ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – May 13, 2016

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 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: Costs Decision: *Walsh and Walker* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Town of*

Turner Valley (13 May 2016), Appeal Nos. 13-022-025, 14-011 and 14-018-CD (A.E.A.B.).

BEFORE: Mr. Alex MacWilliam, Board Chair,
Mr. Jim Barlishen, Board Member, and
Dr. Dave Evans, Board Member.

PARTIES:

Appellants:	Ms. Roxanne Walsh and Ms. Julie Walker.
Approval Holder:	Town of Turner Valley, represented by Mr. Ron Kruhlak, Q.C. 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.

* AESRD is now called Alberta Environment and Parks. However, all relevant events occurred regarding this appeal while the Department was called Alberta Environment and Sustainable Resource Development.

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 Board held a hearing at which the Board heard evidence and argument on eight issues. The Board provided the Minister with its Report and Recommendations and the Minister issued an Order incorporating the recommendations.

The Board received costs applications from the Appellants (totalling $75,095.61 for consultants' fees and disbursements and the Appellants' costs) and the Town (totalling $584,563.09 for expert witness fees and disbursements, legal fees and disbursements, and the Town's costs).

Prior to the hearing, the Appellants applied to the Board for interim costs. After considering submissions from the Appellants and the Town, the Board awarded costs totalling $2,191.88, including GST to the Appellants in respect of fees to be paid to their consultants, WDA Consultants Inc. for their assistance at the hearing. These costs were payable by the Town. The Board subsequently determined the contribution of the Appellants' consultants at the hearing warranted retention of the interim cost award. The Board determined that no additional costs should be awarded to the Appellants.

The Board denied the costs application filed by the Town. The Board determined the costs associated with an appeal are part of the approval process and part of doing business, even though the approval holder in this case is a municipality.

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

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's reasons for decision on the costs applications 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 *Water Act* 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 decisions to issue the Approvals.

[2] The Board held a hearing in Turner Valley from April 28 to May 1, 2015. The Board provided its Report and Recommendations to the Minister, and the Minster issued an Order confirming Amending Approval No. 1242-02-04 and the *Water Act* Approval, and varying Amending Approval Nos. 1242-02-02 and 1242-02-05.

[3] The Appellants and Approval Holder submitted costs applications pursuant to section 96 of EPEA.

[4] The Board awarded costs totalling $2,191.88, payable by the Approval Holder, to the Appellants' consultants for their assistance in the hearing. Since the Approval Holder had previously paid this amount to the Appellants as part of an interim costs award, no additional costs were required to be paid by the Approval Holder.

[5] The Board denied the costs application filed by the Approval Holder as its involvement in an appeal is recognized as a potential consequence of seeking an approval under EPEA or the *Water Act*.

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

II. BACKGROUND

[6] The procedural history of the appeals is contained in the Board's Report and Recommendations in Appendix A.[2]

[7] The Board provided its Report and Recommendations to the Minister on August 14, 2015. On October 6, 2015, the Board provided its Report and Recommendations and the Ministerial Order to the Parties.[3]

[8] On November 30, 2015, the Appellants and Approval Holder submitted applications for costs.

[9] On December 11, 2015, the Board received response comments from the Parties in response to the costs applications.

[10] On January 20, 2016, the Board notified the Parties that the interim costs of $2,191.88 to the Appellants' consultants were confirmed and that no additional costs would be awarded to the Appellants' consultants. The Board also stated it would not be awarding costs to the Appellants or the Approval Holder.

III. LEGAL BASIS FOR COSTS

A. Statutory Basis for Costs

[11] 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*:

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[2] See: *Walsh and Walker* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Town of Turner Valley* (14 August 2015), Appeal Nos. 13-022-025, 14-011 and 14-018-R (A.E.A.B.).

[3] See: *Walsh and Walker* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Town of Turner Valley* (14 August 2015), Appeal Nos. 13-022-025, 14-011 and 14-018-R (A.E.A.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."[4]

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.)[5]

[12] The *Environmental Appeal Board Regulation*,[6] (the "Regulation") provides that:

> "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.
>
> (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;

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

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

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

> (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."

[13] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purposes of the *Water Act* as stated in section 2.[7]

[14] The Board has stated in prior decisions that it has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply to a particular claim for costs.[8] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[9] 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

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[7] Section 2 of the *Water Act* provides:

> "The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:
>
> (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
> (b) the need for Alberta's economic growth and prosperity;
> (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
> (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
> (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
> (f) the important role of comprehensive and responsive action in administering this Act."

[8] *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.)).

[9] *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.).

award costs…" and concluded "…that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."[10]

[15] As stated in previous decisions, the Board evaluates each costs application against the criteria in EPEA and 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
> (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."[11]

[16] 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.[12]

B. Courts vs. Administrative Tribunals

[17] In applying these costs provisions, it is important to remember there is a distinct difference between costs associated with civil litigation and costs in quasi-judicial proceedings. The Board must take the public interest into consideration when making its final decision or recommendation. The outcome is not simply a determination of a dispute between parties. Therefore, the Board is not bound by the "loser-pays" principle used in civil litigation. In

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

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

[12] *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.).

determining whether an award of costs is appropriate, the Board will consider the public interest generally and the overall purposes listed in section 2 of the *Water Act*.

[18] The distinction between costs awarded in judicial and quasi-judicial settings was stated by the Federal Court of Appeal 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 word which must necessarily be given in proceedings before regulatory tribunals."[13]

[19] The effect of this public interest requirement was also discussed by Mr. Justice Fraser in *Cabre*:

> "…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

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[13] *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."

> 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.'"[14]

[20] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it. 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 spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed."[15]

IV. APPELLANTS' COSTS APPLICATION

A. Submissions

1. Appellants

[21] The Appellants claimed costs of $75,095.61, including GST. The claim comprised: (1) WDA Consultants Inc. ("WDA") fees and disbursements - $69,263.09[16]; (2) Ms. Walsh's costs - $3,056.61; (3) Ms. Walker's costs - $2063.22; and (4) Ms. Walsh's and Ms. Walker's shared costs - $712.69.

