



West Energy Ltd.

Application for a Well Licence
Pembina Field

Cost Awards

October 4, 2009

ENERGY RESOURCES CONSERVATION BOARD

Energy Cost Order 2009-009: West Energy Ltd., Application for a Well Licence,
Pembina Field

October 4, 2009

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CONTENTS

1	Introduction.....	1
1.1	Background.....	1
1.2	Cost Claim.....	1
2	Views of the Board—Authority to Award Costs.....	2
3	The Loseys.....	2
3.1	Views of West.....	3
3.2	Views of the Intervener.....	5
3.3	Views of the Board.....	7
4	Order.....	9
	Appendix A.....	10

ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

**WEST ENERGY LTD.
APPLICATION FOR A WELL LICENCE
PEMBINA FIELD**

**Energy Cost Order 2009-009
Application No. 1547037
Cost Application No. 1610223**

1 INTRODUCTION

1.1 Background

West Energy Ltd. (West) applied, pursuant to Section 2.020 of the *Oil and Gas Conservation Regulations*, for a licence to drill a directional level-1 critical sour well from a surface location in Legal Subdivision (LSD) 14, Section 35, Township 50, Range 6, West of the 5th Meridian, to a projected bottomhole location in LSD 14-35-50-6W5M. The maximum hydrogen sulphide (H₂S) concentration would have been about 160.0 moles per kilomole (16.0 per cent), and the cumulative drilling H₂S release rate would have been 2.5 cubic metres per second, with a corresponding emergency planning zone (EPZ) of 4.29 kilometres (km). The purpose of the well was to obtain oil production from the Nisku Formation. The proposed well would have been located about 3.3 km south of the community of Tomahawk.

Intervenors were Parkland County, West Parkland Liaison Committee Members, Parkland School Division No. 70 (PSD70), and community members Dr. T. Losey and Ms. C. Kerpan (the Loseys), who resided within the EPZ.

The Board was scheduled to hold a public hearing in Tomahawk, Alberta, on March 10, 2009, before Board Members M. J. Bruni, Q.C. (Presiding Member), J. D. Ebbels, and G. Eynon, P.Geol.

On February 20, 2009, the applicant notified the ERCB that it was withdrawing Application No. 1547037, pursuant to Section 21 of the *Energy Resources Conservation Board Rules of Practice (Rules of Practice)*, and the Board accepted the withdrawal of the application. Accordingly, the application was withdrawn and the public hearing was cancelled.

1.2 Cost Claim

On March 20, 2009, the Loseys filed a cost claim in the amount of \$57 804.42. On March 23, 2009, PSD70 submitted a cost claim in the amount of \$52 097.62. On April 3, 2009, West submitted comments to the cost claims submitted by the Loseys and PSD70. On April 16, 2009, counsel for the Loseys submitted their response to comments.

On April 28, 2009, following an exchange of correspondence between PSD70 and West, the Board granted an extension to June 8, 2009, to allow West to reply to PSD70's revised backup materials to be filed in support of its cost claim. The Board also granted PSD70 the opportunity to reply by June 22, 2009. On June 2, 2009, the Board granted a further extension to July 13, 2009, to permit West to examine PSD70 on its Affidavit of Costs and to allow sufficient time for the preparation of transcripts, responses to undertakings, and further final submissions. On July 6, 2009, PSD70 advised that it was withdrawing its cost claim in its entirety.

The Board considers the cost process to have closed on July 6, 2009.

2 VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

In determining local intervener costs, the Board is guided by its enabling legislation, in particular by Section 28 of the *Energy Resources Conservation Act*, which reads as follows:

28(1) In this section, “local intervener” means a person or a group or association of persons who, in the opinion of the Board,

- (a) has an interest in, or
- (b) is in actual occupation of or is entitled to occupy

land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, 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.

It is the Board’s position that a person claiming local intervener costs must establish the requisite interest in land and provide reasonable grounds for believing that such an interest may be directly and adversely affected by the Board’s decision on the application in question.

In *Bulletin 2009-09*, dated March 12, 2009, entitled *Directive 031: Guidelines for Energy Proceeding Cost Claims Issued*, the Board stated, “*Directive 031A* and its Scale of Costs will continue to apply to all proceedings commenced by notice of hearing issued on or before March 31, 2009, and will be rescinded once those proceedings are completed.” The Board notes that the notice of hearing in this matter was issued prior to March 31, 2009. Accordingly, the Board has considered and applied *Directive 031A* in its evaluation of the costs claimed in this matter.

