ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – December 22, 2008

IN THE MATTER OF sections 91 and 96 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Roxanne Walsh with respect to *Environmental Protection and Enhancement Act* Amending Approval No. 1242-01-05 issued to the Town of Turner Valley by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: Costs Decision: *Walsh* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Turner Valley* (22 December 2008), Appeal No. 06-071-CD (A.E.A.B.).

BEFORE: Dr. Steve E. Hrudey, Chair,
Mr. Ron V. Peiluck, Vice Chair, and
Mr. Alex G. MacWilliam, Board Member.

PARTIES:

Appellant:	Ms. Roxanne Walsh, represented by Ms. Jennifer Klimek, Klimek Law.
Director:	Mr. David Ardell, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham and Ms. Alison Peel, Alberta Justice.
Approval Holder:	Town of Turner Valley, represented by Mr. Hugh Ham and Ms. Bonnie Anderson, Municipal Counsellors.*

* Municipal Counsellors ceased to act for the Town of Turner Valley before this costs decision was released.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to the Town of Turner Valley relating to the construction, operation, and reclamation of its waterworks system. Specifically, the Amending Approval allows for the construction of a raw water storage reservoir which will supply the Town's potable water treatment plant. The latter provides the municipal water supply to the Town's residents.

The Environmental Appeals Board received a Notice of Appeal from Ms. Roxanne Walsh, and after a preliminary meeting, the Board found Ms. Walsh directly affected. A hearing was held on January 28 and 29, 2008. At the hearing, Ms. Walsh and the Town of Turner Valley reserved their right to apply for costs.

Ms. Walsh requested costs for legal fees ($22,706.25), consulting fees ($266,786.62), and personal costs ($78,714.40) for a total of $368,207.27. The Board found legal counsel kept the presentations focused on the issues and was effective in her cross-examinations of the witnesses. The Board allowed $13,780.25 for legal fees. The Board accepted fees associated with the consultants' work that directly related to the preparation and presentation of data and evidence for the hearing. The Board found the evidence presented by the consultants useful in determining variations to the Amending Approval, many of which were proposed by the Director in response to evidence provided to him, and therefore awarded $61,681.21 towards the consultants' fees. The Board allowed out-of-pocket expenses for Ms. Walsh totaling $606.15. The Board considered the claim for personal expenses for time spent in preparing for the hearing was part of a citizen's obligation to bring environmental issues to the attention of the Board and the Minister and were not eligible for compensation. Total costs of $76,067.61 were allowed. The Board ordered the Town of Turner Valley to pay Ms. Walsh's costs.

The Town of Turner Valley requested legal costs ($62,248.50 plus $2,046.07 for disbursements) and consultant fees and additional testing ($240,222.09) for a total of $304,516.66. The Board found the consultant fees and additional testing benefitted the Town of Turner Valley, particularly given the challenges posed by the location of the reservoir and because the Town was filing a renewal application for its water treatment system. The Board found these costs to be a responsibility of the Town to ensure the safety of its water supply and their consultants' studies were necessary for the work required under the Amending Approval. The Board denied the Town's costs request.

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I. BACKGROUND

[1] On September 8, 2006, the Director, Southern Region, Regional Services, Alberta Environment (the "Director"), issued Amending Approval No. 1242-01-05 (the "Amending Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to the Town of Turner Valley (the "Approval Holder" or the "Town") relating to the construction, operation, and reclamation of a waterworks system for the Town of Turner Valley, Alberta. Specifically, the Amending Approval allows for the construction of a raw water storage reservoir (the "Reservoir"). The Reservoir will supply the Town's potable water treatment plant, which provides the municipal water supply to the Town's residents.

[2] On October 13 and 17, 2006, the Environmental Appeals Board (the "Board") received Notices of Appeal from Ms. Roxanne Walsh (the "Appellant") and Ms. Linda Abrams appealing the Amending Approval.

[3] On October 13 and 23, 2006, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the "Parties") and Ms. Abrams acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the record (the "Record") relating to these appeals.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[5] On October 18, 2006, the Appellant applied for a Stay of the Amending Approval, and the Board determined there was sufficient information to consider granting a Stay. However, before making its determination, the Board requested the Approval Holder and Director provide written submissions responding to the Stay application. The Director and Approval Holder provided their responses on October 27 and 30, 2006, respectively, and final submissions were received from the Appellant on November 10, 2006.

[6] On November 10, 2006, the Approval Holder wrote to the Board and raised the question as to whether the Amending Approval was required, rendering the appeals and Stay issue moot. On November 10, 2006, based on the suggestion by the Approval Holder that the Amending Approval was not required, the Board asked the Approval Holder to notify the Board if it intended to make a request to the Director to cancel the Amending Approval. No such request was made.

[7] On November 14, 2006, the Approval Holder requested that the Board hear arguments on the standing of the Appellant to bring a Stay application, the status of the Statement of Concern which should have been filed by the Appellant, and that security be posted by the Appellant to indemnify the Approval Holder against losses attributed to any delay.

[8] On November 17, 2006, the Approval Holder made additional preliminary motions, specifically with respect to the jurisdiction of the Appellant and Ms. Abrams to file the Notices of Appeal.

[9] On November 20, 2006, the Board received a copy of the Record from the Director, and on November 22, 2006, copies were forwarded to the Appellant, Ms. Abrams, and the Approval Holder. Additional documents were provided on May 16, 2007, September 27, 2007, November 22, 2007, and January 23, 2008.

[10] On December 14, 2006, the Board notified the Parties and Ms. Abrams that a Preliminary Meeting would be held on February 8, 2007.[1]

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[1] The Board heard oral arguments on the following issues:

1. the Stay request filed by Ms. Walsh;
2. Ms. Graham's motion of October 27, 2006, that Ms. Abrams did not file a Statement of Concern;
3. whether Ms. Abrams' appeal was filed late (see the Board's letter of October 23, 2006);
4. Ms. Graham's motion of October 27, 2006, that the issues stated in Ms. Abrams' Notice of Appeal are not related to the current Amending Approval before the Board, that these issues would be the subject of a separate application to the Director for an approval, and that such an application for an approval has not been filed with Alberta Environment;
5. Ms. Anderson's motion of November 9, 2006, that an Amending Approval may not have been required, rendering the appeals and stay issue moot;
6. Ms. Anderson's motions of November 14, 2006, regarding the standing of Ms. Walsh to bring a stay application;
7. Ms. Anderson's motion of November 14, 2006, regarding the status of the Statement of Concern which should have been filed by Ms. Walsh;

[11] The letter also set the procedures for the Preliminary Meeting, including the requirement that written submissions be provided to the Board and the other Parties and Ms. Abrams by January 24, 2007. The Board also requested that the Approval Holder provide a further explanation of its motions regarding "the status of the Statement of Concern which should have been filed by Ms. Walsh," and "the jurisdiction of the Appellants to file a Notice of Appeal."

[12] On December 20, 2006, the Approval Holder stated it would not be able to provide a further explanation of its motions until closer to the January 24, 2007 deadline, and it asked whether the Appellant and Ms. Abrams would provide copies, prior to the Preliminary Meeting, of any new material they would be relying upon. The Board responded on January 12, 2007, explaining that it required a further explanation of the Approval Holder's motions in order to provide the other Parties and Ms. Abrams with sufficient information and time to prepare an adequate response to the motions. The Board also explained the purpose of the written submissions was to have the Parties and Ms. Abrams submit any supporting documents that they intended to rely on at the Preliminary Meeting, as well as to include all of the evidence and arguments they intended to rely on to present their case, and all of the evidence and arguments that could reasonably be anticipated to respond to the submissions of the other Parties and Ms. Abrams.

[13] The Approval Holder provided its explanation of its motions to the Board on January 16, 2007. In this same letter, the Approval Holder objected to the potential for persons without standing to participate in the matter and to obtain a Stay without the basis of their request being examined.

[14] On January 22, 2007, the Board provided a response to the Approval Holder's January 16, 2007 letter. It clarified the issues to be heard, taking into account the Approval

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8. Ms. Anderson's motion of November 14, 2006, regarding the request that security be posted by Ms. Walsh to indemnify the Town against losses attributed to any delay;
9. Ms. Anderson's motion of November 17, 2006, regarding the jurisdiction of Ms. Walsh to file a Notice of Appeal;
10. Ms. Anderson's motion of November 17, 2006, regarding the jurisdiction of Ms. Abrams to file a Notice of Appeal; and
11. the issues to be heard at a hearing should one be heard.

Holder's explanations. In response to the Approval Holder's concern that a Stay may be granted without the Appellant being subject to cross-examination, the Board revised its Preliminary Meeting procedure to allow for the Appellant and Ms. Abrams to present oral evidence and then be subject to cross-examination by the Approval Holder, and it required the Approval Holder to produce a witness who would be subject to cross-examination by the Appellant and Ms. Abrams. The Director was given the option to produce a witness. The Board also explained that the legislation allows it to permit participants to speak to the issues prior to determining standing of the Appellant and Ms. Abrams, and this approach makes the most effective use of time and resources. The Board reassured the Approval Holder that, even though the Board would hear evidence on all of the issues identified, it would only consider the issues that needed to be considered, and therefore, issues such as the Stay application and issues to be heard at a hearing if one is held, would only be considered if at least either the Appellant or Ms. Abrams was found to have standing.

[15] On January 23, 2007, the Approval Holder sent the Board suggested changes to the Board's Preliminary Meeting procedure. The Board responded on January 25, 2007, explaining the proposed agenda did not meet with the principles of natural justice and procedural fairness as all Parties and Ms. Abrams at the Preliminary Meeting are entitled to speak to all of the issues. The Board stated its standard practice is to allow each participant to present evidence and then allow those adverse in interest to cross-examine them. The Board stated this process is more efficient and results in more complete information being provided to the Board because evidence often overlaps between the issues.

[16] The Board received the written submissions from the Parties and Ms. Abrams on January 26, 2007.

[17] On January 29, 2007, the Approval Holder notified the Board that it intended to provide expert evidence on the issues raised by the Appellant and Ms. Abrams, and the experts, who were identified as authors of the various reports supplied by the Approval Holder during the application process, would be available for cross-examination by the Appellant, Ms. Abrams, and the Board. The Approval Holder also expressed concern that Ms. Abrams was scheduled to be a participant for all of the issues considered at the Preliminary Meeting, even though the

Approval Holder did not believe she was directly affected or had filed a valid Notice of Appeal. The Approval Holder stated that unless the person is found to have standing as an appellant, they cannot participate in the process beyond arguing the issue of standing.

[18] On January 31, 2007, the Board received a copy of an e-mail sent from the Appellant to the Approval Holder requesting a full copy of the Approval Holder's application and questioning whether Tab 197 of the Record was considered the application. On February 1, 2007, the Approval Holder responded to the Appellant's e-mail, stating it was too late in the process to raise new issues or concerns and the information she was seeking was already in her possession. The Approval Holder stated the Appellant was asking the Approval Holder to answer a legal question when she questioned whether Tab 197 of the Record was the application. According to the Approval Holder, it was only a small portion of the application, and the Appellant had months to raise concerns regarding the sufficiency of the information in the file. The Approval Holder then stated the Appellant and Ms. Abrams were not entitled to cross-examine the Approval Holder outside the hearing process and all future questions were to be directed to counsel.

[19] On February 2, 2007, the Board acknowledged the e-mails and the January 29, 2007 letter from the Approval Holder. In response to this correspondence, the Board explained the purpose of the Preliminary Meeting is to determine the issues set out in the Board's letter of January 22, 2007, including whether the appeals of the Appellant and Ms. Abrams are validly before the Board and the standing of the Appellant and Ms. Abrams. The Board stated the Approval Holder can raise its concerns regarding the participation of the Appellant and Ms. Abrams at the beginning of the Preliminary Meeting. The Board requested the Approval Holder provide the names of its witnesses.

[20] On February 1, 2007, Ms. Abrams notified the Board that she was attempting to obtain a copy of the "Joint Water Reservoir Proposal" from the Town of Black Diamond, but she was told in a letter from the Town of Turner Valley's engineers to the Approval Holder that the document could not be released. On February 5, 2007, the Board requested the Town of Black Diamond provide a complete copy of the Joint Water Reservoir Proposal to the Board, including a copy of the letter from the Town of Turner Valley's engineers.