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

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

[16] The total costs amount claimed for WDA included a reduction of $2,191.88 that was awarded as interim costs and $1,237.90 paid through Crowd Funding sources. Two people from WDA attended the hearing, Dr. Udo Weyer and Mr. James Ellis.

[22] The Appellants stated the work done for the appeals included: (1) reviewing the application; (2) obtaining evidence; (3) preparing submissions for the hearing; and (4) attending the hearing.

[23] The Appellants said an award of costs would be consistent with, and further the goals set out in, section 2 of EPEA, particularly sections 2(a), (d), (f), and (g).[17]

[24] The Appellants stated the costs claimed were directly related to the matters in their Notices of Appeal and to the preparation for and presentation at the hearing. The Appellants explained Dr. Udo Weyer and his assistant, Mr. James Ellis, were retained to assess the interaction between groundwater, the infiltration gallery and reservoir, and the effectiveness of the sampling protocols and parameters.

[25] The Appellants said they, and their experts, prepared an organized, thorough submission that was clear and succinct.

[26] The Appellants explained that Ms. Walsh's costs related to researching the history of the Turner Valley Gas Plant and past waste disposal practices which she considered were relevant to the issues identified by the Board.

[27] The Appellants said the costs claimed were reasonable, in line with going rates for the work performed, and covered wages for time taken away from work to attend the hearing.

[28] The Appellants stated the Board recommended amendments to the Approvals, indicating the Appellants had considerable success in their appeals. The Appellants noted the

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[17] Sections 2(a), (d), (f), and (g) of EPEA state:

"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;…

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;…

(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…."

contribution they made in raising the issues in their appeals. The Appellants noted the Board recommended the Approval Holder conduct low flow water testing as a result of Dr. Weyer's and Mr. Ellis' participation in the hearing.

[29] The Appellants noted the Director and Approval Holder were represented by legal counsel and retained numerous experts to address the technical issues.

[30] The Appellants stated they required financial resources to make an adequate submission, and their evidence would not have been as effective or useful if they had not retained experts. Ms. Walsh explained she had not earned an income since 2006, and Ms. Walker had a modest income, making it difficult to finance an appeal. The Appellants said they used an internet crowd source funding platform to help offset the costs of their experts, successfully raising $1,237.90 which was paid directly to Dr. Weyer. They said they approached other environmental organizations for funds but were unsuccessful.

[31] The Appellants argued they had many obstacles to overcome as a result of the Director's and Approval Holder's approach to the Approvals and appeals, including the nature of the Approvals, in that the Approvals were issued one after another, which made it impossible to determine the issues at the outset.

[32] The Appellants expressed concern regarding the Water Works Advisory Committee that was set up as a result of a mediated agreement between the Approval Holder and Ms. Walsh in a previous appeal.[18]

[33] The Appellants stated the costs should be paid by the Approval Holder and Director.

[34] Ms. Walsh asked for personal costs totalling $2,331.61, which included costs for office supplies ($68.63), photocopying ($221.10), transit and mileage ($2,004.26), postage ($13.07), and parking ($24.55). Ms. Walsh explained mileage was charged at the same rate as her consultant. Ms. Walsh noted she did not charge for time travelling to Calgary and Edmonton to conduct research, time negotiating preliminary matters in the Board's process, and time spent

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[18] See: *Walsh* v. *Director, Southern Region, Environmental Management, Alberta Environment,* re: *Town of*

analyzing materials, conducting research, and preparing submissions. Ms. Walsh said costs were reduced because she did not have legal counsel at the hearing. She noted she shared resources when appropriate with Ms. Walker. Ms. Walsh claimed 14.5 hours at $50.00 per hour for the time she spent assisting Ms. Walker, for a total of $725.00. The total costs claimed by Ms. Walsh were $3,056.61.

[35] Ms. Walker explained she had to take time off from work to prepare for the hearing, prepare her submission, and attend the hearing. Ms. Walker said she lost $1,504.00 in income as a result. Ms. Walker stated she had additional costs for office supplies ($316.50) and parking ($8.00). In addition, Ms. Walker said there were mileage costs driving to Calgary to meet with the consultants and the lawyer the Appellants had retained ($234.72). Ms. Walker explained she charged mileage at a rate of $0.45 per kilometre, the rate she charges through her business. The total costs claimed by Ms. Walker were $2,063.22.

[36] The Appellants also claimed $712.69 for shared expenses.

[37] The Appellants' consultants prepared a submission in support of the costs application. WDA explained they reviewed the Records and documents, evaluated the data contained in the Records, prepared a report on behalf of the Appellants and submitted it to the Board, prepared a presentation for the hearing, reviewed the hydrogeological portion of the Approval Holder's and Director's submissions, testified at the hearing and underwent cross-examination, and assisted the Appellants in cross-examining witnesses and preparing closing statements.

[38] WDA stated the issues at the hearing were complex and required a significant amount of technical expertise. They explained they focussed on the annual monitoring reports for the reservoir and monitoring network, the details of the construction and plans for the vault well and infiltration gallery, and the post-2013 flood activities. WDA said they analyzed the hydrogeological data in great detail using WDA's proprietary program, which improved the evaluation of the data. WDA said it processed the chemical data provided by the Approval Holder to evaluate trends in the chemistry. WDA stated these assessments were necessary to

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Turner Valley (15 July 2009), Appeal No. 08-019-DOP (A.E.A.B.).

develop an understanding of the hydrogeological systems to assess their impact on the issues. WDA said that, based on the professional data evaluation, Dr. Weyer came to conclusions that had been missed, such as the periodicity of the chemical data and the necessity of low-flow sampling at the site. WDA noted Dr. Weyer's conclusions were incorporated into the Board's recommendations.

[39] WDA stated it did not attend the final day of the hearing in order to reduce costs.

