

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 13, 2015

IN THE MATTER OF sections 91, 92, 94, 95, 96, and 101 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 appeals filed by Roxanne Walsh and Julie Walker with respect to the decisions of the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development, to issue Amending Approval Nos. 1242-02-02, 1242-02-04, and 1242-02-05 under the *Environmental Protection and Enhancement Act* and Approval No. 00334295-00-00 under the *Water Act* to the Town of Turner Valley.

Cite as: Interim Costs Decision: *Walsh and Walker v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Town of Turner Valley* (13 November 2015), Appeal Nos. 13-022-025, 14-011 and 14-018-IC (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Panel Chair.

PARTIES:

Appellants:

Ms. Roxanne Walsh and Ms. Julie Walker.

Approval Holder:

Town of Turner Valley, represented by Mr. Ron Kruhlak and Ms. Jessica Proudfoot, McLennan Ross LLP.

Director:

Mr. Brock Rush, Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Alison Altmiks, Ms. Wendy Thiessen, and Ms. Nicole Hartman, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD)* issued three Amending Approvals under the *Environmental Protection and Enhancement Act* and an Approval under the *Water Act* to the Town of Turner Valley (the Town) to construct, operate, and reclaim a waterworks system for the Town and to construct an infiltration gallery below the bank of the Sheep River.

Ms. Roxanne Walsh and Ms. Julie Walker (the Appellants) appealed the decisions to issue the Amending Approvals and *Water Act* Approval.

The Appellants applied for interim costs for having two consultants prepare for and attend the hearing. Total interim costs claimed were \$21,918.75.

The Board granted interim costs to the Appellants in the amount of \$2,087.50, plus \$104.38 GST, for a total of \$2,191.88, to offset the costs of one consultant's attendance at the hearing. The costs award was to be paid by the Town.

The Town's request to reconsider the interim costs award was denied, because it was asking the Board to pre-judge the value of the consultant's participation in the hearing.

* AESRD is now named Alberta Environment and Parks. However, all relevant events occurred regarding these appeals while the Department was named AESRD.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's reasons for its decision on the interim costs application in respect of appeals of Amending Approval Nos. 1242-02-02, 1242-02-04, and 1242-02-05 (collectively, the "Amending Approvals") issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), and Approval No. 00334295-00-00 (the "Water Act Approval") under the *Water Act*, R.S.A. 2000, c. W-3. The Amending Approvals and the Approval (collectively, the "Approvals") were issued to the Town of Turner Valley (the "Approval Holder" or the "Town") by Alberta Environment and Sustainable Resource Development ("AESRD")¹ for the purposes of constructing, operating, and reclaiming a water works system for the Town, and for the construction of an infiltration gallery below the bank of the Sheep River at NW 6-20-2 W5M. Ms. Roxanne Walsh and Ms. Julie Walker (collectively, the "Appellants") appealed the decision to issue the Approvals.

[2] The Appellants requested interim costs in the amount of \$21,918.75 for having two consultants prepare for and attend the hearing.

[3] The Board granted interim costs to offset the costs of one consultant attending the hearing. The Board granted costs of \$2,087.50, plus \$104.38 GST, for a total of \$2,191.88, payable by the Town of Turner Valley.

[4] The Approval Holder requested a reconsideration of the interim costs decision, but the request was denied.

II. BACKGROUND

[5] On February 10, 2014, the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director"), issued the *Water Act* Approval to the Approval Holder and on February 12, 2015, the Director issued Amending Approval No. 1242-02-02.

¹ AESRD is now called Alberta Environment and Parks. However, all relevant events occurred regarding these appeals while the Department was called AESRD.

[6] On February 19, 2014, the Board received Notices of Appeal from the Appellants appealing Amending Approval No. 1242-02-02 and the *Water Act* Approval. Supplemental information regarding the Notices of Appeal was received on February 27, 2014.

[7] On February 24, 2014, the Board wrote to the Appellants, Approval Holder, and the Director (collectively, the “Parties”) acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and Director of the appeals. The Board asked the Director for a copy of the documents upon which the Director made his decision (the “Record”).

