

Proceeding ID 346

March 22, 2017

BY E-MAIL ONLY

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www.aer.ca**Prehearing Meeting Decision****Bashaw Oil Corp.****Applications 1842705, 1851246 and 1851250¹**

Dear counsel and Mr. Lee:

INTRODUCTION

The Alberta Energy Regulator (AER) held a prehearing meeting at the Clean Energy Technology Centre in Drayton Valley, Alberta, on March 13, 2017 before hearing commissioners Cecilia Low, (presiding), Heather Kennedy, and Dr. Brian Zaitlin. Those who appeared at the hearing are listed in Appendix 1.

Parties

Four parties appeared at the prehearing:

- The applicant, Bashaw Oil Corp.
- The individuals represented by Ackroyd LLP (the Drayton Valley Land Owners). Their counsel confirmed that none of the landowners identified in Appendix B to their written submissions of March 10, 2017, will participate individually.
- Brazeau County

¹ Bashaw applied under section 2.020 of the *Oil and Gas Conservation Rules* to drill and operate three proximity-critical sour wells on a multiwell pad site to be located in Legal Subdivision (LSD) 9, Section 35, Township 49, Range 7, West of the 5th Meridian. The wells are planned to be directionally drilled to bottomhole locations at 04-01-050-07W5, 15-35-049-07W5, and 08-34-049-07W5, targeting crude oil in the Nisku formation. The wells would have a maximum hydrogen sulphide (H₂S) content of 211.5 moles per kilomole (21.15%), and the cumulative completion/servicing H₂S release rate would be 1.15 cubic metres per second. The corresponding emergency planning zone is calculated to be 0.88 kilometres (km). The pad site would be located about 2.3 km. east of Rocky Rapids (Figure 1: map of project area).

- Eagle Point Blue Rapids Parks Council (the Parks Council)

Purpose of the prehearing meeting

The prehearing meeting was held to obtain the parties' views on: the issues; preliminary matters relating to costs; dates, location, and hearing length; the potential role of alternative dispute resolution and case management; whether to hold a prehearing technical meeting with the parties and experts before the hearing and the purpose of such a meeting; and any other matter that may help ensure a fair, efficient, and effective hearing process.

The agenda was included in the notice of prehearing meeting. It was sent to participants on March 3, 2017, and is in Appendix 2. The agenda included a preliminary list of issues as a starting point for discussion.

On March 7th, we received written submissions from Bashaw about the agenda items. On March 10th, we received written submissions from the Drayton Valley Landowners.

Clarification of Agenda Items

Before hearing from the parties, the panel chair clarified three matters that arose from the written submissions filed by Bashaw and the Drayton Valley Land Owners. The clarification is found at pages 10 to 12 of the prehearing transcript which is posted on the AER's website at https://dds.aer.ca/EPS_Query/ProceedingSearch.aspx.

Preliminary Motions

No preliminary motions were brought forward at the prehearing meeting. The Drayton Valley Land Owners said they may file a request for advance costs after considering our decisions regarding the issues for the hearing and a prehearing technical meeting.

AGENDA ITEMS

The parties were asked to address the agenda items at the prehearing meeting and to respond to other parties' submissions. We have considered the submissions made at the prehearing and our conclusions follow.

Nature and Form of Participation

The Drayton Valley Land Owners have been granted full participation rights including, but not limited to, an opportunity to present evidence, cross-examine witnesses, and make arguments on the issues we have identified for the public hearing.

Brazeau County has been granted full participation rights on limited issues. Those issues are

- the adequacy of Bashaw's consultation with Brazeau County on the Emergency Response Plan (ERP),
- Brazeau County's understanding of its role under the ERP, and
- issues specific to Brazeau County's role in emergency response in the event of an incident that triggers the ERP for any of the proposed wells.

