ALBERTA
ENVIRONMENTAL APPEAL BOARD

COST DECISION

Dates of Hearing: April 8 and May 8, 1998
Date of Decision: July 2, 1998

IN THE MATTER OF Sections 84 and 88 of the Environmental Protection and Enhancement Act, (S.A. 1992, ch. E-13.3 as amended);

- and-

IN THE MATTER OF an appeal filed by Fay Ash with respect to Approval No.'s 18445-01 issued to the City of Calgary, Calgary Parks and Recreation and 47150 issued to the City of Calgary, Golf Course Operations # 136, by the Director, Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection.

Cite as: Cost Decision #2 *re: The City of Calgary (Fay Ash)*

PANEL MEMBERSHIP

Dr. William A. Tilleman, Chair
Dr. Ted W. Best
Dr. Steve E. Hrudey

APPEARANCES

Appellant	Mr. Brian O'Ferrall and Ms. Ashley Evans, counsel, Bennett Jones Verchere, representing Ms. Fay Ash, and witnesses, Mr. David Crowe and Mr. Jack Locke
Other Parties	Ms. Charlene Graham, counsel, Alberta Justice, representing Mr. Peter Watson, Director, Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection, Mr. Bob Burland, Approval Coordinator, Alberta Environmental Protection, and Ms. Janet McLean, Head, Pesticide Management Branch, Alberta Environmental Protection
	Mr. Timothy Haufe and Mr. Mark Young, counsel, City of Calgary Law Department, representing the City of Calgary and Mr. Todd Reichardt, Parks and Recreation, City of Calgary
	Mr. Menno Homan, President, and Ms. Kelly Chambers, Bow River Basin Water Council

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BACKGROUND

[1] This Decision addresses cost claims in an appeal by Ms. Fay Ash concerning two "special use" Approvals issued by the Director of Southern East Slopes and Prairie Region, Environmental Regulatory Service, Alberta Environmental Protection.[1] The Director issued the Approvals to the City of Calgary, Calgary Parks and Recreation and Golf Course Operations (the "City"), pursuant to section 9(1) of the *Alberta Pesticide (Ministerial) Regulation*, AR 43/97. As relevant here, that section prohibits the use or application of a pesticide within thirty horizontal metres of an "open body of water" except pursuant to a "special use approval" granted by the Director.

[2] Special Use Approval No. 18445-01 allows Calgary Parks and Recreation to use pesticides for three projects, two of which involve pesticide spraying to control non-native plants at various locations adjacent to the Bow and Elbow Rivers and Nose Creek. The third project involves pesticide spraying adjacent to the Bow River in conjunction with reclamation work at the Inglewood Bird Sanctuary's North Field, in Calgary. The second Special Use Approval -- No. 47150 -- is for the use of three listed pesticides on a putting green within thirty metres of a water hazard on the Shaganappi Golf Course.

[3] The Environmental Appeal Board (the "Board") held hearings on the appeal on April 8, 1998, and May 8, 1998. At the close of the May 8, 1998 hearing, the Board stated that any party seeking costs should file a claim for costs by May 15, 1998.[2]

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[1] Hereinafter, the "Director". Alberta Environmental Protection will hereinafter be referred to as the "Department".

[2] May 13, 1998 Board letter.

[4] The Director subsequently filed a letter stating that he would not be seeking costs from any of the other parties or from the Board.[3] The City filed a letter stating that it was seeking costs from the Appellant.[4] The City's letter did not indicate what its total costs were or how much of that total it sought from the Appellant, let alone provide proof of its costs. The letter stated simply that it "leaves it to the discretion of the Board as to the appropriate amount of costs."[5]

[5] The Appellant filed a letter requesting $46,479.33 in costs from the Board.[6] The fourth party to the appeal -- the Bow River Basin Water Council -- filed a claim for $6,700.00 in costs.[7] The Board refused to consider the Council's claim, however, because it was filed roughly eleven days *after* the Board's May 15, 1998 deadline for the submission of cost claims.[8]

[6] On June 8, 1998 the Board issued a Report and Recommendations (hereinafter "Report"). In the Report, the Board recommended that the Minister of Environmental Protection affirm the Approvals subject to seven "specific recommendations".[9] The Board also made six "general" recommendations on steps the Department and/or the Director could take "to improve the Director's consideration of factors relevant to Special Use Approvals and Approvals generally."[10]

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3 May 11, 1998 letter from Charlene Graham on behalf of the Director.