When assessing costs, the Board refers to Part 5 of the *Rules of Practice* and Appendix D: Scale of Costs in *ERCB Directive 031A: Guidelines for Energy Cost Claims*.

Subsection 57(1) of the *Rules of Practice* states:

57(1) The Board may award costs in accordance with the scale of costs, to a participant if the Board is of the opinion that

- (a) the costs are reasonable and directly and necessarily related to the proceeding, and
- (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board.

3 THE LOSEYS

On March 20, 2009, the Loseys submitted a cost claim for legal fees in the amount of \$21 941.00, expert costs in the amount of \$26 710.04, honoraria in the amount of \$6687.50, expenses totalling \$952.24, and GST in the amount of \$1513.64, for a total cost claim of \$57 804.42.

3.1 Views of West

Honoraria

West submitted that the Loseys claim for honoraria was not compliant with *Directive 031A*, because the Loseys sought to recover an honorarium at an hourly rate of \$50.00 when *Directive 031A* clearly states that honoraria will not be awarded on an hourly basis. West also noted that previously in *Energy Cost Order 2008-015: Highpine Energy Inc.*, Dr. Losey and Ms. Kerpan had sought a lump sum rather than hourly rate-based honorarium.

West noted that in *Energy Cost Order 2007-008: West Energy Ltd.*, *Energy Cost Order 2008-005: Highpine Oil & Gas Limited*, *Energy Cost Order 2008-008: Berkley Resources Inc.*, and *Energy Cost Order 2008-013: Standard Energy Inc.*, the Board made it very clear in each case that honoraria would not be awarded on an hourly rate basis.

In addition, West was of the view that since the Loseys had hired legal counsel and experts to assist with their intervention, they had had a great deal of help in preparing their submissions and should therefore not be entitled to preparation honoraria.

West also took issue with the fact that when attempting to schedule an appropriate dispute resolution (ADR) meeting on this matter, the Loseys could not agree on a convenient time to meet. According to West, because of that, no ADR meeting was set and the concerns of the Loseys could not be addressed prior to the hearing. West also maintained that the Loseys' concerns were directed towards issues related to Highpine Application No. 1525928 (the Highpine proceeding), as opposed to the West application.

Legal Fees

The Loseys claimed \$23 979.20, including GST and disbursements, on behalf of Klimek Law.

West submitted that the majority of the fees claimed by the Loseys on behalf of Klimek Law were quite reasonable and were directly and necessarily related to the application. However, West took issue with the following time entries:

- Time entries December 1, 2008, January 15 and 26, 2009, and February 6, 2009, which totalled 9.1 hours, regarding telephone calls and finalizing submissions in conjunction with Keith Wilson, counsel for PSD70: West submitted that there was no basis or need for Klimek Law to consult with other interveners' counsel with respect to the Loseys' submission. It stated that if there was, then the Loseys and PSD70 should have formed a group to avoid duplication and reduce costs.
- Time entry for December 11, 2008, for a 5.5 hour meeting between West and all interveners: West submitted that only the Loseys' counsel attended and that West's legal counsel was not present at the meeting. West noted that the Board had previously disallowed costs relating to consultation and negotiation and therefore was of the view that the time claimed for Ms. Klimek's attendance should be denied.
- Time entries for February 10, 12, and 13, 2009, totalling 4.5 hours, for a telephone conversation with counsel for PSD70 and for drafting a motion that requested that the Board

provide a staff member to attend the hearing of the application to provide evidence: West submitted that the notice was not directly and necessarily related to the application, as it related to the activities of Highpine Oil and Gas in other applications in which the Loseys were interveners. West was of the view that the notice was consistent with the position taken by Dr. Losey in an article printed in the *Edmonton Journal* wherein he stated his concerns about previous Highpine applications and that he planned to use the hearing of this application as an opportunity to “right some of those wrongs.”

- Time entry for March 17, 2009, of 0.5 hours, for drafting the Loseys’ cost claim. West submitted that Directive 031A clearly stated that one may not claim costs for drafting a cost claim and this cost should be denied entirely.