[40] WDA stated its rates were within comparable rates charged for professionals of similar experience. WDA noted that, according to the Scale of Costs established by the Alberta Energy Regulator, Dr. Weyer would be entitled to a rate of $270.00 per hour rather than the $200.00 per hour he charged the Appellants. Dr. Weyer charged $44,992.50, including GST, for 214.25 hours of work. WDA explained that, whenever possible, Mr. Ellis performed the bulk of the data collection and processing work, reducing the rate charged to $100.00 per hour. Total hours claimed for Mr. Ellis were 261 for a total of $27,405.00, including GST.

[41] WDA explained expenses charged included: (1) parking fees and transit costs when collecting documents and meeting with the Appellants and the lawyer who initially agreed to take on the case ($33.46); (2) mileage, at the government rate of $0.46 per kilometre, for traveling from Calgary to the hearing in Turner Valley ($199.29); and (3) meals ($48.53).

[42] WDA acknowledged the Appellants do not have significant financial resources to enable them to finance the bill for the complex hydrogeological review these appeals required. WDA stated the safety of the Town's waterworks system is important to all of the people impacted by the system, justifying the Appellants' concerns. WDA acknowledged crowdfunding monies, totalling $1,237.90, were contributed towards WDA's costs.

[43] WDA said it could not work for free to any significant degree, and the delay and possible lack of payment put WDA under financial strain.

[44] WDA noted the following about the Board's recommendations:

1. The Board accepted WDA's arguments that the remediation of the industrial landfill site across the river from the water supply was not complete, and that contamination to the water supply from the site was "unlikely;"

2. In response to concerns identified by Dr. Weyer that the proposed sampling frequency would miss seasonal extremes, the Board recommended the timing of the extremes be identified and the sampling period adjusted to match; and

3. The Board found merit in Dr. Weyer's testimony regarding the sampling protocol and recommended the Approval Holder develop and implement a pilot project to test the reliability of low-flow sampling.

[45] WDA stated their participation in the hearing helped to determine whether the Town's water system is a safe source of drinking water, and they provided technical advice to the Appellants and cross-examined other witnesses.

[46] WDA said their costs in the entire amount of $69,263.09 were justified as the appeals were an exceptional case where the Appellants' participation supported the public interest in environmental protection.

2. Approval Holder's Response

[47] The Approval Holder stated the Appellants failed to show why the Board should award costs. It said the Appellants' decision to use the appeal process to raise general concerns about the historical contamination in Turner Valley instead of participating in the Waterworks Advisory Committee ("WWAC") did not support the purposes set out in section 2 of EPEA.

[48] The Approval Holder submitted the Appellants' costs claims should be dismissed because they did not show their submissions contributed to the determination of the issues. It stated the Appellants did not demonstrate how their costs were directly related to the preparation and presentation of their submissions respecting the issues.

[49] The Approval Holder noted the Appellants used their cost claims to:

(a) continue expressing their grievances with the Town and its consultants;

(b) express their dissatisfaction with the terms of the Approvals;

(c) tender new evidence and arguments unrelated to their application for costs; and

(d) file a commentary of the Board's Report and Recommendations.

[50] The Approval Holder stated the Appellants prolonged and complicated the appeal process by refusing to:

(a) attend WWAC meetings, which were specifically designed to cater to consultation concerns raised by Ms. Walsh in an earlier appeal;

(b) participate in mediation;

(c) limit their written and oral submissions and cross-examination to the issues set for the hearing; and

(d) comply with the Board's deadlines.

[51] The Approval Holder said the Appellants made the process costlier by:

(a) making numerous document requests which resulted in the Town incurring significant expense locating and producing reports and data which proved largely irrelevant to the issues;

(b) bringing several unsuccessful pre-hearing applications, including a stay application, last minute adjournment requests, and applications for interim costs;

(c) demanding the attendance of Mr. Sunil Beeharry at the hearing; and

(d) making presentations that were unfocussed narratives of supposition, opinion, conjecture, and speculation.

[52] The Approval Holder noted the majority of Ms. Walsh's claimed expenses related to trips to the Provincial Archives in Edmonton to collect information. The Approval Holder believed these trips provided the information used by Ms. Walsh in her written submission on the history of natural resource development in Turner Valley and area, but this information did not assist in reviewing the issues. The Approval Holder said these expenses were not necessary to the Appellants' submissions on the issues.

[53] The Approval Holder said Ms. Walker used her appeals to advance arguments about perceived deficiencies in the Canadian Drinking Water Guidelines and to discuss her concern that unidentified "chemical soups" could endanger the Town's water supply.

[54] The Approval Holder submitted the Appellants' broad concerns went beyond the provisions in the Approvals and did not contribute to the issues.

[55] The Approval Holder noted Ms. Walker argued she is entitled to costs because her involvement at the hearing identified an error in the Town's groundwater flow models arising from data temporarily skewed by the destruction of a piezometer and she demonstrated gaps in AESRD's ability to obtain documents. The Approval Holder submitted that neither of these points were relevant to the issues, and these points had already been considered. The Approval Holder stated the Director's staff had noted the effect of the destroyed piezometer and discussed it with the Approval Holder's consultant prior to the appeals, and the Director and Approval Holder already understood the Director's limited jurisdiction to compel third party records in these circumstances.

[56] The Approval Holder stated the Appellants failed in their efforts to completely reverse all of the Approvals under appeal.

[57] The Approval Holder submitted the Appellants should not be entitled to costs for their personal involvement in the appeals.

[58] The Approval Holder stated WDA did not substantially contribute to the issues, and they tendered evidence that was not directly related to the issues and was based on groundwater flow theories which Dr. Weyer admitted were not accepted in the scientific community.

[59] The Approval Holder noted WDA raised the potential use of low-flow testing and compared it to the Approval Holder's current purge-and-sample method. The Approval Holder stated it had considered the low-flow testing method, but the purge-and-sample method was the standard method prescribed by the Director.