[21] The Board held a Preliminary Meeting on February 8, 2007, to determine a number of preliminary matters. The Board's decision was released on May 2, 2007.[2] The Board determined the Appellant was directly affected by the Amending Approval as the water that would be stored in the Reservoir would be the source for the Town's potable water treatment plant, and in turn, the municipal water supply the Appellant was entitled to use for her personal and household use. Ms. Adams was found not to be directly affected because, among other things, she was a resident of Black Diamond and not a resident of the Town, and as a result, her appeal was dismissed.

[22] The Board scheduled the Hearing for June 21, 2007, at Black Diamond, Alberta. In response to the Board's advertisement notifying the public about the Hearing, the Board received an intervenor request from Ms. Linda Abrams on May 16, 2007, and on June 1, 2007, it received an intervenor request from Ms. Sue Williamson.

[23] The Board requested the Parties provide submissions on the intervenor requests. Submissions were received June 5 to 7, 2007, and from June 11 to 18, 2007. The Board denied the intervenor requests as the issues raised were similar to the Parties' interests and therefore, the intervenors' concerns would be covered in the Parties' submissions.[3]

[24] On June 6, 2007, effectively in response to a request from the Town, the Board notified the Parties that the Hearing for June 21, 2007, was adjourned, and instead, the Board would hold another Preliminary Meeting to deal with the concerns raised by counsel for the Approval Holder.[4] The Board instructed that the matter of the intervenor requests would not be addressed at the Preliminary Meeting.

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[2] See: Preliminary Motions: *Walsh and Abrams* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Turner Valley* (2 May 2007), Appeal Nos. 06-071 and 072-ID1 (A.E.A.B.).

[3] See: Intervenor Decision: *Walsh* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Turner Valley* (30 July 2007), Appeal No. 06-071-ID2 (A.E.A.B.).

[4] The matters dealt with at the June 21, 2007 Preliminary Meeting were:

1. Length of the Hearing,
2. Date for Hearing,
3. Submissions Filing for the Hearing,
4. Issues for the Hearing,
5. Cross Examination,
6. Pre-Meeting of Experts,
7. Document Production/Access to Information,

[25] On June 11, 2007, the Appellant copied the Board on a letter she sent to the Minister of Environment expressing concern regarding the location of Water Well No. 7 and the potential of it being contaminated with substances associated with past practices of the oil and gas industry. The Appellant explained her concerns were separate and apart from her appeal before the Board.

[26] On June 19, 2007, the Approval Holder copied the Board on a letter it sent to the Minister of Environment. In the letter, the Approval Holder noted the Board determined the status of Water Well No. 7 fell outside the parameters of the appeal. It stated the Board expanded the appeal beyond what the Approval Holder believed relevant to the proposed construction of the Reservoir, and "…the appeal has become a piece of political theater for the benefit of Ms. Walsh and that the Board has turned what is supposed to be an appeal into a sweeping inquiry based upon the unfounded allegations of Ms. Walsh." The Approval Holder commented the Appellant "…has no education, experience or expertise in relation to the issues before the EAB…."

[27] At the June 21, 2007 Preliminary Meeting, the Board considered each of the concerns raised by counsel for the Approval Holder in detail, and the Parties and Board discussed alternative dates to hold the Hearing. A tentative date was scheduled for November 13 and 14, 2007. The Board provided its responses to the concerns raised by counsel for the Approval Holder at the Preliminary Meeting and provided written confirmation of the responses to the Parties on June 29, 2007. The Approval Holder acknowledged that each of its concerns that had precipitated converting the June hearing into a second preliminary motions hearing had been satisfied.

[28] After hearing from the Parties, the Hearing was confirmed for November 13 and 14, 2007, in Turner Valley.

[29] On July 12, 2007, the Approval Holder sent a letter to Dr. Udo Weyer, consultant for the Appellant, and copied to the Board, explaining the Approval Holder was prepared to

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8. Witness,
9. Stay Application,
10. Mr. Ham's Letters of June 1 and June 5, 2007, and
11. Inquiry vs. Appeal.

cover some of the costs for drilling and sampling as was discussed at the June 21, 2007 Preliminary Meeting, but it would not fund Dr. Weyer's complete research into the Reservoir.[5]

[30] On July 12, 2007, the Appellant provided the list of reports and data sources she required from the Approval Holder. As a result of the June 21, 2007 Preliminary Meeting, at the specific request of the Approval Holder, it was decided the Board would provide an order for the documents. On July 20, 2007, the Board provided the formal order requiring the production of the reports and data sources. The documents were received August 8, 2007.

[31] On June 29, 2007, the Board confirmed the Hearing was scheduled for November 12 and 13, 2007, and submissions from the Parties were due September 27, 2007, for the Appellant's initial submission, October 12, 2007, for the Approval Holder's and Director's response submissions, and October 26, 2007, for the Appellant's rebuttal submission.

[32] On September 6, 2007, the Appellant notified the Board that she would be unable to meet the September 27, 2007 deadline for submissions due to difficulties in obtaining field data. She requested an extension until October 15, 2007. On September 6, 2007, the Approval Holder stated it was in a position to meet the deadlines and that the Hearing must go ahead as scheduled. The Director explained on September 7, 2007, that he was waiting for an interim report on the status of the work being done on the site, and he was advised the report was a couple of weeks from being completed.

[33] On September 20, 2007, the Board granted a one week extension until October 4, 2007, for the Appellant to file her submission. The Approval Holder and Director were to provide their response submissions on October 19, 2007, and the Appellant's rebuttal submission was then due October 29, 2007.

[34] On September 26, 2007, the Appellant, after reviewing a local newspaper article, asked the Board to request a copy of the Phase III environmental site assessment from the Approval Holder. On September 28, 2007, the Approval Holder wrote to the Board, stating the

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[5] The Board did not order the Approval Holder, or any other Party, to undertake any work other than locating and providing the Board with a number of existing reports and data sets. In particular, the Board did not order the Approval Holder or the Appellant (or her consultant) to undertake any drilling, sampling, or other new research regarding the site.

Town had not commissioned a Phase III environmental site assessment so it could not produce a report that does not exist. However, on December 4, 2007, the Board received a copy of a letter only, dated November 29, 2007, from MPE Engineering Ltd. to Alberta Environment, attaching a copy of the Town of Turner Valley's "Reservoir Construction Soil, Groundwater, and Surface Water Testing Program Report #3" from MPE Engineering Ltd. The Board requested confirmation that the report was provided to the Appellant.

[35] On September 27, 2007, the Board wrote to the Parties, noting the Amending Approval expired on December 1, 2007, and an application for a new approval was being considered by the Director. The Board explained it was unaware of the expiry date at the time the Hearing was scheduled, and neither the Approval Holder nor the Director mentioned the expiry date of the Amending Approval at the June 21, 2007 Preliminary Meeting. The Board explained it would be unable to provide its Report and Recommendations to the Minister before December 1, 2007, and the Minister would then require time to review the Report and Recommendations prior to making his decision.

[36] On September 27, 2007, the Board acknowledged a request from the Appellant to have two weeks after the Approval Holder and Director provide their response submissions to file her rebuttal submission. The Board did not grant the extension because receiving the submission on November 5, 2007, would not have provided sufficient time for the Board to adequately review the submission. The Appellant provided her submission on October 4, 2007.

[37] On October 1, 2007, the Approval Holder notified the Board that it did not complete a Phase III environmental site assessment report. It also took issue with the Board denying the Appellant's request for an extension without receiving comments from the other Parties. The Approval Holder stated the adjournment of the Hearing from the original June 21, 2007 date to November 13 and 14, 2007, rendered the appeal process moot because the Amending Approval would expire before the Minister would have time to make a decision based on the Board's Report and Recommendations.

[38] On October 16, 2007, the Approval Holder notified the Director, and copied the Board, that it was withdrawing its application with respect to the Reservoir, because it did not believe an approval was required to construct the Reservoir. The Approval Holder stated that

because it withdrew its application, there is no effective decision and nothing for the Appellant to appeal.

[39] On October 17, 2007, the Appellant requested the Hearing be held as scheduled. On October 18, 2007, the Board received a letter from the Director addressed to the Approval Holder, explaining the consequences of withdrawing the application and how the suspension of the Amending Approval does not affect the Board's process. The Director explained that if the Amending Approval is cancelled, the Town would be prohibited from using the Reservoir and the structure would have to be reclaimed. If the Amending Approval was suspended, the Town could not carry on with construction or filling and use of the Reservoir.

[40] On October 19, 2007, the Board notified the Parties that the Hearing would proceed as scheduled and extended the Approval Holder's submission deadline to October 22, 2007, and the Appellant's rebuttal submission was then due October 30, 2007.

[41] The Director provided his response submission on October 19, 2007.

[42] The Approval Holder wrote to the Board on October 22, 2007, stating the letter was not a submission and arguing the Board no longer had jurisdiction in the matter.

[43] On October 23, 2007, the Director copied the Board on a letter sent to the Approval Holder explaining the Director would be issuing an extension of the Amending Approval and original approval because the review of the renewal application would not be complete by December 1, 2007. On October 26, 2007, the Director extended the original approval and relevant amendments to October 1, 2008.

[44] On October 26, 2007, the Board confirmed the Hearing would proceed on November 12 and 13, 2007, and an extension was allowed until October 31, 2007, for the Approval Holder to provide its response submission. The Appellant's rebuttal submission to the Director's response submission was extended to October 31, 2007, and her rebuttal of the Approval Holder's submission was due November 5, 2007.

[45] On October 26, 2007, the Approval Holder notified the Board that even if it wanted to participate in the Hearing, it was impossible to prepare a submission within the extended deadline.

[46] On October 29, 2007, the Board wrote to the Parties, indicating its decision to proceed with the Hearing on November 12 and 13, 2007, and if the Approval Holder did not provide a response or indicated it did not want to participate, the Board would consider issuing subpoenas to any witnesses it believed would be relevant to deal with the issues.

[47] On October 31, 2007, the Director wrote to the Board asking whether it was in everyone's best interest to proceed with the Hearing without the full participation of the Approval Holder. He noted there was no pressing need to use the Reservoir as a drinking water supply and the Approval Holder had undertaken not to use the water as a source of drinking water until the appeal was resolved. The Board requested the Parties to respond.

[48] The Board received the Appellant's rebuttal submission to the Director's submission on October 31, 2007.

[49] On November 1, 2007, the Approval Holder notified the Board that it would not object to a new hearing or rescheduling the new hearing to a future date providing there is only one hearing of the entire waterworks system and the appeal of the Reservoir would be included in the new hearing.

[50] The Board responded on November 2, 2007, advising the Parties of the conditions that the Approval Holder would have to accept in order to adjourn the Hearing until January 2008.[6] On November 6, 2007, the Approval Holder notified the Board that it would participate in a January 2008 hearing.

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[6] The Board's November 2, 2007 letter stated:

"There would only be merit in adjourning the hearing until January if the Town agrees to participate fully in the hearing. This would mean that the Town would:

(1) file a written submission on a date specified by the Board, providing sufficient time for the Appellant to provide a written submission;
(2) present opening arguments;
(3) presenting direct evidence through the various technical experts that have been involved in the project, following which making these experts available for cross-examination;
(4) participating in cross-examination of the Appellant;
(5) presenting closing arguments;
(6) with respect to all of these matters, focus on the three issues set by the Board; and
(7) once the hearing date and procedure set for such a hearing, there would be no further extensions or adjournments."

[51] On November 6, 2007, the Board notified the Parties that the Hearing was adjourned until January 28 and 29, 2008. The Board set the schedule for receiving updated submissions from the Appellant and Director, and submission deadlines for the Approval Holder and the Appellant's rebuttal submission.

[52] On November 15, 2007, the Board confirmed the schedule for providing submissions for the Hearing.

[53] On November 16, 2007, the Approval Holder wrote to the Board expressing concern that its submission was now due December 14, 2007, instead of December 21, 2007 as originally outlined in the Board's November 6, 2007 letter. On December 5, 2007, the Board responded, explaining the date was changed because it had not taken into account the number of non-working days around Christmas and New Year's.