The Parks Council asked for and received limited participation rights. The Parks Council will not cross examine. It will present evidence and will be available for questioning about park use, including numbers of users and type of use by time of year if possible for the park area that falls in Township 49 Range 7 W5M, including any information on the river usage. The area we request information about is limited to the west side of the North Saskatchewan River. If possible the information provided should include data on use of access to Eagle Point Park immediately to the east of the EPZ, where there appear to be three routes into Eagle Point Park. For greater clarity on the location of the routes of interest, please refer to page 274 -275 of the Bashaw Emergency Response Plan (Exhibit 1.04- 2016-12-08).

Site visit

All parties agreed that a site visit by the panel would be useful.

A time and format for the site visit will be communicated to all parties before the site visit to allow for input on timing, locations, route etc.

Prehearing Technical Meeting

After considering the submissions on this agenda item made at the prehearing meeting we have decided not to proceed with this meeting.

Expert Witnesses

Bashaw and the Drayton Valley Land Owners said it's too early to determine what expert witnesses they may present at the hearing. They will be in a better position to do so once they have our views on the issues and the scope of the issues for the hearing.

We invited the parties to provide comments on ways to more effectively hear expert evidence. We suggested that we might seat subject matter experts together by discipline as a panel (sometimes referred to as "hot tubbing") at the hearing or that we might direct a meeting of the experts so they may identify and be prepared to report on areas where they agree or disagree and why.

Bashaw is of the view that we should not experiment with hot tubbing at its expense. The Drayton Valley Land Owners support the idea of hot tubbing based on the use of that approach by the Alberta Utilities Commission. The Parks Council did not make any submissions on this point.

We will consider this and provide further direction regarding expert witnesses and their evidence once the parties identify their experts for the hearing.

ADR and Hearing Processes

For the purposes of this proceeding we have identified two possible forms of dispute resolution. In the agenda for the prehearing we called the first “traditional ADR” and the second “hearing related ADR”. After considering the parties’ submissions, and in particular concerns with respect to costs for ADR, we will no longer refer to hearing related ADR. For the purposes of this proceeding we will use the term “facilitated hearing management”. We think that term better describes the processes we have in mind.

What do we mean by traditional ADR and facilitated hearing management?

We identified Traditional ADR and hearing related ADR as topics for discussion at the prehearing meeting. Those terms are not used in the *Responsible Energy Development Act* (REDA) or the *Alberta Energy Regulator Rules of Practice* (the *Rules of Practice*). Similarly, there is no reference in either REDA or the *Rules of Practice* to “facilitated hearing management”. The following is what we mean when we use those terms for the purposes of this proceeding.

In traditional ADR

- The hearing panel is not involved.
- The parties can develop the process to suit them.
- Often engaged first – before the hearing process- but is also used independently of and at the same time as a hearing process.
- If the parties agree, people who are not parties to the hearing may take part.
- Information shared during the process remains confidential under section 7.7 of the *Rules of Practice* and does not form part of the public record in the hearing – there would be no need to bring an application to request that the information, for example information about an individual’s health, be kept confidential and off the public record.
- Parties can deal with issues that the AER or in this case the hearing panel will not or cannot deal with.
- Parties may resolve what are private matters or matters that are specific to an individual or family without going to a hearing. An example would be ERP provisions specifically tailored to the health needs of an individual.
- The *Rules of Practice* relating to confidentiality and costs clearly apply.

For the purposes of this proceeding facilitated hearing management is a process where a hearing commissioner, not a member of the hearing panel, assists the parties to resolve matters specifically relating to or arising out of the hearing. For example, the parties may engage in facilitated hearing management to agree: to narrow some issues; on a joint expert or a set of facts to go to experts; or they may agree on recommended conditions for an application should it be approved.

In facilitated hearing management

- Parties may choose to engage or we may direct them to participate in a facilitated hearing management meeting to deal with hearing related matters.

- The hearing panel is involved – not in the facilitated hearing management meetings but in providing direction and making decisions on recommendations, proposals, agreement, etc. that result from the meetings. For example, the hearing panel may direct parties to work together to develop a joint recommendation for the procedure to be followed in a site visit. In a different example, the parties may take the initiative to develop a set of conditions for approval for our consideration.

