

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – September 26, 2012

IN THE MATTER OF sections 91, 92, 95, and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF notices of appeal filed with respect to *Water Act* Approval No. 00266612-00-00 and *EPEA* Approval No. 236328-00-00 issued to Waste Management of Canada Corporation by the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: Interim Costs: *Cramer et al. v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Waste Management of Canada Corporation* (26 September 2012), Appeal Nos. 11-025-

027, 030, 032-035, 038-040, 043-047, 051-053, 056, 068-069, 071, 076, 100, 104-105, 107-109, 112, 147-150, 156-159, 161, and 173-IC (A.E.A.B.).

BEFORE:

Mr. Eric McAvity, Q.C., Panel Chair.

SUBMISSIONS BY:

Appellants: Concerned Citizens of Thorhild County Society on behalf of Lori Cramer, Chantel Cramer, Tony and Keith Cramer, Lorne Skuba, Morris Haig, Joyce Haig, Jim Panich, Sophie Panich, Clinton and Stacey Kirk, Linda Kirk, John Kirk, Hazel Lahti, Melvin Telstad, Odessa Telstad, Kevin and Carmen Ewasiw, Darwin Trenholm, Larry Sisson, Cecile Sisson, Betty and Bernie Kolewaski, and Jason Dmetruk, represented by Ms. Karin Buss, K2B Law Klimek Buss Bishop.

Approval Holder: Waste Management of Canada Corporation, represented by Donald Wilson, Davis LLP.

Director: Patrick Marriott, Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Michelle Williamson, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development issued an Approval under the *Water Act* to Waste Management of Canada Corporation (WMCC) for the placing, constructing, operating, maintaining, removing, or disturbing works, in or on any land, water, or water body for the purpose of removing wetlands, constructing wetland compensation works, and managing surface water run-on and run-off for a landfill near Thorhild. An Approval was also issued to the WMCC under the *Environmental Protection and Enhancement Act* (EPEA) allowing for the construction, operation, and reclamation of the Thorhild Landfill (Class II).

The Board received 36 appeals of the *Water Act* Approval and 35 appeals of the EPEA Approval. The Board accepted 19 appeals of the *Water Act* Approval and 22 appeals of the EPEA Approval.

The Concerned Citizens of Thorhild County Society (CCTCS) filed an interim costs application on behalf of 19 of the appellants.

The CCTCS requested \$58,040.00, including \$34,915.00 for three consultants and \$23,125.00 for legal costs. This was half of the CCTCS's anticipated costs to prepare and attend at the hearing.

Although the Board believed retaining consultants and legal counsel for the hearing would be beneficial, costs are normally awarded based on the assistance the party provides to the Board in determining its recommendations. At this stage of the appeal process, it is not known how much assistance a party and its witnesses will be at the hearing. Therefore, the Board allowed \$6,240.00 in interim costs to be payable by the project proponent, WMCC.

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION | 1 |
| II. | BACKGROUND | 1 |
| III. | SUBMISSIONS | 2 |
| | A. CCTCS | 2 |
| | B. Approval Holder | 5 |
| | C. Director | 9 |
| IV. | ANALYSIS | 9 |
| | A. Legal Basis | 9 |
| | B. Application | 11 |
| | C. Who Should Bear the Costs? | 14 |
| | D. Final Costs | 15 |
| V. | DECISION | 16 |

I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision on the interim costs application filed by the Concerned Citizens of Thorhild County Society ("CCTCS") on behalf of 19 appellants (the "CCTCS Appellants")¹. The appeals are in relation to approvals issued to Waste Management of Canada Corporation ("WMCC" or the "Approval Holder") for a landfill, specifically an approval issued under the *Water Act*, R.S.A. 2000, c. W-3, and an approval issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") allowing for the development of the Thorhild Landfill (Class II). A Class II landfill is a landfill that accepts non-hazardous waste.