[54] On November 22, 2007, the Appellant filed a Stay request. The Board notified the Parties on January 4, 2008, that the Stay was denied.[7]

[55] On December 4, 2007, the Approval Holder asked the Board to allow the Reservoir to be filled to protect the integrity of the clay liner. The Board responded on December 5, 2007, explaining it does not have the authority to grant the Approval Holder permission to fill the Reservoir and that written permission from the Director is required.

[56] The Approval Holder provided its submission on December 14, 2007, with the report compiled by Dr. Frank G. Bercha (the "Bercha Report") submitted on January 10, 2008. The Appellant provided her rebuttal submission to the Town's submission of December 14, 2007, on January 11, 2008, and she provided a rebuttal to the Bercha Report on January 25, 2008. The Board notified the Parties on January 25, 2008, that it would address the admissibility of the late-filed Bercha Report and rebuttal as a preliminary matter at the Hearing.

[57] On December 28, 2007, Dr. Weyer submitted an interim costs application to the Board. The Board received response submissions from the Director and Approval Holder on January 18 and 22, 2008, respectively. The Board notified the Parties on January 25, 2008, that it would not award interim costs in this appeal given the timing of the costs application.

[58] On January 23, 2008, in response to a request by the Appellant, the Board wrote to the Parties, requesting the Approval Holder provide the information regarding the blockage of one of the piezometers and the water levels taken in the previous two weeks. The Board also requested the Approval Holder provide the missing page of a document prepared by the Town entitled "Description of Operation BCA Model DF-900-2 Package Water Treatment Plant." In response to the Board's request, the Approval Holder stated it could not effectively provide the information requested.

[59] The Hearing was held on January 28 and 29, 2008, in Turner Valley, Alberta.

[60] The Board submitted its Report and Recommendations to the Minister on February 28, 2008, and the Minister provided Ministerial Order No. 5/2008 on March 7, 2008, varying the Amending Approval.[8]

[61] The Appellant and the Approval Holder reserved their right to ask for costs at the Hearing. The Board set the schedule to receive costs submissions from the Parties. The Appellant and Approval Holder provided their submissions on April 10 and 11, 2008, respectively, and response submissions were received from the Appellant on April 23, 2008 and on May 2, 2008, from the Approval Holder and Director.

II. SUBMISSIONS

A. Appellant's Costs Application

[62] The Appellant submitted that, considering the circumstances of this appeal, the Board should award all of her costs, including legal fees, consultant fees, disbursements, and GST in the amount of $368,207.27. The Appellant requested her costs be paid by the Approval Holder, the Director, or both. The Appellant's costs were as follows:

a) legal costs in the amount of $22,705.25, including GST;

b) WDA Consultants Ltd. ("WDA") in the amount of $258,363.85;

c) Mr. Bogdan Pawlak in the amount of $7,393.77, including GST; and

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[7] See: Board's letter to Parties, dated January 4, 2008.

[8] See: *Walsh* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Turner Valley* (28 February 2008), Appeal No. 06-071-R (A.E.A.B.).

d) the Appellant's personal costs in the amount of $78,714.40.

[63] The Appellant explained her costs relate to reviewing the application, attending the February 8, 2007 and June 21, 2007 preliminary meetings (the "Preliminary Meetings"), obtaining evidence, preparing submissions, and attending the January 28 and 29, 2008 Hearing (the "Hearing").

[64] The Appellant stated the costs claimed were directly related to the matters contained in her Notice of Appeal and the preparation and presentation of her submissions at the Preliminary Meetings, and the Hearing. She explained Dr. Udo Weyer of WDA was retained to assess the interaction between groundwater, the Reservoir, and the liner and to obtain evidence to carry out that assessment, to prepare reports, and to present his findings at the Hearing.

[65] The Appellant explained Mr. Pawlak's total invoice was $24,844.50, and the Approval Holder paid him $17,444.73, leaving $7,399.77 owing. The Appellant stated the Approval Holder advised Mr. Pawlak that the remaining amount was to be paid by the Appellant because it was not authorized by the Town and the work was primarily done to obtain data for Dr. Weyer's model. The Appellant stated this was incorrect because Mr. Pawlak's work was started after the model was completed, and the work was done to obtain data to understand the hydrogeological conditions at the Reservoir site. The Appellant stated Mr. Pawlak attended the Hearing to explain what he saw on site and that the wells had been improperly developed.

[66] The Appellant explained Mr. Doug McCutcheon was retained just prior to the Hearing to review the Bercha Report and to provide Dr. Weyer and the Appellant's counsel with advice on how to approach it.

[67] The Appellant stated her counsel, Ms. Jennifer Klimek, was retained less than one month before the Hearing. She explained her account is for reviewing the submissions for the Hearing, preparing the Appellant and her witnesses for the Hearing, consultation with the Appellant, and for attending the Hearing.

[68] The Appellant submitted that her and her experts prepared a very organized, thorough submission that was succinct and clear. The Appellant explained that, although some of the costs related to work that was done between the filing of the Statement of Concern and the

filing of the Notice of Appeal, the work was relevant to the appeal. The Appellant argued a Statement of Concern is a precursor to an appeal and should be considered part of the appeal. The Appellant stated the same work would have had to be done for the appeal if it had not been completed earlier.

[69] The Appellant argued all the accounts are reasonable and in line with the going rates for such individuals and the work performed.

[70] The Appellant argued she had considerable success in her appeal given the significant amendments to the Amending Approval approved by the Minister. The Appellant noted many of the variations recommended by the Board and accepted by the Minister.

[71] The Appellant noted the Approval Holder and the Director were represented by senior, experienced legal counsel and retained numerous experts to address technical issues. The Appellant explained she has a very modest income and was receiving only medical disability payments that have now ceased. She stated she is considered disabled, is unable to work, and has no savings to finance an appeal. The Appellant stated she was unable to access or acquire other funding sources. The Appellant argued she needed financial resources to make an adequate submission, and her written and oral evidence would not have been as effective or useful if she had not retained her team of experts and legal counsel.

[72] The Appellant stated she had additional obstacles to overcome as a result of the Approval Holder's and Director's approach to the Amending Approval and appeal. The Appellant noted the nature of the Amending Approval, in that it used the milestone approach, made it impossible to determine at the outset what the actual conditions of the Amending Approval would be as the project progressed. The Appellant stated the only time she could raise her concerns was before the actual conditions were finalized, because there was no process to allow for input as the project progressed and conditions developed.

[73] The Appellant stated the conduct of the Approval Holder and the Director is another exceptional circumstance in this case. The Appellant stated, "Their early e-mails characterized her as troublesome and obstructionist."[9] The Appellant stated the Approval

[9] Appellant's submission, dated April 10, 2008, at paragraph 38.

Holder, through its counsel, continued to denigrate her concerns because she was "uneducated" and had no right to raise concerns, and the opposition continued in Town meetings and in the press. The Appellant explained the Approval Holder stated in some cases and insinuated in others that she was the sole cause of a significant increase of the cost to the taxpayers, but even though at the Hearing this allegation was exposed to be unfounded, the Approval Holder continued to make the same unfounded claim.

[74] The Appellant stated she was challenged with personal, unwarranted attacks that were particularly aggressive before she retained Dr. Weyer. After she retained Dr. Weyer, the aggression was directed at him, accusing him of bringing unnecessary requests, and ultimately, the Town stopped cooperating with him.

[75] The Appellant stated the Approval Holder added to the stress and work by refusing to attend hearings and taking positions unfounded in law or on the evidence. The Appellant noted, as an example, the Approval Holder trying to withdraw its application for the amendment and the renewal of its approval and submitting a risk assessment that had no credibility.

[76] The Appellant stated that she focused on the issues and acted in a very responsible, professional manner. According to the Appellant, the conduct of the Approval Holder caused her extra work and additional stress because she was not familiar with the judicial system or the adversarial approach. The Appellant explained that, because of the Town's approach, she determined she needed legal counsel to assist with the Hearing because she did not want the attacks from the Town's witnesses or counsel to distract her from delivering her presentation.

[77] Ms. Klimek explained she was able to provide representation for the Appellant starting so late in the process because the Appellant and her experts had prepared clear submissions, were well prepared, and were committed to doing a good job.

[78] The Appellant stated the Director compounded the problem, because it appeared the Director was complicit with the Approval Holder in its approach to the Appellant. Because of this, the Appellant argued the Board should use its discretion to order a portion of the costs be

paid by the Director. The Appellant argued the Director did not present accurate information at the Hearing. The Appellant referred to the Director suggesting at the Hearing that the liner thickness met or exceeded Alberta Environment guidelines, but the fact was that the final permeabilities measured in the liner would have required the liner at the base of the Reservoir be 40 cm thicker to meet the guidelines. The Appellant stated the Director used rounding of the permeabilities to suggest the guidelines had been met. The Appellant stated that even with rounding off, the guidelines would still require 35 cm more thickness be installed. The Appellant explained that her questioning and the evidence of WDA, brought the issue of the permeability of the liner to the Board's attention and, as a result, the Board did not accept the liner was appropriate and required further monitoring to ensure the liner was acceptable.

[79] The Appellant argued the Director should have required the investigative work be done by the Approval Holder, thereby putting all of the costs on the Town. The Appellant stressed that the Approval Holder's and Director's behaviours were particularly egregious because both are public bodies and had obligations to the public over and above what is imposed by EPEA.

[80] The Appellant explained the steps she took to educate herself about the Reservoir and to communicate her concerns to the Director and the Approval Holder before she decided to file the appeal. The Appellant stated she found the consultants for the Town and the Director did not listen to the information she provided them. She stated the answers to her concerns that were given by the Director after he issued the Amending Approval were often incomplete or lacked certainty. The Appellant stated the Director was prepared to issue the Amending Approval based on a poor and incomplete Phase 1 environmental site assessment, and had she not filed her Statement of Concern, the amendments included in the Amending Approval would likely not have been included.

[81] The Appellant explained that early in the process, the Town publicly stated her Statement of Concern had caused delay in the construction of the Reservoir, resulting in increased costs to the Town to build the Reservoir. The Appellant explained she wanted to avoid an appeal if possible, but the Town did not respond to her letters. The Appellant stated she filed her appeal to have her concerns heard by an impartial third party, to continue to obtain

information she thought the Director should have had before issuing the Amending Approval, and to have a public hearing to deal with the public allegations made against her.

[82] The Appellant explained she tried to keep costs down by trying to do everything herself or with the assistance of volunteers or other free services she could find. The Appellant stated she contacted the Environmental Law Centre for information because it is a free service. The Appellant explained she requested a Stay at the start of the process to slow the building of the Reservoir down until the public process was completed. She stated she undertook extensive research into her Stay application. The Appellant explained she read every page of the Director's Record, conducted research at the AEUB core lab, and talked with local old-timers and experts in various disciplines. The Appellant explained the appeal was not about money but about the safety of Turner Valley residents.

[83] The Appellant referred to letters written by the Approval Holder's counsel, and the Appellant stated she spent time reviewing and responding to the letters as best as she could and she spent time figuring out if a response was necessary. The Appellant stated she continued to ask the Town for information in an attempt to avert the hearing process, but her requests for information were met with resistance from the Town's counsel.

[84] The Appellant explained she had to learn about the Board's process as well as the technical information. The Appellant stated she was personally attacked in writing and at the Preliminary Meeting by the Approval Holder's counsel.

[85] The Appellant explained that she was not prepared to go to mediation because she wanted the process to be open and transparent. She also stated her decision was also based on her past interactions with the Approval Holder and the aggressive and personal attacks made by the Town's counsel.

[86] The Appellant noted the Hearing was originally scheduled for June 21, 2007, and in preparation for the Hearing, in May 2007 she contacted Dr. Weyer of WDA to assist her. The Appellant stated she was prepared to go to the Hearing on June 21, 2007, as scheduled, but the Hearing was converted to a preliminary meeting to discuss seven issues that the Approval Holder wanted to discuss, including the Approval Holder's allegations of bias and threats of court action

against the Board. The Appellant believed that many of the matters could have been taken care through telephone calls to the Board.