Facilitated hearing management requires a careful approach to what information will and will not be shared with the hearing panel. Typically, conclusions and recommendations are shared but the discussions that lead to those conclusions or recommendations would not be. There will need to be some communication between the panel and the hearing management process to be specified by us and agreed to by the parties.

For the purposes of this hearing, counsel for the Drayton Valley Land Owners said that the approach to confidentiality set out in the prehearing agenda should be adopted. Counsel for Bashaw did not address this point. We confirm that the confidentiality provisions of the *Rules of Practice* apply for traditional ADR and that the following principles apply to facilitated hearing management unless or until parties engaged in that process agree or request otherwise.

- Commissioner Macken and Ms. Garbe will be copied on all communication from panel to parties (including communication re: process from hearing coordinator and communication from counsel).
- For facilitated hearing management hearing commissioner to hearing panel communication, only information that all parties to the facilitated hearing management agree may be communicated to the hearing panel will be shared.

Costs relating to ADR and Facilitated Hearing Management

We heard that costs related to ADR and facilitated hearing management, are a concern to the parties. The Drayton Valley Land Owners asked us to direct the parties to facilitated hearing management so that they may recover related costs. We will not direct the parties to take part in traditional ADR or facilitated hearing management at this time as such processes have the best chance of success if the parties choose to engage.

In addition, in our view the parties will benefit from time to consider our decision regarding the issues for the hearing. If any party requests that we direct a dispute resolution or facilitated hearing management meeting of any nature we will fully consider that request and supporting submissions.

The preferable approach to costs, and the practice encouraged by the AER, is for the parties to agree on costs. If they cannot there are options available. Specifically

- Participants may apply for an advance of costs or other costs for facilitated hearing management, and
- Participants may include a claim for ADR costs in the event the panel has directed them to an ADR process – see Rule 7.82 (b), (c), (d) and (e) and see AERCO 2016-003.

What we heard from the parties about opportunities for ADR

Finally, Bashaw and the Drayton Valley Landowners shared their views on the potential effectiveness of ADR. Bashaw takes the position that ADR will not be effective. The Drayton Valley Land Owners take the position that ADR may resolve significant portions of this matter.

To us, this suggests that there is middle ground - especially on two issues. The first is the potential impacts of the proposed wells on individuals with specific health concerns. Addressing personal matters in traditional ADR may be the best means of ensuring the confidentiality of personal health information. The second is flaring notification and plans. Counsel for the Drayton Valley Landowners suggested that many of his clients may have no more concerns with the applications if they are able to agree on matters relating to flaring.

The parties also made submissions about whether dispute resolution ought to be tried first with any unresolved issues going to a hearing, or whether dispute resolution could or should be held in parallel to the hearing schedule (Appendix 3.) Nothing we heard leads us to conclude that one approach would be better than the other.

We encourage the parties to continue to consider ADR as an option. They may choose to engage in dispute resolution or request that we direct a dispute resolution meeting at any time.

Witness numbers

Bashaw and the Drayton Valley Land Owners were not prepared to say how many and what type of witnesses that they would call. They said it was too early for that or that they were looking for guidance from us on the issues they will have to address.

Brazeau County anticipates calling up to three witnesses. The witnesses will focus on safety, the impact of the delineation of the EPZ on Brazeau County, and on emergency response in the event of an incident triggering Bashaw's ERP.

The Parks Council expects to call one witness.

Hearing Duration

We have set the hearing down for eight days.

The parties' preliminary estimates of the hearing duration ranged from one to two weeks. Brazeau County anticipates that its participation will take approximately one day of hearing time. The Parks Council indicated that it would take less than a day to present its evidence.