II. BACKGROUND

[2] On September 22, 2011, the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development² (the "Director"), issued Approval No. 00266612-00-00 (the "*Water Act* Approval") under the *Water Act* to WMCC. The *Water Act* Approval was issued for the placing, constructing, operating, maintaining, removing, disturbing works, in or on any land, water, or water body for the purpose of removing wetlands, constructing wetland compensation works, and managing surface water run-on and run-off for a landfill near Thorhild, Alberta.³ On September 22, 2011, the Director also issued Approval No. 236328-00-00 under EPEA (the "EPEA Approval") to WMCC for the construction, operation,

¹ The CCTCS represents the following appellants: Ms. Chantel Cramer, Ms. Lori Cramer, Mr. Tony and Mr. Keith Cramer, Mr. Jason Dmetruk, Mr. Kevin and Ms. Carmen Ewasiw, Mr. John and Ms. Linda Kirk, Ms. Stacey and Mr. Clinton Kirk, Ms. Betty and Mr. Bernie Kolewaski, Ms. Hazel Lahti, Mr. Jim and Ms. Sophie Panich, Mr. Larry and Ms. Cecile Sisson, Mr. Lorne Skuba, Mr. Mel and Ms. Odessa Telstad, and Mr. Darwin Trenholm.

² During these appeals, the Department was named Alberta Environment and Water. However, as of May 8, 2012, the Department was renamed Alberta Environment and Sustainable Resource Development. For the purposes of this Decision, the Department will be referred to as Alberta Environment and Sustainable Resource Development ("AESRD").

³ The landfill has two distinct areas. In this decision, the actual land where the landfill cells will be constructed will be referred to as the "Landfill Area" and the adjoining area that includes a main access road, intersections to provide access, and a crossing of a railway right-of-way, will be referred to as the "Transportation Lands." Collectively, the Landfill Area and Transportation Lands will be referred to as the "Landfill."

and reclamation of the Landfill where more than 10,000 tonnes of waste, not including hazardous wastes, is disposed of each year.⁴

[3] Between September 29, 2011 and November 8, 2011, the Environmental Appeals Board (the “Board”) received 36 Notices of Appeal appealing the *Water Act* Approval and 35 Notices of Appeal appealing the EPEA Approval. After reviewing submissions on preliminary matters, including which appeals are validly before the Board, the Board accepted 19 appeals of the *Water Act* Approval and 22 appeals of the EPEA Approval (collectively the “Appellants”).⁵

[4] On July 18, 2012, the Board received an interim costs application from the CCTCS on behalf of the 19 appellants it represents. The Board received response submissions from the Approval Holder and Director on August 29, 2012.

III. SUBMISSIONS

A. CCTCS

[5] The CCTCS, on behalf of its members, requested interim costs totaling 50 percent of the estimated costs for preparation for and attendance at the hearing. The total anticipated cost for retaining three consultants and legal counsel was \$116,080.00, so the interim costs asked for was \$58,040.00.⁶

[6] The CCTCS noted 19 of its members were found to be directly affected.

⁴ Collectively, the *Water Act* Approval and EPEA Approval will be referred to as the “Approvals.”

⁵ The appeal filed by the Confederacy of Treaty Six First Nations was dismissed for failing to respond to the Board and, therefore, their appeal is not considered in this decision. See: *Confederacy of Treaty Six First Nations v. Director, Northern Region, Operations Division, Alberta Environment and Water*, re: *Waste Management of Canada Corporation* (01 February 2012), Appeal No. 11-024-D (A.E.A.B.). See: Preliminary Motions: *Cramer et al. v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Waste Management of Canada Corporation* (09 August 2012), Appeal Nos. 11-025-059, 062-063, 068-071, 075-076, 100-112, 147-150, 156-161, 163-165, and 173-ID2 (A.E.A.B.).

The complete list of Appellants is attached in Appendix A. The Appellants who are members of the CCTCS and have valid appeals will be referred to as the “CCTCS or CCTCS Appellants” in this decision.