4 May 13, 1998 letter from Mark Young on behalf of the City, at 1.

5 *Ibid.*, at 3.

6 May 15, 1998 letter from Ashley Evans on behalf of Ms. Ash.

7 May 21, 1998 letter from Menno Homan on behalf of the Bow River Basin Water Council.

8 May 27, 1998 Board letter.

9 Report, at 31 (par. 73).

10 Report, at 33 (par. 74).

[7] On June 9, 1998 the Minister signed an Order stating that the Board's decision and specific recommendations "are to be implemented" but that the Board's general recommendations were to be used only as "suggestions".[11]

THE BOARD'S ANALYSIS OF THE PARTIES' COST CLAIMS

[8] This appeal was filed pursuant to the *Alberta Environmental Protection and Enhancement Act* (the "Act"), S.A. 1992, ch. E-13.3, as amended. Section 88 of the Act provides that the Board "may" award final costs and, in accordance with regulations established by the Minister, direct who should pay costs awarded by the Board. Section 94 of the Act gives the Minister authority to adopt regulations "prescribing the criteria" for the Board to consider in "directing . . . costs to be paid." Section 18(2) of those regulations provide that any party may apply for all costs that are "reasonable" and "directly and primarily related to (a) the matters contained in the notice of objection, and (b) the preparation and presentation of the party's submission." Section 20(2) of the regulations provides that, in deciding whether to grant a request for costs, the Board "may" consider seven factors, the first three of which refer to the nature of the appeal; the remaining factors are: whether the cost request is supported by "the appropriate information"; whether the party seeking costs "required financial resources to make an adequate submission"; whether the party made a "substantial contribution" to the appeal; and whether the party's costs were "directly related" to the matters raised in the appeal and to the "presentation of the party's submission". Section 18(2) of the regulations also allows the Board to base its cost decision on "any further criteria the Board considers appropriate." The Board has previously stated that it has discretion to decide which of the criteria in section 18(2) of the regulations should apply to a particular claim for costs, and that a cost claimant need not satisfy all of the criteria in that section.[12]

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[11] Report, at 35 ("Order"). The Minister indicated that "[n]o approvals are to be withheld in the future because of perceived lack of action on these [general] suggestions." *Ibid.*

[12] *Cost Decision re:* Zon, *et al.*, EAB No. 97-005 - 97-015, Dec. 22, 1997, at 7.

[9] Section 18(3) of the regulations authorizes the Board to order that a party's costs be paid by either or both of: any other party to the appeal or the Board.[13]

[10] The Board has long made it clear that it is not bound to follow the "loser pays" principle generally adopted by courts in civil litigation.[14] Rather, the Board determines whether an award of costs is appropriate in light of the "public interest" generally and the Act's overall purpose in section 2, which is to "support and promote the protection, enhancement and wise use of the environment. . . ." That purpose is subject to ten principles in section 2(a)-(j), two of which refer expressly to the importance of the public's role in fostering environmental protection. Section 2(f) refers to the "shared responsibility of all Alberta citizens" for protecting the environment "through individual actions"; section 2(g) refers to the "opportunities made available through this Act for citizens to provide advice on decisions affecting the environment. . . ." One of these opportunities, of course, is the appeal process in Division 2, Part 3 of the Act. [15] In addition, section 2(c) of the Act refers generally to the principle of "sustainable development".

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[13] Section 33 of the Board's Rules of Practice mirrors several of the provisions of the regulations referenced above.

[14] *E.g., Zon*, at 9 n. 11; *Cost Decision re: Bernice Kozdrowski*, EAB No. 96-059, July 7, 1997, at 9.