Hearing Dates and Location

The hearing will start at 9 a.m. on September 6, 2017, at the Clean Energy Technology Centre in Drayton Valley. We chose that date based on the submissions made by the parties regarding scheduling. For example, Brazeau County requested that the hearing not occur during or just after municipal elections or during budget preparation. Bashaw requested that the hearing not occur over the summer. We also took into account the need to allow sufficient time for a formal, reciprocal information request process

and for the preparation of expert evidence. All participants were in agreement that the hearing should take place in, or close to, Drayton Valley.

Formal Information Request (IR) Process

We have established a formal IR process. The timeline is incorporated in the overall hearing process timeline in Appendix 3. The IR process is based on the following recommendations we heard from the parties:

- Information requests must be reciprocal.
- The AER will consider requests to compel answers under the *Rules of Practice*.
- Clear timelines for process will be set.

Draft List of Conditions

At the prehearing the parties were asked for their views about whether there would be some benefit if we provided a draft list of potential conditions for the well licences, should they be approved. The list would be circulated prior to the close of the hearing so that the parties may comment on it. Bashaw, the Drayton Valley Land Owners and Brazeau County agreed that a draft list of potential conditions would be useful. The Parks Council did not comment on this point.

If we decide to prepare a list of potential conditions we will provide further direction to the parties about timing and the opportunity for the parties to comment on the potential conditions.

Other Issues the Parties Asked Us to Address

At the request of the the Drayton Valley Land Owners, a complete transcript of the prehearing meeting was made available on the AER website (https://dds.aer.ca/EPS_Query/ProceedingSearch.aspx). Instructions for accessing them were emailed to the parties.

Costs

The parties requested direction from us regarding timing and a process for dealing with advance cost requests or other means of assurance that certain costs would be recoverable.

The Drayton Valley Land Owners noted that they are not yet in a position to make a formal request for advanced costs under section 59 of the *Rules of Practice* and *Directive 031 REDA Energy Cost Claims*. They have contacted experts to determine availability, capacity, timing and budget. Prior to applying for advanced funding, they request a detailed list of the matters/issues we would consider to be part of this hearing so that they can decide what type of subject matter experts would be needed. They are looking for guidance from us about how to request advanced costs.

Brazeau County indicated that it would make application for advanced funding and costs if invited or directed to participate in ADR.

Bashaw said it would review potential requests for advanced funding when and if they are submitted. Bashaw also said that Brazeau County should not be awarded any costs based on the past practices of the Energy Resources Conservation Board.

The Parks Council did not say if it would file a request for advanced costs.

The *Rules of Practice* govern the award of costs. AER and ERCB decisions provide guidance on factors that the regulator has taken into consideration on past cost applications. The parties are in the best position to judge if and when they would benefit from bringing an application for costs. We will not predetermine an award or possible award of advance or other costs in the absence of an application from a participant, submissions from Bashaw and opportunity for reply.

ISSUES FOR THE HEARING

We sought input from the parties on a preliminary list of issues set out in an appendix to the prehearing agenda. After considering the parties' views, we have made our decisions regarding the issues that will be heard as part of this proceeding.

1. Scope of the project's activity

The AER has only received the three *Directive 056 Energy Development Applications and Schedules* well licence applications from Bashaw. The applications received have been deemed, by AER staff, to be complete, according to the *Oil and Gas Conservation Act*. The AER has not received any pipeline or facility applications associated with the proposed wells. Without those it is impossible to effectively hear any matters outside of the applications before us and so we have defined the scope as being limited to the activities authorized by the three well license applications.

2. The location for the proposed wells

3. Potential impacts on:

- a) Safety
- b) Nuisance (noise, dust)
- c) Animal safety
- d) Health
- e) Social and economic effects
- f) Pollution
- g) Flaring, and
- h) Environmental impacts other than those already described in this list, for example impacts on water

4. Emergency preparedness and response

The emergency response plan (ERP) prepared by Bashaw for the applications is an issue for this proceeding in three areas: i) how the plan is tailored for the site and the activities planned; ii) whether the level of consultation with the local authority and the public is adequate; and iii) Bashaw's capability to effectively lead the response and coordinate with the public and the local authority should an emergency arise. There can be no confusion on roles and accountability of all parties to the plan.