⁶ The Board notes the CCTCS stated it was seeking costs totalling \$48,050.00, but this does not equate to 50 percent of the total costs anticipated. The Board will use \$58,040.00 as the starting point for the interim costs application.

[7] The CCTCS stated they are interested and obligated to prepare and submit relevant, useful evidence and legal argument in support of their appeals. Interim costs would enable them to prepare their expert witnesses and other evidence in advance of the hearing, which will assist in timely submissions. The CCTCS explained interim costs will enable them to retain legal counsel who will provide guidance and assistance to ensure their evidence and submissions are prepared in a timely manner and are relevant, focused, and useful to the issues. The CCTCS noted many of the issues raised are technical, scientific, or specialized and, therefore, expert evidence is required to assist the CCTCS and the Board.

[8] The CCTCS explained they have retained legal counsel and three experts. Their legal counsel has more than 18 years experience in environmental law. Legal costs claimed included reviewing the appeal documents, communicating with clients, the Board, and experts, preparing written submissions, and representing the CCTCS Appellants at the hearing. Two of the experts will focus on surface water impacts and protection and potential groundwater issues. They will review the application as it relates to surface water, wetlands, and groundwater, prepare a report, and present at the hearing. The third expert is an environmental engineer and expert in landfill assessment and public health. He will review the application as it relates to potential contamination and nuisance issues, waste management and liner integrity, prepare a technical review and report, and present at the hearing.

[9] The CCTCS estimated costs of \$46,250.00 for legal costs and \$69,830.00 for consultant costs. The total costs were estimated at \$116,080.00, based on a four day hearing. The costs were broken down as follows:

| Person Retained | Hourly rate | Hours document review and report preparation | Hours hearing preparation and attendance at hearing | Cost | Disbursements | Subtotal |
|----------------------------|--------------------|---|--|-------------|----------------------|-----------------|
| Hydrological specialist | \$210.00 | 40 | 8 | \$10,080 | \$1,800.00 | |
| Hydrogeological specialist | \$160.00 | 40 | 8 | \$7,680.00 | | |
| Project manager | \$190.00 | 8 | | \$1,520.00 | | \$21,080 |

| Person Retained | Hourly rate | Hours document review and report preparation | Hours hearing preparation and attendance at hearing | Cost | Disbursements | Subtotal |
|------------------------|-----------------|--|---|--------------------|---|---------------------|
| Environmental engineer | \$300.00 USD | 144.5 | 8 | \$45,750.00 USD | Travel, hotel and meals: \$2,500.00 Misc.: \$500.00 | \$48,750.00 |
| Legal counsel | \$350.00 | 32 | 98 | \$45,500.00 | \$750.00 | \$46,250.00 |
| | | | | | Total: | \$116,080.00 |

[10] The CCTCS claimed interim costs half of the above total.

[11] The CCTCS explained most of its members are farmers and many are seniors and close to retirement or retired, and their life's work will be negatively impacted by the Landfill. The CCTCS stated the equity in their property is their retirement fund, and they fear the Landfill will reduce that equity. Most of its members have modest personal finances.

[12] The CCTCS argued the costs of an appeal are part of the Approval Holder's costs of doing business, but this is not true for the CCTCS Appellants. They argued the Landfill is potentially a significant source of profit for the Approval Holder but it will generate only costs to the individual CCTCS Appellants.

[13] The CCTCS noted the Approval Holder reimbursed the Thorhild County for all of its expenses related to the proposed Landfill, including expert and legal costs and the costs of the rezoning application and hearings. The CCTCS argued this indicates the Approval Holder recognizes its responsibility to compensate the parties who incur costs as a result of its activities.

[14] The CCTCS explained it received donations from its members in the past and continues to raise funds. It has held fundraisers; applied for community grants, which were turned down; requested funding from Thorhild County, which was denied; and researched other possible funding grants, but they do not qualify.