[87] The Appellant explained she started keeping track of her time on August 27, 2007, when she realized the process could be drawn out longer than expected. The Appellant stated she was not motivated by personal gain and it was not about the money. The Appellant stated she could have asked the Board to quash the Amending Approval, but she decided to find a way to make it the best reservoir possible. She explained she did not have access to funding.

[88] The Appellant stated she met the October 4, 2007 deadline for her submission for the November 14-15, 2007 hearing. The Appellant stated the Approval Holder attempted to withdraw its application for the Amending Approval three days before the Approval Holder's submission was due. The Appellant noted the Board gave the Approval Holder an extension to file its submission, but on November 6, 2007, the Board notified the Parties that the Hearing was being rescheduled until January 2008 because the Town refused to participate in the November hearing.

[89] The Appellant explained she retained counsel in January 2008 to help with legal arguments and to have someone deflect the personal attacks of the Approval Holder's counsel, allowing her to concentrate on delivering an effective presentation to the Board. The Appellant stated that waiting until January to retain counsel kept the costs down.

[90] The Appellant stated the Bercha Report was filed by the Approval Holder on January 10, 2008, well past the deadline for written submissions. The Appellant explained she spent many hours reviewing the report and preparing a rebuttal even though it had not been determined that the Board would admit the report as evidence.

[91] Dr. Weyer was retained by the Appellant and provided additional comments to the Board as part of the Appellant's costs submission.

[92] Dr. Weyer explained that, in agreement with the Town, WDA undertook a model calculation of groundwater flow at the reservoir site and through the liner. Dr. Weyer explained he was able to negotiate a reduced cost for drilling from $105,000 to $55,000, thereby saving the

Town approximately $50,000 for work agreed upon by the ad hoc committee[10] and later deemed necessary and beneficial by the Director. Dr Weyer stated the ad hoc committee and the Approval Holder agreed that drilling and permeability testing needed to be done. Dr. Weyer explained the costs for drilling and testing, including supervision and logging costs for Dr. Weyer and Mr. Pawlak of AquaSolv Environmental Services, were sent to the Town as agreed upon, but the Town decided to pay only the costs for Mr. Pawlak. According to Dr. Weyer, the Town agreed to pay for his fees for drilling and slug testing if the ad hoc committee supported it. Dr. Weyer stated the committee's additional hydrogeologist accepted the completion of the piezometers but the Town has not paid Dr. Weyer. Dr. Weyer explained the invoice submitted by Mr. Pawlak for drilling work was paid in full by the Town.

[93] Dr. Weyer stated the Approval Holder retroactively claimed that permeability testing was not part of the work agreed upon by the ad hoc committee. Dr. Weyer stated the Town paid only part of Mr. Pawlak's invoice with respect to the permeability testing, and the remaining fees are now being claimed for in the costs submission.

[94] Dr. Weyer explained travel expenses of $848.02 were being claimed, because he returned from an overseas assignment for the sole purpose of finalizing the slug test evaluation and present the findings to the ad hoc committee. Dr. Weyer stated an additional $1,560.32 for travel was included in the costs claim to cover the expense of purchasing tickets from overseas to Calgary and return. Dr. Weyer stated the tickets were purchased prior to the November 2007 hearing being cancelled.

[95] Dr. Weyer explained that, because of the time constraints, additional hours were spent after the Hearing to wind down and archive the material used. Dr. Weyer stated that approximately 1,800 hours were spent on the appeal with associated costs of $258,363.85. Dr. Weyer explained the total hours for administration was approximately 180 hours, which is still within the 10 percent range commonly charged by many consulting companies.

[96] Dr. Weyer stated mileage was charged only for the necessary trips to Turner Valley, to the drilling company, and to some of the meetings of the ad hoc committee. Dr.

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[10] The ad hoc committee consisted of consultants for the Appellant and the Approval Holder.

Weyer explained that he charged only $80.00 per hour for the use of the proprietary program set HydroDynamik, even though the normal rate is $180.00 per hour. He stated he also reduced copying charges to $0.10 per page.

[97] Dr. Weyer explained he tried to make use of electronic data files whenever possible, noting the Approval Holder made use of files prepared by WDA, but the Town would not always provide an electronic copy of the data so time was spent duplicating the work. Dr. Weyer stated it took several telephone calls and e-mails to receive some of the data, particularly when the Approval Holder's counsel controlled the release of data.

[98] Dr. Weyer summarized his costs into nine specific activities:

1. model and data handling, including evaluation of slug tests and writing of reports and rebuttals;
2. communications with the Town's experts;
3. consultations and meetings with the Town, Director, the Board, and the Appellant;
4. preparation and supervision of drilling;
5. preparation and conduct of slug tests and selection of piezometers for additional re-development;
6. rebuttal of risk assessment by Bercha Engineering;
7. gathering of information and preparation for the hearings;
8. attendance at the two hearings; and
9. administration costs.

[99] Dr. Weyer stated that, prior to WDA's involvement, the Approval Holder had neglected to include any experts in hydrogeological matters on its technical team. He stated the Approval Holder was planning to install monitoring piezometers that would have been insufficient to determine the direction and composition of groundwater flow in the vicinity of the Reservoir. Dr. Weyer stated the Approval Holder had not retained a slope stability expert to assess the construction of the Reservoir, and the Approval Holder was satisfied with taking only a few clay samples to assess the final permeability of the Reservoir liner.

[100] Dr. Weyer argued the Board ruled that the Amending Approval had to be changed, and WDA substantially assisted the Board to come to that conclusion and to the necessary amendments. He stated WDA assisted in bringing the issues to the forefront and for bringing the deficiencies of the pre-construction testing to the Board.

B. Approval Holder's Costs Application

[101] The Approval Holder stated that, given the complexity of the proceedings and that substantive matters were considered at the Preliminary Meetings, it would be appropriate to allow for preparation and attendance time for the Preliminary Meetings as well as the Hearing.

[102] The Approval Holder explained its legal costs were $245,242.21, but the Town was only claiming $62,248.50 of its legal costs in its application. The $62,248.50 was for 29 days for preparation and attending the Preliminary Meetings and the Hearing plus $3,523.50 in GST. The costs were based on a rate of $225.00 per hour by its lead counsel. The Approval Holder explained its lead counsel has been practicing for 30 years and had experience in environmental matters and appeared before numerous administrative tribunals. According to the Approval Holder, the rate is nearly half the market rate in Calgary and is within the tariff of fees used by the Government of Alberta for outside legal counsel. The Approval Holder requested 20 days of preparation time for the Hearing, based on 10 days preparation for each day of hearing, and requested two days preparation for each of the two Preliminary Meetings and attendance at the Preliminary Meetings for another 6 days.

[103] The Approval Holder claimed an additional $2,046.07 for photocopying charges, including $115.82 for GST. The Approval Holder also claimed $240,222.09 in costs for the retention of experts and additional testing as set out by the Reservoir project manager, MPE Engineering.

[104] The Approval Holder stated it was required to participate in the proceedings because it was the applicant and the Board directed that it was appropriate for the Town to participate. The Approval Holder explained it was required to retain legal counsel and a number of experts to provide submissions to address the substantive issues, given the complexity of the proceedings and the scientific and technical issues.

[105] The Approval Holder stated it made a valuable contribution to the proceedings, its presentation of expert witnesses responded to the numerous issues and allegations raised by the Appellant, and it addressed the three broad questions posed by the Board.

[106] The Approval Holder stated that, as a publicly funded organization, the Town may have greater resources than many individuals, but its financial resources are limited. The Approval Holder argued it was appropriate for the Board to consider awarding costs to the Town.

[107] The Approval Holder stated it is out of pocket for legal costs, costs of its experts, and costs for additional testing. The Approval Holder explained it received partial funding for its costs in relation to the Reservoir, but it still must pay $2,144,684.80, including costs associated with these appeal proceedings.

[108] The Approval Holder requested costs be awarded against the Director and the Department of Environment. The Approval Holder agreed with the general proposition that the Director should not be held responsible for costs, but according to the Approval Holder, special circumstances exist in these proceedings.

[109] The Approval Holder stated the special circumstances included:

> "[a] The Town of Turner Valley is <u>not</u> a for-profit entity.
>
> [b] The Amending Approval was a 'milestone' type of approval which the Board indicated is difficult as it defers the Director's discretion to a later point in time and inconsistent with the intent of the *EPEA*. But that is what the Town was issued and had to work with.
>
> [c] It is the 'public at large' who benefited from prior oil and gas activity in the Town of Turner Valley, the very activity which the Appellant and Board saw as requiring these proceedings." [Emphasis in original.][11]

[110] The Approval Holder explained it had a limited number of sites within its jurisdiction to build a reservoir. The Approval Holder stated that, even if a different site was chosen, it still could have been involved in these proceedings because the historic records of prior oil and gas activities are not necessarily accurate and the Appellant asserted all of the area could be contaminated by the historical activity.

[111] The Approval Holder stated the costs claimed are reasonable and within acceptable costs found in previous Board decisions. The Approval Holder emphasized that it is out-of-pocket for $2 million dollars with respect to the Reservoir, and much of that is due to

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[11] Approval Holder's submission, dated April 11, 2008, at paragraph 43.

historical oil and gas activity in the area which required the Town to take appropriate cautionary measures.

C. Director Response Submission

[112] The Director did not file a costs application, but he filed a response submission to the Appellant's and Approval Holder's costs submissions.

[113] The Director argued he should not be responsible for paying any of the costs claimed by the Appellant or the Approval Holder. The Director explained the Board and the courts have developed specific principles for costs claims as they relate to the Director, because the Director is in a unique role as the statutory decision maker whose decision is being appealed. The Director stated EPEA provides him the specific statutory authority to consider the application submitted and make decisions whether to issue the applied for environmental authorization with certain terms and conditions. The Director explained he is an automatic party to every appeal, and the Board and courts have recognized this statutory role and considered it a vital factor in not ordering the Director to pay costs as long as the Director is acting in good faith.

[114] The Director noted that in past decisions made by the Board, even though the Board recommended the Director's decision be substantially varied or reversed, the Board has not considered this to be a special circumstance to warrant awarding costs against the Director.

[115] The Director stated there were no findings of bad faith in his actions or interpretations or in issuing the "milestone" type of Amending Approval.

[116] The Director stated that, even though the Board recommended variations to the Amending Approval, a large portion of the variations were put forward by the Director after he reviewed the information that was required to be provided to him according to the terms of the Amending Approval. The Director submitted that no special circumstance exists that would result in costs being assessed against the Director.

[117] The Director referred to the Appellant's submission wherein she alleged the Director "…was in 'collaboration with the Town.'"[12] The Director submitted that the Board should ignore the allegation because it is improper to make such an allegation at this time in the proceeding instead of at the Hearing when witnesses could defend themselves. The Director explained that Alberta Environment took every effort to answer the Appellant's questions and she was not ignored. The Director stated the Appellant's concerns brought value to the process and were considered in how the Amending Approval was structured. The Director argued the Appellant's unfounded allegations are insufficient to establish bad faith or special circumstances.

[118] The Director pointed out that, in past decisions, the Board did not award costs for personal time or expenses. The Director submitted that a large portion of Dr. Weyer's costs relate to the ad hoc committee with the Town and the difficulties that arose from that undertaking. The Director argued he should not be responsible for these "field issues."

[119] The Director argued he should not be responsible for any of the Appellant's costs claim. The Director disagreed with the Approval Holder's argument that this Amending Approval is a special circumstance and the Director should pay over $300,000 for the Approval Holder's legal and engineering costs. The Director stated he had little choice, beyond refusing the Approval Holder's application, to issue a milestone Amending Approval given the information provided in the application and the nature of the site chosen for the Reservoir. The Director emphasized that it is the Town's Amending Approval, and if the Approval Holder did not like this type of Amending Approval, it could have filed an appeal.

[120] In response to the Approval Holder's comments that the location of the Reservoir was a factor in the costs, the Director stated it was the Approval Holder's decision, not the Director's, to build a raw water storage reservoir and it was the Approval Holder that chose the location.