5. Calculating the Emergency Planning Zone (EPZ) for this application

Bashaw's input variables in the ERCBH2S model are meant to reflect the site-specific conditions, operating practices, and specific technology for their application. These inputs, and the outputs that come from Bashaw's input choices, may be scrutinized as part of this proceeding. Any challenge to the model methodology and its parameters is not part of this hearing.

6. Bashaw's operational capability to safely carry out and manage the activities authorized by the well licences

7. Status of the hydrogen sulphide (H₂S) release rate approval by the AER

During the prehearing meeting, the Drayton Valley Land Owners asked us to consider that Bashaw's H₂S release rates had not been previously approved by the regulator. They asked us to add review of these rates to our list of issues. Bashaw filed their release rates as part of their application and these rates were accepted by the regulator, by letter on September 16, 2015. The letter can be found on page 535 of the Bashaw Application to the AER binder, Volume 1. The letter indicates that the release rates have been reviewed and that the AER has concluded they are reasonable for the noted areas. It is important to acknowledge that the letter further states that the estimate is based on currently available data and requires Bashaw to immediately notify the regulator if additional data becomes available. The letter states that revisions are required should the release rates be higher.

We are satisfied with the information provided to us about this topic in Bashaw's application. No one has said that there is new information that should be considered. If the parties are aware of additional relevant data that would cause a revision to the H₂S release rates we will review and consider it.

8. Bashaw's financial capacity

The Drayton Valley Land Owners' asked that we consider including Bashaw's financial viability as an issue for our proceeding. While we do acknowledge that there are examples of companies who have, after being vetted, not met their obligations, this alone is not enough to assume Bashaw will do the same. There is no evidence before us that would lead us to conclude that Bashaw cannot meet the AER requirements for being able to undertake new energy activities.

If the parties are aware of relevant information relating to Bashaw's financial capability to safely carry out its responsibilities arising from the applications, they may bring it forward in their submissions for the hearing and we will review and consider it.

Hearing Schedule	File by
Bashaw submission to hearing	April 19, 2017
Preliminary identification of expert witnesses & advance costs	May 10, 2017
Participant information requests (IRs) to Bashaw	May 17, 2017
Bashaw response to IRs	May 31, 2017
Final date for motions about Bashaw responses to IRs	June 7, 2017
Participant submissions to hearing	June 14, 2017
Bashaw IRs to participants	July 12, 2017
Participant responses to IRs	July 26, 2017
Final date for motions about participant responses to IRs	August 2, 2017
Bashaw final reply submissions	August 16, 2017
Prehearing motions	August 23, 2017
Site visit	To be determined
Hearing starts	September 6, 2017

If you have any questions please call the hearing coordinator, Greg McLean at 403-297-3232 or email hearing.services@aer.ca .

<Original signed by>

Cecilia Low, B.Sc., LL.B., LL.M.
Presiding Hearing Commissioner

<Original signed by>

Heather Kennedy, P.Eng.
Hearing Commissioner

<Original signed by>

Brian Zaitlin, Ph.D., P. Geol., C.P.G.
Hearing Commissioner

cc: Christine Macken, ADR Hearing Commissioner
Ashley Garbe, AER Counsel

Appendix 1 Hearing Participants

Principals and Representatives

Bashaw Oil Corp.
G. Fitch

Drayton Valley Landowners
W. L. McElhanney
R. C. Secord

Brazeau County
K. N. Lambrecht

Eagle Point Blue Rapids Parks Council
P. Lee

Alberta Energy Regulator staff
M. LaCasse, AER Counsel
A. Koper, AER Counsel
L. Olsen
D. Campbell

Appendix 2 Agenda

PREHEARING MEETING AGENDA:

