
ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – July 24, 2023

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 an appeal filed by Mitchell Hochhausen and Wavy Lake Enterprises Ltd. with respect to Enforcement Order No. WA-EO-2019/12-RDNSR issued under the *Water Act* by the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Protected Areas to Mitchell Hochhausen and Wavy Lake Enterprises Ltd.

Cite as: Costs Decision: *Hochhausen et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Protected Areas* (24 July 2023), Appeal Nos. 19-044-045-CD (A.E.A.B.), 2023 ABEAB 10.

BEFORE:

Dr. Chidinma Thompson, Board Chair, Dr. Brenda Ballachey, Board Member, and Mr. Dave McGee, Board Member.

SUBMISSIONS BY:

Appellants: Mr. Mitchell Hochhausen, and Wavy Lake Enterprises Ltd., represented by Mr. Keith Wilson, Wilson Law Office.

Director: Mr. Todd Urquhart, Director, Compliance Manager, Red Deer, Environment and Protected Areas, represented by Ms. Shannon Keehn and Ms. Nicole Hartman, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment and Protected Areas (EPA)* issued a Water Management Order under the *Water Act* to Mr. Mitchell Hochhausen and Wavy Lake Enterprises Ltd. (the Appellants) requiring them to cease work on ditches the Appellants were constructing to drain wetlands located on Mr. Hochhausen's lands, and to fill the ditches in. The Appellants complied with the Order.

Approximately a year and a half later, the Director, EPA, issued an Enforcement Order requiring the Appellants to:

- (a) immediately cease all unauthorized activity on Mr. Hochhausen's lands;
- (b) retain a professional to prepare a Wetlands Assessment Report detailing the wetlands' condition prior to the Appellants' unauthorized activities and the current conditions of the wetlands;
- (c) retain a professional to prepare a Wetlands Restoration Plan to restore each of the wetlands to the condition prior to the Appellants' unauthorized activities;
- (d) ensure the Wetlands Assessment Report and the Wetlands Restoration Plan meet the Director's requirements set out in the Enforcement Order; and
- (e) implement the Wetlands Restoration Plan once authorized by the Director.

The Appellants appealed the Enforcement Order to the Environmental Appeals Board (the Board). The Board set a date for a hearing and requested written submissions from the Appellants and the Director. The Appellants provided their written submission in accordance with the Board's schedule and included a report from the Appellants' environmental consultants. After reviewing the information provided in the Appellants' written submission, the Director determined the requirements in the Enforcement Order relating to the Wetlands Restoration Plan were satisfied and closed the Order. The Appellants applied for costs against the Director.

The Board received written submissions from the Appellants and the Director regarding whether the Board should award costs against the Director. The Board determined the Director acted in good faith, did not commit an egregious error in making the decision, and conducted himself appropriately as a regulator. As the Board found no special circumstances that would warrant a costs award against the Director, the Board declined to award any costs to the Appellants.

* Alberta Environment and Protected Areas succeeded Alberta Environment and Parks as the department responsible for enforcement orders under the *Water Act*, in October 2022.

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I. INTRODUCTION

[2] This is the costs decision of the Environmental Appeals Board (the “Board”) regarding an appeal filed by Mr. Mitchell Hochhausen and Wavy Lake Enterprises Ltd. (collectively, the “Appellants”), of the decision of the Director, Compliance, Red Deer, Alberta Environment and Protected Areas (the “Director”), to issue Enforcement Order No. WA-EO-2019/12-RDNSR, including amendments, (the “Enforcement Order”), under the *Water Act*, R.S.A. 2000, c. W-3. The Director issued the Enforcement Order on October 1, 2021. On July 5, 2022, after receiving the Appellants’ written submission for a hearing scheduled by the Board, the Director closed the Enforcement Order. The Appellants applied to the Board for costs against the Director.

II. BACKGROUND

[3] Wavy Lake Enterprises Ltd. is the registered owner of lands legally described as S½-7-46-15-W4M, in Flagstaff County, Alberta (the “Lands”). Mr. Hochhausen is the sole director of Wavy Lake Enterprises Ltd.