[60] The Approval Holder argued the remainder of WDA's report and evidence consisted largely of conjecture, which extended the debate on issues which could have otherwise been eliminated from the hearing. The Approval Holder said WDA used the hearing to raise general concerns about the Town's monitoring program instead of providing specific technical evidence in response to the issues.

[61] The Approval Holder argued WDA did not make a significant contribution to the goals of EPEA.

[62] The Approval Holder noted the Appellants were awarded interim costs in the amount of $2,191.88, including GST, in respect of work to be done by WDA. The Approval Holder submitted WDA did not meet the Board's expectations for interim costs, and WDA's submission was conjecture and supposition. The Approval Holder stated the ambiguous and irrelevant material did not assist in narrowing the issues, nor did it assist the Board.

[63] The Approval Holder stated WDA's interpretation of groundwater flow data was based on theories not generally accepted, and WDA's attempts to explain and justify these novel theories were time consuming, distracting, and unnecessarily complicated the Board's consideration of the issues.

[64] The Approval Holder stated Dr. Weyer commented on matters beyond his area of expertise, such as arguing the Director should be permitted to make changes to the Ministerial Order. The Approval Holder said WDA took a more active role in the hearing than what is usually expected of an objective technical expert.

[65] The Approval Holder noted WDA made numerous recommendations that were not adopted by the Board.

[66] The Approval Holder said WDA opposed the Town's request to reduce the monitoring frequency for PCBs, NORMS, and petroleum hydrocarbon fractions F3 and F4 but did not provide any technical evidence to support that view.

[67] The Approval Holder noted WDA believed it added value to the hearing because the Board accepted Dr. Weyer's assessment that contamination to the water supply from the remediated landfill was unlikely. In response, the Approval Holder submitted WDA failed to acknowledge:

(a) the Town submitted the conversion to a well capture system did not increase the risk of contamination to the Town's water supply from the remediated landfill;

(b) there was no objective evidence which would support a conclusion that the Town's water supply was actually impacted by any potential residual contamination at the remediated landfill; and

(c) Dr. Weyer was non-committal in his conclusions.

[68] The Approval Holder noted WDA asked that it be credited with informing the Board's recommendation to adopt a low-flow sampling pilot project. The Approval Holder explained it was aware of the low-flow alternatives but decided not to implement any change until there was a policy change by AEP. The Approval Holder argued the additional information WDA provided respecting low-flow sampling was overshadowed by the large volume of speculative evidence given by WDA.

[69] The Approval Holder noted the Board disagreed with WDA's suggestion that the Director should not have relied on reports, data, and other information.

[70] The Approval Holder submitted the Appellants should not be entitled to costs in respect of the work done by WDA.

3. Director's Response

[71] The Director confirmed he was not seeking costs.

[72] The Director stated he should not be responsible for paying any of the costs claimed by the Appellants. The Director took no position regarding the costs claimed by the Appellants and Approval Holder.

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

[74] The Director noted the Board's Report and Recommendations did not find the Director erred or was not acting in good faith. The Director said his decisions were not substantially varied or reversed.

[75] The Director stated the Appellants did not establish any special circumstances that would warrant costs be payable by the Director.

B. Discussion

[76] The purpose of a costs award is to acknowledge the assistance the party made to the Board in determining the recommendations it makes to the Minister. Costs awarded against a party are not intended to be a punitive measure.

[77] The Board notes Ms. Walsh labelled the final closing of her costs submission as "Public Document." The Board wants to make it clear all the submissions from the Parties are public documents and form part of the record of the appeals.

[78] In the Appellants' costs application, the Appellants analyzed the Board's Report and Recommendations and took issue with some of the Board's conclusions and comments. The purpose of a costs application is to attain an award of costs, when warranted, to offset the expenses a party incurred as a result of participating in a hearing. A costs application is not intended as an opportunity for a party to review and note disagreement with the Board's recommendations or to provide more evidence or arguments. The substantive hearing on the appeals is complete and the Minister has made her decision.

[79] The Approval Holder commented on the protracted appeal process in this case. The Board notes the issuance of sequential amendments lengthened the appeal process considerably. However, hearing the appeals of all the amendments at the same time saved time and effort for all the Parties.

[80] The Board recognizes the efforts taken by the Appellants to secure additional funds to offset the costs they incurred in bringing the appeals forward.

[81] In assessing whether a party should receive a costs award, the main factor the Board considers is the degree to which the party assisted the Board in determining the recommendations it provides to the Minister.

[82] The Appellants raised concerns regarding the potable water system used by the Town. However, their main focus was potential contamination sources from past events. Unless the Appellants had been able to demonstrate that former contamination sources continued to be an issue or reasonably had the potential to impact the water supply, the evidence they provided

was of little value to the Board in determining recommendations with respect to the issues. Much of the Appellants' evidence concerning potential impacts was speculative and not based on fact. Even the Appellants' consultant conceded there was unlikely to be an impact on the infiltration wells from the reclaimed landfill across the river.

[83] The Board appreciates the Appellants were not represented by legal counsel at the hearing, but had they focussed on the issues previously identified by the Board, their evidence would have been more helpful to the Board.

[84] The Appellants appeared to use the appeal process to present concerns on broader issues, rather than the issues identified by the Board. The Board understands the Appellants' concerns, but the appeal process was not the appropriate process to raise these broader concerns.

[85] Given the limited assistance the Appellants provided in their own submissions and evidence, the Board denies the Appellants' application for costs for their personal time.

[86] With respect to the costs claimed for the work done by WDA, the Board acknowledges the consultants provided assistance to the Board in that two recommendations resulted from the evidence provided by WDA. Specifically, WDA recommended using low-flow monitoring and revising the monitoring schedule to adjust for peaks and troughs for the various parameters. In addition, WDA pointed out the wrong interpretation in the Approval Holder's consultants' groundwater flow analysis due to the loss of a piezometer and the failure to integrate this loss of data into the report. The Board also notes the support provided by WDA to the Appellants during cross-examination at the hearing.

