001: Grizzly Resources Ltd. and Sinopec Daylight Energy Ltd.* In this costs order, the AER noted that the matter was “unique and complex” because the “proceeding involved two applicants with eleven related wells.” The participants in



this case were awarded \$218 498.86—just under half of the costs claimed by the landowners in this proceeding.

[21] Bashaw submits that the landowners did contribute to the hearing but that their contribution was not commensurate with the costs claimed and that they should not expect another party to bear all of the costs. They also noted that the landowners' excessive, repetitive, and largely irrelevant questions and information requests unnecessarily lengthened the proceeding.

[22] Bashaw submits that the landowners' costs for expert witnesses are excessive in the cases of Dr. Zelt, Dr. Batterman, and Dr. Coppock because they were not directly and necessarily related to the matters contained in the notice of hearing and unreasonable in the cases of Mr. Wallis and Veritas Litigation Support due to the lack of relevance.

[23] Bashaw submits that the landowners' claim for intervener honoraria is in excess of what is allowed by *Directive 031*.

[24] The landowners and Bashaw agree that the \$30 000 in advance funds awarded to the landowners will need to be deducted from any final costs award.

#### Views of the Panel

[25] Costs are awarded based on the factors set out in the *Rules of Practice* and *Directive 031* and must be reasonable and necessary in regards to the subject matter, scope and complexity of the applications, and length of the hearing. We are satisfied that the use of legal counsel and expert witnesses was justified. We feel that the landowners did contribute to the proceeding but did not keep within our scope directives in numerous instances, despite repeated warnings that they were pushing the boundaries regarding scope. The panel accepts that there are no other funding sources available for the landowners. We will consider each type of cost claimed in this decision.

[26] The panel agrees with both parties that the advance funds awarded need to be deducted from the amount of the final costs award.

#### Legal Fees

[27] The landowners submit that this was a complex and challenging proceeding, which required lawyers who could specifically deal with certain areas in respect to the applications and the preparation of documents. Assistance from a number of lawyers was required to substitute for lawyers who left the firm, went on maternity leave, or were unavailable due to scheduling conflicts. The use of a student contributed significantly to the efficiencies and reduction in costs.

[28] The landowners also submit that the number of lawyers involved was justified due to the complexity of this file, as evidenced by the voluminous materials, number of parties, changes in the well

applications and materials, the tight timelines for filing and responding, client management, and many discussions with legal counsel. The landowners also indicate that the assertion that the issues raised by the applications are well understood is false. While some interveners have had experience on similar files, the applications at issue here were different from the others. For example, significant information that was included in previous applications was not addressed in Bashaw's applications. The landowners submit that these costs were necessary to provide assistance to clients who required an understanding of the process and the application. Ultimately, the ease by which the landowner panels presented their views at the hearing in an honest, concise, and direct manner was the direct result of the preparation and time taken to prepare them for the hearing.

[29] Bashaw submits that the legal costs claimed by the landowners are excessive having regard for the circumstances and that a substantial reduction in legal costs is required. Given the history of sour well licence applications in the Rocky Rapids area, and the previous involvement of some of the individual landowners in similar proceedings, the issues should have been well understood. While Bashaw does not dispute that the use of second counsel was justified in this proceeding, it notes that the use of nine different lawyers at varying levels of seniority is unprecedented and unwarranted. Bashaw also submits that where senior counsel was used, the expectation is that senior counsel will apply their experience and judgement to manage the file in an efficient and cost-effective manner. That did not happen in this case.

[30] With respect to the March 13, 2017, prehearing meeting, Bashaw submits that there was no need for two senior counsel, Mr. McElhanney and Mr. Secord, to attend. Costs should be awarded for the attendance of only one senior counsel.

#### Views of the Panel

[31] The panel awards the landowners costs of \$121 800 plus GST for Ackroyd LLP's legal fees.

[32] We considered the factors set out in *Directive 031* and specifically the complexity of the matter, the reasonableness of the costs claimed, and the use of multiple counsel. We agree with Bashaw that these applications were not particularly complex and did not warrant the time claimed by the landowners' counsel. We therefore conclude that the total amount of legal fees claimed is unreasonable.

[33] We advised the landowners in our decision on the application for advance funds that this proceeding did not involve particularly complex issues. Despite this, the landowners spent a significant amount of money preparing evidence that was not helpful to us. We agree with Bashaw that the landowners should have understood the issues and hearing process reasonably well given the history of sour well licence applications in the area and the previous involvement of some of the individual landowners in similar proceedings. We do not accept the landowners' assertion that the volume of material was exceptional and note that the changes in the applications, with the exception of the *Water Act* application, did not significantly affect the nature of the evidence that the landowners chose to submit. Further, no uniquely complex legal issues arose in this matter.