[4] On April 27, 2018, after receiving information from a member of the public, Alberta Environment and Protected Areas (“EPA”)¹ investigated activities involving the dewatering of wetlands located on the Lands. EPA found the Appellants had constructed ditches to drain water from several wetlands. On April 27, 2018, the Director issued Water Management Order No. WMO 2018/04-RDNSR (the “Water Management Order”) to the Appellants, requiring the Appellants to take certain actions to stop the draining of water from wetlands on the Lands. The Appellants responded that the wetlands were being drained to make the Lands suitable for agricultural use. On April 28, 2018, the Appellants complied with the Water Management Order and infilled the ditches.²

[5] On October 10, 2019, the Director issued the Enforcement Order to the Appellants, requiring the Appellants to do the following:

¹ In October 2022, Environment and Protected Areas succeeded Alberta Environment and Parks as the department responsible for *Water Act* enforcement orders.

² Appellants’ Initial Submission, June 24, 2022, at paragraph 5.

- (a) immediately cease all unauthorized activity on the Lands;
- (b) retain a professional to prepare a Wetlands Assessment Report detailing the wetlands' condition prior to the Appellants' unauthorized activities and the current conditions of the wetlands;
- (c) retain a professional to prepare a Wetlands Restoration Plan to restore each of the wetlands to the condition prior to the Appellants' unauthorized activities;
- (d) ensure the Wetlands Assessment Report and the Wetlands Restoration Plan meet the Director's requirements set out in the Enforcement Order; and
- (e) when authorized to do so, the Appellants must implement the Wetlands Restoration Plan.

[6] On October 16, 2019, the Appellants filed Notices of Appeal with the Board, seeking to have the Enforcement Order reversed.

[7] On October 24, 2019, the Board wrote to the Director and the Appellants (collectively the "Parties") acknowledging the Notices of Appeal and requested the Director provide all records available to him when making his decision, including any policy documents.

[8] On November 1, 2019, the Director requested the Board reject the Appellants' Notices of Appeal on the basis that the Enforcement Order was not appealable under the *Water Act*. The Board established a written submission process to address the Director's motion, and received submissions from the Parties from November 13, 2019, until December 3, 2019.

[9] On February 4, 2020, the Board advised the Parties it had determined the Enforcement Order was appealable under the *Water Act*.³ On April 17, 2020, the Director provided the Board with the Director's Record, which the Board distributed to the Parties. The Board scheduled a mediation meeting between the Parties for June 10, 2020. On June 1, 2020, the Parties wrote to the Board and requested the Board adjourn the appeal proceedings, including the mediation meeting, while the Parties worked to resolve the matter themselves. The Board granted the request to adjourn the mediation meeting and received updates from the Parties

³ *Hochhausen et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (7 April 2020), Appeal Nos. 19-044-045-ID1 (A.E.A.B.), 2020 ABEAB 14.

regarding the status of their negotiations.

[10] On October 1, 2021, the Director provided the Board and the Appellants with Amendment No. 2 to the Enforcement Order. On October 7, 2021, the Appellants filed a Notice of Appeal with the Board appealing Amendment No. 2.

[11] On October 12, 2021, the Board wrote to the Parties and advised that, as the Appellants appealed the original Enforcement Order, the Board considered that the appeal of Amendment No. 2 to be a supplement to the existing appeal. On October 21, 2021, the Appellants requested the matter proceed to a hearing. The Board set the hearing for August 17, 2022, chosen by and mutually acceptable to the parties.

[12] On April 20, 2022, the Director provided the Director's Supplemental Record to the Board and the Appellants.

[13] On June 8, 2022, the Board set out a written submission schedule for the hearing. The Appellants provided the Board and the Director with their written submission on June 24, 2022. The written submission included the Wavy Lake Enterprises Ditch Block Assessment Report (the "Wavy Lake Report") from the Appellants' environmental consultants.

