



Highpine Oil & Gas Limited

Application for Well Licences
Pembina Field

Cost Awards

ALBERTA ENERGY AND UTILITIES BOARD

Energy Cost Order 2008-005: Highpine Oil & Gas Limited
Application for Well Licences Pembina Field
Application Nos. 1480869 and 1486164
Cost Application No. 1568520

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ALBERTA ENERGY AND UTILITIES BOARD

Calgary, Alberta

**HIGHPINE OIL & GAS LIMITED
APPLICATION FOR WELL LICENCES
PEMBINA FIELD**

**Energy Cost Order 2008-005
Application Nos. 1480869 and 1486164
Cost Application No. 1568520**

1 INTRODUCTION

Highpine Oil & Gas Limited (Highpine) applied to the Alberta Energy and Utilities Board (EUB or Board), pursuant to section 2.020 of the *Oil and Gas Conservation Regulations* for licences to drill two level 2 critical sour wells to obtain crude oil production from the Nisku formation.

The EUB held a public hearing in Drayton Valley, Alberta, and Lodgepole, Alberta which commenced on September 27, 2007, and concluded on December 7, 2007. The oral hearing portion of the proceeding totaled 8 days. The panel assigned to consider the matter consisted of Acting Board Members K.G. Sharp, P.Eng. (Presiding Member), D.K. Boyler, P.Eng., and J.G. Gilmour, B.A., LL.B. On March 6, 2008, the Board issued Decision [2008-018](#).

On December 20, 2007, counsel for the Rocky Rapids Concerned Citizens (RRCC), filed a cost claim totaling \$175,197.46. On January 14, 2008, Highpine submitted comments regarding the cost claim, and on January 25, 2008 the RRCC submitted a response.

The Board considers the cost process to have closed on January 25, 2008.

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* (ERCA) 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 project in question.

When assessing costs, the Board will have reference to Part 5 of the *Rules of Practice* and to its *Scale of Costs*.

Section 55(1) of the *Rules of Practice* reads as follows:

- Section 55(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 KLIMEK LAW, BARRISTERS & SOLICITORS

The following table summarizes the legal fees and expenses claimed by Klimek Law.

Table 1 Fees and Expenses Claimed by Klimek Law

Counsel	Fees	Expenses	GST	Total
Klimek Law		\$6,742.96	\$316.85	\$7,059.81
Jennifer Klimek	\$71,850.00		\$4,311.00	\$76,161.00
Debbie Bishop	\$34,405.00		\$2,064.30	\$36,469.30
Total	\$106,255.00	\$6,742.96	\$6,692.15	\$119,690.11

3.1 Views of Highpine

Highpine submitted that the disjointed hearing was caused in part by the RRCC not objecting to the adjournment request of the Attorney General to enable the Attorney General to respond to the constitutional issues raised by the RRCC.

Highpine referred to *Energy Cost Order 2004-004, Polaris Resources Ltd.* and the Board statement therein that

The Board does not generally award costs for the attendance of two counsel at a hearing. It is only in exceptional circumstances, such as where issues and the intervention are complex will the Board find it necessary for two counsels to have been in attendance at a hearing.

Highpine also raised a concern about the duplication of time by counsel.

Highpine pointed out that this hearing followed closely on the heels of the West Energy Ltd. (West) hearing concerning an application to drill two level 2 critical sour crude oil wells to obtain crude oil from the Nisku formation. Highpine maintained that the West hearing pointed out that all but four of the RRCC members who appeared at the West hearing and two experts who testified at the West hearing appeared at the Highpine hearing. Counsel for RRCC was the same on both hearings.

Highpine objected to the costs relating to the RRCC's constitutional issues and the extensive questioning of the Board's procedure from pre-submission and approval of predicted H₂S release rates and makes reference to section 5.1 of Directive 031A. Highpine suggests a reduction for the preparation of all materials, submissions and arguments respecting the constitutional challenge of the RRCC and for the H₂S release rate questioning.

Highpine objected to a specific disbursement in the amount of \$600.00 for consultation by the RRCC counsel with Phil Weber of EnAble Performance for the review of the CAPP Stewardship Audit. Mr. Weber was not called to testify at the hearing.

Another expert was consulted by the RRCC counsel, namely Carol Eamer, in connection with human health issues. Ms. Eamer did not testify at the hearing and did not render an account. Highpine seeks a reduction for counsel's time spent on this consultation.

Highpine also asked the Board to apply a cost reduction for travel time of counsel to ½ of the usual hourly rate.