[15] The Board notes that the Court of Queen's Bench *Kostuch* case said that s.2(g) was not intended to refer to EAB appeals. *Kostuch v. Environmental Appeal Board, et al.*, [1996] 21 C.E.L.R. (N.S.) 257 at 263 (Alta. Q.B.).

[11] In a 1995 report, an Alberta Task Force listed the following as a "priority" for implementing the principle of sustainable development: "Ensure greater environmental empowerment and accountability for all sectors of Alberta society."[16] The report stated that it was necessary to "[e]mpower Albertans through measures that facilitate individual environmental responsibility" and that "[p]ublic input is essential to an empowered society."[17] Accordingly, the report admonished "[a]ll levels of government . . . [to] actively identify and implement appropriate ways to empower Albertans to contribute to our common sustainable future."[18]

[12] Consistent with the principles in section 2 of the Act, the Board believes that it should decide requests for costs with the primary objectives of making the appeal process a meaningful "opportunity" under the Act for public participation, to help enable citizens to fulfill their individual "responsibility" for protecting the environment, and to empower citizens in order to promote sustainable development. To fulfill these objectives, where an appeal validly raising broad "public interest" concerns is nevertheless filed unsuccessfully by private citizens (by themselves or by non-profit organizations on their behalf), the Board will generally not require the citizen-appellants to pay for the costs incurred by the approval holder or by the Director who ultimately prevail in the appeal.[19] Conversely, the Board may exercise its discretion to award costs to a citizen-appellant

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16 "Ensuring Prosperity - Implementing Sustainable Development, The Report of the Future Environmental Directions for Alberta Task Force," March, 1995, at 76.

17 *Ibid.*, at 81.

18 *Ibid.*, at 82.

19 In *Dr. Martha Kostuch v. Director, Air and Water Approvals Div., Alberta Environmental Protection*, Appeal No. 94-017, the Board dismissed a private citizen's appeal, regarding the environmental impacts of a proposed cement plant, because the citizen lacked "standing" to file the appeal. August 23, 1995 Decision, at 21. The Board nevertheless denied the cement company's claim for costs, noting that it would be "undesirable" for the Board to award costs "to thwart appellants who feel they have specific, legitimate concerns, even though in the end the rather specific terms of the Act may preclude the Board from hearing the appeal, or the appellants may be unsuccessful in the appeal." *Ibid.*, at 22. The Board observed that there was "no doubt about this Appellant's bona fides" in filing her appeal and that her appeal had raised "interesting and genuine issues of fact and law, her case was clearly and effectively presented, and her appeal was well argued by competent counsel." *Ibid.*

who raises issues important to the matter, not identified or not advanced adequately by other parties. This will normally arise where the appellant's intervention promotes the public interest by ensuring that evidence of value to the Board is put forward where that evidence might otherwise have been unavailable.

[13] In the Board's view, a successful appeal is typically a pre-requisite for the Board to conclude that the appeal has promoted the public interest. Thus, a citizen-appellant generally must succeed in the appeal in order to be eligible for a cost award. In addition, the Board may consider the reasonableness of the appellant's overall claim for costs, not only in terms of whether those costs are "directly related" to the issues decided by the Board, but also in terms of the degree of success achieved in relation to the Act's objective and guiding principles and the relief sought by the Appellant.

[14] Following these standards for deciding requests for costs, the Board must first consider whether, and the extent to which Ms. Ash prevailed in her appeal. Ms. Ash did not achieve her overall objective, which was to preclude the City's use of pesticides within 30 metres of open water by convincing the Board to recommend that the Approval be withdrawn.[20] However, Ms. Ash also sought changes to the specific terms of the Approvals, in large part, to make them more enforceable or to otherwise ensure that the City's pesticide use would not contaminate open waters.[21] Chief among the Approval terms on which Ms. Ash focussed was Condition #1, which required the City to use pesticides only "where necessary" and only after the City first "evaluate[s]" "non-chemical methods" of weed control as part of an "Integrated Pest Management ["IPM"] approach."[22] Ms. Ash complained that the Condition lacked a definition of "IPM" and was otherwise

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20 *See* Ms. Ash's Written Submission, at 11; Notice of Appeal (Hearing Exhibit 2).