[34] In assessing the reasonableness of the claim for legal fees, the panel considers the total amount of legal fees as the primary consideration. The landowners' costs claim does not demonstrate that 1100 hours of billable time was reasonably necessary. This amount represents 137.5 eight-hour workdays by counsel, which is extraordinary for a seven-day hearing for a project of this scope. In addition, the AER normally does not award costs, including those for legal fees, incurred before the notice of hearing is issued, and *Directive 031* states that costs for participating in alternative dispute resolution are not recoverable through the AER's costs recovery process.

[35] We also note that the landowners posed a large number of information requests, but many of these requests were not relevant to the proceeding. Further, a considerable portion of the legal fees was for work with expert witnesses, whose evidence was largely not helpful to us, as discussed below, and therefore legal fees relating to that evidence cannot be awarded in full.

[36] Our conclusion on legal fees recognizes that the landowners group was comprised of many individuals, that dealing with a group of this size would require considerable effort by counsel, and that the proceeding undoubtedly benefited from efficiencies resulting from those individuals working as a group. We consider it appropriate to award fees for a senior lawyer and a junior lawyer.

[37] The landowners' costs claim includes fees for several lawyers, partly resulting from personnel issues at Ackroyd's offices that led to changes in lawyers and the use of several lawyers. Those are irrelevant considerations for this costs claim and do not persuade the panel.

[38] We would like to remind the parties that AER costs awards are not intended to be a full indemnification of the costs incurred by a participant in an AER proceeding and view an award of \$121 800 for legal fees to the landowners as fair for this proceeding. This amount covers fees for prehearing and preparation matters (150 hours for a senior lawyer at \$350 per hour and 250 hours for junior counsel, in this case an articling student, at \$140 per hour) and fees for participation in the hearing itself, including in the closing argument (70 hours each for senior and junior counsel).

### Legal Disbursements

[39] For invoices from Eldor-Wal Registrations Inc. for Queen's Bench and Provincial Court search fees, the landowners contend that corporate support was needed to conduct these searches undertaken to bring forward evidence on Bashaw's financial capability to safely carry out its responsibilities arising from the applications. This led to the review of the AER's liability requirements, which ultimately led to cross-examination in those areas.

[40] Bashaw questions the relevancy of these invoices, which relate to Queen's Bench and Provincial Court search fees. Bashaw submits that these costs are not properly claimable as they relate to matters not relevant to the AER's jurisdiction.

[41] Bashaw notes that it does not take issue with counsel travel being claimed for scheduled events—the prehearing meeting (March 13, 2017), hearing planning meeting (September 8, 2017), or hearing. Bashaw outlined its concerns with the costs claimed for travel between Edmonton and Drayton Valley or Calgary conducted outside of the hearing period. It states that, historically, the AER has not awarded costs for travel other than to a hearing (or prehearing meeting) and submits that travel costs should likewise not be awarded here.

[42] Bashaw also states that disbursements and other charges claimed for travel not related to scheduled events should be disallowed: fuel costs claimed for several trips to Drayton Valley on dates not associated with the prehearing meeting or the hearing, and meal charges claimed outside of these periods. In relation to meal claims during the prehearing meeting or hearing, some exceed the limit of \$40 per day. These costs are not in accordance with *Directive 031* requirements.

[43] Bashaw disputes the disbursements claimed for medical assessments for several members of the landowners group. From the outset, Bashaw has argued that this evidence was not relevant or necessary. Further, only one landowner brought forward this evidence at the hearing. Bashaw submits that these costs should be disallowed with the exception of the claim for the evidence regarding the landowner's daughter.

[44] The landowners submit that these are reasonable disbursements because they relate to concerns regarding health susceptibility expressed at the very early stages of the proceeding. The process of acquiring the medical assessments allowed the interveners and their counsel to review the documents and discuss the prospect of having to give evidence to the AER, the County, and Bashaw.

#### Views of the Panel

[45] The panel awards the landowners' costs for Ackroyd LLP disbursements in the amount of \$12 206.47, plus GST and provincial hotel tax.

[46] The claim for disbursements for Eldor-Wal searches is denied. We are not satisfied that these searches are directly related to this proceeding, including Bashaw's capability to safely carry out the proposed project.

[47] As noted above, we believe that the formation of the landowners group created efficiencies and that the efforts of counsel to effectively organize the group contributed to these efficiencies. We recognize that it was not feasible for all members of the group to travel to Edmonton to meet with counsel. Accordingly, we view the claimed travel costs of two counsel, for travel that occurred after the notice of hearing was issued, to be appropriate. However, as per *Directive 031*, amounts for meals and accommodations are only permitted during the hearing phase of the proceeding, and meal claims during this phase are limited to \$40 per day. We award costs for these disbursements.