3.2 Views of the RRCC

The RRCC contends that while a group was formed, each of the individual members had specific concerns that had to be advanced at the hearing. The formation of the group and the use of one law firm is said to have kept costs down.

On the issue of costs for two counsel, the RRCC responded by citing three costs orders of the Board (2007-001, 2007-007; and 2007-008) in which second counsel fees were allowed. The group also argues that two counsel were required due to the number of clients being represented and the complexity of issues.

The RRCC contends that there was a useful division of duties throughout, efforts to reduce duplication and delegation of tasks from more senior to more junior counsel. For example, it is stated that Ms. Bishop, with her lower hourly rate, did the lion's share of meeting with each member of the RRCC to prepare summaries of their evidence.

Part of the hearing was scheduled when it was known to the parties that Ms. Klimek was unavailable which necessitated junior counsel being fully up to speed in the event that Ms. Klimek was unable to attend that portion of the hearing. The Board commented in their letter to counsel for the RRCC and Highpine on September 21, 2007 stating that

Regarding the hearing schedule, Counsel for the RRCC identified scheduling concerns with sitting on October 12, 2007. The Board noted that Ms. Bishop was assisting Ms. Klimek with this matter. The Board advises that it intends to sit on October 12, 2007, and expects that Ms. Klimek will be able to make arrangements to have Counsel present on that day.

In connection with the disbursement to Phil Weber, counsel for the RRCC points out that he was consulted to provide advice on Highpine's audit and non-compliance record. Scheduling precluded him from testifying at the hearing but he was able to provide advice on the Audit and what questions should be asked.

As far as a reduction for travel time is concerned, counsel states that there were a total of 11 trips to Drayton Valley from Edmonton and one trip to Calgary. Both counsel travelled together on the trip to Calgary and on four of the trips to Drayton Valley. They maintain that when they travelled together, they used the time to discuss the case and plan for the hearing. In other words the time was spent in preparation for or in consultation on the hearing and that it just happened to occur in a vehicle therefore, the usual reduction of 50% for travel time ought not to be used. Four trips were made by each counsel individually and they state that their time has already been reduced by six hours to account for the EUB's policy on travel time.

3.3 Views of the Board

While the Board does not generally award costs for the attendance of two counsel at a hearing, in the circumstances of this hearing, the Board finds that the retention and attendance of two counsel is appropriate. Numerous witnesses and experts had to be organized and prepared. The hearing did have some complexity and dealt with two wells. Further, the Board considers the hourly rate claimed by Ms. Bishop, as more junior counsel, in the amount of \$140.00 per hour is reasonable.

The Board is, by legislation, appointed as a tribunal to hear constitutional challenges raised before it. Such constitutional challenges are to be made upon the evidence adduced at the hearing. The Board understands the objection by Highpine to time and fees being spent on such a challenge when the basis for the challenge may not be directly related to the application. The Board holds that in these circumstances however, it is prepared to allow a claim of fees for this aspect of the hearing, including the preparation of argument on the constitutional issues.

Highpine asserted that some of the cross-examination of Ms. Bishop was inefficient as it related to the pre-submission of Highpine and release rates. However, the Board holds that the lower hourly rate claimed by Ms. Bishop takes certain inefficiencies and inexperience into account.

With respect to travel time, the Scale of Costs provides that the Board will allow professionals only half of their hourly rate for travel time. The Board notes that counsel for the RRCC contends that when they travelled together, they were able to consult on the matter, consider issues and strategize and therefore the Board's suggested rate for travel time should not apply. The Board does not accept that car travel is an efficient way for counsel to concentrate and work on files and subsequently recover the maximum amount of legal fees under the Scale of Costs for this time. The cost claim for counsel does not break out this dual travel time with specifics other than to state that counsel travelled together once to Calgary return and four times to Drayton Valley.

Given the Board's view on travel time, the Board is not prepared to award a travel rate above the Scale of Costs. The Board has estimated 6 hours for return travel between Edmonton and Calgary. The Board has estimated 2.5 hours for return travel between Edmonton and Drayton Valley for a total of 10 hours (2.5 hours x 4 trips). By these estimates, the Board concludes that Ms. Klimek and Ms. Bishop each incurred a total of 16 hours of travel time for the Calgary trip and 4 Drayton Valley trips. The Board reduces these hours for each counsel by 50%. Therefore the Board reduces Ms. Klimek's fees by \$2,000.00 (\$250 x 8 hours) and Ms. Bishop's fees by \$1,120.00 (\$140 x 8 hours).