- Opening – panel chair
- Registration of appearances – counsel, Mr. Lee, other?
- Preliminary motions - if any, including costs
- Issues for this proceeding - see Appendix A “Preliminary Issues List”
- Nature/form of participation
 - Can evolve
 - Not restricted to entitled to participate group and others
 - By issue – especially if this means some don’t need to participate in all issues/whole hearing
 - If any participant is still intending to participate through counsel as well as individually – what, specifically would that look like
 - Confirm intentions re: providing evidence, including expert evidence, making submissions, cross examination and being available to be cross examined, and final argument
- Views of the parties regarding possible site visit by the panel
- Possibility of a technical prehearing with an expert to provide information to all the parties, the ADR hearing commissioner and the panel on the changes to the EPZ calculation from H2S v. 1.9 to H2S v. 2.0
- Panel’s preliminary thoughts re: expert witnesses
 - Pre-hearing meeting of experts – facilitated by ADR hearing commissioner
 - Experts on a topic seated as a single panel
- ADR and Hearing Processes
 - “Traditional ADR” – Hearing related ADR
 - “Traditional ADR” – a neutral assists parties to resolve an issue or matter in dispute and the resulting agreement between the parties concludes the matter
 - Hearing related ADR – a hearing commissioner, not a member of the hearing panel, assists the parties to, e.g.: narrow issues, agree on a joint expert or a set of facts to go to experts; recommend conditions - the hearing panel has to consider, giving appropriate weight to proposal/recommendation developed in ADR and decide possibly after hearing evidence and asking questions to understand
 - give and take of discussions leading to a recommendation would not be disclosed unless all agreed but the reason(s) for the recommendation (e.g.

satisfies concerns about an issue and doesn't raise new concerns) would be

- Confidentiality
 - Ability/opportunity to make effective use of hearing related ADR
 - ADR agreement
 - Panel ↔ ADR hearing commissioner communication
 - cc. Commissioner Macken and Ms. Garbe on all communication from panel to parties (including communication re: process from hearing coordinator and communication from counsel)
 - ADR hearing commissioner ↔ panel
 - Only that which all parties to ADR agree may be communicated
- Estimates of witness numbers: “expert”, lay witnesses
- Hearing duration
- Possible hearing dates
- Hearing location
- Formal IR process – necessity, dates
- Closing – panel chair
 - Summary
 - Next steps

Appendix A - Preliminary Issues List

Issues the panel will consider:

- Impacts of the proposed exploratory wells on landowners:
 - Safety
 - Nuisance impacts (e.g. dust, noise)
 - Health issues
- Effects of the proposed exploratory wells on the environment
 - Control of pollution, including air pollution
- Social and economic effects of the proposed exploratory wells
- Compliance with Directive 56
- Compliance with Directive 60
 - Specifically relating to the drilling and testing of the proposed exploratory wells
- Compliance with Directive 71

- User selected inputs to EPZ calculation
- Adequacy of public involvement program
- Is ERP as comprehensive as required by the particular circumstances of these applications?
- Adequacy of consultation with the local authority

Issues falling outside the panel's jurisdiction (i.e. issues the panel will not hear):

- Policy allowing drilling of sour wells
- Effects of energy resource activity generally
- Use of the H2S v.1.2 model to calculate the EPZ*/calculated size of the EPZ
- * User selected inputs are within the panel's jurisdiction
- Policy giving energy resource activity precedence over municipal land use plans
- Municipal emergency response obligations other than as contemplated in the ERP
- Possible next steps relating to production, gathering, transportation and processing of any hydrocarbons that may be produced from the wells.

Appendix 3 Hearing Schedule

Hearing Schedule	File by
Bashaw submission to hearing	April 19, 2017
Preliminary identification of expert witnesses & advance costs	May 10, 2017
Participant information requests (IRs) to Bashaw	May 17, 2017
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Site visit	To be determined
Hearing starts ²	September 6, 2017

² Hearing scheduled for September 6 to September 15, 2017