[48] Regarding disbursements for medical assessments for members of the landowners group, the AER does not typically award costs in relation to reports it does not receive. However, in the circumstances of this matter and because Bashaw agreed on the amount, the panel awards the costs for a medical assessment of the daughter of the landowner who provided evidence (*in camera*) at the hearing.

### Experts' Fees and Expenses

#### Dr. Brian Zelt

[49] The landowners submit that Dr. Zelt provided relevant and helpful evidence to the panel as a result of his review of risk analysis, air quality, and modelling. The landowners note that Dr. Zelt's report and evidence highlighted that the output of the current ERCBH2S model was not necessarily incorporated into the emergency response plan (ERP) and had important implications regarding response with respect to meteorology and changes in event conditions. The contributions of scientific advisors are the only means for review of the approval process (confirmation, challenge, change, identification of gaps). Denial of these fees will result in a lack of this review on future applications.

[50] Bashaw contends that Dr. Zelt's evidence at the hearing confirmed that he was, in large part, challenging the ERCBH2S model, which the panel confirmed was beyond the scope of the proceeding. Even if Dr. Zelt's evidence was not beyond the scope of the hearing, it was of little if any value or assistance. It did not challenge Bashaw's emergency planning zone (EPZ) calculations or its use of the ERCBH2S model. It was an academic exercise that had little if anything to do with Bashaw's applications. Bashaw submits that Dr. Zelt's costs should be disallowed in their entirety or reduced substantially.

#### Dr. Stuart Batterman

[51] The landowners submit that Dr. Batterman's report and testimony drew from *Directive 060: Upstream Petroleum Industry Flaring, Incinerating, and Venting* and identified shortfalls in Bashaw's compliance with the *Directive 060* requirements and other elements in Alberta regulatory guidance. Further, the landowners submit that Dr. Batterman understands the application of *Directive 060* and air quality policies in Canada, the United States, and other countries, is highly respected for his work and experience, and brings current scientific knowledge and tools to bear in understanding and predicting health effects from pollutant exposure during well development and testing (including flaring).

[52] Bashaw responds that Dr. Batterman, an academic from the University in Michigan, does not understand the regulatory regime administered by the AER. Bashaw further submits that Dr. Batterman was by his own admission challenging *Directive 060* requirements (as allegedly not being protective of human health) and the methodology and parameters of AERflare, AERSCREEN, AERMOD, and the *Alberta Ambient Air Quality Objectives*. Bashaw contends that Dr. Batterman's costs should be disallowed in their entirety or at the very least reduced substantially.

Dr. Robert Coppock

[53] The landowners submit that Dr. Coppock provided detailed analysis with respect to the susceptibility of their animals to challenges relating to ingress/egress and emissions. Dr. Coppock has expertise in emergency response planning as it pertains to toxicology and that any challenge to his expertise is trite and trivial. In his report, he provided the basic elements of a written proactive emergency animal care welfare plan. He highlights that omitting such a plan, as Bashaw did here, is unsatisfactory and does not meet current animal welfare standards. Scientific evidence was provided that the ERP must define, in writing, the interactivity and interoperability with animal owners who are the primary animal caregivers and stakeholders. Dr. Coppock also provided a brief overview of sulphur dioxide toxicosis in cattle.

[54] Bashaw responds that Dr. Coppock's expert evidence was not necessary because much of his evidence was already well understood and not denied by Bashaw (e.g., toxicity of H<sub>2</sub>S and sulphur dioxide, and adverse effects on animals and livestock associated with exposure). Further, Dr. Coppock's evidence about the challenges associated with moving livestock and barns not being airtight did not require expert testimony, because common sense and experience would lead the panel to such a conclusion. Also, while Dr. Coppock claimed to be an expert in emergency response planning, he is not an expert in this area and this was not the basis on which he was put forward as an expert. Bashaw submits that Dr. Coppock's claim should be reduced substantially on the basis that his evidence was of little if any assistance to the panel.

Cliff Wallis (Cottonwood Consultants Ltd.)

[55] The landowners submit that Mr. Wallis provided detailed evidence in respect to the impacts of the proposed project on the environment, biodiversity, and wetlands. There were serious issues of process related to wetlands and ravine setbacks that needed to be exposed and challenged because these were not fully addressed by Bashaw in its applications, and Mr. Wallis efficiently and effectively provided a detailed examination of these issues.

[56] They state that it was Bashaw's own actions that resulted in an increased time commitment by Mr. Wallis. These actions include revisions to the well applications; Bashaw's resistance to providing information in the information request process; lack of adherence by Bashaw to recommendations in policy and guidance from Alberta Environment and Parks; and the volume of information in the applications and information requests that needed evaluation.

[57] Bashaw responds that Mr. Wallis's expert knowledge was of limited utility. In addition, Mr. Wallis's actual fee was more than double what he quoted in the landowners' claim for advance costs. Bashaw submits that this is unreasonably large in comparison with the proposed surface location and very low environmental impact of the project.