[15] The CCTCS stated that, since the appeals were filed, it has raised \$4,703.25 from fund raising and \$9,600.00 has been contributed by individual members. Expenses so far have totaled \$17,703.33, including hall rental costs for group meetings, bank fees, fundraising supplies, and experts.

[16] The CCTCS stated the individual CCTCS Appellants have organized themselves into a group. They have spent considerable time forming the group, retaining legal counsel and experts, coordinating the appeals and landowners' issues and concerns, and communicating between the members, counsel, and their experts. Additional time was invested in fundraising.

[17] The CCTCS submitted that, by forming a group and sharing a lawyer and experts, they are using resources efficiently, thereby saving time for the Board, Director, and Approval Holder.

[18] The CCTCS argued its members do not have the funds to continue to prepare for these appeals without an award of interim costs. Therefore, they requested an interim order of costs against the Approval Holder in the amount of \$58,040.00.

B. Approval Holder

[19] The Approval Holder argued the costs application was deficient and does not justify an award of interim costs.

[20] The Approval Holder noted the CCTCS is not a party to the appeals and, according to section 19 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation") and section 33 of the Board's Rules of Practice, an application for interim costs may only be brought by a party. The Approval Holder stated the CCTCS may advance an application for interim costs on behalf of the 19 CCTCS members whose appeals were accepted, however it appeared the application was brought by the CCTCS on its own behalf. The Approval Holder argued this is inappropriate and the application should be dismissed.

[21] The Approval Holder acknowledged some of the issues raised in the appeals are technical and it would be appropriate to retain an expert. The Approval Holder argued it would be, however, inappropriate to prejudge the effectiveness of the proposed experts. It further argued the CCTCS's proposal did not demonstrate that interim costs were reasonable or necessary.

[22] The Approval Holder acknowledged CCTCS' legal counsel is experienced, but given the nature of the appeals and the number of Appellants, there is no guarantee counsel would be able to assist in streamlining the hearing process. The Approval Holder argued the Board cannot predetermine how effective counsel will be in keeping the submissions and cross-examination focused.

[23] The Approval Holder argued interim costs are inappropriate and the value of the experts and legal counsel should be determined at the end of the hearing.

[24] The Approval Holder noted the interim costs application proposes to retain three experts to address surface water, ground water, potential contamination and nuisance issues, waste management, and liner integrity.

[25] The Approval Holder noted the consultants the CCTCS intends to retain have already completed significant work with respect to the Landfill and, therefore, the number of hours proposed in the costs application is unreasonable and unnecessary. The Approval Holder stated CCTCS anticipates retaining a hydrologist and hydrogeologist for the hearing who had conducted a hydrogeological review and prepared a report dated April 23, 2009, in which there was an evaluation of the hydrogeological conditions beneath the Landfill. The Approval Holder stated the third expert the CCTCS proposes to retain also prepared a report in response to the re-zoning application filed with the County of Thorhild in which he addressed several of the expert reports attached to the re-zoning application and included comments about the location of the Landfill, surface water, groundwater, engineering, containment, and air quality.

[26] The Approval Holder stated the reports prepared by the CCTCS' experts were prepared for the re-zoning application, but the underlying issues are similar to those raised in the appeals. The Approval Holder submitted that, given the amount of work already completed by

the CCTCS' consultants, the number of hours proposed by the CCTCS is unreasonable. It argued the CCTCS bears the onus of establishing what additional work must be undertaken to deal with the issues before the Board and to provide a detailed, reasonable estimate for the additional work.

[27] The Approval Holder submitted the costs claimed for travel, hotel, meals, and miscellaneous expenses should not be allowed, because these expenses are not directly and primarily related to the issues and do not fall within the scope of section 19 of the Regulation.