[8] On March 27, 2014, the Board notified the Parties that Ms. Walsh was found to be directly affected, but the stay was not granted. On April 8, 2014, the Board provided the Parties its reasons for finding Ms. Walsh directly affected and for denying the stay request.²

[9] The Board received the Director’s Record for Amending Approval 1242-02-02 and the *Water Act* Approval on April 11, 2014, and copies were provided to the Parties on April 28, 2014.

[10] On April 28, 2014, the Board set the schedule to receive submissions on the following matters:

1. Is Ms. Walker directly affected by the *Water Act* Approval?
2. What are Ms. Walsh’s and Ms. Walker’s grounds for appeal included in the Notices of Appeal, and are those grounds for appeal properly before the Board?
3. What are the issues to be heard at the hearing of these appeals?

[11] The Board received submissions on the preliminary motions from the Appellants on May 12, 2014. On May 26, 2014, the Board received response submissions from the Approval Holder and Director. Written rebuttal submissions on the preliminary motions were received from Ms. Walsh and Ms. Walker on June 26 and July 7, 2014, respectively.

[12] On July 2, 2014, the Board requested the Parties hold October 6 to 8, 2014, for the hearing.

² See: Stay Decision: *Walsh v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Town of Turner Valley* (08 April 2014), Appeal Nos. 13-

[13] On July 10, 2014, the Director issued Amending Approval 1242-02-04 to the Approval Holder. Amending Approval 1242-02-04 authorized the Approval Holder to install upgrades to the water treatment plant.

[14] On July 17, 2014, the Board received a Notice of Appeal from Ms. Walsh regarding Amending Approval No. 1242-02-04. The Board acknowledged the appeal on July 18, 2014, and notified the Approval Holder and the Director of the appeal. The Director was asked to provide the Board with copies of all documents upon which the Director based his decision to issue Amending Approval 1242-02-04.

[15] On July 21, 2014, the Board notified the Parties of the issues for the hearing with reasons to follow.³

[16] On July 24, 2014, the Director informed the Board that the Record for Amending Approval 1242-02-04 would be provided by September 19, 2014. The Board advised the Parties that they could release the dates previously held for the hearing as there was insufficient time to

022 and 13-023-ID1 (A.E.A.B.).

³ The issues identified as of July 21, 2014, were:

1. Does the conversion from the well capture system to the infiltration gallery increase the level of risk of contamination to the Town's water supply system? The potential sources of contamination include:
 - a. the industrial landfill located across the Sheep River;
 - b. the residential subdivision septic tank and field system located near the infiltration gallery site;
 - c. agricultural activities upstream of the infiltration gallery site;
 - d. historical oil and gas activities upstream of the infiltration gallery site; and
 - e. current and historical oil and gas activities and infrastructure (wells and pipelines) around the infiltration gallery site.

The Board notes that the industrial landfill appears to have been remediated and the residential subdivision septic tank and field system appears to have been decommissioned, in which case the likelihood of any residual contamination from these sources may need to be considered.

2. If the answer to Issue 1 is "Yes", do the terms and conditions of the EPEA Amending Approval 1242-02-02 and the WA Approval 00334295-00-00 adequately address the increased level of risk of contamination?
3. Should the minimum monitoring frequency, detailed in Table 1 for PCBs, NORMs, and Petroleum Hydrocarbon Fractions F3 and F4 be: twice per year; one time prior to water from the infiltration gallery entering the raw water storage reservoir or water treatment plant; or some other frequency? (Table 1 is found in section 8 of EPEA Amending Approval 1242-02-02.)

prepare for the hearing. The Board requested the Parties provide available dates for a hearing in January 2015.

[17] On August 8, 2014, Ms. Walsh requested an extension of time until after she reviewed the Director's Record in order to add her concerns to her Notice of Appeal regarding Amending Approval 1242-02-04. On August 11, 2014, the Board granted Ms. Walsh's request and extended the date to October 3, 2014.

[18] On August 22, 2014, the Board notified the Parties that, based on the Parties' available dates, the hearing would be held on January 19 and 20, 2015.

[19] The Board's reasons regarding the issues were provided to the Parties on September 9, 2014. In this decision, the Board stated the issues for the hearing, confirmed the circumstances surrounding the Approval Holder's withdrawal of its appeal, and noted the Parties accepted Ms. Walker as directly affected by Amending Approval No. 1242-02-02 and that she would have standing. Because she had standing, she had the right to present arguments and cross-examine the other Parties adverse in interest on all the issues identified by the Board.⁴

[20] On September 19, 2014, the Board received the Director's Record for Amending Approval No. 1242-02-04.

