

Via Email

May 23, 2017

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Attention: Mr. W.L. (Bill) McElhanney

Attention: Mr. Gavin S. Fitch Q.C.

Dear Counsel:

**Re: Request for Advance of Funds
Proceeding ID 346
Bashaw Oil Corp. (Bashaw)
Application 1842705 1851246 and 1851250**

On May 10, 2017, the Drayton Valley Landowners (Landowners) filed an application for an advance of funds in the amount of \$185,753.50. That amount is 50% of the sum \$265,680 in estimated legal costs and \$105,827 in estimated expert costs. Bashaw responded by way of a letter dated May 15, 2017 and the Landowners filed reply comments on May 16, 2017.

The panel has considered the application, Bashaw's response and the Landowners' reply. It has decided that it is appropriate to exercise its discretion to award a partial advance of funds to the Landowners in the circumstances of this case.

Advance of Funds Requests

In awarding an advance of funds in Proceeding ID 341, the Alberta Energy Regulator (Regulator) said that "the purpose of an advance of funds made under section 59 of the *Alberta Energy Regulator Rules of Practice* (the Rules) is to assist a party with its participation in a proceeding in circumstances where it requires financial assistance to allow it to make an effective submission in that proceeding."

Directive 31: REDA Energy Cost Claims (Directive 31) sets out the requirements for a request for advance funding. According to *Directive 31*, an award of advance funds is entirely discretionary. In addition, *Directive 31* says that a request for an advance of funds must include specific information including a detailed and itemized budget outlining the "direct expenses that the participant reasonably and necessarily expects to incur in the preparation and presentation of his or her participation". It must also include information addressing the relevant factors listed in section 58.1 of the *Rules*. In this case the relevant factors are those in subsections 58.1 (a), (b), (c), (e), (f), (h), (i), (k) and (r). More specifically the relevant factors for the Landowners' request are:

- a) whether there is a compelling reason why the Landowners should not bear their own costs;
- b) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- c) whether the submission of the Landowners will contribute to the hearing;
- e) whether the Landowner has made an adequate attempt to use other funding sources;
- f) whether the Landowner has attempted to consolidate common issues or resources with other parties;
- h) whether the application was filed with the appropriate information;
- i) whether the Landowner requires financial resources to make an adequate submission;

- k) whether the costs are reasonable and directly and necessarily related to the issues specified by the panel for the hearing; and
- r) any other factor the Regulator considers appropriate.

The factors set out above make it clear that an advance of funds is intended to be the exception and not the rule. They also make it clear that advances are intended to be made for specific and necessary pre-hearing expenses a participant must pay to enable it to effectively participate in a hearing. An example of such an expense would be the retainer fee for an expert that must be paid before the expert will start work.

The Landowners' Request

The Landowners have asked to be awarded an advance of 50% of their estimate of the legal costs and expert costs they expect to incur for this proceeding. According to the Advance of Funds worksheet found at pages 1 and 2 of the Landowners' request, the total cost estimate is \$371,507. So, the Landowners are asking for an advance of funds in the amount of \$185,753.50.

The Landowners submit that the principles of expropriation law are relevant here – without explaining how and with no reference to any authority for the proposition – and that the guiding principle is that landowners ought to be kept whole, including for any costs they incur for participation in expropriation processes. This hearing is about whether or not Bashaw should be granted approval to drill three exploratory critical sour gas wells on lands that are not owned or occupied by any of the individual members of the Landowners; it is not an expropriation proceeding. Principles that may be relevant in expropriation proceedings are not relevant here.

The Landowners also submit that the Regulator ought to look to the Alberta Environmental Appeal Board (AEAB) for guidance in how to estimate legal costs for a hearing. The Regulator is not bound by its own previous decisions but does strive to ensure coherency with its own past decisions and those of its predecessors where relevant. Decisions of a different regulator in a different regime are of no assistance here. The relevant factors are set out above.

Bashaw's Response

Bashaw calculated the amount requested differently than the Landowners and included GST. Bashaw's calculation is that the Landowners are asking to be awarded 50% of total legal and expert costs in the amount of \$390,082.35. Bashaw submits that this request is unreasonable, excessive and asks that the AER deny the request based on precedents outlined in their submission, or in the alternative, make an award "commensurate with the award made in the Rocky 7 proceeding." Proceeding ID 341 dealt with the project known as Rocky 7.

The Panel's Decision

Each request for advance funding must be assessed on its own merits and in the context of the proceeding for which advance funding is requested.

The Landowners submit that their application is reasonable and that advanced funding has been granted by the Energy Resources Conservation Board (ERCB) in similar matters in the area in the past. They also submit that it is unreasonable to expect legal counsel and expert witnesses to wait till the conclusion of the hearing to receive payment for fees, services and disbursements. When legal counsel and expert witnesses are to be paid is a matter to be dealt with between the lawyers and their clients. It is not relevant to this decision.