## Veritas Litigation Support

[58] The landowners submit that the Veritas drone evidence was pertinent to the landowners' issues and depicted the proposed well pad and egress routes in relation to their properties. The drone video showed the bus route and the negative impact of an unplanned incident on that route, the location of the individual landowners, the proximity of the pad site to residences and the ravine, and the topography that will impede egress away from a plume. The landowners contend that this provided unparalleled value. In response to Bashaw's submission that the video is misleading, the landowners submit that (a) the video reflected what would occur in the case of an incident at certain parts per million and (b) it could be argued that a notional circle is equal to the notional emergency planning zone or other circles used by Bashaw.

[59] The landowners refer to hearings where applicant energy companies agreed that the cost of Veritas's drone video evidence was reasonable and paid the invoice without contest. Where applicants have challenged the Veritas cost claim, examples are provided of costs awards approving the claim and finding that the video aids assisted interveners in presenting evidence, assisted the panel in understanding the evidence, and assisted in making the hearing process more efficient. The landowners submit that the rates charged are consistent with the AER's scale of costs and reasonable taking into account the costs of equipment and time involved in drone operations and postproduction editing and graphics enhancement.

[60] Bashaw argues that Veritas's claim of \$8986.20 for a drone video, of which \$6854.40 is claimed as professional fees, is excessive. Bashaw contends that the drone video added little if any value to the hearing. It was misleading and appeared to show an extent of hazard and risk that does not exist. Bashaw contends that \$2131.80 (the hard cost of the drone video excluding professional fees) is more in line with its understanding of industry costs for drone videos. Bashaw submits that the costs of the drone video should be disallowed or substantially reduced.

## Views of the Panel

[61] The panel recognizes that Dr. Zelt is a very accomplished expert in air dispersion modelling and notes that he provided interesting evidence. However, Bashaw is correct that his evidence was largely a challenge to the ERCBH2S model, which was beyond the scope of the proceeding. While some of Dr. Zelt's evidence was within the scope of the proceeding, it was still of limited value in helping us decide on the well applications because it did not challenge Bashaw's EPZ calculations or suggest that Bashaw used the ERCBH2S model incorrectly. Bashaw should not be required to pay costs for evidence that is not directly related to its applications. Furthermore, in both the advance funds and the interim costs decisions, we raised concerns that the work proposed by Dr. Zelt was not limited to or directly and necessarily related to the hearing issues. For these reasons, we award \$3000.00 of the requested \$24 012.50 for Dr. Zelt's fees, plus his disbursements.

[62] We considered Dr. Batterman's evidence to be of little help in considering Bashaw's applications, and it was largely unnecessary. Bashaw is correct that Dr. Batterman's evidence challenged *Directive 060*

requirements as allegedly not being protective of human health and the methodology and parameters of AERflare, AERSCREEN, AERMOD, and the *Alberta Ambient Air Quality Objectives*. These matters were outside the scope of the hearing, and costs related to them are not recoverable under the AER cost regime. In both the advance funds and interim costs decisions, we raised concerns that the work proposed by Dr. Batterman was not limited to or directly and necessarily related to the hearing issues. Further, the statement of account provided to support Dr. Batterman's costs of \$20 520 provides no meaningful description of the nature of the work done, which makes it impossible to evaluate the claim. For example, a lump sum of 72 hours for preparation does not explain the amount claimed. However, Dr. Batterman's evidence did provide us with a better understanding of the health effects associated with flaring. On that basis, we award \$5000 for Dr. Batterman's fees. No claim was made for disbursements for Dr. Batterman.

[63] Dr. Coppock provided evidence that we considered helpful in understanding issues related to emergency planning for livestock and pets. Dr. Coppock provided a report to the panel and testified for about one hour. Of the claim of \$34 429.50, we award costs of \$9000.00 for his fees for providing evidence and assisting counsel, plus disbursements as claimed, excluding for mileage for travel outside of the hearing phase of the proceeding.

[64] We found the evidence of Mr. Wallis to be of some help in understanding the issues around slope, erosion, and wetlands. However, we consider his fees of \$15 558.75 to be excessive given the limited nature of his contribution. Mr. Wallis provided evidence at the hearing for only three hours. While it is to be expected that experts may assist counsel with their examination of witnesses and closing argument, we find that the claim of more than 10 hours to assist counsel to be excessive. We deny Mr. Wallis's time to attend the closing argument because his attendance was not necessary. We award fees of \$5000 plus disbursements as claimed in accordance with *Directive 031*.

[65] We considered the drone footage provided by Veritas to be helpful and so award costs for the video itself. We also award some postproduction expenses associated with the footage. However, the enhanced graphics were of little probative value. In total, we award a global amount of \$4500.00 of the \$8986.20 claimed.