[21] On October 1, 2014, the Board provided a copy of the Director's Record regarding Amending Approval No. 1242-02-04 to the Parties.

[22] On October 15, 2014, Ms. Walsh requested a further extension to complete sections of her Notice of Appeal of Amending Approval 1242-02-04. The Board granted the extension to October 20, 2014. On October 20, 2014, Ms. Walsh completed her Notice of Appeal of Amending Approval 1242-02-04.

[23] On October 24, 2014, the Board asked the Parties for comments regarding the issues to be considered at the hearing for Amending Approval No. 1242-02-04.

⁴ Preliminary Motions Decision: *Walsh and Walker and Town of Turner Valley v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Town of Turner Valley* (09 September 2014), Appeal Nos. 13-022-025 and 13-030-ID2 (A.E.A.B.).

[24] On October 29, 2014, the Director issued Amending Approval No. 1242-02-05 to the Approval Holder. Amending Approval No. 1242-02-05 made changes to the monitoring requirements, including the monitoring for the raw water reservoir.

[25] On October 30, 2014, the Approval Holder requested an extension to provide comments on the issues for the hearing. The Board granted the request and the deadline was set to November 5, 2014. On November 4 and 5, 2014, the Parties provided their submissions on the issues for the hearing for Amending Approval No. 1242-02-04.

[26] On November 4, 2014, Ms. Walsh filed a Notice of Appeal of Amending Approval No. 1242-02-05. The Board notified the Approval Holder and Director of the appeal on November 7, 2014. The Board noted Ms. Walsh had not fully completed her Notice of Appeal and reserved her right to review the Record before completing her Notice of Appeal. The Director was asked to provide the Board with copies of all documents upon which the Director based his decision to issue Amending Approval No. 1242-02-05.

[27] On November 13, 2014, the Director made a motion to dismiss Ms. Walsh's appeal of Amending Approval No. 1242-02-05 on the basis it was incomplete or, alternatively, to have Ms. Walsh complete the Notice of Appeal in a timely fashion. The Director advised the Record regarding Amending Approval No. 1242-02-05 would not be available until January 16, 2015.

[28] On November 14, 2014, the Board advised the Parties that the hearing scheduled for January 19 and 20, 2015, was adjourned given the Record would not be available until January 16, 2015.

[29] On December 4, 2014, the Board advised the Parties to hold April 27 to May 1, 2015, for the hearing. On December 22, 2014, the Board confirmed the hearing would be held on April 27 to May 1, 2015.

[30] On January 16, 2015, the Board received a copy of the Director's Record regarding Amending Approval No. 1242-02-05.

[31] On January 21, 2015, the Board provided copies of the Director's Record regarding Amending Approval No. 1242-02-05 to the Appellants and Approval Holder. The Board notified the Parties that it was dismissing the Director's motion to dismiss the appeal of Amending Approval 1242-02-05 (Appeal No. 14-018) since the Notice of Appeal, in this circumstance, was sufficiently complete. The Board gave Ms. Walsh until February 6, 2015, to complete her Notice of Appeal.

[32] On February 6, 2015, the Board received Ms. Walsh's supplemental Notice of Appeal for Amending Approval No. 1242-02-05. The Board set the schedule to receive updated Records, set the schedule to receive submissions for the hearing, and set the hearing procedure.

[33] On February 7, 2015, the Board asked the Parties to provide any preliminary motions, identify the issues for the hearing, and confirmed the hearing would be held for 4 days from April 28, 2015 to May 1, 2015.

[34] On February 11, 2015, the Director requested the appeals of the *Water Act* Approval be dismissed as the appeals were moot given the *Water Act* Approval expired on February 9, 2015. The Director also requested the appeal of Amending Approval No. 1242-02-04 be dismissed because Ms. Walsh did not identify any valid issues for the hearing.