[121] The Director stated the Approval Holder's argument that taxpayers, through a regional budget, should pay the Approval Holder's costs because the taxpayers of Alberta benefited from the oil and gas activity around Turner Valley is "inventive." The Director argued

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[12] Directors, submission, dated May 2, 2006, at paragraph 46.

this theory would apply to almost every piece of property in Alberta, including the benefits received from crops growing on agricultural lands. The Director agreed that all Albertans received a benefit from the natural resources, but the Town of Turner Valley probably would not exist but for having these natural resources in its backyard.

[122] The Director submitted that none of the arguments provided by the Approval Holder demonstrated a special circumstance to warrant an order of costs against the Director.

[123] The Director argued the Approval Holder's claim for costs against the Director should be dismissed in its entirety and that no award of costs should be made against the Director.

D. Appellant's Response Submission

[124] The Appellant noted the Approval Holder did not make an application for costs against her. The Appellant stated this was an appropriate position for the Approval Holder. The Appellant reiterated that she should not be subjected to a cost award, because she acted in good faith and her intervention was helpful to the Director, the Approval Holder, and the Board.

[125] In response to the Approval Holder's argument that it should receive costs from the Director because of the nature of the Amending Approval, the Appellant agreed the nature of the Amending Approval did cause many of the concerns and made the Appellant's work more difficult. The Appellant added that the Approval Holder was not prejudiced by the Amending Approval because it had an opportunity to review it before it was granted and essentially got what it asked for. The Appellant stated that had the information requested been provided prior to the Amending Approval being issued, the appeal would not have cost the Appellant as much.

E. Approval Holder's Response Submission

[126] The Approval Holder stated it was not opposed to a reasonable apportionment of the costs claimed by the Appellant's lawyer and the Appellant's out-of-pocket expenses. However, the Approval Holder was opposed to paying costs for the Appellant's experts including Mr. Doug McCutcheon, Mr. Bogdan Pawlak, and Dr. Udo Weyer, and did not agree to pay the Appellant's personal costs.

[127] The Approval Holder noted the Board does not generally award full solicitor – client costs but will consider an allowance for hearing and preparation time. The Approval Holder stated it would be appropriate to award some costs for Ms. Klimek's contribution because she contributed to the Hearing and focused the Appellant's presentation.

[128] The Approval Holder stated the 10.5 hours claimed by Ms. Klimek for reviewing the Board's Report and Recommendations and preparation of the costs submission should not be considered, because those costs are not directly and primarily related to the preparation and presentation of evidence at the Hearing. The Approval Holder argued the costs claimed should be reduced a further 8 hours because travel time is not typically awarded by the Board. The Approval Holder argued the rate claimed by Ms. Klimek should be reduced to $200.00 per hour, and therefore, the amount for legal fees should be reduced to $13,600.00 (76 hours at $200.00 per hour). The Town considered it appropriate to award half of this amount, $6,800.00, taking into consideration section 2(f) of EPEA requires Alberta citizens to take a role in protecting the environment. The Approval Holder stated it "…would not be opposed to a reasonable apportionment of the $6,800.00 in conjunction with the Director given the 'special circumstances' of these proceedings…."[13]

[129] The Approval Holder stated the starting point for determining costs is section 2 of EPEA, and that individual parties are responsible for some, if not all, of the costs incurred, including personal time of the Appellant.

[130] The Approval Holder argued the Appellant's decision not to obtain appropriate experts or legal counsel at the start of the appeal or to make an interim costs application was a personal decision. The Approval Holder did not agree the Appellant's decision kept costs down, because she was at a disadvantage without expert advice throughout the whole process given the technical and legal complexities of the proceedings. The Approval Holder stated it was also at a disadvantage because its experts had to address a non-expert. The Approval Holder claimed WDA was retained after the February 2007 preliminary hearing and "…on the eve of preparations for the June 2007 hearing dates,"[14] making it more difficult for all of the Parties.

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13 Approval Holder's submission, dated May 2, 2008, at paragraph 33.

14 Approval Holder's submission, dated May 2, 2008, at paragraph 40.

[131] The Approval Holder noted the Appellant refused to participate in mediation, and the Appellant wanted a public hearing to deal with allegations made against her.

[132] The Approval Holder argued the Appellant should be responsible for her own personal costs except for disbursements justifiably necessary in preparation for and attending the hearings. The Approval Holder noted the Appellant did not provide any documentation to verify her actual salary costs or if she lost wages to attend the hearings. The Approval Holder stated the Appellant appeared to select an hourly rate and she was actually receiving disability insurance or without an income.

[133] The Approval Holder noted the Appellant provided receipts for certain expenses but provided estimates for others. The Approval Holder considered it appropriate to reduce the Appellant's disbursements by 50 percent. The Approval Holder was not opposed to awarding a reasonable apportionment of the Appellant's disbursement costs in the range of $303.20.

[134] The Approval Holder noted the amount claimed for the services of Mr. Bogdan Pawlak and AquaSolv Environmental was $7,393.77 even though the three invoices totaled $28,150.64 less the $17,450.73 paid by the Approval Holder, leaving $10,699.91. The Approval Holder explained its records indicate it reimbursed AquaSolv $32,671.80 out of a total of $39,744.41 invoiced for drilling, water sampling, and water levels that would have been carried out by the Town's consultants. The Approval Holder stated the payment included half of AquaSolv's time carrying out slug tests which the ad hoc committee agreed WDA could carry out to satisfy its modeling requirements but were not approved for payment by the Town.

[135] The Approval Holder explained the remaining costs for AquaSolv ($7,072.61 or $7,939.77 as stated in the Appellant's submission) was for "…work directly for WDA, the remaining half of the slug tests, higher than reasonable charges for mileage, and equipment rental problems for equipment that might have been available through the Town's consultants, if requested."[15] The Approval Holder stated there are now concerns regarding the data gathered in the slug tests that were paid by the Approval Holder. As to the costs claimed by AquaSolv for hearing attendance, cell phone, and mileage, the Approval Holder respectfully stated that Mr.

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15 Approval Holder's submission, dated May 2, 2008, at paragraph 52.

Pawlak did not significantly contribute to the Board's decision or hearing process, and therefore an award of these costs is not warranted.

[136] The Approval Holder stated Mr. McCutcheon, who reviewed the Bercha Report, did not provide a written report, provide oral evidence, or attend the Hearing. Therefore, he did not significantly contribute to the Board's decision and should not be awarded costs.

[137] The Approval Holder stated it was extremely cooperative and tried to act in good faith throughout the process. The Approval Holder listed examples of the efforts it took, including: meeting with the Appellant on site; responding to the Appellant's inquiries; meeting with the Appellant's consultants on numerous occasions; modifying the drilling program and testing program to assist WDA and following WDA's recommendation on the choice of sonic rig; retaining a third party hydrogeologist recommended by WDA to oversee the rig operations even though the Town's consultant maintained trained technical staff to carry out the rig operations; reimbursing the hydrogeologist for most of his costs; allowing WDA reasonably full access to the site to carry out slug tests; readily forwarding information to WDA and AquaSolv; and continued updating and sharing of data with the Appellant's consultants as soon as the data was available.

[138] The Approval Holder stated the Appellant and WDA brought some value to the process and the public must be able to comment on such processes, but the Approval Holder questioned whether the value brought to the process is fairly represented by the costs claimed.

[139] The Approval Holder stated the Board recommended a number of testing and operational variations to the Amending Approval, but the Board did not recommend any changes to the design or site that the Appellant recommended. The Approval Holder believed this indicated the work carried out by the Town was adequate and accepted by the Board.

[140] The Approval Holder stated that more information does not always make for a better project. The Approval Holder explained the collection of additional information must be assessed against whether the information will be useful and the cost of the information must be assessed against its relative benefits. The Approval Holder questioned the costs claimed by the Appellant associated with: doubling up of experts and costs due to a lack of trust between the

Parties; information that was not useful in the final analysis, including slug tests and model work that gave no definitive conclusions; air travel when the Town did not request a personal meeting; mileage charges of $0.65 per kilometer; and the 10 percent claimed for disbursements compared to the 7 percent charged by the City of Calgary.

[141] The Approval Holder stated it retained its own qualified experts to provide advice regarding the Reservoir throughout the appeal process to meet professional obligations and the requirements of the Amending Approval. The Approval Holder explained it had no intention of, nor the means to, underwrite WDA's work. The Approval Holder argued the costs associated with WDA are balanced by the costs the Town incurred in responding to the Appellant's concerns.

[142] The Approval Holder noted the costs claimed associated with Mr. Jim Ellis totaled $91,000.00. The Approval Holder argued there was no evidence that Mr. Ellis made a substantial contribution to the Board's decision or hearing process to warrant an award of costs.

[143] The Approval Holder stated there is no evidence the Appellant has or will be invoiced for the costs of WDA, Mr. Pawlak, or Doug McCutcheon & Associates, or that they expect to able to recover their costs from the Appellant. The Approval Holder stated there is no evidence that the Appellant attempted to find alternative funding sources to cover the costs or that the Appellant is out-of-pocket for the expenses claimed. The Approval Holder argued the Board should not award costs for the expenses claimed for the Appellant's experts.

[144] The Approval Holder submitted that the Parties made an equal and substantial contribution to the process leading up to the Hearing, and therefore the costs incurred should be the responsibility of the individual Parties.

[145] The Approval Holder explained the Town, with about 2,000 residents, is not a profit-making venture. The Approval Holder stated that, as a publicly funded organization, the Town may have greater resources than many individuals, but it is not like large corporations or large municipalities and its financial resources are limited. The Approval Holder submitted that costs should not be awarded against the Town for the adequacy of the Amending Approval, or the lack of legislation dealing with the requirements of a potable water reservoir. The Approval

Holder argued all of the Parties were operating within an inadequate legislative framework. The Approval Holder stated it complied with its statutory duty, complied with all reasonable requests for information, and its experts were available to answer questions raised in the Notice of Appeal.

[146] The Approval Holder argued it would be inappropriate to shift the Appellant's costs to the Town. The Approval Holder argued special circumstances exist that should be considered in assessing whether the Director should pay costs. The Approval Holder stated it is not a for-profit entity, the Director issued the Amending Approval and he was satisfied the terms and conditions were sufficiently broad to protect the public interest, the Amending Approval was a milestone type of approval and the Approval Holder had to work with it, and the public at large benefited from prior oil and gas activity in the Town. The Approval Holder explained it had a limited number of sites to choose from, and given historic records of prior oil and gas activity were not necessarily accurate, there was still the risk that it would have resulted in an appeal.

[147] The Approval Holder argued it was reasonable the public at large, through the Director, bear some of the costs for the prior oil and gas activities because it was the public at large that benefited from the activities. Therefore, according to the Approval Holder it was appropriate to consider a costs award against the Director.

[148] The Approval Holder explained the Appellant's demands were overwhelming and often made at the last moment. The Approval Holder stated the Board considered the Appellant's rights to have her demands met superseded the Town's rights and obligations to put its efforts toward preparing its written submission on time or comply with ongoing information requirements of the Director under the Amending Approval. The Approval Holder stated that on two occasions, the Appellant's demands and Board's orders were made immediately prior to the Approval Holder's submission deadlines, thereby materially and adversely affecting the Town's ability to prepare and present its case.

[149] The Approval Holder stated the Board essentially affirmed the Amending Approval. The Approval Holder submitted that it has satisfied the Director and the Board, and the Town should not have to pay the Appellant's costs except for out-of-pocket expenses and legal costs as outlined above.

III. LEGAL BASIS

A. Statutory Basis for Costs

[150] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA which provides: "The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid." This section gives the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre*:

> "Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs 'of and incidental to any proceedings before it…'. The legislation gives the Board broad discretion in deciding whether and how to award costs."[16]

Further, Mr. Justice Fraser stated:

> "I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the Board '*may* award costs … and *may*, in accordance with the regulations, direct by whom and to whom any costs are to be paid….'" (Emphasis in the original.)[17]

[151] The sections of the *Environmental Appeal Board Regulation*,[18] (the "Regulation") concerning final costs provide:

> "18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.
>
> (2) A party may make an application for all costs that are reasonable and that are directly and primarily related to
>
> (a) the matters contained in the notice of appeal, and
> (b) the preparation and presentation of the party's submission.
>
> …
>
> 20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.

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16 *Cabre Exploration Ltd*. v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

17 *Cabre Exploration Ltd*. v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

18 *Environmental Appeal Board Regulation*, A.R. 114/93.