The Board accepts Ms. Klimek's submission of December 20, 2007 that the remaining travel time incurred was reduced to comply with the Scale of Costs.

With the exception of the reduction for travel time, the Board is not prepared to apply further reductions to the fees claimed by counsel for the RRCC. On balance, it finds the fees claimed to be reasonable in all of the circumstances.

The Board has reviewed the legal expenses being claimed. The Board recognizes that Ms. Klimek included the professional fees of Phil Weber of EnAble Performance Inc. as an expense. While the Board would not normally accept professional fees as part of a lawyer's expenses, in this instance the Board notes that Mr. Weber's account was submitted with the cost claim which includes his hourly rate, number of hours incurred, and tasks undertaken. Therefore the Board is prepared to consider this portion of the cost claim.

Mr. Weber's tasks included telephone and e-mail discussions with counsel, review of Highpine CAPP Stewardship Audit Report and related documents, and preparation of review notes. Mr. Weber incurred 4 hours at \$150.00 per hour (\$600.00). In the covering letter accompanying the cost claim, Ms. Klimek explained that Mr. Weber was unable to attend the hearing due to scheduling conflicts and could only provide advice on the Audit and identify questions that should be asked.

In considering Mr. Weber's fees, the Board notes that Mr. Weber did not file evidence, nor did he attend the hearing. While the Board generally finds the attendance of an expert to be more beneficial to issues being raised, the Board does recognize that this type of review may assist in a generally way and Ms. Klimek did briefly address the stewardship audit at the hearing. Therefore, the Board finds the fees of Mr. Weber to be appropriate and are approved in full.

The Board finds the remaining expenses incurred by Ms. Klimek to be reasonable and in accordance with Directive 031A, and are therefore approved.

In summary, the Board approves legal fees in the amount of \$103,135.00, expenses in the amount of \$6,742.96, and related GST in the amount of \$6,504.95, for an overall award of \$116,382.91.

4 DR SHUMING DU

Dr. Du claims fees of \$18,114.00, expenses of \$441.09, and GST of \$1,101.91 for a total claim of \$19,657.00.

4.1 Views of Highpine

Highpine urged the Panel to focus on the significance of the contributions of the expert witnesses put forward by the RRCC. Highpine questioned Dr. Du's referring to the Jacques Whitford AXYS reports, which he was hired to critique as being an "honest and remarkable assessment." Highpine also suggest that Dr. Du strayed form his area of expertise and that he was unable to fully critique the reports as he was without access to the Release/SLAB modeling required to fully address them.

Finally, Highpine contends that Dr. Du seems to have spent an inordinate amount of time in preparation of his report, 135 hours, and there should therefore be an appropriate reduction to reflect a more reasonable amount of time.

4.2 Views of the RRCC

In its January 25, 2008 response, counsel for the RRCC stated that in fact Dr. Du did do extensive CALPUFF modeling and SLAB modeling which were discussed in his report.

4.3 Views of the Board

In relation to the modeling issue, the Board notes that the Statement of Account of Dr. Du contains the following elaboration of some of his time for the period July 5 to September 11, 2007

Acquire modeling documents/electronic files from Jacques Whitford AXYS, replicate the modeling results, and change model parameters to examine air quality impact for other possible release scenarios.

It is the view of the Board that Dr. Du provided assistance to it in testing the evidence of Highpine and it is not prepared to find that the time spent was unreasonable.

The Board has considered the expenses of \$441.09 and finds that they are reasonable and in accordance with Directive 031A, and are therefore approved in full.

Therefore, the Board approves professional fees for Dr. Du in the amount of \$18,114.00, expenses of \$441.09, and GST of \$1,101.91, for an overall award of \$19,657.00.

5 DOUG MCCUTCHEON AND ASSOCIATES CONSULTING

Mr. McCutcheon claims fees of \$17,395.00, expenses of \$211.80 and GST of \$1,043.70 for a total of \$18,650.50.

5.1 Views of Highpine

Highpine maintained that Mr. McCutcheon's consideration of Highpine's Emergency Response Plan (ERP) lacked soundness as elements of it treated the ERP as if it were a production ERP as distinct from a drilling and completion ERP. Highpine also argued that this expert witness acknowledged that he had strayed from his area of expertise on cross-examination.

Highpine expressed concern with the nine days billed for at the rate of \$1,960.00 per day for preparation of Mr. McCutcheon's report. Highpine also contended that some of the materials and consideration of this expert witness were on irrelevant issues or matters outside of the scope of Mr. McCutcheon's expertise. Highpine relied upon the EUB's Directive 031A and in particular section 5.1 wherein it is stated that an example of costs that might not be considered reasonable include studies and expert consultation beyond the impact of a proposed project.