[35] On February 13, 2015, the Board requested the Parties provide submissions on the preliminary issues as identified in the Parties' letters and emails. These preliminary issues were:

1. Are EAB Appeals 13-023 and 13-025, appealing *Water Act* Approval No. 00334295-00-00, moot on the basis that the *Water Act* Approval expired on February 9, 2015?
2. Should EAB Appeal 14-011, appealing EPEA Approval No. 1242-02-04 (the water treatment plant upgrade), be dismissed as Ms. Walsh has not identified any valid issues for the hearing?
3. Subject to questions 1 and 2, what issues should be considered at the hearing of all of the appeals?
4. What additional disclosure and clarification from the Town of Turner Valley and the Director should be provided to the Appellants?

[36] On February 18, 2015, the Parties provided their responses to the preliminary motions and identified the issues for the hearing. On February 25, 2015, the Board received the response submissions from the Parties on the preliminary motions and issues for the hearing.

[37] The Board published Notice of the Hearing in the Okotoks Western Wheel and the online Gateway Gazette, and it was provided to the Town of Turner Valley and the Municipal District of Foothills to post on their public bulletin boards. A news release was forwarded to the Public Affairs Bureau for distribution to media throughout the Province, and the news release was posted on the Board's website. The Notice of Hearing provided an opportunity for persons who wanted to make a representation before the Board to apply to intervene. The Board received five requests to intervene.

[38] On March 2, 2015, the Board provided its responses to the preliminary motions and set the issues for the hearing.⁵

⁵ The Board set the following issues for the hearing:

1. Does that Director have the authority to make the changes included in the Amending Approvals given the issuance of Ministerial Order 5/2008 in EAB Appeal 06-071?
2. Does the conversion from the well capture system to an infiltration gallery or the vault system, as currently constructed, increase the risk of contamination to the Town's water supply system? The potential sources of contamination include:
 - a. the remediated industrial landfill located across the Sheep River;
 - b. the decommissioned residential subdivision (Calkins Place) septic tank and field system located near the infiltration gallery site;
 - c. agricultural and farming activities upstream of the infiltration gallery site;
 - d. historical oil and gas activities upstream of the infiltration gallery site; and
 - e. current and historical oil and gas activities and infrastructure (wells, pipelines, tanks and flare pits) around the infiltration gallery site.

The Board notes that the industrial landfill appears to have been remediated and the residential subdivision septic tank and field system appears to have been decommissioned, therefore the likelihood of any residual contamination from these sources may need to be considered.

3. If the answer to Issue 1 is "Yes", do the terms and conditions of the EPEA Amending Approval 1242-02-02 and the *Water Act* Approval 00334295-00-00 adequately address the increased level of risk of contamination?
4. Should the minimum monitoring frequency, detailed in Table 1 for PCBs, NORMs, and Petroleum Hydrocarbon Fractions F3 and F4 be: twice per year; one time prior to water from the infiltration gallery entering the raw water storage reservoir or water treatment plant; or some other frequency? (Table 1 is found in section 8 of EPEA Amending Approval 1242-02-02.)
5. Does the use of a granulated activated charcoal filter system decrease the risk of contamination to the Town's water supply system? Is the use of a granulated activated charcoal filter system appropriate to protect the environment, including human health, given potential contaminant sources?

[39] On March 23, 2015, Ms. Walker provided her initial submission for the hearing. On March 25, 2015, Ms. Walsh provided her submission and her expert's technical report.

[40] On March 27, 2015, the Appellants filed a request for interim costs in the amount of \$45,307.50 for costs associated with retaining a consultant.

[41] On March 31, 2015, the Approval Holder applied to strike some of the issues, because the Appellants did not provide any evidence on the issues. The Approval Holder moved to strike Issues 1, 2 (a), (b), (c), and (e), and Issue 5. In addition, the Approval Holder asked that if Issues 2 (a), (b), (c), and (e) are struck, the sub issues should also be eliminated from Issues 6 and 7.

[42] On April 2, 2015, the Board notified the Parties that the intervenor requests of Ms. Irene Waring, Ms. Maureen and Mr. Randy Nelson, Ms. Monica Dragosz, and Ms. Kathy Grill (collectively, the "Intervenors") were allowed and they would participate in the hearing through written submissions only. The intervenor request from Ms. Lisa Wilcox was denied. The Board's reasons would follow.

[43] On April 6, 2015, the Appellants provided further information in support of their interim costs request.