(2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:

(a) whether there was a meeting under section 11 or 13(a);
(b) whether interim costs were awarded;
(c) whether an oral hearing was held in the course of the appeal;
(d) whether the application for costs was filed with the appropriate information;
(e) whether the party applying for costs required financial resources to make an adequate submission;
(f) whether the submission of the party made a substantial contribution to the appeal;
(g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;
(h) any further criteria the Board considers appropriate.

(3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of

(a) any other party to the appeal that the Board may direct;
(b) the Board.

(4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate."

[152] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purpose of the EPEA as found in section 2:

"The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
(b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
(c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
(e) the need for Government leadership in areas of environmental research, technology and protection standards;

> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
> (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
> (i) the responsibility of polluters to pay for the costs of their actions;
> (j) the important role of comprehensive and responsive action in administering this Act."

[153] While all of these purposes are important, the Board believes the responsibility that sections 2(f) and (g) of EPEA place on all Albertans "…for the shared responsibility of all Alberta citizens…" and "…their role in providing advice…" is particularly instructive in making its costs decision.

[154] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply in the particular claim for costs.[19] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[20] In *Cabre*, Mr. Justice Fraser noted that section "…20(2) of the Regulation sets out several factors that the Board 'may' consider in deciding whether to award costs…,"[21] reinforcing the wide discretion given to the Board to award costs.

[155] The Board evaluates each costs application against the criteria in EPEA, the Regulation, and the following:

> "To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:
>
> (a) substantially contributed to the hearing;
> (b) directly related to the matters contained in the Notice of Appeal; and

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19 *Zon* (1998), 26 C.E.L.R. (N.S.) 309 (Alta. Env. App. Bd.), (*sub nom. Costs Decision re: Zon et al.)* (22 December 1997), Appeal Nos. 97-005 to 97-015 (A.E.A.B.)).

20 *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.) (*"Paron*").

21 *Cabre Exploration Ltd*. v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

(c) made a significant and noteworthy contribution to the goals of the Act.

If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."[22]

[156] Under section 18(2) of the Regulation, costs awarded by the Board must be "directly and primarily related to ... (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party's submission." These elements are not discretionary.[23]

B. Courts vs. Administrative Tribunals

[157] In applying these costs provisions, it is important to remember there is a distinct difference between costs associated with civil litigation and costs awarded in quasi-judicial forums such as board hearings or proceedings. As the public interest is part of all hearings before the Board, it must take the public interest into consideration when making its final decision or recommendation. The outcome is not simply making a determination of a dispute between parties. Therefore, the Board is not bound by the "loser-pays" principle used in civil litigation. The Board will determine whether an award of costs is appropriate considering the public interest generally and the overall purpose as defined in section 2 of EPEA.

[158] The distinction between the costs awarded in judicial and quasi-judicial settings was stated in *Bell Canada* v. *C.R.T.C.*:

"The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the

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[22] Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.).

[23] *New Dale Hutterian Brethren* (2001), 36 C.E.L.R. (N.S.) 33 at paragraph 25 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Monner*) (17 October 2000), Appeal No. 99-166-CD (A.E.A.B.).

word which must necessarily be given in proceedings before regulatory tribunals."[24]

[159] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it, and the Board is not bound by the loser-pays principle. As stated in *Mizera*:

> "Section 88 [now section 96] of the Act and section 20 of the Regulation give the Board the ability to award costs in a variety of situations that may exceed the common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays, as outlined in *Reese*. [*Reese* v. *Alberta (Ministry of Forestry, Lands and Wildlife)* (1992) Alta. L.R. (3d) 40, [1993] W.W.R. 450 (Alta. Q.B.).] The Board stresses that deciding who won is far less important than assessing and balancing the contributions of the Parties so the evidence and arguments presented to the Board are not skewed and are as complete as possible. The Board prefers articulate, succinct presentations from expert and lay

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[24] *Bell Canada* v. *C.R.T.C.*, [1984] 1 F.C. 79 (Fed. C.A.). See also: R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001) at page 8-1, where he attempts to

> "…express the fundamental differences between administrative agencies and courts. Nowhere, however, is the difference more fundamental than in relation to the public interest. To serve the public interest is the sole goal of nearly every agency in the country. The public interest, at best, is incidental in a court where a court finds for a winner and against a loser. In that sense, the court is an arbitrator, an adjudicator. Administrative agencies for the most part do not find winners or losers. Agencies, in finding what best serves the public interest, may rule against every party representing before it."

See also: *Cabre Exploration Ltd*. v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 32 (Alta. Q.B.):

> "…administrative tribunals are clearly entitled to take a different approach from that of the courts in awarding costs. In *Re Green*, *supra* [*Re Green, Michaels & Associates Ltd. et al. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.)], the Alberta Court of Appeal considered a costs decision of the Public Utilities Board. The P.U.B. was applying a statutory costs provision similar to section 88 [(now section 96)] of the Act in the present case. Clement J.A., for a unanimous Court, stated, at pp. 655-56:
>
> > 'In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tarrifs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.'"

> spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed."[25]

[160] The Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.[26] There is an obligation for each member of the public to accept some responsibility of bringing environmental issues to the forefront.

IV. DISCUSSION

A. Appellant

1. Ms. Roxanne Walsh

[161] As the Board has stated in previous decisions, the starting point in considering any costs application is that the parties are responsible for the costs they incurred. Section 2 of EPEA states citizens of Alberta have a responsibility in protecting the environment, and participating in the approval and appeal processes is one way of fulfilling their obligations. The party making the costs application needs to show the Board there are sufficient reasons to depart from the starting point and award costs to that party.

[162] The Board has always held that costs are intended to defray costs associated with preparing for a hearing in which the party has provided evidence and submissions that assisted the Board in reaching its recommendations. The Board must look at whether the costs claimed were required for the party to prepare and present its case at the hearing. Costs are not awarded to provide a financial benefit to a party appearing before the Board, and costs are not awarded to penalize another party unless that party was acting in a vexatious manner.[27]

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[25] *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 at paragraph 9 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) ("*Mizera*"). See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.).

[26] *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

[27] See: *Gadd* (2006), 19 C.E.L.R. (3d) 1 (Alta. Env. App. Bd.) at paragraph 83, (*sub nom.* Costs Decision: *Gadd* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd.* (16 December 2005), Appeal Nos. 03-150, 151 and 152-CD (A.E.A.B.); *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2004), 4 C.E.L.R. (3d) 238 (Alta. Env. App. Bd.) at paragraph 75, (*sub nom. Costs Decision: Imperial Oil and Devon Estates* (8 September 2003), Appeal No. 01-062-CD (A.E.A.B.).

[163] The Appellant in this case was concerned with developing the best Amending Approval possible to ensure a safe, secure water supply is available to the residents of the Town. Her efforts to ensure the Reservoir is safe led the Approval Holder to do additional testing and analyses to make certain the Town's residents would receive uncontaminated water.

[164] The Appellant filed an appeal, as was her right under EPEA as a directly affected citizen of the Town. The Appellant effectively prepared her submissions. She continued with her appeal even though the Approval Holder complicated the process with sometimes meaningless motions.[28]

[165] The Approval Holder noted the Appellant declined to go to mediation as a reason to deny, or at least limit, costs awarded to the Appellant. The Board, as part of its process, usually asks parties if they want to participate in mediation to resolve the disputes giving rise to the appeal. In this case, the Director suggested mediation, but when the Parties were canvassed as to whether they wanted to mediate, the Appellant responded she did not want to proceed to mediation. The Board notes the Approval Holder also advised in its May 18, 2007 letter that it would also not be inclined to participate in mediation because it would not be appropriate since the design or testing standards are based on scientific analysis and expert opinion.

[166] Mediation is voluntary, so when one party declines participation, the Board proceeds to a formal hearing, and therefore, the Approval Holder did not respond to the question. The Appellant in this case considered the safety of a public water supply should be heard in a public forum. Furthermore, the derisive comments made by counsel for the Approval Holder towards the Appellant at the Preliminary Meetings would indicate that mediation would likely not have been productive.

[167] The Appellant raised an important issue in her appeal, the safety of the Town's water supply. As a result of her appeal, more data were collected that resulted in changes to the

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[28] For example see: October 17, 2007 letter from the Approval Holder attaching a letter to Alberta Environment withdrawing its application for an interim approval of the raw water Reservoir. The letter seeks to withdraw the Town's application for something that is not found in the legislation, i.e. "an interim approval." Presuming the intent was to withdraw the application for the Amending Approval, that application could not be withdrawn because the Amending Approval had already been issued and it was the subject of the appeal. The Approval Holder could have applied to the Director to cancel the Amending Approval, which would have made illegal the Reservoir which had been the subject of the Amending Approval and was already constructed.

Amending Approval and provided additional information for the Town's application to renew its approval.

[168] The Appellant claimed $78,108.00 for the time she spent personally working on her appeal. There were no documents to indicate that she lost wages while attending hearings or preparing submissions. Without some indication of how the appeal resulted in a loss of income, the Board will generally not reimburse appellants for their own time spent on the appeal.[29] These costs are considered part of an appellant's obligation to bring environmental issues to the forefront. It should be noted that, even though the Board is not awarding costs for the Appellant's personal time, the Board recognizes the time and effort the Appellant put into preparing her submissions, preparing for the hearings, and familiarizing herself with the issues surrounding the Reservoir. She is to be commended for her efforts.

[169] The Appellant indicated that she expended $606.15 for out-of-pocket expenses. These expenses were itemized as follows:

Phone bill:	$ 46.74
Office supplies:	$538.95
Postal expenses:	$ 4.56
AEUB invoice:	$ 15.90

[170] The Appellant provided documentation to support her claim for out-of–pocket expenses. This documentation is required to demonstrate the costs were associated with preparation for the hearings. These expenses appear to be reasonable given the length and complexity of this appeal. The Board notes the Approval Holder did not consider these costs unreasonable and it recommended half of these costs be paid.

[171] The Appellant was receiving only disability payments during the appeal. She minimized costs by seeking assistance from the Environmental Law Centre and waiting until later in the process to retain counsel. In this case, the Board considers it appropriate to award all of the Appellant's out-of-pocket expenses totaling $606.15. She raised an important issue with

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[29] See: Costs Decision: *Maga et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (27 June 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-CD (A.E.A.B.) at paragraph 106.

the Board that resulted in a better Amending Approval for all concerned. However, she will not receive costs for her time spent on the appeal.

2. WDA Consultants Inc./Dr. Udo Weyer/Mr. Jim Ellis

[172] The Appellant claimed costs totaling $258,363.85 for the services of WDA, including Dr. Weyer and Mr. Jim Ellis.[30] Included in these costs is a claim of $1,029.00 for the services of Mr. Doug McCutcheon.

[173] The Approval Holder argued the Appellant was at a disadvantage not to have expert advice from the start of the process. The Appellant retained the services of Dr. Weyer shortly after the Board released its decision that the Appellant was given standing.[31] The Board believes this was a logical decision in these circumstances, because until the Board issued its decision regarding standing, the Appellant did not know whether her appeal would proceed. At the preliminary meeting in February 2007, one of the issues was whether the Appellant had standing; the Board was not hearing evidence on the substantive matters which is what Dr. Weyer was retained to speak to. The Appellant retained Dr. Weyer for the June 2007 preliminary meeting, and he was prepared to present evidence at that preliminary meeting.

[174] Dr. Weyer divided his expenses and that of Mr. Ellis, a co-worker at WDA Consultants, into nine categories: data, model, and report/rebuttals; professional communications; consultations, meetings; drilling preparation and supervision; slugtests and piezometer redevelopment; risk assessment rebuttal; preparations for motions and the Hearing; attendance at the preliminary meeting and hearing; and time documentation, applications preparation, etc.

[175] Mileage costs were charged for some of the ad hoc committee meetings. The Board will only allow mileage for those trips to the Preliminary Meetings, Hearing, and going to the Reservoir site to collect data. The other trips will not be considered by the Board because they are unrelated to the Hearing. Even though some of the mileage may have resulted from

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[30] In totaling the costs claimed, the Board found a discrepancy of $826.28 less than what is included in this total. The Board does not believe these costs would significantly change its costs award.