[87] The Board is concerned with the considerable time spent by WDA on promoting theories on groundwater flow that were not supported by the evidence. Expert evidence needs to be presented in a neutral manner and be based on the best available scientific information.

[88] Prior to the hearing, the Board awarded interim costs to the Appellants for work to be done by WDA at the hearing in the amount of $2,191.88. This was based on an estimate of 41.75 hours of time for Dr. Weyer attending the hearing at $200 per hour (41.75 x 200 = 8350.00). This was reduced by 75 percent (8400 - 75% = 2087.50) since at the time the interim

costs were determined, the Board could not assess the contribution WDA would make at the hearing.

[89] After reviewing the submissions provided by the Parties and based on the evidence presented at the hearing, the Board considers a costs award based on 41.75 hours of hearing time is adequate. Although Dr. Weyer charged out at $200.00 per hour and Mr. Ellis charged out at $100.00, the Board will accept the $200.00 per hour rate in calculating the costs award. This hourly rate is within the expected range for experts with Dr. Weyer's experience. Therefore, the final costs award is $2087.50 plus $104.38 GST, for a total of $2.191.88.

[90] In this case, the Board will not allow costs claimed for consultants' travel, meals, parking fees, and transit costs. The Board does not generally award costs for these items.

C. Who Should Pay the Costs?

[91] The Board has generally accepted, as a starting point, that costs incurred in an appeal are the responsibility of the individual parties.[19] The public shares responsibility for bringing environmental issues to the forefront.[20]

[92] 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,[21] that costs should not be awarded against the Director providing his actions in carrying out his statutory duties were done in good faith.

[93] Special circumstances are required for costs to be awarded against the Director. Although the appeal process was protracted due to the consecutive amendments issued, there was

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[19] *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.).

[20] Section 2 of EPEA states:

> "(2) The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: … (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions…."

[21] See: *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

no indication the Director acted outside his jurisdiction or acted in bad faith. The circumstances in this case do not warrant the Director being liable for the costs.

[94] Therefore, the costs awarded to the Appellants are payable by the Approval Holder. Since the Approval Holder previously paid WDA $2,191.88 as an interim costs award, no additional monies need to be paid.

D. Summary

[95] The total costs award for the Appellants is $2,191.88, for expert fees. The interim costs award of $2,191.88 is credited to the Approval Holder, leaving no outstanding costs payable.

V. Town of Turner Valley's Costs Application

A. Submissions

1. Approval Holder

[96] The Approval Holder asked for costs totalling $584,563.09, including: (1) $277,155.99 for expert witness fees and disbursements; (2) $298,768.90 for legal fees and disbursements; and (3) $8,638.20 for the Town's costs.

[97] The Approval Holder submitted the following unique circumstances in these appeals to justify an award of costs against the Appellants:

1. the Town is not a large municipality and it had to replace its water supply as a result of a natural disaster;
2. the Appellants, who were well-versed with the regulatory process, chose to challenge each step of the Town's attempt to repair its water supply;
3. the Appellants publicly stated the Town failed to meet Provincial testing standards and the water was unsafe;
4. the Appellants sought a stay to prevent the repairs to the water system;
5. the Appellants refused to consider mediation or other means to focus their issues;

6. the Appellants filed numerous appeals which resulted in extensive pre-hearing motions, which led to a protracted hearing;
7. the Appellants provided evidence that was irrelevant to the issues identified by the Board;
8. the Board essentially dismissed all of the substantive grounds the Appellants advanced;
9. the issues which resulted in the Ministerial Order could have been resolved at mediation if the Appellants had been prepared to focus on these issues; and
10. the Town expended almost $600,000.00, plus the cost borne by its residents as taxpayers of Alberta for the hearing costs incurred by the Director and the Board.

[98] The Approval Holder requested the Board award costs to the Town to be paid by the Appellants and direct the interim costs be returned to the Town.

[99] The Approval Holder stated the following aspects of the Appellants' pre-hearing conduct complicated and protracted the process of bringing the appeals to a hearing:

1. the Appellants did not provide specific grounds in their Notices of Appeal, thereby necessitating three rounds of preliminary motions to determine the issues and an application to dismiss the appeal of Amending Approval No. 1242-02-05;
2. the Appellants failed to provide objective evidence on many of the issues, resulting in a further preliminary motion to strike those issues;
3. the Appellants routinely sought extensions to comply with the Board's procedural requirements and, even though the Board declined to grant an extension, the Appellants nevertheless failed to provide their written submissions as required and thereby protracted the time to respond;
4. Ms. Walsh unsuccessfully sought a stay of the *Water Act* Approval and Amending Approval No. 1242-02-02, requiring the Approval Holder to file a response submission;
5. the Appellants filed numerous document requests which resulted in the Town paying its consultants to locate and provide records to the Appellants. Many of these documents were irrelevant and were never put before the Board;
6. the Appellants unsuccessfully sought an adjournment after the hearing had been rescheduled; and
7. the Appellants refused to participate in mediation.

[100] The Approval Holder said the Appellants' conduct at the hearing extended the process by:

1. making submissions primarily about matters which did not relate to the issues;
2. using the hearing as an opportunity to voice their concerns about the competency and integrity of the Town's elected officials; and
3. insisting at the last minute that Mr. Sunil Beeharry attend the hearing, yet his evidence and cross-examination were only tangentially relevant to the issues.

[101] The Approval Holder noted the Appellants sought to completely reverse all the decisions appealed, but the Board accepted the Approval Holder's and Director's evidence that the change in the collection method to an infiltration gallery did not increase the level of risk to the Town's water supply. The Approval Holder noted the Board rejected the Appellants' suggestion that the Approvals increased the risk of contamination from the remediated landfill, the gas plant, and other potential sources of historical contamination.

[102] The Approval Holder also noted the Board agreed the terms and conditions in the Approvals were more than adequate to protect the users of the water, and the Approval Holder's request to correct a typographical error which effectively reduced the monitoring requirements was granted by the Board.