[44] On April 6, 2015, the Appellants notified the Board they were willing to reduce the issues set for the hearing, specifically Issues 2(b) and (c). Also, the Appellants asked that their consultant be given the opportunity to conduct a site visit and, based on the visit, they would consider striking Issue 5.

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6. Are the changes to the frequency of sampling, monitoring, testing and reporting provide for in the Amending Approvals appropriate to ensure the protection of the environment, including human health? The historical and ongoing oil and gas activities, agricultural, farming, and other industrial activities that have occurred in the area should be considered.
 7. Are the changes to the parameters that need to be sampled, monitored, tested and reported provided for in the Amending Approvals appropriate to ensure the protection of the environment, including human health? The historical and ongoing oil and gas activities, agricultural, farming, and other industrial activities that have occurred in the area should be considered.
 8. Was it reasonable for the Director to rely on the reports, data, and other information that were provided to him to make the changes in the Amending Approvals to the frequency and parameters described in Issues 6 and 7?

[45] On April 7, 2015, the Director notified the Board that he supported the Approval Holder's application to strike certain issues. The Director also sought clarification of Issue 2.

[46] On April 8, 2015, the Approval Holder and Director provided their responses to the Appellants' request for a site visit. They opposed to waiting for a site visit to determine if Issue 5 should be struck.

[47] On April 9, 2015, the Board notified the Parties of its decision regarding the narrowing of the issues for the hearing. The request to strike Issue 1, and Issues 2 (a) and (e) were denied. The request to strike Issues 2(b) and (c) and Issue 5 were granted. In addition, references to the septic tank and field system and agriculture and farming activities were stricken from Issues 6 and 7.

[48] On April 10, 2015, the Board notified the Parties that the Appellants' application for interim costs was denied.

[49] On April 10, 2015, the Board received an interim costs application for the anticipated costs for the Appellants' consultant to prepare for and attend the hearing.

[50] On April 13 and 14, 2015, the Board received the written submissions for the hearing from the Intervenors.

[51] On April 17, 2015, the Board received comments from the Approval Holder and Director regarding the interim costs application.

[52] On April 17, 2015, the Approval Holder and Director provided their written submissions for the hearing.

[53] On April 17, 2015, the Director notified the Board that he was unable to provide an update to the Record because it was beyond the resources of his office to meet all the April 17, 2015 deadlines. The Board responded the same day expressing concern the delay may prejudice the rights of the Appellants and makes it difficult for the panel to prepare properly for the hearing.

[54] On April 17, 2015, the Director provided an update to the infiltration gallery Record.

[55] On April 21, 2015, the Board received the Appellants' rebuttal submissions for the hearing.

[56] On April 24, 2015, the Board notified the Parties that interim costs in the amount of \$2,087.50 were awarded to the Appellants and payable by the Approval Holder, with reasons to follow.

[57] On May 5, 2015, the Board clarified it granted interim costs in the amount of \$2,087.50, plus GST, which represented one-quarter of the hours requested by Dr. Udo Weyer, the Appellants' consultant, to attend the hearing. The Board ordered the Approval Holder to pay WDA Consultants Inc., the amount of \$2,191.88, on or before May 8, 2015. The Board's reasons for its decisions are set out below.

[58] At the hearing, the Approval Holder asked the Board to reconsider the award of interim costs. This request was denied. The Board's reasons are set out below.

III. SUBMISSIONS

A. Appellants

[59] On behalf of the Appellants, Dr. Udo Weyer of WDA Consultants Inc. ("WDA"), submitted an interim costs application, covering the period from April 17, 2015, and up to and including the hearing days on April 28 to May 1, 2015.

[60] Dr. Weyer's submission explained the projected costs included time for preparation of the rebuttal technical report and submission. He stated time was included for preparing his presentation at the hearing, additional preparation of facts and figures for cross-examination, and for preparation of cross-examination of the Approval Holder's expert.

[61] Dr. Weyer also included time for a single meeting with the Appellants to look at the hearing presentation and answer any questions in order to better convey the evidence to the Board.

[62] The interim costs claimed included 59.25 hours, charged out at \$100.00/hour, for Mr. James Ellis, and 74.75 hours, charged out at \$200.00/hour for Dr. Weyer. The total costs claim, including GST, amounted to \$21,918.75.