[31] See: Preliminary Motions: *Walsh* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Turner Valley* (02 May 2007), Appeal No. 06-071-ID1 (A.E.A.B.).

trips to meet with the Appellant to discuss strategy and technical matters, there is no clear indication of this in the documentation. Meetings with the ad hoc committee cannot be considered even though the Board appreciates the efforts taken to share information between the Parties.

[176] Dr. Weyer claimed $51,290.76 for the data collection and modeling, while Mr. Ellis claimed $59,672.70. Expenses amounted to $3,863.32[32] for a total of $114,826.78. The Board notes a claim of $2,133.25 for Mr. John Molson, another employee of WDA, for work on the model, but since he did not appear as a witness at the Hearing, the extent of his involvement is unclear and the Board will not award these costs. The data and reports written after the modeling was completed assisted the Board in determining whether the Amending Approval should be varied. The information also assisted the Approval Holder in assessing the site for the approval renewal. Of particular assistance was the modeling information that was obtained. Therefore, the Board will allow those costs directly related to the input of data and the running of the models. The time spent going through the Record for data, up to six hours for Dr. Weyer and 12 hours for Mr. Ellis, will be allowed as the information extracted from the Record formed the initial basis of the modeling and demonstrated the areas where there was a lack of information. Time spent correcting problems with the programs used will not be included as part of the costs. The Board appreciates the effort taken to ensure the results were accurate, but it is also assumed the programs themselves should be operational. The Board will not award costs for time spent preparing submissions or discussing the file with the Appellant. Although important to providing effective submissions, these efforts are also part of the responsibilities of an appellant included in the purpose section of EPEA. Therefore, the starting point of the costs associated with the modeling is $21,239.75 for Dr. Weyer (based on 114.5 hours at a rate of $175.00 per hour plus 6 percent GST[33]) and $29,526.30 for Mr. Ellis (based on 309.5 hours at an hourly rate of $90.00 plus 6 percent GST). Also included are the expenses, with the exception of mileage

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[32] Costs claimed for expenses were: $211.63 for ink cartridges; $314.88 for mileage; $172.20 for data and maps; $ 3,052.80 for program fees; and $111.83 for copying.

[33] The Board recognizes that the current GST rate is 5 percent, but at the time the work was completed and billed, the GST rate was 6 percent. The Board notes the percentage of GST has resulted in slightly different calculated values for the work claimed by WDA. The Board used the values from the supporting time sheets included in the Appellant's submission.

and print cartridges. Mileage was claimed when Dr. Weyer visited the site to get an overview of the area and conditions and included mileage when gathering information from adjacent residents, but the mileage was not for actual data collection. The Board accepts that WDA used a fair amount of ink during the preparation of its reports, but the printing of reports and graphs are part of a consultant's business and the Board will not allow these expenses. Therefore, the allowable expenses associated with the modeling includes $111.83 for copying, $3,052.80 for the HydroDynamik program fee, and $172.20 for maps and groundwater searches, for a total of $3,336.83.

[177] The information was gathered to support the Appellant's position. However, it also benefitted the Approval Holder to have this additional information, so the Board will award half of the costs claimed for Dr. Weyer and Mr. Ellis, less the adjustments described above. The Board will allow full costs of the allowable expenses. The HydroDynamik program, maps, and groundwater searches were instrumental in the modeling and were beneficial to understanding the issues related to the Reservoir site.

[178] Therefore, for the time spent with the modeling, the Board awards $25,383.03 for the consultants' time, plus $3,336.83 for expenses for a total of $28,719.86.

[179] Dr. Weyer's costs under professional communications were $10,295.26 and Mr. Ellis' costs were $524.70. Expenses totaled $600.38 and these costs included mileage ($314.18) and HydroDynamik program fees ($286.20). The total claim for communication was $11,420.34. The Board appreciated the efforts taken by the consultants to work together on data collection. Because of the mutual time and effort of all of the consultants, the costs associated with professional communication essentially balances out between the Parties. Therefore, no costs will be awarded for professional communication.

[180] The costs claimed under consultations and meetings totaled $16,180.92; $13,541.52 for Dr. Weyer, $2,432.70 for Mr. Ellis, and $206.70 for mileage. These costs do not relate directly to the preparation and presentation of evidence at the Hearing. These costs were primarily consultation between the consultants and the Appellant. These costs did not materially assist the Board in its deliberations regarding the Amending Approval. Therefore, the Board will not award costs for consultations.

[181] It is clear from the time sheets submitted that work completed under the categories of drilling preparation and supervision, slugtests and piezometer redevelopment, and risk assessment rebuttal were clearly completed for the purposes of collecting and analyzing data to present at the Hearing. The costs claimed for drilling preparation and supervision were $24,578.75 for Dr. Weyer, $1,621.80 for Mr. Ellis, and $2,288.75 for expenses that included telephones ($212.00), meals ($424.00), mileage ($1080.35) and fees for the HydroDynamik program ($572.40), for a total of $28,489.30. For the slugtests and piezometer redevelopment, the costs claimed were $4,312.88 for Dr. Weyer's services, $3,386.70 for Mr. Ellis, and $437.14 for expenses that included $341.74 for mileage and $95.40 for the HydroDynamik program fee, for a total of $8,136.72.

[182] The Board reviewed the costs claimed under these categories. It deducted time spent working on the cost estimate for the drilling, administrative costs, and searching for documents with minimal relevance to the Hearing. The Board recognizes the time and effort Dr. Weyer and Mr. Ellis spent in gathering and analyzing the data to present at the Hearing. It was the data that were collected that was most useful to the Board, and they provided the Director and Approval Holder additional information in understanding the conditions that exist on the Reservoir site. Therefore, the Board will allow the costs claimed, adjusted for those costs listed above. The Board awards $10,712.62 for Dr. Weyer's costs and $4,340.70 for Mr. Ellis.

[183] The Board will not allow the costs for meals because there is no documentation to indicate that $424.00 was actually spent on the meals. Telephone costs will not be included because it is part of the costs of doing business. Mileage was reduced by 150 km because of a return trip to Calgary for forgotten or additional items, and the rate was recalculated using the Alberta Government rate of $0.46 per km. Therefore, the allowable expenses are $880.44 for mileage[34] and $667.80 for the program fees, for a total of $1,548.24.

[184] The costs claimed for reviewing the Bercha Report were $16,834.13 for Dr. Weyer, $5,676.30 for Mr. Ellis, and $22.10 for expenses (parking and postage), for a total of $22,532.53. The Board appreciated the effort taken by Dr. Weyer and Mr. Ellis to understand the Bercha Report and how the analysis was undertaken. However, the Board finds the total

costs claimed, compared to that of Mr. Doug McCutcheon, higher than anticipated. Therefore, the Board reduces the costs claimed by Dr. Weyer and Mr. Ellis by half, leaving a total costs award for their time at $11,255.22.

[185] The Board will allow the expense claim of $22.10 for postage and parking.

[186] Dr. Weyer claimed costs totaling $19,106.51 for preparation and attendance at the June 21, 2007 preliminary meeting and the Hearing. Mr. Ellis' costs totaled $7,298.10 and expenses totaled $411.96 ($47.70 for program fees, $314.18 for mileage, $28.83 for copying, and $21.25 for meals). Therefore, the total of the costs claimed for preparing for the hearings and attending the hearings is $26,816.57. The Board will allow for the expenses claimed except for the copying costs. There was no indication what was copied and how it assisted at the Hearing. The June 21, 2007 preliminary meeting was held in Black Diamond and the Hearing was in Turner Valley, so it is reasonable to allow for the mileage claimed. However, the Board will use the government rate for mileage, which is $0.46 per kilometer. Therefore, the expenses total $278.71.[35]

[187] Dr. Weyer attended the June 21, 2007 preliminary meeting but had a limited role in assisting the Appellant present her arguments on the preliminary matters. Therefore, the Board will allow $278.25 for his attendance at the June 21, 2007 preliminary meeting. Both Dr. Weyer and Mr. Ellis attended the Hearing. Dr. Weyer provided useful information to the Board and assisted the Appellant's counsel in the cross-examination of the Approval Holder's and Director's witnesses. Therefore, the Board will allow $2,226.00 for Dr. Weyer. Mr. Ellis assisted Dr. Weyer but provided very little evidence. Therefore, the Board will allow $629.64 for Mr. Ellis' attendance at the Hearing. The total for costs claimed for preparation and attendance at the hearings and the associated expenses is $3,412.60.

[188] Dr. Weyer and Mr. Ellis included a total costs claim of $27,856.81 for time documentation and applications preparation. These items are administrative in nature and did

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[34] This is based on (2064 km – 150 km = 1914 km) * $0.46/km = $880.44.

[35] This was calculated by adding the costs for the program fee ($47.70) plus meals ($21.25) plus mileage (456 km * $0.46/km = 209.76).

not relate to the preparation and presentation of evidence at the Hearing. Therefore, the Board will not award any of these costs.

[189] Dr. Weyer claimed for travel expenses for two trips from overseas. The first trip, costing $848.02, was a flight from Europe to Calgary in September 2007 to present his findings on the slugtests to the ad hoc committee. Although it may have been beneficial to the Approval Holder and ultimately the Director, this meeting did not relate to the preparation and presentation of arguments before the Board. Therefore, the Board will not consider these costs. The second trip, costing $1,560.32, was for a return trip in November 2007. Dr. Weyer explained he purchased the ticket to Calgary before the hearing was cancelled. Had the hearing proceeded as scheduled, Dr. Weyer would have had to purchase the ticket anyway. Although the Board recognizes the inconvenience placed on Dr. Weyer for having to return early for a hearing that was cancelled due to the Approval Holder's actions,[36] the Board cannot award these costs because they are not for the preparation and presentation of submissions for the Hearing.

[190] The Approval Holder argued WDA's costs are offset by the costs incurred by the Town to respond to the Appellant's concerns. It was the result of the appeal that additional information was obtained that benefited the Director, the Approval Holder,[37] and ultimately the Board and the Minister. The Town did incur costs, but it was the Town's Amending Approval and it was the Town that chose the site for the Reservoir. The Approval Holder recognized that there was probably going to be additional costs associated with the site. Had all of the testing been conducted by the Town at the outset, or at least without an appeal facing the Town, the Town would have had to bear all of the costs associated with conducting the tests and analyses.

[191] The Board will award costs for WDA's participation in the appeal process totaling $60,011.12.

3. Doug McCutcheon and Associates

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[36] See: October 22, 2007 letter from Approval Holder, stating it was withdrawing its application for the Reservoir and, therefore, the Board lost jurisdiction and the Approval Holder would not make a submission or participate further in the process.

[37] See: *Walsh* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Turner Valley* (28 February 2008), Appeal No. 06-071-R (A.E.A.B.) at paragraph 287.

[192] The Appellant retained the services of Mr. McCutcheon to review the Bercha Report and is now seeking costs in the amount of $1,029.00, including $49.00 for GST. The Approval Holder submitted the Bercha Report just before the Hearing, well past the deadline for submissions. Because of the late submission and the need to hear from all the Parties to the appeal, the Board had not ruled, prior to the Hearing, on whether the Bercha Report would be admitted as evidence, the Appellant was required to be prepared in case the Bercha Report was allowed as evidence at the Hearing. Mr. McCutcheon spent half a day reviewing the Bercha Report and advising the Appellant and her consultants. As a result of this review, the Appellant was able to ask pointed questions in an effective, focused cross-examination of Dr. Bercha. This questioning assisted the Board in its deliberations and in its preparation of its recommendations. Without Mr. McCutcheon, questioning by the Appellant may not have been as helpful to the Board.

[193] Therefore, the Board will allow all costs associated with Mr. McCutcheon, totaling $1,029.00.

4. AquaSolv Environmental Services/Mr. Bogdan Pawlak

[194] As a result of a co-operative process between the consultants for the Approval Holder and the Appellant, the Approval Holder paid some of the costs for the work completed by Mr. Pawlak and AquaSolv Environmental Services.