In summary, West submitted that the legal fees claimed by the Loseys on behalf of Klimek Law should be reduced by a total of 18.6 hours, or \$4882.50, including GST. In addition, West submitted that because the cost claim was noncompliant with *Directive 031A*, the legal fees should be further reduced by 2 hours, or \$525.00, including GST, for a total award for legal fees of \$17 630.55, including GST.

Doug McCutcheon & Associates

The Loseys claimed \$8011.50, including GST and disbursements, on behalf of Doug McCutcheon & Associates.

West took issue with the hourly rate claimed by Doug McCutcheon. Based on his daily rate of \$2180.00 for an 8-hour day, that equated to \$272.50 per hour, which West submitted was well in excess of the \$250.00 per hour permitted by the Scale of Costs in *Directive 031A*. West submitted that Mr. McCutcheon’s daily rate should be reduced to \$1960.00, which would be an hourly rate of \$245.00, the same as in the Losey cost submission and same as he was awarded in *Energy Cost Order 2008-005: Highpine Oil and Gas Limited*.

In relation to the report submitted by Mr. McCutcheon, West noted that of the 39 pages, only 3.5 pages were written text actually prepared by Mr. McCutcheon and the rest consisted of third-party reference documents. Furthermore, West noted that the report only briefly referred to the application’s emergency response plan (ERP) and addressed the complexity and need for testing ERPs generally. The report also contained 1.5 pages devoted to a general opinion on current government policy, laws, and regulations. West submitted that Mr. McCutcheon’s fees should be reduced by one-half of the time invoiced at the proposed daily rate, for a total award of \$3601.50, including GST.

Dr. Shuming Du

West submitted that the fees claimed by the Loseys on behalf of Dr. Shuming Du in the amount of \$19 080.00 should either be denied entirely or significantly reduced.

West compared Dr. Du’s evidence prepared in the Highpine proceeding to the report prepared for West’s application and noted that it was substantially the same as his evidence in the Highpine proceeding, or almost verbatim. West noted that Dr. Du used the same meteorological data from the Highpine proceeding in order to prepare his evidence related to this application and yet did not explain why the data were applied to the West application or account for the

difference in well locations. In West's opinion, Dr. Du's evidence made it clear that he was not critiquing West's expert reports but was critiquing the models used in those reports prepared in compliance with the ERCB directives and using the ERCB's ERCBH2S model.

West submitted that it should not have to pay for a third-party critique of the ERCB's well-established ERCBH2S model, which was clearly what some of the evidence filed by Dr. Du was doing. West stated that the ERCB made it clear in *Directive 031A* that intervener costs were not reasonable if they were related to a critique of policy or law.

Based on the above, West submitted that the costs claimed by the Loseys on behalf of Dr. Du were excessive and not directly and necessarily related to the application.

Regarding the hourly rate claimed by Dr. Du, West was of the view that it was excessive and noted that in past cost orders Dr. Du had claimed relatively the same amount; however, West pointed out that on the invoice provided to the Loseys, Dr. Du's hourly rate was not specified. The Loseys indicated on their Form E2 submitted with their cost claim that Dr. Du incurred a total of 102 hours at two different hourly rates. There were 33 hours charged at \$160.00 per hour and 69 hours charged at \$200.00 per hour. Based on what Dr. Du had been awarded for an hourly rate on cost decisions in the past year, the rate of \$200.00 per hour is roughly a 67 per cent wage increase in one year. West was of the view that this was not a reasonable increase and that the Board should use its discretion when awarding costs in this instance.

West submitted that Dr. Du's cost claim should be reduced by a total of 75 per cent to 25.75 hours and an average hourly rate of \$140.00, for a total cost award of \$3605.00.

3.2 Views of the Intervener

Honoraria

The Loseys claimed that due to several extenuating circumstances, they should be entitled to claim honoraria at an hourly rate. The Loseys stated that they lived in an area where there was extensive development, and since they were concerned about the effect of such development on their lives, they were required to expend a great deal of time and effort in understanding applications, instructing counsel, and preparing for hearings. The Loseys also noted that they were self-employed and that any time spent on applications took away from their work, causing them significant financial hardship. They stated that if they did not receive an award for their work, the only alternative they felt they had was to either not oppose such development or to subsidize the company's applications with their own time and effort. The Loseys felt that they were an integral part to the preparation of their written submission and that they had to review West's application to understand the effects it would have on them. They had provided counsel with instruction and discussed the matter with neighbours to ensure that they were not duplicating efforts. They had also started to prepare for the hearing when the application was withdrawn.