B. Approval Holder

[63] The Approval Holder opposed the application for interim costs for policy and evidentiary reasons.

[64] The Approval Holder said an award of interim costs would validate the Appellants' approach to engage in unnecessarily litigious and expensive process of appeals instead of using effective alternative consultation mechanisms which were designed to address these issues.

[65] The Approval Holder explained that, since mediating a resolution with Ms. Walsh in a previous AEAB appeal,⁶ the Town constituted the Waterworks Advisory Committee, which holds meetings to discuss and debate issues relevant to the Town's waterworks system. The Approval Holder noted the meetings are open to the public and are advertised on the Town's online calendar. The Approval Holder stated the Appellants refused to use that process, choosing instead to engage in appeals.

[66] The Approval Holder noted the Appellants would have the ability to apply for final costs at the conclusion of the hearing. The Approval Holder stated that, since the hearing was scheduled to be held in two weeks, there was no real delay if costs were deferred until the conclusion of the hearing.

[67] The Approval Holder considered the appeals were without merit, and it anticipated bringing a final costs application itself. The Approval Holder noted the Appellants raised doubts about their ability to repay any interim costs awarded and, therefore, any redetermination of interim costs in an award of final costs would be meaningless.

⁶ See: *Walsh v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Town of Turner Valley* (15 July 2009), Appeal No. 08-019-DOP (A.E.A.B.).

[68] The Approval Holder stated the Appellants did not provide evidence as to the necessity of the expenses proposed by Dr. Weyer for his and Mr. Ellis' effective preparation for, attendance at, and submissions for the hearing, nor the amounts proposed, which were excessive and unsubstantiated. The Approval Holder noted Dr. Weyer itemized his intended activities and associated costs, but did not provide evidence of the necessity of any of the activities or if they will be helpful to the Board.

[69] The Approval Holder stated that it did not appear the Appellants made adequate attempts to obtain funding from other sources, such as non-governmental organizations or educational institutions.

[70] The Approval Holder argued the costs claimed were excessive and unsubstantiated. The Approval Holder noted there was a duplication of costs in connection with both Dr. Weyer and Mr. Ellis with no explanation why the duplication of services was required with the various preparation items listed in the invoice.

C. Director

[71] The Director took no position regarding the interim costs application, other than to submit the Director should not be responsible for paying any of the interim costs.

[72] The Director noted it has been consistently held that, given the unique role of the Director as a party to the appeal and as statutory decision-maker, costs are not awarded against the Director as long as the Director acted in good faith in carrying out his statutory mandate.

[73] The Director stated the Appellants did not establish any special circumstances that would warrant costs be payable by the Director. The Director said he carried out his statutory duties in good faith.

IV. Analysis

A. Legal Basis

[74] 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.”

[75] 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

“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.”

[76] 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....’”

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

[78] Sections 18 and 19 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (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.

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

- 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.”

[79] 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.”

[80] 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

[81] 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. This does not preclude the parties from choosing to claim such costs in a final costs application.

[82] 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. An application for interim costs needs to include enough detail to allow the Board 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.

[83] The Appellants' costs claim was essentially divided into preparation for the hearing (including a written rebuttal submission, an oral presentation for the hearing, and a meeting between the Appellants and their consultants) and attendance at the hearing.

[84] The purpose of the hearing is to ensure the Board hears the best evidence on the issues in order to provide the best recommendations possible to the Minister. In this case, the safety of the municipal water supply was at issue. The Board considered it important to hear from experts in the field in order to obtain a full picture of the concerns and the mitigative measures being taken. The Board considered the participation of Dr. Weyer at the hearing may provide additional information regarding the specified issues. Therefore, the Board considered the costs of having Dr. Weyer present evidence at the hearing.

[85] The costs claim included anticipated time that Dr. Weyer and Mr. Ellis (Dr. Weyer's associate) would spend on preparation for and attendance at the hearing. The total time claimed for Dr. Weyer was 33 hours for preparation and 41.75 hours for attending the hearing, all charged at a rate of \$200.00 per hour (total of \$14,950.00). The total time claimed for Mr. Ellis was 23.5 hours for preparation and 35.75 hours for attendance at the hearing, all charged at a rate of \$100.00 per hour (\$5,925.00).