[103] The Approval Holder submitted that, given its relative success in these appeals and the significant costs it incurred responding to the Appellants' unfocussed "'narrative of supposition and opinion…conjecture and speculation…,'"[22] it is entitled to at least some of its costs and the return of the interim costs.

[104] The Approval Holder stated the Appellants declined to participate in a mediation meeting which would have narrowed or resolved the appeals, and they did not attend WWAC meetings which were designed to respond to community concerns.

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[22] Approval Holder's submission, dated November 30, 2015, at paragraph 16, quoting Board's Report and Recommendations at paragraph 55.

[105] The Approval Holder noted the Appellants were awarded interim costs for their expert, Dr. Weyer. The Approval Holder noted the only contribution Dr. Weyer made to the hearing was his evidence regarding the potential utility of low-flow testing as compared to the Approval Holder's current purge and sample method. The Approval Holder said it had considered the low-flow testing method. The Approval Holder argued any utility of Dr. Weyer's evidence was overshadowed by the large volume of speculative evidence he presented, including evidence respecting the hydro-conductivity of contamination from the landfill which was largely conjecture, rather than presenting scientific evidence needed to discharge the Appellants' burden of proof. The Approval Holder stated that Dr. Weyer admitted his theories respecting groundwater flow were not accepted in the scientific community. The Approval Holder stated Dr. Weyer was aware of his obligations to provide scientifically sound evidence, but failed to do so.

[106] The Approval Holder stated the four-day hearing would not have been necessary had the Appellants limited their submissions and evidence to the issues and had they agreed to withdraw those appeals and issues for which they had no objective evidence. The Approval Holder believed the appeals could have been dealt with without a hearing had the Appellants attended the WWAC meetings, participated in mediation, or otherwise constructively engaged with the Approval Holder and Director.

[107] The Approval Holder stated the Appellants unnecessarily prolonged and complicated the hearing by demanding the attendance of Mr. Sunil Beeharry and using the hearing as an opportunity to express their views regarding the Town's and Province's allegedly deficient efforts to remediate contamination in the Turner Valley area.

[108] The Approval Holder explained its experts' expenses included costs of providing advice with respect to the technical merit of the Appellants' concerns and the issues and the costs incurred responding to the Appellants' demands for information, detailed construction updates, and further production of documents, including obscure reports and historical data.

[109] The Approval Holder explained its experts provided a written report and presented oral evidence at the hearing in their fields of expertise.

[110] The Approval Holder said it could not have adequately responded to the Appellants' concerns without incurring the expert and legal expenses. The Approval Holder stated it was forced to engage numerous experts to dispel unsubstantiated allegations made by the Appellants and their experts.

[111] The Approval Holder submitted the Appellants' submissions did not contribute to a determination of any of the issues. The Approval Holder stated the Appellants' conduct was not consistent with the purpose and intent of EPEA, but instead the Appellants used the Board's process to air their grievances about:

1. the adequacy of Canadian Drinking Water Guidelines to protect infant health;
2. the Province's and Town's management of the decommissioned gas plant; and
3. the integrity of the Town's administrators.

[112] The Approval Holder explained its submissions were focused on the issues which the Board identified for the hearing. The Approval Holder stated it provided a concise factual foundation against which the Board was able to consider the numerous concerns raised by the Appellants. The Approval Holder said its experts provided informed and useful responses to the issues.

[113] The Approval Holder stated the Appellants did not define their concerns with any degree of specificity in their Notices of Appeal. The Approval Holder explained some of its expenses pertained to pre-hearing submissions to strike some of the appeals and to respond to other preliminary matters, including providing information and records in response to the Appellants' demands for production. The Approval Holder said it incurred expenses responding to and preparing submissions with respect to issues which were struck three weeks before the hearing.

[114] The Approval Holder noted the Appellants declined to make submissions or provide evidence with respect to several of the issues notwithstanding the Appellants' refusal to strike those issues. The Approval Holder said it was obliged to file reply evidence even when the Appellants failed to file any of their own evidence.

[115] The Approval Holder submitted that a costs award in favour of the Town is consistent with the purpose of EPEA.

[116] The Approval Holder acknowledged there is value in public participation, but it submitted these appeals would not have been necessary had the Appellants made use of the public consultation process already established (WWAC) and available to citizens wishing to provide advice on decisions affecting the environment. The Approval Holder said that, had the Appellants attended a WWAC meeting or reviewed the testing data they demanded, they would have discovered the Approval Holder was already sampling for many of the parameters raised by the Appellants. The Approval Holder argued the repetition of that information in an expensive and adversarial hearing was unnecessary and contrary to the public interest and the purpose of EPEA.

[117] The Approval Holder stated the Appellants used the Board's appeal process to advance their own issues for broader reclamation goals in the Turner Valley area and for a number of other issues unrelated to the Approvals.

[118] The Approval Holder submitted that responding to unfocussed appeals brought by individuals who refused to make use of consultation processes available to them should not be the cost of doing business for a municipality that holds EPEA and *Water Act* approvals.

[119] The Approval Holder explained it does not have unlimited human and financial resources, and it had applied for some reimbursement through a grant program. The Approval Holder stated these appeals not only affected the costs, but were a source of derision and conflict in the community, distracting its administrators from flood-recovery activities.

[120] The Approval Holder stated it was aware of the low-flow alternatives, but any changes would require a policy change by AESRD.

[121] The Approval Holder submitted it was entitled to costs and the return of the interim costs previously paid.

2. Appellants' Response

[122] Ms. Walsh stated that, since the first hearing, the Town had made the appeal process personal.

[123] Ms. Walsh noted that at no time did the Appellants state the water was "unsafe" as alleged by the Approval Holder.