21 *See* Ms. Ash's Written Submission, at 9-11.

22 Board's June 8, 1998 Decision, at 18 (citing Approval 18445-01, at 1).

unenforceable. On balance of all evidence heard, the Board essentially agreed.[23] The Board accepted the City's IPM definition,[24] but also made several recommendations to ensure that the City was accountable for its implementation of the IPM approach in the riparian zones covered by the Approvals.[25] In response to Ms. Ash's concerns, the Board also made several recommendations addressing the manner in which pesticides would be applied and one recommendation that the Director affirmatively designate a "buffer zone" for the use of the Garlon 4 herbicide to control Purple loosestrife.[26] The Board is convinced that these changes will improve the Approvals and, thus, will substantially promote the Act's objective and guiding principles.

[15] Even the Board's general recommendations, which the Minister accepted only as "suggestions," will further the Act's objective and principles because they, and their accompanying explanation in the Board's Report, highlight for the Director perceived deficiencies in his pesticide program in particular and Approvals program more generally.[27]

[16] In sum, on balance, the Board believes that Ms. Ash's appeal contributed to the Act's objective and guiding principles even though, as explained below, the Board was not impressed by Ms. Ash's inadequate presentation of her appeal nor her unsubstantiated perspectives on the environmental consequences of pest management. Given her partial success, it would be wholly

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23 Board's June 8, 1998 Decision, at 18-19.

24 *Ibid.*, at 20 (pars. 45-46 summarizing the City's IPM concepts and concluding that they are "laudable, in the abstract. . . .").

25 *Ibid.*, at 21-22 (pars. 49-50, and 52).

26 *Ibid.*, at 32 (recommendation #s 3-7).

27 The Board's general recommendations were, among other things, that the Department revise the *Pesticide (Ministerial) Regulations* to clarify that applicants for Special Use Approvals should investigate alternatives to pesticides, that the Director should ensure that his Special Use Approvals are consistent with the Alberta Environmental Code of Practice for Pesticides, and that the Director should develop a policy for addressing the cumulative impacts of proposed water pollution sources in the Bow River system, together with other pollution or sources of harm, in issuing Approvals. *See* Board's June 8, 1998 Report, at 33 (par. 74).

inappropriate for the Board to require Ms. Ash to pay for the City's costs in this appeal.

[17] The Board recognizes that the City did not have the benefit of knowing the outcome of the appeal at the time the City filed its claim for costs. However, the Board notes that much of the City's justification for its cost claim was inappropriate, even viewed before the Board issued its Report. The City's justification starts by reminding the Board that Ms. Ash's appeal was preceded by a settlement of her and others' appeal of the Director's previous Special Use Approval to the City which resulted in the City's expenditure of "hundreds of thousands of dollars" to develop the City's state-of-the-art IPM Plan.[28] By this historical account, the City implies that Ms. Ash's latest appeal violated the spirit of the 1994 settlement and ignored the City's good faith in developing its IPM Plan. The City's implication ignores Ms. Ash's arguments regarding the unenforceability of Condition #1 of the Approvals. Rather than ignoring or seeking to side-step the City's IPM Plan, those arguments show that she sought to make sure that it would in fact be implemented.

[18] The City argues that it should be entitled to costs for the additional reason that the appeal was brought to "pursu[e] a political agenda: a complete ban on the use of pesticides." The City claims that the appeal "had nothing to do with seeking amendments to the approvals to ensure that surface water quality was not impacted. Rather, the Appellant was using the hearing as a forum to once again express her extremist views regarding the use of pesticides."[29] The Board recognizes that the City has been frustrated in their dealings with Ms. Ash. She admitted in cross-examination that her long term objective was to eliminate the use of pesticides, but this objective *per se* does not somehow impugn her motives for filing the appeal. Labelling the objective "political" does not assist the Board in judging the merits of their request for costs.

[19] The City implies that, given her lack of affirmative evidence specific to the water

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[28] City's May 13, 1998 letter, at 1-2.