[28] The Approval Holder argued the costs proposal submitted by the CCTCS for legal counsel was unreasonable. The Approval Holder noted the CCTCS is claiming for more than three hours of preparation time for every hour spent at the hearing based on 32 hours of hearing time. The Approval Holder noted the Board has accepted one hour for preparation time for each hour of hearing as reasonable for legal counsel and one and a half hours of preparation for every hour of hearing time for experts. The Approval Holder argued three hours of preparation is well outside the Board's accepted range. The Approval Holder stated there is no evidence or reason to believe the CCTCS will be required to pay the full amount of the estimated legal fees in advance of the hearing. The Approval Holder noted the Board applies the tariff of fees used by the Government of Alberta for outside counsel, which would entitle the CCTCS's counsel to charge out at a rate of \$250.00 per hour, not the \$350.00 being asked for in the costs application. The Approval Holder stated disbursement costs claimed are not directly and primarily related to the issues and do not fall within the scope of section 19 of the Regulation.

[29] The Approval Holder stated the CCTCS' costs application did not contain details or evidence to show the applicants were economically disadvantaged and cannot pay for the hearing costs, and no evidence was provided as to the personal circumstances of the individual CCTCS Appellants. The Approval Holder noted many of the CCTCS Appellants own multiple pieces of property, and even though the CCTCS stated the equity in the properties are the members' retirement fund, that does not assist in establishing a need for interim costs.

[30] The Approval Holder stated the CCTCS had the burden of establishing a demonstrated need for interim costs, and without more detailed information about the members'

financial circumstances, it is impossible to assess the interim costs application. Therefore, the Approval Holder argued, the costs application must fail.

[31] The Approval Holder noted there are 36 members of the CCTCS and 19 are still Appellants. The Approval Holder stated that, even though 17 members are no longer parties to the appeals, they are members who have expressed a strong interest in the appeals. The Approval Holder stated it is not clear whether the \$9,600.00 in contributions to the CCTCS is from the members who are still Appellants or from all 36 members. The Approval Holder submitted that, if it is from the members who are still Appellants, then it would be appropriate for the CCTCS to seek contributions from the non-appellant members before seeking interim costs from the Approval Holder.

[32] The Approval Holder added that, if the additional 17 members of the CCTCS are included in the \$9,600.00 figure, then the members have only contributed \$266.67 each. The Approval Holder submitted that it is unreasonable for the CCTCS Appellants to expect their appeals would be heard at such a small cost as this does not accord with the principle that responsibility for environmental issues must be shared.

[33] The Approval Holder acknowledged the CCTCS made efforts to consolidate issues and resources, but it is unclear yet if that will have a significant positive effect on the hearing. The Approval Holder noted there is no indication whether the CCTCS made any effort to pool resources with the remaining six Appellants who are not CCTCS members. The Approval Holder submitted the CCTCS should be required to canvass the other remaining Appellants to determine if they are prepared to contribute to the costs of the experts and legal counsel.

[34] The Approval Holder stated there are 36 members of the CCTCS and an additional six Appellants who are not members. It explained that, even if the costs claimed by the CCTCS were reasonable, \$116,080.00 divided by 42 is \$2,763.81. The Approval Holder submitted this is not an unreasonable amount to expect those interested in the Landfill to pay. The Approval Holder noted there is no indication how much of the amount applied for must be paid in advance of the hearing.

[35] The Approval Holder submitted the costs application is deficient and does not meet the test for interim costs. In addition, the CCTCS is not a party to the appeals and is not entitled to apply for interim costs on its own behalf. The Approval Holder argued it is impossible to predict at this stage of the process how useful the CCTCS' consultants and legal counsel will be, and the costs application did not show the costs proposed are reasonable, necessary, or needed for the preparation and presentation of the CCTCS' case. Therefore, according to the Approval Holder, it would be inappropriate to award interim costs to the CCTCS, and any issues regarding costs should reserved until after the hearing when a decision can be based on actual information and all relevant factors.

C. Director

[36] The Director made no comment on the costs application. The Director submitted costs should not be assessed against the Director given his role in the appeal.