5.2 Views of the RRCC

In response to Highpine, the RRCC was succinct stating only that Mr. McCutcheon has been a witness before the Board on many occasions and has been granted his costs for each hearing.

5.3 Views of the Board

Mr. McCutcheon's daily rate is \$1,960.00. Based on an eight hour day, the Board calculates Mr. McCutcheon's hourly rate to be approximately \$245.00. Other than travel time, the Board recognizes that Mr. McCutcheon's hourly rate complies with the Board's Scale of Costs.

Generally, the Board found Mr. McCutcheon's participation helpful and he assisted the hearing process. However, the Board does note that this expert witness' experience does not relate closely to oil and gas matters. Further, the Board finds that some of the testimony of Mr. McCutcheon was of questionable relevancy which limited his contribution to the hearing. Accordingly, the Board is going to reduce the fees claimed by Mr. McCutcheon by one day, being \$1,960.00.

The Board recognizes that Mr. McCutcheon's daily rate is inclusive of travel time. The Board is not prepared to deviate from the Scale of Costs for travel time by professionals, which allows ½ of the usual hourly rate. The Board will assume that the 706 kilometres travelled took 8 hours being a cost of \$1,960.00¹. The Board will approve 50% of this cost with respect to travel time, resulting in a reduction of \$980.00.

Therefore, the Board approves fees of \$14,455.00, expenses of \$211.80, and GST of \$867.30, for a total of \$15,534.10.

6 RRCC MEMBERS

The following table summarizes the honoraria and expenses claimed by 9 RRCC members and 4 witnesses for the RRCC.

Table 2 Table of RRCC Members' and Witnesses Requested Honoraria and Expenses

Category	No. of Members	No. of Witnesses	Total Amount of Claims
Preparation honoraria	9		\$7,260.00
Preparation honoraria		4	\$300.00
Attendance honoraria	9		\$4,600.00
Attendance honoraria		4	\$300.00
Forming a Group	3		\$1,500.00
Expenses	9		\$3,239.85
Total			\$17,199.85

¹ 8 hours x \$245.00/hr

6.1 Views of Highpine

Highpine pointed out that the monetary claims of the RRCC members for preparation were based upon a recording of actual time spent at the rate of \$30.00 per hour whereas, the claim for attendance honoraria appears to be based upon the honoraria set out in Directive 031A namely \$50.00 per ½ day spent in attendance. Highpine points out that the Directive contemplates honoraria as opposed to hourly billing rates or wages for compensation.

Highpine relies upon section 6.1.1 of Directive 031A in pointing out that.

If an individual intervener hires a lawyer to assist with the intervention and the lawyer is primarily responsible for the preparation of the intervention, the Board generally will not provide an honorarium to the individual for his or her preparation efforts. In situations where both the lawyer and the individual contribute substantially to the preparation of the intervention, the Board may consider an honorarium in recognition of the individual's efforts.

6.2 Views of the RRCC

The RRCC acknowledges the Board's practice of not awarding costs based upon an hourly rate but contends that this is an appropriate instance to do so for the following reasons.

- The importance of the issues to both the members and the public;
- The complexity of the issues which required research and study; and
- The detailed evidence of the interveners.

The RRCC then turns to the West cost decision in which the same group was awarded preparation, attendance and group formation honoraria together with reasonable expenses including those for meals and mileage.

The RRCC concludes by reiterating that many members of the RRCC had specific individual concerns that they wanted the Board to hear and understand and that the members took sizeable amounts of time away from their families or pursuits.

6.3 Views of the Board

Honoraria Awards

The Board is not prepared to vary from its established practice of awarding honoraria as opposed to hourly rate and lost wage claims. While the Board is not prepared to award hourly rates or lost wage claims, it does want to recognize the efforts of the RRCC for endeavouring to understand the EUB process, prepare submissions, make presentations and attend the hearing. The Board acknowledges the expenditure of personal time by RRCC members.

While the RRCC had counsel who was primarily responsible for representing the intervention, the Board recognizes that the RRCC is comprised of nine members and the duration of the hearing was 8 days. Therefore, the Board is of the view that this is an appropriate instance to exercise its discretion and recognize the efforts of members of the RRCC by awarding attendance and preparation honoraria.

The RRCC presented the following panels on the dates indicated.