[195] According to the Appellant, the Approval Holder still owes Mr. Pawlak $7,393.77. The Approval Holder claimed these costs were associated with work completed for WDA, half of the slugtests, mileage, and "…equipment rental problems for equipment that might have been available through the Town's consultants, if requested."[38]

[196] The Board notes the discrepancy in what the Appellant considers is still owing to Mr. Pawlak and what the Approval Holder considers is still outstanding. It also appears the Appellant did not include, as part of her submission and costs argument, an invoice for $3,306.14 for Mr. Pawlak's attendance at the Hearing.[39] It is not clear why this invoice was not included as

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[38] Approval Holder's submission, dated May 2, 2008, at paragraph 52.

[39] See: Appellant's submission, dated April 10, 2008, at Tab 3, Invoice # 1158.

part of the costs claim or in the discussion in the submission. Because it was not included as part of the costs claim, the Board cannot consider the invoice.

[197] Most of the work completed by Mr. Pawlak was paid for by the Approval Holder. The evidence provided by Mr. Pawlak at the Hearing was limited considering the problems with the piezometers installed by Mr. Pawlak. As a result, the Board will not award any additional costs for Mr. Pawlak's participation in the appeal.

[198] Costs could have been reduced by the sharing of equipment. According to the Approval Holder, AquaSolv rented equipment that might have been available through the Approval Holder's consultants, but the Approval Holder's consultant did not offer the use of the equipment to expedite the data collection or to assist in the data collection that could have then be used by the Appellant and the Approval Holder. The Approval Holder should have offered the use of its equipment or its consultant's equipment to minimize costs and time for all Parties. It would also have demonstrated a true spirit of co-operation. Therefore, costs associated with the use of the dataloggers, totaling $604.80 plus $36.29 for GST calculated at 6 percent, will be allowed.

[199] The Board awards the Appellant $641.09 for costs associated with the dataloggers.

5. Ms. Jennifer Klimek

[200] The Appellant started the appeal process, retained experts, and filed submissions prior to her retaining legal counsel shortly before the Hearing. The Board understands the Appellant had to retain counsel due to procedural maneuvers undertaken by counsel for the Approval Holder. The Appellant's submissions and responses throughout the process were well thought out and organized, even though she did not have counsel at the time.

[201] One of the advantages of an administrative proceeding is that the parties are not required to be represented by legal counsel. The Appellant in this case was unrepresented until shortly before the January 2008 Hearing. The Appellant was effective in these proceedings with preparing and forwarding her submissions within the timeframe given the Board. However, the Board recognizes the Appellant's concern with appearing at the Hearing without counsel.

[202] The Appellant's legal counsel provided effective cross-examination of the Approval Holder's consultants and the Director's panel at the Hearing. She targeted the main issues and asked appropriate, probing questions of the witnesses. Ms. Klimek is experienced in the areas of environmental and administrative law. Her experience resulted in a focused presentation by the Appellant and her consultants.

[203] Because Ms. Klimek was effective throughout the Hearing, the Board will award costs for her services. The Approval Holder also considered it appropriate to have some of Ms. Klimek's costs reimbursed.

[204] The Appellant claimed costs for legal services totaling $22,706.25. The Board notes that part of the legal costs claimed included costs that resulted after the Hearing. The Board will not consider costs associated with preparing a costs submission. Costs resulting after the Hearing could not have been for the preparation and presentation of arguments at the Hearing and cannot be considered by the Board in a costs application. Therefore, as a starting point, the Board will deduct the costs incurred after January 29, 2008, leaving a costs application of $19,000 plus $950.00 for GST.

[205] The Board generally does not award costs related to travel, particularly as part of legal fees. In this case, Ms. Klimek claimed eight hours for travel time between Turner Valley and Edmonton. Because the Hearing was held in Turner Valley, the Board will allow two hours travelling time, the amount of time that would have been required had counsel been retained from Calgary. This reduces the time claimed to 70 hours and the legal costs are reduced to $17,500.00, plus $875.00 for GST. This amount is based on an hourly rate of $250.00.

[206] According to the Alberta Legal Telephone Directory 2008-2009, Ms. Klimek has been at the Alberta Bar for over 20 years. She also holds a Masters Degree in environmental law. Based on the tariff of fees used by the Government of Alberta for outside counsel, a lawyer of her experience would be paid at the rate of $250.00 per hour. The Board considers the Government of Alberta rate as an appropriate tariff against which to judge the appropriateness of

legal fees, but it is always cognizant that there may be circumstances in which it may not be appropriate.[40]

[207] The hours claimed by Ms. Klimek to prepare for the Hearing are reasonable given Ms. Klimek was brought into the appeal process just one month prior to the Hearing. Because the Board believes that Parties are responsible for some of the costs of presenting their issues before the Board, the Board will often start by reducing the costs claimed by one half. In this case, Ms. Klimek was very effective in preparing the Appellant for the Hearing and in cross-examination, so the Board will allow 75 percent of the costs claimed as adjusted above.

[208] The Board awards costs for the legal services of Ms. Klimek in the amount of $13,125.00 plus $656.25 for GST, totaling $13,780.25.

6. Summary

[209] For the reasons given above, the Board will award costs for the Appellant's participation in the appeal process. It is the opinion of the Board that she presented a valid issue and supported her concerns with evidence that was useful to the Board in making its recommendations. The validity of the Appellant's case was reflected in the submission of the Director and his evidence at the Hearing in which he recommended a substantial increase in monitoring, which comprised most of the changes to the Amending Approval ultimately contained in the Ministerial Order. She provided input through her experts that was appropriate for assuring the safety of the Approval Holder's drinking water supply.

[210] Therefore, the Board will award costs as follows:

Personal Expenses	$606.15
Experts	$61,681.21
Legal Costs	$13,780.25

[211] The total costs award is $76,067.61.

7. Who Should Bear the Costs?

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[40] See: Costs Decision re: *Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098, and 101-CD (A.E.A.B.) at paragraph 42 and associated footnotes.

[212] Although the legislation does not prevent the Board from awarding costs against the Director, the Board has stated in previous cases, and the courts have concurred,[41] that costs should not be awarded against the Director providing his actions, while carrying out his statutory duties, were done in good faith.

[213] In this case, the Director's decision was not overturned by the Board but was varied. Even if the decision had been reversed, special circumstances are required for costs to be awarded against the Director. The Court, in the decision of *Cabre*, considered the issue of the Board not awarding costs against the Director. In his reasons, Justice Fraser stated:

> "I find that it is not patently unreasonable for the Board to place the Department in a special category; the Department's officials are the original statutory decision-makers whose decisions are being appealed to the Board. As the Board notes, the Act protects Department officials from claims for damages for all acts done in good faith in carrying out their statutory duties. The Board is entitled to conclude, based on this statutory immunity and based on the other factors mentioned in the Board's decision, that the Department should be treated differently from other parties to an appeal.
>
> The Board states in its written submission for this application:
>
> > 'There is a clear rationale for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker's judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision.'
>
> In conclusion, the Board may legitimately require special circumstances before imposing costs on the Department. Further, the Board has not fettered its discretion. The Board's decision leaves open the possibility that costs might be ordered against the Department. The Board is not required to itemize special circumstances that would give rise to such an order before those circumstances arise."[42]

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[41] See: *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

[42] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board*) (9 April 2001) Action No. 0001-11527 (Alta. Q.B.) at paragraphs 33 to 35.

[214] There are no special circumstances to warrant awarding costs against the Director. When the Board refers to special circumstances, the Board is looking at whether the Director acted in good faith within his jurisdiction. The Director, in issuing a milestone approval, allowed the Approval Holder to proceed with the project and to use the construction phase to also be a data gathering step. This type of milestone approval created some concern with the Board because of the difficulty directly affected persons would have in determining exactly what the conditions would be for the operation of the project. However, in this case, where there was uncertainty about the conditions of the site for the Reservoir, it was an understandable approach. This approach, although not ideal, does not constitute the special circumstances that warrant costs against the Director. Therefore, costs will not be awarded against the Director in these circumstances.

[215] In previous costs decisions where costs have been awarded against the project proponent, the Board has described the role of project proponents as being "…responsible for incorporating the principles of environmental protection set out in the Act [EPEA] into its project. This includes accommodating, in a reasonable way, the types of interests advanced by the parties…."[43] As the Board has stated before, "…these costs are more properly fixed upon the body proposing the project, filing the application, using the natural resources and responsible for the projects financing, than upon the public at large as would be the case if they were to be assessed against the Department."[44]

[216] The Board understands that, in this case, the proponent of the project is a municipality with limited resources. The Board acknowledges the Approval Holder's efforts to cooperate with the Appellant's consultants and its payment of most of the costs associated with the work completed by AquaSolv. However, the Board also notes that some of the problems

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[43] See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B). In *Cabre*, the Board stated that where Alberta Environment has carried out its mandate and has been found, on appeal, to be in error, then in the absence of *special circumstances*, it should not attract an award of costs. The Court of Queen's Bench upheld the Board's decision: *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.)

[44] Re: *Mizeras* (2000), 32 C.E.L.R. (N.S.) 33 (Alta. Env. App. Bd.), (*sub nom.* Cost Decision re: *Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) at paragraph 33.

facing the Approval Holder were the result of the Town's decision to construct the Reservoir on a site with known past and present oil and gas activity.

[217] The work the Appellant did in this appeal resulted in a better Amending Approval, one that will ensure the protection of the water supply for all of the Town's citizens. Costs would likely have been lower had the Town not allowed its legal counsel to prolong and complicate the process.

[218] Therefore, in the circumstances of this appeal, costs in the amount of $76,067.61 will be ordered against the Approval Holder.

B. Approval Holder

[219] The Approval Holder expressed concerns regarding the Appellant's response submission. The Appellant was given the opportunity to provide a response submission as part of the process to ensure the principles of natural justice, including fairness to all of the Parties, is maintained. There were no arguments presented in the Appellant's response submission that were new or that were not presented at the Hearing.

[220] As stated above, the Board has not found the special circumstances required to assess costs against the Director. He was acting within his jurisdiction and his actions were done in good faith. Because the Approval Holder claimed its costs against the Director, the Board cannot award costs.

[221] It should be noted that had a costs claim been made against the Board or the Appellant, the Board would not have awarded costs for the following reasons.

[222] The Approval Holder claimed costs totaling $240,222.09 for retaining consultants and conducting additional testing. Much of the additional testing was required pursuant to the Amending Approval. As each step in the construction phase progressed, the Approval Holder was required to provide data from tests performed. This information was used by the Director to determine if the project should proceed. Although additional testing might have been a result of the appeal, both the Director and the Approval Holder agreed more information is valuable, particularly at a site subject to historical industrial contamination such as this. The information

was also valuable to the Approval Holder because it could be used and incorporated into the Town's application to renew the Approval. Therefore, no costs will be awarded to the Approval Holder for expenses incurred retaining its consultants.

[223] In its costs application, the Approval Holder asked for $62,248.50 of its total legal costs of $245,242.21. (The actual billing was not provided.) Counsel for the Town only claimed for the days at the Hearing and Preliminary Meetings, a total of 24 days for preparation time, plus one day for preparing the written submission in response to the intervenor application. Although the Board appreciates the reduced claim for legal costs, the Board will not award these costs to the Approval Holder. Most of the delays were the result of counsel's actions, and many of the preliminary matters could have been resolved by contacting the Board and making a formal request. In reviewing and considering the totality of the correspondence from the Approval Holder's counsel, the Board is of the view that it would be inappropriate to make any costs award to the Approval Holder for legal fees. (In preparing this costs decision, the Board prepared a summary of the correspondence from the Approval Holder's counsel. A copy of this summary has been placed on the Board's appeal file and is available upon request. The Board's complete appeal file is also available for viewing.)

[224] Therefore, the Board will not award any of the costs claimed by the Approval Holder.

V. DECISION

[225] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs to the Appellant totaling $76,067.61, payable by the Town of Turner Valley.

[226] The Board orders that these costs be paid within 60 days of issuance of this decision. Payment is to be made to the Appellant's counsel, Ms. Jennifer Klimek, in trust. The Town is requested to provide confirmation to the Board that payment has been made.

Dated on December 22, 2008, at Edmonton, Alberta.

_____
Dr. Steve E. Hrudey, FRSC, PEng
Chair

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Ron V. Peiluck
Vice-Chair

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Alex G. MacWilliam
Board Member