[124] Ms. Walsh stated the Appellants did not receive any offer from the Approval Holder or the Director to deal with the matters outside of the Board's process, so it seemed the Approval Holder and Director preferred to proceed to a hearing. Ms. Walsh stated she could not find any justification for the Approval Holder to retain several lawyers. She noted the Director had at least three lawyers at the hearing, whereas the Appellants had none. Ms. Walsh stated that had they been allowed to be represented by counsel, which she argued was "denied by the Board," the Appellants would have been on more of an equal footing.[23]

[125] Ms. Walsh stated that:

> "To expect more then (sic) that from ordinary Albertans wanting to have their concerns addressed about the location of our drinking water in a heavily industrialized area, who are doing the best they can with limited means, and no special education, related to a contaminated industrial site incorporated as a municipality, is unconscionable."[24]

[126] Ms. Walsh said the Appellants should not have to pay costs for something that was their right under EPEA and was done in good faith. She said the Appellants did not ask to extend deadlines to hold the process up, but it was a difficult process to navigate. Ms. Walsh stated the Appellants were not experts on the regulatory process as the Approval Holder alleged.

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[23] See: Board's letter dated April 24, 2015, responding to Appellants' request for an adjournment filed April 22, 2015.

[24] Ms. Walsh's submission, dated December 11, 2015, at page 3.

[127] Ms. Walsh stated that if she felt there was another option that could have resolved anything, she would have been willing to participate. She explained she had tried mediation in the past, but it did not seem to work after the mediation was completed.

[128] Ms. Walsh noted that not every amendment to the Approval that was issued had been appealed.

[129] Ms. Walsh stated the Board advised early in the process that it did not believe mediation was an option, and she trusted that opinion. She said the Appellants were willing to proceed to mediation at a later date, but they were advised it was too late.

[130] Ms. Walsh questioned sections of the Approval Holder's costs submission including:

(a) it was unclear what services "Lyran Holdings Ltd." provided to MPE Engineering at a cost of over $87,000.00. The company was not represented at the hearing and the value of its contribution to the hearing is unknown;

(b) it was unclear what rate was charged for MPE's or Stantec's travel expenses;

(c) raises were provided to MPE employees and Stantec employees;

(d) disbursements were included for Stantec but did not describe what they related to;

(e) the travel rate for GERL was $0.70 per kilometre, which was too high;

(f) the $750.00 charged by Ghostpine Environmental for the preparation of a report that discussed the number of fish it caught;

(g) legal counsel for the Approval Holder charged for gas, mileage, and time traveling; and

(h) the CAO claimed a wage of $102.34 per hour, but the average top wage for a CAO in Alberta is $68.10 per hour. CAOs are usually paid a salary for the work they do on behalf of the municipality and, therefore, the Town likely paid the CAO for work he was already doing.

[131] Ms. Walsh noted that proof of the expenses would only be provided to the Board in-camera, indicating the Approval Holder was unwilling to be transparent and upfront with the actual costs it incurred.

[132] Ms. Walsh stated the Appellants did their best to obtain funding while participating in a complex and time consuming process due to the nature of the Approvals, how they were issued, and what was required of them under the circumstances.

[133] Ms. Walsh stated Dr. Weyer is a highly qualified and respected scientist and did the best he could with the data provided by the Approval Holder. Ms. Walsh believed the information provided by the Approval Holder was not enough for Dr. Weyer to characterize fully the locations in question. She noted Mr. Ellis did a great job cross examining witnesses and demonstrating that not enough is known about the area.

[134] Ms. Walsh stated the costs for the hearing should be the responsibility of the Director since he made the decisions without all of the information necessary to do so, but since it was unlikely the Director would pay the costs, then by default the costs should be paid by the Approval Holder.

[135] Ms. Walker stated she is not well versed in the regulatory process. She said she never made a public statement that the Town failed to meet provincial testing standards or the water was unsafe, but only asked the question on the JusticeFunder website.

[136] Ms. Walker explained she did not ask for a stay and she did not refuse mediation. She said she chose a hearing over mediation after seeing how the Approval Holder treated Ms. Walsh leading up to the hearing, and she understood the Board did not believe mediation would be effective.

[137] Ms. Walker clarified that she attended a WWAC meeting and found the Approval Holder and Director were there to advise people on a moot issue and were not there to receive input from the public.

[138] Ms. Walker noted the Board did grant an extension to the Appellants to provide their written submissions. Ms. Walker stated the Approval Holder asked for an extension to provide the drinking water safety plan, but it did not meet the extended deadline.

[139] Ms. Walker argued the Appellants made significant contributions to the hearing in that they:

(1) presented information on the historic landfill located across the river from the infiltration gallery;

(2) raised the lack of hydro-geological evidence on groundwater flow direction from the landfill and lack of delineation of a plume from the landfill;

(3) noted the lack of information on the location of where waste chemicals had been dumped;

(4) raised issues related to the flare pit upstream of the water infiltration gallery;

(5) increased awareness of potential risk pathways and source contaminant locations regarding current and possible future drinking water access; and

(6) provided suggestions related to the piezometer testing methodology.

[140] Ms. Walker explained that many experts were not willing to participate in a hearing on the Appellants' behalf, sometimes due to concerns about losing their jobs. She said this was an additional reason why offering proof and scientific evidence to support their concerns was difficult.

[141] Ms. Walker could not understand why residents should pay costs associated with the hearing because of their concern for other residents.

[142] Ms. Walker believed the costs for the hearing should be the responsibility of the Director since he advised the Approval Holder in these matters, but since it was unlikely the Director would pay the costs, then the Approval Holder should bear the costs. Ms. Walker stated the Approval Holder carried equal responsibility in the steps that led to the hearing.

[143] WDA took exception with the Approval Holder's characterization that Dr. Weyer's theories regarding groundwater flow were not accepted in the scientific community. WDA noted Dr. Weyer emphasized on multiple occasions during the hearing that the scientific theories he was drawing on were established by well-known and reputable scientists and form the basis of modern physical hydrogeology worldwide. Dr. Weyer acknowledged a lack of acceptance of his methodology because physically-based hydrogeology is not generally understood by individuals trained only in other methods of hydrogeology, such as the contaminant and practical wellsite hydrogeologists who represented the Approval Holder.