## Participants' Honoraria and Expenses

### Honorarium for Forming a Group

[66] The landowners submit an honorarium claim of \$10 000.00 for forming a group. The landowners group consisted of individuals who own or occupy (or both) many parcels of land in close proximity to the proposed well site. The group was created to collectively manage and express the individuals' concerns regarding the impacts of the applications. The landowners note that Ms. Kelly was instrumental in forming this group, which led to significant efficiencies in the presentation of the individual landowner evidence.



[67] The landowners assert that this group honorarium is similar to the amount that was awarded to the Sturgeon Landowners Group in *AUC Decision 2011-489* on the Heartland Transmission Project. In awarding this amount, the Alberta Utilities Commission recognized the considerable organizational activities undertaken on behalf of the group and noted that the group's formation likely reduced duplication of costs and effort and was beneficial to the hearing process. The landowners submit that the efforts undertaken in the Bashaw matter equalled or exceeded the efforts in the Heartland matter (counsel for the landowners was also counsel for the Sturgeon Landowners Group).

[68] Bashaw refers to section 6.1.1, "Honorarium for Forming a Group," in *Directive 031*, which states that "such awards are generally \$300.00 to \$500.00" and that awards above \$500.00 "may be considered" but only "in exceptional cases." Bashaw submits that this is not an exceptional case that warrants an honorarium above \$500.00.

[69] Bashaw contends that there is no valid comparison between the Heartland Transmission Project and Bashaw's applications. The Heartland Transmission Project was a major transmission line in the metropolitan Edmonton area that had the potential to affect hundreds of thousands of stakeholders. By contrast, Bashaw's applications were for three wells drilled from a single pad site. As well, the Sturgeon Landowners Group had over 200 members, while the landowners group had approximately 39 members.

[70] The landowners also submit that Ms. Kelly was fully aware of the issues in the hearing, and her activities as far back as September 2015 ultimately led to a more efficient intervention on the part of landowners. There was no overlap because the respective roles were well understood by the interveners and legal counsel. Counsel involvement beginning in September 2016 resulted in efficiencies in terms of understanding process.

[71] Bashaw notes that Ms. Kelly appeared to be seeking compensation as though she were a consultant for the landowners, because the justification for the group honorarium includes everything she did in relation to Bashaw's applications since September 2015. Bashaw also submits that Ms. Kelly's claim began back in September 2015, 15 months prior to the commencement of the hearing. As such, the landowners cannot expect to have their legal costs and a group honorarium paid when the activities of counsel and clients seem to have overlapped for a long period of time.

[72] Bashaw submits that Ms. Kelly claimed \$1100 for ERCBH2S modelling carried out by Shuming Du of Du and Associates. Dr. Du was not called as a witness, and his modelling results were not put into evidence by the landowners. Accordingly, this expense is clearly improper and should be disallowed in its entirety.

[73] The landowners reply that the ERCBH2S modelling carried out by Dr. Du was in fact put into evidence on two separate occasions (a request to participate submission and the landowners' written submission).

## Views of the Panel

[74] An honorarium of \$500 for forming a group is the maximum amount contemplated in *Directive 031* unless exceptional circumstances exist. The panel does not consider this to be an exceptional circumstance, and so we believe this is an appropriate sum for this matter. The formation of a group was of assistance to the panel and increased the overall efficiency of the proceeding. However, forming a group and acting efficiently in a proceeding is something expected of all participants and does not warrant an increase in the amount of the honorarium by 2000 per cent. An honorarium is awarded for a service for which payment is not normally required; it is not intended to be direct compensation for time spent.

[75] *Directive 031* contemplates an honorarium for a participant who prepares a submission without expert help. Ms. Kelly and the landowners as a group had a great deal of expert help, and therefore a preparation honorarium is not appropriate.

[76] The amount claimed for modelling work by Dr. Du, an individual who did not testify, is not recoverable.

## Attendance Honoraria

[77] The landowners submit a claim for attendance honoraria of \$11 200 on behalf of 18 of its members. They state that their attendance at the hearing was an indication of their interest in the proceeding and that it put a human face on the matter. Exceptional circumstances warranting an award of attendance costs to 18 landowners exist in these circumstances. The individual landowners are all in very close proximity to the proposed well site and took a keen interest in Bashaw's testimony.

[78] Bashaw refers to section 6.1.3 of *Directive 031*, which states that for a large participant group, the AER generally awards attendance honoraria to no more than six individuals but may consider additional attendance honoraria in "exceptional circumstances." Bashaw submits that this case does not present exceptional circumstances and that claiming attendance honoraria for 18 individuals is excessive.

[79] Bashaw contends that attendance honoraria in *Directive 031* are intended to be awarded for the period of time at a hearing that a participant is giving evidence, being cross-examined, assisting counsel or consultants, or presenting argument. It is not the intent of *Directive 031* that attendance honoraria be claimed for all of the time an intervener watched proceedings from the back of the hearing room.