[14] On July 5, 2022, the Director advised that EPA "... has concluded our file respecting unauthorized ditching and wetland drainage on lands located on the [Lands]."⁴ The Director stated he had reviewed the Wavy Lake Report and the assessment of the Lands conducted by EPA on June 30, 2022. The Director stated:

"As a result of the June 30, 2022 assessment and my review of the June 24, 2022 Report, I am satisfied that the requirements of clauses 5, 5.1 and 5.2 of Enforcement Order No, WA-EO-2019/12-RDNSR, as amended have been met. The assessment and Report show that hydrology appears to be restored and the impacted wetlands appear to be on the trajectory to natural recovery.

I am of the further view that the requirements set out in the Order related to the Wetlands Restoration Plan and potential Monitoring and Verification are no longer necessary.

⁴ Director's letter, July 5, 2022.

I hereby close the Order.”⁵

[15] On July 11, 2022, the Appellants advised the Board they were seeking costs against the Director.

[16] On July 14, 2022, the Board cancelled the hearing and set a schedule for the Appellants to apply for costs and for the Director to respond. The Board received the Appellants’ costs application on August 15, 2022, and the Director’s written response submission on August 26, 2022.

III. ISSUES

[17] The issue for the Board to consider in this costs application is whether the actions of the Director warrant a costs decision in favour of the Appellants.

IV. SUBMISSIONS

A. Appellants

[18] The Appellants acknowledged they constructed ditches between some of the wetlands on the Lands. However, the Appellants noted that once they received the Water Management Order to fill in the ditches, they complied the next day, on April 28, 2018. The Appellants submitted that, “at no time were the wetlands drained or even significantly lowered during the approximately 30 hours that the ditches were functioning.”⁶

[19] The Appellants stated that one and a half years passed from when they filled in the ditches to when the Director issued the Enforcement Order. The Enforcement Order required the Appellants to hire qualified professionals to conduct “... extensive and expensive testing and studies on the wetlands and Lands despite the Director’s own clear evidence that the ditches were immediately infilled and the wetlands continued to hold water.”⁷

[20] The Appellants submitted that their Notices of Appeal filed on October 16, 2019,

⁵ Director’s letter, July 5, 2022.

⁶ Appellants’ Costs Application, August 15, 2022, at page 1.

⁷ Appellants’ Costs Application, August 15, 2022, at page 2.

included the information that the Appellants had complied with the requirement in the Water Management Order to fill in the ditches before the Director issued the Enforcement Order. The Appellants argued the Enforcement Order was punitive, rather than remedial. The Appellants stated the Enforcement Order was "... arbitrary, unreasonable, punitive, not based on science, and not based on an accurate understanding of the facts."⁸

[21] The Appellants indicated that because they immediately filled in the ditches no impact or adverse effect occurred. The Appellants stated:

"For the Director to use his broad powers to force a young farmer to incur significant costs in conducting wetlands assessments where it is scientifically impossible for the wetlands to have been impacted is an arbitrary and punitive exercise of power by the Director."⁹

[22] The Appellants noted the Director did not file a reply to the Appellants' written submission of June 24, 2022, which included a request for costs as per section 20 of the *Environmental Appeals Board Regulation*, A. R. 114/93 (the "*Regulation*").¹⁰

The Appellants claimed \$23,549.44 for costs of their consultants, Tetra Tech, and \$33,014.64, for legal costs. The Appellants submitted that the costs claimed were reasonable. The Appellants stated:

"... the Director should have realized that given that the ditches were immediately backfilled, there was no proper basis for the issuance of the EO.... The Appellants conducted themselves properly and in good faith throughout the appeal including participating in mediation."¹¹

B. Director

[23] The Director submitted that the Board should deny the Appellants' costs application as the Appellants had not met the criteria for costs award set out in section 20 of the *Regulation*. The Director stated the costs application was insufficient for the following reasons:

⁸ Appellants' Costs Application, August 15, 2022, at page 2.