With respect to the statement made by West that the Loseys did not make an effort to attend an ADR meeting, the Loseys responded by stating that they had in fact received correspondence from West after a meeting stating that a "...mutually satisfactory resolution for both parties is not achievable." Further correspondence between West and the Loseys was attached as Schedule

“A” to the Loseys’ response to comments. The Loseys noted that they had been prepared to meet for ADR if their costs would be covered, but West refused to cover said costs.

The Loseys also took issue with the comments submitted by West regarding the Loseys’ concerns with respect to a Highpine application. The emergency response (ER/ERP) exercise completed in the fall of 2008 was a part of West’s application, as it was referred to in its submission as a reason the approval should be granted. West used Bissett Resources Consultants to draft and manage the ERP, the same planner used by Highpine for its wells and the exercise. Therefore, the ability to manage the ERP, which was the subject of the exercise, was relevant to this application.

Legal Fees

Regarding the issues West had about time entries made by Klimek Law, the Loseys provided the following:

- Time entries December 1, 2008, January 15 and 26, 2009, and February 6, 2009, totalling 8.1 hours: The Loseys believed that West must have misread the time docket, since 6 hours was for preparing their submission, as well as for a conversation with Mr. Wilson, which did not last 6 hours. The Loseys were of the view that it was very important for Ms. Klimek to discuss the matter with Mr. Wilson, since the Board required counsel for interveners to ensure that they did not duplicate evidence or positions taken by other interveners.
- Time entry for December 11, 2008, for 5.5 hours: The Loseys reiterated that Ms. Klimek had made it clear that they would not attend the meeting unless counsel was present and it was agreed by all parties that counsel was allowed to attend. The Loseys felt at a disadvantage at these meetings, and that is why counsel was necessary. It was not negotiations; it was an attempt to understand the substance of the application and alternative locations.
- Time entries for February 10, 12, and 13, 2009: According to the Loseys, the time was not all spent with other lawyers but with Parkland County and was necessary to ensure that experts were not duplicated.
- Regarding the motion, the Loseys stated that it was related to this proceeding and that there were two components to it: how the ERCB evaluated West’s ERP and how the ERCB assessed emergency response exercises in general and the October exercise in particular. Also, the Loseys stated that the *Rules of Practice* allowed for ERCB employees to attend hearings and provide evidence on behalf of interveners.
- Regarding preparation of the cost submission, the Loseys stated that the costs were an integral part of applications and that the time to prepare a claim should be covered.

Doug McCutcheon & Associates

The Loseys stated that they believed that the hourly rate claimed by Mr. McCutcheon was reasonable and the amount had been noted in the revised *Directive 031*. In addition, Mr. McCutcheon’s report was relevant, as risk-based analysis was important in understanding how risk assessments should be used. The information on testing the ERP was important, since one of

the positions of the Loseys was that West did not have a proven track record for implementing ERPs.

Dr. Shuming Du

The Loseys noted that the Board had accepted Dr. Du's evidence in the past and that the ERCB had also asked him for input in relation to the ERCBH2S modelling. According to the Loseys, Dr. Du looked at the application and ran models based on the well. Dr. Du also ran the CALPUFF model for the uncontrolled and unignited release in light of the ERCB decision in a similar Highpine matter that H₂S may not always be heavier than air. The Loseys observed that Dr. Du also used ERCBH2S to analyze the effect of low wind and stable conditions on EPZ sites.

The Loseys were of the opinion that West pulled its application because the Highpine well, which was very similar to the West well, came up dry and then criticized Dr. Du's use of information from that well. The Loseys concurred that Dr. Du did use model input filed from a previous Highpine file to start his analyses, but maintained that all of the modelling he did was specifically for West's well.

With respect to the hourly rate charged by Dr. Du, the Loseys pointed out that Dr. Du's rate increased as of January 1, 2009, which was reflected in the bill and was within the amount set out in the tariff.

3.3 Views of the Board

Honoraria

The Board notes that the Loseys have based their claim for an hourly honorarium on concerns about the application, the extensive time taken reviewing the application, and the need to avoid duplication and overlap in the presentation of evidence and to account for the time that could have been devoted to their private business endeavours.