November 13, 2007

- Panel 1: David Kessler, Darwin Mulroy, Diane Sullivan, Nona Coombs, and Jim Coombs
- Panel 2: Mike Mueller and Ken McKenzie
- Panel 3: Lil Dupperon, Susan Kelly, Bob Domke, Linda McGinn, and Mandy Ochsner

November 14, 2007

- Panel 3: Lil Dupperon, Susan Kelly, Bob Domke, Linda McGinn, and Mandy Ochsner
- Panel 4: Daryl Schmidt and Christine Dodd

With respect to panels 1 and 3, the Board recognizes that these panels are comprised of the RRCC members. For these individuals, in recognition of their efforts in participating in preliminary meetings and in a witness panel, the Board approves their amounts as claimed up to a maximum of \$500.00. The Board recognizes these awards as preparation honorarium.

The Board recognizes that panels 2 and 4; being Mike Mueller, Ken McKenzie, Daryl Schmidt, and Christine Dodd, appeared as witnesses on behalf of the RRCC. The Board notes section 6.3.3 of Directive 031A which states as follows.

An intervener may find it necessary to support a submission with the testimony of a witness who has some especially relevant knowledge but is neither an intervener nor an expert. The attendance at a hearing of such a witness may qualify for a witness fee of \$50 for each half day necessarily and actually present at a hearing to be available to appear as a witness on behalf of an intervener. Normally, such a witness could not attend the whole hearing.

Therefore, with respect to Mike Mueller, Ken McKenzie, Daryl Schmidt, and Christine Dodd, the Board approves a \$50.00 witness fees to be paid to each of them for their attendance at the hearing.

With respect to honoraria for forming a group, Susan Kelly, Linda McGinn and Lil Duperon each claim \$500.00. The Board recognizes that two RRCC members received honoraria for the formation of the group in Energy Cost Order 2007-008, *West Energy Ltd., Applications for Well Licences*. The Board finds that the group was formed and ready to proceed in connection with the Highpine application, therefore, the Board does not find it appropriate to duplicate those honoraria.

With respect to attendance, the Board understands the importance of the RRCC members attending the hearing. The Board appreciates the efforts to convene for long hours, and be available when requested by Panel. The Board finds it appropriate to award attendance honoraria at \$100.00 per day for the hearing.

Table 3 Board Determined Honoraria for RRCC Members

The following table summarizes the above noted honoraria awards.

Name	Claims	Board Awarded Honoraria		
		Preparation	Attendance	Total Award
Susan Kelly	\$5,080.00	\$500.00	\$800.00	\$1,300.00
Linda McGinn	\$2,580.00	\$500.00	\$700.00	\$1,100.00
Darwin Mulroy	\$500.00	\$300.00	\$200.00	\$500.00
Robert Domke	\$1,280.00	\$400.00	\$800.00	\$1,200.00
Nona Combs	\$220.00	\$120.00	\$100.00	\$220.00
Mandi Oschner	\$1,280.00	\$400.00	\$800.00	\$1,200.00
Dave Kessler	\$320.00	\$120.00	\$200.00	\$320.00
Dianne Sullivan	\$320.00	\$120.00	\$200.00	\$320.00
Lil Duperon	\$1,780.00	\$480.00	\$800.00	\$1,280.00
Daryle Schmidt	\$200.00	\$0.00	\$50.00	\$50.00
Mike Mueller	\$100.00	\$0.00	\$50.00	\$50.00
Ken McKenzie	\$100.00	\$0.00	\$50.00	\$50.00
Christina Dodd	\$200.00	\$0.00	\$50.00	\$50.00
Total	\$13,960.00	\$3,040.00	\$4,800.00	\$7,640.00

Expenses

The Board has reviewed the expenses claimed. The Board notes that Ms. McGinn claims for loss of wages in the amount of \$1,500.00. As discussed earlier in this section, the Board is not prepared to award costs of this nature. Therefore, the Board disallows this portion of Ms. McGinn's expense claim. The Board approves Ms. McGinn's remaining expenses, as well as the expenses claimed by the other RRCC members.

7 ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Board approves intervener costs in the amount of \$161,273.86.
- (2) Payment shall be made to Klimek Law, Barristers & Solicitors at #240, 4808 – 87 Street, Edmonton, AB T6E 5W3.

Dated in Calgary, Alberta on this 21st day of May, 2008.

ALBERTA ENERGY AND UTILITIES BOARD

“Original Signed by Thomas McGee”

Thomas McGee
EUB Board Member

APPENDIX A – SUMMARY OF COSTS CLAIMED AND AWARDED



Appendix A