[29] City's May 13, 1998 letter, at 2.

quality issue before the Board, Ms. Ash was using this appeal simply as a means to *broadcast* her long term policy objectives to the public.[30] The Board agrees with the City that Ms. Ash's affirmative evidence was weak and largely irrelevant. The Board also agrees that it would be an abuse of its appeal proceedings for an appellant to use them simply as a mouthpiece for communicating with the public. However, as the Board's Report makes clear, some of Ms. Ash's claims were based on weaknesses either in the Director's record and/or on the face of the Approvals themselves and, thus, did not require Ms. Ash to provide affirmative evidence for their support.

[30] City's May 13, 1998 letter, at 2.

[20] In further support of its argument that Ms. Ash should be liable for the City's costs because of the "political" nature of her appeal, the City cites *Reese v. Alberta*[31] in which the court assessed partial costs against "public interest" litigants for their unsuccessful judicial challenge to a "forest management agreement" issued by the Alberta government to Diashawa Canada (Ltd.). The City's reliance on *Reese* for its cost claim in this appeal is misplaced, primarily, because the Board has long believed that the "loser pays" principle, which was the foundation for the court's decision in *Reese*,[32] is inapplicable generally to Board proceedings.[33] Moreover, the *Reese* court awarded costs against the public interest litigants not simply because they lost, but because the court felt that they had "fallen far short" of presenting even a "close case".[34] Given the Board's specific recommendations, Ms. Ash clearly is not in the same category as the public interest litigants in *Reese*, even with her lack of credible affirmative evidence and her failure to obtain *all* of the relief that she sought.[35] Of course, the City could not have known this result when it was required to decide whether to file its claim for costs.

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31 (1992), 5 Alta. L.R. (3d) 40 (Q.B.).

32 *See, e.g., ibid.,* at 41.

33 *See, e.g., Kozdrowski,* at 9; *Zon,* at 9 n. 11; *Supra* n. 10.

34 5 Alta. L. R. (3d) at 46-47.

35 The court in *Reese* felt that awarding costs against the public interest litigants was appropriate particularly because the litigants' expert witnesses' testimony "contained elements of advocacy of public policy unrelated to their professional expertise and irrelevant to the narrow legal issue of the validity of the [forest management] agreement." 5 Alta. L.R. (3d) at 48. Whether or not policy issues were truly distinguishable from the "narrow legal issue" before the court in *Reese*, as noted above, they are generally inextricable from the issues before this Board.

[21] For the reasons given above, the Board believes it would be inappropriate to award costs to the City. The Board also believes that, despite Ms. Ash's sincere desire to protect water quality and the material contribution to the "public interest" which resulted from her appeal, there are several factors warranting denying Ms. Ash's claim for costs as well. One of these factors is the evidence Ms. Ash used in support of her appeal. As noted above and in the Board's June 8, 1998 Report, much of Ms. Ash's testimonial and documentary evidence was unpersuasive and of tangential relevance, at best, to the water quality issue before the Board. While she need not have provided any factual evidence with respect to several of her claims, given the defects in the Director's record and on the face of the Approvals (*e.g.* regarding the unenforceability of Condition #1), her affirmative submissions required the Board and the other parties to spend considerable time to address. Those submissions also likely required her and her counsel to spend considerable time to prepare. It would be inappropriate to reward Ms. Ash her and her counsel's costs for preparing these evidentiary submissions. The Board suspects that these costs account for the vast majority of her total claim for costs. At any rate, whatever costs are fairly attributable to her non-evidentiary submissions are cancelled out by the considerable costs likely incurred by the other parties in responding to her affirmative evidence. Finally, as the Director's counsel observed,[36] on several occasions in this appeal Ms. Ash disregarded the Board's directions. This conduct likely increased all parties' costs and, thus, further warrants denying Ms. Ash's claim for any costs.

DECISION

[22] For the reasons given above, the Board denies the City's and Ms. Ash's applications for costs. All parties shall bear their own costs in this appeal.

Dated on July 2, 1998, at Edmonton, Alberta.

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[36] May 22, 1998 Graham letter, at 3.

"Original signed by"
Dr. William A. Tilleman, Chair

"Original signed by"
Dr. Ted W. Best

"Original signed by"
Dr. Steve E. Hrudey