Honoraria are awards in recognition of personal time and efforts and typically range from \$300 to \$500. The Board is prepared to increase the honoraria awarded to interveners in exceptional situations where there is a clear need for such a substantial intervention. In cases where the group is assisted by counsel and experts, the group may not qualify for an honorarium. The Board has in previous cost decisions made it clear that it is not prepared to grant honoraria on an hourly basis or as compensation for lost wages.

The Board notes that the West application was for one well, the Loseys are experienced participants in the ERCB's process, and they had hired experienced counsel and experts to assist them in the preparation and presentation of their intervention. In short, the Board concludes that the Loseys' preparations for the scheduled hearing do not justify an award of an exceptional preparation honorarium.

However, this matter was set down for a hearing and while the hearing did not proceed, it is reasonable to expect that the Loseys were diligently preparing.. Accordingly the Board awards \$500.00 to each of the Loseys plus the disbursements claimed totalling \$46.22, including GST.

The Board notes that West argued that the Board ought to consider that the Loseys did not attend an ADR meeting. The Board is of the view that a party's attendance or nonattendance at an ADR meeting is not a factor that it is prepared to take into consideration in a cost award in this case. The Board notes that ADR is a voluntary process that depends very much on the goodwill of the parties entering into such discussions. Cost decisions that reduce cost awards to interveners who decline to participate have the potential to undermine the voluntariness and ultimately the effectiveness of the ADR process.

Legal Fees

The Board is satisfied with the explanations provided by the Loseys with respect to the time entries claimed by Klimek Law disputed by West. The Board views these costs as reasonable and related to the proceeding as it unfolded. However, in keeping with *Directive 031A*, the Board declines to award costs for the time to prepare the Loseys' cost submission. Therefore, the Board awards legal fees in the amount of \$21 816.00, disbursements in the amount of \$908.22, and GST of \$1123.73, for a total award of \$23 847.95.

Doug McCutcheon & Associates

As mentioned previously, the Board has used *Directive 031A* in its evaluation of the costs claimed in this matter. Accordingly, the Board directs that Mr. McCutcheon's daily rate be reduced to reflect the maximum hourly rate \$250.00/hour for an 8-hour day.

The Board does note that the Mr. McCutcheon's written report itself is relatively brief (3.5 pages) and it is mostly reference material. Mr. McCutcheon's invoice indicates that the report took 1.5 days to develop and prepare of the 3.5 days claimed. The Board considers this to be excessive, given its content. Furthermore, the Board notes that a considerable portion of the report contains a discussion on government policy and law. The Board is not satisfied that the portion of the report respecting risk-based land-use planning would have assisted the Board with regard to the issues that were before it, given the Board's policy in place. As noted by the Board in *Directive 031A*, general discussions related to policy, rather than the application(s) currently before the Board, may not qualify for costs. For these reasons, the Board reduces the claim for report preparation by 1.75 days. Given the foregoing, the Board grants a total award of \$3675.00, including GST.

Dr. Shuming Du

The Board notes that Dr. Du appeared before the ERCB and prepared expert evidence in the Highpine proceeding. The Board agrees that the report submitted in relation to this application is substantially similar to the report prepared by Dr. Du in the Highpine application and used data garnered from that proceeding as the basis of his modelling in this application. Dr. Du has claimed 102 hours to prepare his report, using much of the same text and the same data. The Board considers the costs for preparation to be excessive. The Board also agrees with West's submission that a portion of the report is essentially a critique of existing ERCB directives and the ERCB dispersion model. As noted above, general policy discussions and critiques may not qualify for costs. Accordingly, the Board reduces costs associated with Dr. Du's report and analysis by 50 per cent, for a total cost award of \$9540.00.

4 ORDER

It is hereby ordered that

- 1) West Energy Ltd. shall pay intervener costs in the amount of \$38 109.17, and
- 2) payment shall be made to the offices of Klimek Law, 240, 4808 -87 Street, Edmonton AB T6E 5W3.

Dated in Calgary, Alberta, on October 4, 2009.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

M. J. Bruni, Q.C.
Presiding Board Member

<original signed by>

J. D. Ebbels
Board Member

<original signed by>

G. Eynon, P.Geol.
Board Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED



Appendix A