[80] Bashaw submits that the attendance honoraria claimed is far in excess of what is properly claimable under *Directive 031*. The following honoraria claims were noted as clearly excessive:

- Mr. Mastre, Ms. Mastre, and Ms. Kelly each claim attendance honoraria for 16 half-days.
- Mr. Kiehlbauch claims attendance honoraria for 13 half-days.
- Ms. Dodd claims attendance honoraria for 12 half-days.

- Mr. Kisser claims attendance honoraria for 10 half-days.
- A total of \$3200 attendance honoraria are being claimed by two members of the same household, Mr. and Ms. Mastre.
- A total of \$1800 attendance honoraria are being claimed by three members of the Dodd family.

Views of the Panel

[81] It was clear to the panel that Ms. Kelly was the de facto leader of the landowners; she gave evidence and instructed counsel. As such, the panel considers it was appropriate for Ms. Kelly to attend the hearing and receive an honorarium for all 14 half-days she attended the hearing, as well as for 2 half-days for attending the prehearing meeting.

[82] While other members of the landowners group were entitled to attend the entire hearing, and their presence was an indication of their specific interest and the broader community's interest in this proceeding, the panel does not consider it appropriate to grant the full requested honoraria for their attendance. Attendance honoraria in *Directive 031* are intended for individuals who actively participate in a hearing (e.g., give evidence, are cross-examined, assist counsel or consultants, or present an argument). Accordingly, the panel awards a \$100 honorarium to each of the landowners who testified and claimed an honorarium for that testimony, for each half-day of testimony they provided (see appendix 1). These landowners' testimonies made a substantial contribution to the hearing and contributed to a better understanding of the issues.

[83] Because of Ms. Kelly's leadership role with the landowners, they are also entitled to the disbursements claimed for Ms. Kelly for meals during the hearing and prehearing meeting. However, the amount claimed for "Meals – meeting with counsel," which relates to other time periods, is not recoverable. Ms. Kelly is entitled to costs for the rental of the Rocky Rapids Community Hall and for faxing and photocopying.

[84] Disbursements for information requests made pursuant to the *Freedom of Information and Privacy Protection Act* are not recoverable because the panel has no information about these requests.

[85] Other members of the landowners group are entitled to meals and other disbursements claimed in accordance with *Directive 031* that are reasonable and directly and necessarily incurred to give testimony. Costs for mileage for travel under 50 km and for meals outside of the scheduled hearing phase will not be awarded.

[86] The costs awarded have been summarized in table 1 of appendix 1.

## Costs Claim of Brazeau County

[87] The total costs claim by the County is \$82 235.11, broken down as follows:

legal fees	\$75 355.00
disbursements and expenses	\$3 112.36
GST	\$3 767.75

### Entitlement to Costs

[88] The County submits that there is no compelling reason why it should bear its own costs. It is entitled to claim costs as a participant in this proceeding and has interests in emergency response planning, the conditional road allowance, and the wetlands thereon. The County adds that it was compelled to participate in the AER process by the actions and inactions of Bashaw. Had Bashaw meaningfully engaged with the County on the subject of emergency response planning, the County would not have needed to be involved in this aspect of the hearing.

[89] According to the County, there is no AER longstanding practice of not awarding costs to municipalities or AER authority to support such a practice. Further, the County submits that the AER’s costs regime has no provision comparable to the restrictive section 28 of the repealed *Energy Resources Conservation Act*. The cases cited by Bashaw did not involve the AER, and Bashaw misunderstood the AER’s jurisdiction in relation to costs. The legislative change that resulted in the AER’s new costs regime was intended to give the AER broader jurisdiction over costs than that exercised by its predecessors. The County submits that there is no such presumption in law, as asserted by Bashaw, that a statutory body exercising a statutory mandate should bear its own costs.

[90] The County submits that Bashaw failed to comply with *Bulletin 2014-07* by not disputing certain aspects of the costs claim, and consequently the AER should apply its practice as stated in that bulletin and presume that the County’s costs claim is eligible for an award.

[91] Bashaw submits that the County’s costs claim should be rejected entirely because the County is a statutory body exercising its statutory mandate. Bashaw submits that the County is precluded from cost recovery by virtue of a longstanding practice of the AER (and before it the Energy Resources Conservation Board [ERCB] and the Alberta Energy and Utilities Board [EUB]) not to award costs to municipalities. Bashaw acknowledges that this practice is not absolute, being subject to the Regulator’s discretion, but argues that costs should only be awarded in “exceptional circumstances.” Bashaw notes that it found no decisions where this discretion was exercised to award a municipality costs and submits that there is no reason to deviate from this practice.

[92] Bashaw refers to an ERCB costs order and an EUB costs order in support of its argument and an Alberta Court of Appeal decision in which the ERCB’s authority to deny costs was upheld.