IV. Analysis

A. Legal Basis

[37] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA which states:

“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.”

[38] This section appears to give the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre Exploration Ltd.*:⁷

⁷ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

“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.”

[39] 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....’”

[40] Although Mr. Justice Fraser’s comments were in relation to final costs, the principles are equally relevant to interim costs applications.

[41] Sections 18 and 19 of the Regulation specify the requirements of applying for interim costs. These sections state:

“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 preparations and presentation of the party’s submission.

19(1) An application for an award of interim costs may be made by a party at any time prior to the close of a hearing of the appeal but after the Board had determined all parties to the appeal.

- (2) An application for an award of interim costs shall contain sufficient information to demonstrate to the Board that the interim costs are necessary in order to assist the party in effectively preparing and presenting its submission,
- (3) In deciding whether to grant an interim award of costs in whole or in part, the Board may consider the following:
- (a) whether the submission of the party will contribute to the meeting or hearing of the appeal;
 - (b) whether the party has a clear proposal for the interim costs;
 - (c) whether the party has demonstrated a need for the interim costs;
 - (d) whether the party has made an adequate attempt to use other funding sources;

- (e) whether the party has attempted to consolidate common issues or resources with other parties;
 - (f) any further criteria the Board considers appropriate.
- (4) In an award of interim costs the Board may order the costs to be paid by either or both of
- (a) any other party to the appeal that the Board may direct;
 - (b) the Board.
- (5) An award of interim costs is subject to redetermination in an award of final costs under section 20.”

[42] Section 33 of the Board’s Rules of Practice states:

“Any party to a proceeding before the Board may make an application in writing to the Board for an award of costs on an interim or final basis. A party may make an application for all costs that are reasonable and are directly and primarily related to the matters contained in the notice of appeal in the preparation and presentation of the party’s submission.

An application for an award of interim costs can be made by a party at any time prior to the close of a hearing of the appeal but after the Board has determined all parties to the appeal.

An application for interim costs shall contain sufficient information to demonstrate to the Board that interim costs are necessary in order to assist the party in effectively preparing its submission at a hearing or mediation meeting.”

[43] The Board has generally accepted, as the starting point, that costs incurred in an appeal are the responsibility of the individual parties. There is an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront. This applies to interim costs as well as final costs.

B. Application

[44] The Board has generally viewed interim costs as those costs associated with work that has to be done in preparation for and attendance at the hearing and does not include costs associated with work that has already been completed. Therefore, costs associated with attending community meetings and preparation of preliminary submissions are not considered in interim costs awards. This does not preclude the parties from choosing to claim such costs in a final costs application.

[45] To determine whether interim costs should be awarded, the Board looks at whether the party applying has a specific plan to show where it is anticipated the costs will be incurred. Including more specifics in the plan will enable the Board to determine whether interim costs are warranted. In their costs application, the Applicants divided the anticipated costs between legal costs and costs associated with retaining three consultants.

[46] An application for interim costs needs to include enough detail to understand where the funds will be used if awarded. There must be an explanation as to why specific amounts are claimed, including estimates of the number of hours that will be required for preparation and attendance at the hearing.

[47] The CCTCS provided a break down of the anticipated hours and hourly rates for each of the consultants they intend to retain to review the data and present at the hearing and for legal counsel. They also provided a general description of the work that each will conduct in relation to the hearing.

[48] The Board awards costs on the basis of whether the evidence and arguments assisted the Board in preparing its recommendations. When an interim costs application is assessed, the Board does not know the level of assistance consultants and legal counsel will provide at the hearing. However, in reviewing the Director's record and given the issues for the hearing, the Board believes it would be beneficial for the CCTCS to retain consultants and legal counsel. The issues require technical analysis of the suitability of the site and the potential impacts, if any, of the operation of the Landfill.