The panel's overall impression of the amount estimated by the Landowners for the purposes of their request for an advance of funds is that it is disproportionate to the nature of the issues specified by the panel for hearing. The issues are very similar to those examined in a number of previous proceedings heard by the Regulator and its predecessor the ERCB. Some of the individual participants in the Landowners' group participated in those hearings. They will be familiar with both the process and the issues.

The Landowners' estimate includes time for two senior lawyers to work on the file to prepare for the hearing and to attend at the hearing. As a general rule, the Regulator does not award costs for two lawyers to attend at a hearing. In exceptional circumstances, costs for two lawyers to attend may be found to be reasonable, but a party would have to show why two senior counsel were reasonable and necessary. The panel is not persuaded that the Landowners require an advance of funds to cover the fees and expenses for two senior counsel. In addition, the Landowners' estimate uses a rule of thumb of 10 hours of preparation time per hour of hearing time based on a decision of the AEAB. The panel finds that submission to be of no assistance here. The Landowners will have the opportunity to demonstrate that the legal fees they actually incur were reasonable and necessary when they file their costs claim after the conclusion of the hearing.

The Landowners' estimate includes time and costs for four experts. The proposed budget provided by Cliff Wallis, P. Biol. appears reasonable and proportionate to the issues identified for the hearing that he would speak to. However, the budgets of the other three experts cause the panel to be concerned that those experts have been asked to provide evidence on issues that go beyond those identified for the hearing. For example, Dr. Zelt's budget includes an estimate of 92 hours for reviewing materials and preparing his report. As noted by Bashaw, the Landowners state in Schedule "D" to their request that they "have expressed concerns regarding dispersion conditions, maximums of primary and secondary hazard distances [sic], and dispersion modelling" and that Dr. Zelt has been retained to "provide an expert opinion on these issues." Given the limits on issue 5 for the hearing – specifically that any challenge to the model used for calculating the emergency planning zone for the applications is not part of the hearing – Dr. Zelt's estimate does not appear to be reasonable for the purposes of providing an expert opinion on the inputs and outputs that come from Bashaw's input choices to the ERCBH2S model. That issue is an issue the panel has specified for the hearing. The panel has a similar concern with Dr. Batterman's and Dr. Coppock's estimates. The Landowners will have the opportunity to demonstrate that the expert costs they actually incur were reasonable and directly and necessarily related to the issues specified for the hearing when they file their final costs claim.

The Landowners did provide much of the information required by Directive 31, but did not directly address factors listed in section 58.1 of the Rules as required. For example, they provide no compelling reason why they should not bear their own costs other than to say that principles relevant to expropriation proceedings should apply. There is no evidence that the Landowners attempted to find other ways to fund their participation such as through contingency agreements. Having said that, some statements made in the Landowners' request lead the panel to conclude that they require some financial resources to make an adequate submission in the hearing. In addition, the individuals making up the Landowners filed statements of concern in response to Bashaw's applications individually but have since consolidated their resources and common issues for the purposes of participating in the hearing. Finally, Bashaw's applications do raise a number of issues including public safety issues and environmental impacts for which expert evidence focussed on the issues specified for the hearing would contribute to the hearing. For these reasons, the panel has decided to exercise its discretion to award a partial advance of costs to the Landowners in the amount of \$30,000.

Directions

The AER directs Bashaw to provide the funds to the Landowners by no later than June 6 2017. The Regulator will not prescribe how the Landowners must allocate the advance of funds. However, the advance is subject to a redetermination in a final decision on costs made after the conclusion of the hearing. The Landowners are required to provide a full accounting of how the advanced funds were spent by way of a costs application that complies with Directive 31 (cost application). The cost application must be supported by invoices and detailed descriptions of services rendered on the Landowners' behalf and all other information required by Directive 31. The cost application must be filed no later than thirty (30) days following the close of the hearing unless the panel directs otherwise.

To be clear, in the Landowners' cost application, the Landowners may request amounts in addition to the amounts received pursuant to this advance of funds. To be recoverable, those amounts must comply with the requirements set out in the *Rules* and in *Directive 31*.

This advance of funds does not guarantee that the Regulator will make a final cost order in the amount of the advance of funds or amounts in addition to the advanced funds. The Landowners assume the risk that if the Regulator is not satisfied that the amounts claimed in their cost claim meet the requirements set out in the Rules and Directive 31, the Landowners may be required to re-pay all or a specified portion of the advance payment made by Bashaw pursuant to this award of an advance of funds.

Sincerely,

<original signed by>

Meighan G. LaCasse
Counsel

cc. AER, Alison Koper
AER, Greg McLean