[86] Although Mr. Ellis was contributing to the preparation of the submissions, both written and oral, the Board was uncertain as to what degree his involvement would assist the Board. It was clear that it was Dr. Weyer who would be presenting at the hearing and who would be taking the lead in cross-examination of experts. When a more thorough breakdown of costs and time is provided when the final costs application is made, if the Appellants choose to, the Board will have a better understanding of the breakdown of costs. Given the limited information on Mr. Ellis' contribution at the time of this application, the Board would not award interim costs for Mr. Ellis.

[87] Dr. Weyer would be attending the hearing to provide technical evidence related to the issues. The Board anticipated his participation in the hearing could be beneficial to the Board. Dr. Weyer would be presenting a different interpretation of the available data and would provide technical evidence that would assist in focusing in on the issues at the hearing and assist the Board when it prepared its report and recommendations.

[88] At the stage of the hearing process at which interim costs were requested, the Board did not know the degree of assistance Dr. Weyer's evidence would be to the Board. Therefore, for the purpose of determining interim costs, the Board could only consider the time Dr. Weyer would be at the hearing. Given the usual starting point is that each party should be responsible for their own costs, the Board considered it appropriate to only award 25 percent of Dr. Weyer's anticipated costs for attending the hearing. Dr. Weyer estimated he would be at the hearing for 41.75 hours, based on the schedule set by the Board. This is an acceptable approach when claiming interim costs. The Board accepted an hourly rate of \$200.00 is reasonable given Dr. Weyer's experience.

[89] The Board decided to grant interim costs to the Appellants in the amount of \$2,087.50, plus \$104.38 GST, for a total of \$2,191.88. The Board noted any interim costs award is subject to re-determination in any final costs application.

[90] It has been generally accepted by the Board and the Courts that costs should not be directed against the Director given his role as statutory decision-maker. The exception would be when the Director was not acting in good faith in carrying out his statutory duties.

[91] There was no indication in these appeals to suggest the Director was not acting in good faith when he made his decisions to issue the Approvals or in his actions so far in the appeal process.

[92] The project proponent in this case is a municipality. In most appeals before the Board, the project proponent is a company using the resource for a profit-making adventure. This is not the case here, and the Board recognizes this. In addition, the Board recognizes that costs levied against the Approval Holder are essentially being levied against the residents of the Town.

[93] However, the Appellants have a right to appeal, even when a municipality is the project proponent. Since the Director has performed his statutory obligations in good faith, the Board did not find the circumstances existed to direct costs against the Director. Therefore, the Board directed costs be paid by the Approval Holder. The costs were specifically to offset Dr. Weyer's costs to attend the hearing. Therefore, the Board directed that costs in the amount of \$2,191.88 be forwarded directly to WDA Consultants Inc. by May 8, 2015. The Approval Holder was also directed to notify the Board in writing that the funds were forwarded as specified.

V. RECONSIDERATION

[94] At the hearing, the Approval Holder asked the Board to reconsider its interim costs decision. The Board denied the request for the following reasons.

[95] The Approval Holder did not provide a reason to reconsider the Board's decision other than to suggest all of the costs should be considered as part of the final costs decision.

[96] By requesting the reconsideration of the interim costs, the Approval Holder was essentially asking the Board to pre-judge the value of Dr. Weyer's evidence. At the close of the hearing, before the Board had started its discussions and deliberations, the Board had not weighed the value of Dr. Weyer's evidence. Therefore, the Board did not grant the Approval Holder's reconsideration request of the Board's interim costs decision.

[97] When determining final costs, the Board will be able to determine if Dr. Weyer's participation was helpful to the Board. Any final costs awarded will be adjusted to reflect interim costs awarded. If the final costs award is determined to be less than the interim costs paid, it will be the Appellants' responsibility to ensure monies owed are reimbursed.

VI. DECISION

[98] The Board granted interim costs to Dr. Weyer in the amount of \$2,087.50 plus \$104.38 GST and directed that these costs be paid by the Town of Turner Valley to WDA Consultants Inc. by May 8, 2015.

[99] The Approval Holder's reconsideration of the interim costs award is denied.

Dated on November 13, 2015, at Edmonton, Alberta.

"original signed by"

Alex MacWilliam
Panel Chair