[49] The CCTCS Appellants are clearly working together to bring forward their issues. By working cooperatively, the hearing process should have minimal duplication of evidence. It also provides a better opportunity for the members to pool their resources to retain consultants and legal counsel to assist them in providing valid evidence and arguments. The Board notes the CCTCS has attempted to secure funding from other sources but with no success.

[50] Included in the costs associated with the hydrogeologist and hydrologist was a project manager. Given that many of the issues are directly related to ground and surface water

concerns, the Board sees value in having the CCTCS retain a hydrologist and a hydrogeologist to present evidence. It is unclear what role the project manager would have in the preparation and presentation of the submissions. Therefore, the Board will not consider the costs associated with the project manager in its interim costs analysis. Also included in the costs application were disbursements. The Board will not include these costs into its consideration of interim costs because they are not directly related to the preparation and presentation of submissions before the Board. The Board may consider these costs in a final costs application, if one is submitted.

[51] The Board generally accepts one to four hours of preparation time for each hour of hearing time. The hydrogeologist and hydrologist are anticipating attending the hearing for eight hours and requiring 40 hours of preparation time. The Board acknowledges the volume of material the consultants will have to review to prepare comprehensive and relevant submissions. Therefore, for the purpose of interim costs, the Board will accept the 40 hours of preparation time and eight hours for attending at the hearing. The Board notes the hearing has been scheduled for four days, so the amount of time the consultants actually attend at the hearing may vary.

[52] The hydrological consultant's rate was \$210.00 per hour and the hydrogeological consultant's rate was \$160.00 per hour. These rates appear reasonable given the experience of the hydrologist and hydrogeologist. Based on these rates, the total costs for these consultants is \$35,520.00. The CCTCS is claiming half of this for interim costs, totaling \$17,760.00.

[53] The Board has recognized the importance of individuals bringing forward environmental issues before the Board. However, the Board also considers it important for parties appearing before the Board to be responsible for costs incurred in the process. Therefore, the Board generally does not award full costs claimed, particularly for interim costs. As the Board does not know at this stage of the process how much assistance the consultants will provide to the Board in making its recommendations, the Board will award 25 percent of the relevant costs in the costs application in relation to the hydrologist and hydrogeologist, thereby awarding costs of \$4,440.00.

[54] Based on the information provided about the environmental engineer the CCTCS is proposing to bring forward, it appears he will be able to present relevant evidence on many of

the remaining issues. The environmental engineer estimated 144.5 hours preparation time would be required and eight hours for attending at the hearing, at a rate of \$300.00US per hour. Although the environmental engineer has his rate in US dollars, the Board will not consider the difference in exchange rate, which varies daily. The Board notes that, at this time, the rate is almost at par so it would not make a significant difference in the costs claimed.

[55] Included in the costs application for the environmental engineer were travel, hotel, meal, and miscellaneous costs, totaling \$3,000.00. These costs are not directly related to the preparation and presentation of the submissions before the Board and, therefore, will not be considered in the interim costs application. Without assessing the value of the intended evidence of the environmental engineer, the Board considers 144.5 hours more than it would expect to be required. Therefore, the Board will only consider interim costs for this environmental engineer for 40 hours preparation time, the same as the hydrologist and hydrogeologist, plus eight hours for attending the hearing. Therefore, the starting point for the costs for the environmental engineer would be \$14,400.00. As the CCTCS was seeking half of the total costs, this would reduce the costs application for the environmental engineer to \$7,200.00. The Board will allow 25 percent of this total as interim costs, thereby allowing interim costs of \$1,800.00 for the environmental engineer.

[56] The CCTCS estimated legal costs totalling \$45,500.00 for 130 hours, including 32 preparation time and 98 hours for attending the hearing, at a rate of \$350.00 per hour, plus \$750.00 for disbursements. Although the Board anticipates legal counsel will assist in ensuring the issues will be addressed and the evidence and submissions will focus on the issues, the Board will not award interim costs for legal counsel. This in no way reflects the confidence the Board has in the experienced legal counsel for the CCTCS to prepare succinct submissions, lead evidence, and conduct effective cross-examination. The Board will review the effectiveness of legal counsel after the hearing is held and if the CCTCS applies for final costs.