[144] WDA noted it contributed to the hearing in the following ways:

1. established a possible pathway, albeit unlikely, for contaminants to enter the Town's water supply from the landfill located on the other side of the Sheep River;
2. established potential pathways for contaminants to travel from former oil storage tanks in the direction of the Town's water supply wells;
3. demonstrated when and to what degree chemical sampling of water from the water supply wells, monitoring piezometers, and stored water showed indications of contamination;
4. established the purging sampling methodology used by the Approval Holder, particularly at the piezometers by the reservoir, distorted water levels, introduced turbidity, interfered with the ability to obtain representative samples from otherwise functioning piezometers, and may have camouflaged all metal sampling results;
5. the hydrogeological phenomena at the site, such as seasonal rise of water levels in the piezometers, were mischaracterized;
6. seasonal variations in chemistry values were overlooked when recommending when samples should be taken;
7. established that significant increases in the pumping rate at the water supply wells were reflected by changes in the chemistry pattern, reflecting a change in groundwater flow pattern at the site leading to water entering the supply system from other sources;
8. recommended field measurements for redox potential to improve the interpretation of the chemical data taken; and
9. demonstrated the impact the 2013 flooding had on the channel of the Sheep River, requiring work in the region and undercutting claims the aquifer was unchanged.

[145] WDA stated the Approval Holder discounted the work done by WDA to introduce the need for low-flow sampling at the site.

[146] WDA stated it performed a thorough, professional, and independent analysis of the data available.

[147] WDA said it stands behind all of the evidence it provided, even though the evidence was inadequate at times to convince the Board of its merit, particularly regarding sources of potential contamination. WDA said it was hampered by the limitations of the

available data. WDA stated the work it conducted was necessary to extract as much information from the available data as possible. WDA said that without its efforts, the inadequacy of the Approval Holder's data and lack of piezometer nests in the area of the water supply wells would not have been exposed.

[148] WDA noted that all the Approval Holder's consultants were fully paid for their work, and it is therefore fair and equitable that WDA's charges be reimbursed fully as well. WDA stated the Board and Province need to create an equal playing field for appellants and applicants in hearing procedures and preparation.

[149] WDA said its contribution, in particular with regard to low-flow sampling, forms the basis for future accurate monitoring of water levels and any occurrence and migration of contaminants.

3. Director's Response

[150] The Director confirmed he was not seeking costs.

[151] The Director stated he should not be responsible for paying any of the costs claimed by the Appellants. The Director took no position regarding the costs claimed between the Appellants and Approval Holder.

B. Discussion

[152] The Approval Holder argued the circumstances of these appeals warranted awarding costs to the Approval Holder.

[153] In previous decisions, the Board has generally held that an approval holder does not receive costs because responding to an appeal is part of its cost of doing business. The Approval Holder argued this view is not applicable in this case given the Appellants had other alternatives to have their issues resolved instead of the hearing process. In response, the Appellants stated they did not feel safe attending WWAC meetings and the Board determined mediation would not be successful. Given the animosity displayed among the Parties at the

hearing and throughout the appeal process, the Board is doubtful if mediation would have resolved the appeals, but it may have limited the issues for the hearing. As previously stated in the Report and Recommendations, the Board is disappointed the creation of WWAC did not help resolve some of the communication issues between the Appellants and Approval Holder. However, the Appellants' limited involvement in the WWAC does not affect the Board's assessment as to whether costs should be awarded to the Approval Holder.

[154] The legislation gives a directly affected person the right to appeal certain decisions made by the Director. Although it is preferable to have issues resolved through other means, the right to file a Notice of Appeal and proceed to a hearing is provided for in the legislation. Any project proponent applying for an approval is aware this right exists and should be prepared to participate in an appeal process.

[155] Costs are not awarded as a punitive measure. The Approval Holder argued that, given the number of requests for documents and the unwillingness of the Appellants to participate in mediation, costs should be awarded against the Appellants.

[156] The Board acknowledges the number of document requests made by the Appellants and that many of the documents were not used as part of the Appellants' submissions at the hearing. However, many of the documents should have been readily available and accessible without the Appellants having to make a document request. As stated in the Report and Recommendations, requiring the Approval Holder to post the data on its website should minimize any future requests for information from the public.

[157] The appeal process was longer than usual in this case primarily due to the number of consecutive amendments that were made to the original Approval. This was not a result of the Appellants' actions. From the Board's point of view, it was prudent to consider all of the amendments at one hearing.

[158] The Board acknowledges the Approval Holder in this case is a municipality with limited resources partly as a result of the impacts from the 2013 flood. However, as stated in previous Board decisions, the appeal process is a necessary part of the approval process. The legislation provides an appeal process for those who are directly affected by the Director's

decision and any applicant for an approval must be aware that an appeal may be filed. The appeal process is a potential cost of doing business when applying for an approval.

[159] The Appellants had a right, as directly affected persons, to file appeals of the Approvals. The steps taken, and costs incurred, by the Approval Holder to respond to the appeals were required in order to ensure the Board heard the best available evidence from all perspectives.

[160] It is part of a municipality's function to respond to an appeal when the Board's recommendations could impact the way the municipality does business. This case was unique in that one of the issues was the result of the Approval Holder's appeal to have a condition varied in the Amending Approval. The Approval Holder did what was required for any project proponent seeking an approval. The appeal process was necessary to complete the regulatory process.

[161] The Board has found no reason in this case to award the Approval Holder costs. Therefore, the Board denies the Approval Holder's costs application.

VI. DECISION

[162] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs to the Appellants, in the amount of $2,191.88, payable by the Approval Holder. This amount was previously paid as an interim costs award. Therefore, no additional costs are owed to the Appellants.

[163] The Board denies the Approval Holder's application for costs.

Dated on May 13, 2016, at Edmonton, Alberta

"*original signed by*"
Alex MacWilliam
Board Chair

"*original signed by*"
Jim Barlishen
Board Member

"*original signed by*"
David Evans
Board Member