Views of the Panel

[93] The panel denies the County’s costs claim and makes no award to the County.

[94] The County’s participation in the hearing was limited to specific issues, and on these issues, the panel found the County’s participation to be helpful. The County falls within the definition of “participant” under section 58(1)(c) of the *Rules of Practice*, and we do not accept Bashaw’s assertion that statutory bodies are precluded from costs recovery by virtue of a longstanding practice of the AER and its predecessors. In some circumstances, it may be appropriate for a panel to exercise its discretion to award costs to statutory bodies. However, we have decided that an award of costs is not warranted in this instance. The County’s mandate includes fostering the well-being of the environment and developing and maintaining safe and viable communities.<sup>2</sup> When we look at the factors listed in section 58.1 of the *Rules of Practice*, we find no compelling reason why this statutory body, which determined that it should participate in the hearing to fulfil its mandate, should not bear its own costs. The hearing was not particularly lengthy or complex, and the issues addressed by the County were squarely within its statutory mandate.

[95] We reject the County’s suggestion that it should be awarded costs because Bashaw did not comply with *Bulletin 2014-07*. The County relies upon the following portion of the bulletin:

[T]he AER intends to conduct a more limited review of costs claims and will instead rely on costs submissions to identify matters arising from costs claims that require an AER decision. Specifically, the AER will review only those aspects of a costs claim that a claimant or a responder to a claim identifies in its costs submission as being in dispute. As a result, if a party responding to a costs claim does not dispute a particular amount claimed by a costs applicant, the AER will presume that part of the claim is eligible for an award in the amount sought and that the costs payee does not object to the AER awarding the amount claimed.

Bashaw disputes the County’s entire costs claim, and therefore this part of *Bulletin 2014-07* is not applicable.

[96] The purpose of the above portion of *Bulletin 2014-07* is to alert those responding to costs claims that if they do not provide adequate reasons why they should not pay all or a portion of a costs claim, they run the risk that the AER, which does not audit the claim, may award undisputed costs. Where, as here, a respondent argues that the whole of the claimed costs should be rejected, the absence of comment on specific items in the costs claim does not mean the respondent has failed to comply with *Bulletin 2014-07*. It also does not mean there is a presumption that the costs applicant is eligible to

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<sup>2</sup> *Municipal Government Act*, RSA 2000 c. M-26, section 3(a.1) and (c).

receive all costs sought. Further, the AER retains its discretion to accept or reject costs claims irrespective of the content of the cost respondent's submissions.

## **Order**

[97] The AER hereby orders Bashaw to pay costs of \$166 729.55 and GST of \$8181.02 to the landowners, less \$30 000.00, which was the amount of advance funds, for a total of \$144 910.57. This amount must be paid within 30 days from this order being issued to

Ackroyd LLP  
1500 First Edmonton Place  
10665 Jasper Avenue  
Edmonton, AB T5J 3S9

Dated in Calgary, Alberta, on June 12, 2018.

## **Alberta Energy Regulator**

*<original signed by>*

H. Kennedy, P.Eng.  
Presiding Hearing Commissioner

*<original signed by>*

C. McKinnon, B.A., LL.B  
Hearing Commissioner

*<original signed by>*

B. Zaitlin, Ph.D., P.Geol., CPG  
Hearing Commissioner

## Appendix 1 Summary of Costs Claimed and Awarded

Table 1. Honoraria, Expenses, and GST Claimed and Awarded to the Drayton Valley Landowners