[57] Therefore, the Board awards interim costs totalling \$6,240.00.

C. Who Should Bear the Costs?

[58] In previous costs decisions against a project's 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 into its project. This includes accommodating, in a reasonable way, the types of interests advanced by the parties...."⁸ 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 project's financing, than upon the public at large as would be the case if they were to be assessed against the Department."⁹

[59] 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,¹⁰ that costs should not be awarded against the Director providing his actions, while carrying out his statutory duties, were done in good faith. At this stage of the process, there is no indication or evidence the Director's decision was made in bad faith.

[60] The Board considers it appropriate in this case that the Approval Holder bears the responsibility of paying interim costs associated with these appeals. It is the Approval Holder that is benefitting from the Approvals, and the Approval Holder knows there is a risk of an appeal when an application is made for an approval.

D. Final Costs

[61] Each party to this appeal can make an application for final costs. If they choose to do so, they must advise the Board in their written submissions for the hearing and prior to the close of the hearing. The applicants are free to submit a final costs submission and request the

⁸ 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.)

⁹ 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.

¹⁰ See: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

Board consider any additional costs incurred, legal and otherwise. However, the CCTCS must remain aware of section 19(5) of the Regulation, which provides:

“An award of interim costs is subject to redetermination in an award of final costs under section 20.”

V. DECISION

[62] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards interim costs to the CCTCS totaling \$6,240.00. The Board orders that on or before October 5, 2012, Waste Management Corporation of Canada shall pay the amount of \$6,240.00 in trust to legal counsel for the CCTCS for the purpose of paying consulting costs. WMCC shall provide the Board with written confirmation of this payment.

Dated on September 26, 2012, at Edmonton, Alberta.

“*original signed by*”

Eric McAvity, Q.C.
Panel Chair

Appendix A

Complete List of Appellants

EPEA Approval No. 236328-00-00

| | |
|----------------------------------|-------------------------------------|
| Cecile Sisson (11-053) | Morris and Joyce Haig (11-112) |
| Odessa Telstad (11-068) | Sophie Panich (11-147) |
| Melvin Telstad (11-069) | Cori Kuzyk (11-148) |
| Hazel Lahti (11-071) | Jim Panich (11-149) |
| Laurie and David Genert (11-076) | Larry Sisson (11-150) |
| Lorne Skuba (11-100) | Peggy and Ted Hilts (11-156) |
| Linda Kirk (11-104) | Tracy Kuzyk (11-157) |
| John Kirk (11-105) | Jason Dmetruk (11-158) |
| Kevin and Carmen Ewasiw (11-107) | Chantel Cramer (11-159) |
| Lori Cramer (11-108) | Betty and Bernie Kolewaski (11-161) |
| Tony and Keith Cramer (11-109) | Darwin Trenholm (11-173) |

Water Act Approval No. 00266612-00-00

| | |
|------------------------------------|---------------------------------------|
| Lori Cramer (11-025) | John Kirk (11-040) |
| Chantel Cramer (11-026) | Peggy Hilts and Edward Hilts (11-043) |
| Tony and Mr. Keith Cramer (11-027) | Hazel Lahti (11-044) |
| Lorne Skuba (11-030) | Melvin Telstad (11-045) |
| Morris Haig (11-032) | Odessa Telstad (11-046) |
| Joyce Haig (11-033) | Kevin and Carmen Ewasiw (11-047) |
| Jim Panich (11-034) | Larry Gordon Sisson (11-051) |
| Sophie Panich (11-035) | Cecile Sisson (11-052) |
| Clinton and Stacey Kirk (11-038) | Betty Kolewaski (11-056) |
| Linda Kirk (11-039) | |