	Total Fees/Honoraria Claimed	Total Expenses Claimed	Total GST Claimed	Total Amount Claimed	Total Fees/Honoraria Awarded	Total Expenses Awarded	Total GST Awarded	Total Amount Awarded	Reduction
Group formation	\$10 000.00	\$0.00	\$0.00	\$10 000.00	\$500.00	\$0.00	\$0.00	\$500.00	\$9 500.00
Individual members									
A. Peck	\$100.00	\$0.00	\$0.00	\$100.00	\$100.00	\$0.00	\$0.00	\$100.00	\$0.00
B. Dodd	\$500.00	\$75.75	\$0.00	\$575.75	\$100.00	\$0.00	\$0.00	\$100.00	\$475.75
C. Anderson	\$100.00	\$0.00	\$0.00	\$100.00	\$100.00	\$0.00	\$0.00	\$100.00	\$0.00
C. Huber	\$100.00	\$0.00	\$0.00	\$100.00	\$100.00	\$0.00	\$0.00	\$100.00	\$0.00
C. Dodd	\$1 200.00	\$195.00	\$0.66	\$1 395.66	\$200.00	\$6.13	\$0.31	\$206.44	\$1 189.22
C. Kelly	\$100.00	\$0.00	\$0.00	\$100.00	\$100.00	\$0.00	\$0.00	\$100.00	\$0.00
D. Kisser	\$1 000.00	\$0.00	\$0.00	\$1 000.00	\$100.00	\$0.00	\$0.00	\$100.00	\$900.00
D. Schmidt	\$100.00	\$0.00	\$0.00	\$100.00	\$100.00	\$0.00	\$0.00	\$100.00	\$0.00
D. Schmidt	\$100.00	\$0.00	\$0.00	\$100.00	\$100.00	\$0.00	\$0.00	\$100.00	\$0.00
E. Belva	\$400.00	\$0.00	\$0.00	\$400.00	\$100.00	\$0.00	\$0.00	\$100.00	\$300.00
G. Mastre	\$1 600.00	\$167.68	\$4.42	\$1 772.10	\$100.00	\$5.49	\$0.28	\$105.77	\$1 666.33
I. Jaffray	\$1 100.00	\$113.12	\$0.00	\$1 213.12	\$200.00	\$0.00	\$0.00	\$200.00	\$1 013.12
J. Huber	\$100.00	\$0.00	\$0.00	\$100.00	\$100.00	\$0.00	\$0.00	\$100.00	\$0.00
L. Mastre	\$1 600.00	\$88.50	\$4.42	\$1 692.92	\$0.00	\$0.00	\$0.00	\$0.00	\$1 692.92
M. Dodd	\$100.00	\$0.00	\$0.00	\$100.00	\$0.00	\$0.00	\$0.00	\$0.00	\$100.00
R. Kiehlbauch	\$1 300.00	\$192.19	\$1.88	\$1 494.07	\$100.00	\$35.37	\$1.77	\$137.14	\$1 356.93
S. Dusterhoft	\$100.00	\$0.00	\$0.00	\$100.00	\$100.00	\$0.00	\$0.00	\$100.00	\$0.00
S. Kelly	\$1 600.00	\$1 872.89	\$15.81	\$3 488.70	\$1 600.00	\$379.71	\$3.91	\$1 983.62	\$1 505.08
<b>Total</b>	<b>\$21 200.00</b>	<b>\$2 705.13</b>	<b>\$27.19</b>	<b>\$23 932.32</b>	<b>\$3 800.00</b>	<b>\$426.70</b>	<b>\$6.27</b>	<b>\$4 232.97</b>	<b>\$19 699.35</b>

**Table 2. Total Costs Claimed and Awarded**

	Total Fees/ Honoraria Claimed	Total Expenses Claimed	Total GST Claimed	Total Amount Claimed	Total Fees/ Honoraria Awarded	Total Expenses Awarded	Total GST Awarded <sup>1</sup>	Total Amount Awarded	Reduction
<b>Drayton Valley Landowners</b>									
Ackroyd LLP	\$281 430.50	\$13 473.28	\$14 689.64	\$309 593.42	\$121 800.00	\$12 206.47	\$6 761.77	<b>\$140 768.24</b>	\$168 825.18
Zelt Professional Services Inc. (Dr. Brian Zelt)	\$24 012.50	\$687.14	\$1 214.63	\$25 914.27	\$3 000.00	\$687.14	\$164.00	<b>\$3 851.14</b>	\$22 063.13
Dr. Stuart Batterman	\$20 520.00	\$0.00	\$0.00	\$20 520.00	\$5 000.00	\$0.00	\$250.00	<b>\$5 250.00</b>	\$15 270.00
Dr. Robert Coppock	\$34 429.50	\$486.14	\$1 721.48	\$36 637.12	\$9 000.00	\$221.05	\$470.09	<b>\$9 691.14</b>	\$26 945.98
Cottonwood Consultants Ltd. (Cliff Wallis)	\$15 558.75	\$1 088.19	\$831.83	\$17 478.77	\$5 000.00	\$1 088.19	\$303.89	<b>\$6 392.08</b>	\$11 086.69
Veritas Litigation Support	\$6 528.00	\$2 030.29	\$427.91	\$8 986.20	\$4 500.00	\$0.00	\$225.00	<b>\$4 725.00</b>	\$4 261.20
Landowners	\$21 200.00	\$2 705.13	\$27.19	\$23 932.32	\$3 800.00	\$426.70	\$6.27	<b>\$4 232.97</b>	\$19 699.35
<b>Advance Funds</b>				<b>-\$30 000.00</b>				<b>-\$30 000.00</b>	
Total	\$403 679.25	\$20 470.17	\$18 912.68	\$413 062.10	\$152 100.00	\$14 629.55	\$8 181.02	<b>\$144 910.57</b>	\$268 151.53
<b>Brazeau County</b>	\$75 355.00	\$3 112.36	\$3 767.75	\$82 235.11	\$0.00	\$0.00	\$0.00	<b>\$0.00</b>	\$82 235.11

<sup>1</sup>Including provincial hotel tax as applicable.