⁹ Appellants' Costs Application, August 15, 2022, at page 2.

¹⁰ Section 20(1) of the *Regulation* provides: "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."

¹¹ Appellants' Costs Application, August 15, 2022, at page 3.

- “• The application for costs was not filed with the appropriate information;
- The Appellants provided no evidence they required financial resources to make an adequate submission, and gave no indication attempts were made to seek other sources of funding;
- The Board cannot assess whether the Appellants’ submission made a substantial contribution to the hearing, as no hearing was held;
- The costs requested are unreasonable and do not reflect only the actual expenditures directly or primarily incurred in the preparation and presentation of the Appellants’ written submission. Much of the costs claimed relate to expenses incurred to comply with the Enforcement Order, as amended.”¹²

[24] The Director noted that in previous costs decisions the Board has found individual parties are responsible for their own costs, and that final costs are awarded after completion of a hearing in recognition of a party’s assistance in helping the Board prepare its recommendations to the Minister. The Director referred to the Board’s decision in *Lac La Biche County and WSP Canada Inc. v. Alberta Environment and Parks* (“*Lac La Biche County*”),¹³ where the Board declined to award costs against a director who withdrew an Administrative Penalty before a hearing. The Board in that decision found the director had the right to withdraw an Administrative Penalty at any time in the appeal process.

[25] The Director stated the Board and the courts only award costs against the director in “special circumstances.” The Director noted that in *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (“*Cherokee*”),¹⁴ the Board indicated costs may be awarded where the director made sufficiently egregious errors that demonstrated the director’s judgement had been distorted away from his statutory duty.

¹² Director’s Response Submission, August 26, 2022, at paragraph 3.

¹³ Costs Decision: *Lac La Biche County and WSP Canada Inc. v. Compliance Manager, Regulatory Assurance Division – North Region, Alberta Environment and Parks* (28 January 2022), Appeal Nos. 20-020-021-CD (AEAB), 2022 ABEAB 5, at paragraph 30.

¹⁴ Costs Decision: *Cherokee Canada Inc. et al. v Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020) Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (AEAB), 2020 ABEAB 10.

[26] The Director submitted there were no egregious errors or special circumstances that would warrant costs against the Director, as he acted within his statutory authority and acted in good faith.

[27] The Director noted section 20(1) of the *Regulation* stated that final costs are awarded after the completion of a hearing. The Director submitted that as there was no hearing, no costs could be awarded. The Director stated the Appellants incurred their costs as they complied with the Enforcement Order, and not as part of preparation for an appeal.

[28] The Director submitted he was unable to determine if the Appellants had complied with the amended Enforcement Order until he received the Appellants' written submissions for the hearing, which included the Wavy Lake Report. The Director argued that if the Appellants had provided the Wavy Lake Report earlier, there would not have been a need for written submissions. The Director stated:

“Once the Director had received the inspection results from his staff confirming the accuracy of the Ditch Block Assessment, only then was it appropriate for the Director to close the Enforcement Order. Upon making this determination, the Director immediately notified the Appellants and closed the Enforcement Order. He also promptly notified the Board of his decision.

It would have been improper and inefficient for the Director to keep the Enforcement Order open and proceed to an unnecessary appeal after he determined the Appellants had satisfied the Order's requirements.”¹⁵

[29] The Director submitted that the Appellants did not provide sufficient submissions relating to the factors considered by the Board when determining whether to grant a final costs award. The Director noted the Appellants alleged the Enforcement Order was “arbitrary, unreasonable, punitive, not based on science, and not based on an accurate understanding of the facts”¹⁶ and that the Director should have realized there was no basis for issuing the Enforcement Order. The Director said these comments were without supporting evidence and irrelevant to the costs application.

¹⁵ Director's Response Submission, August 26, 2022, at paragraphs 40 to 41.

¹⁶ Appellants' Costs Application, August 15, 2022, at pages 2 to 3.

[30] The Director submitted the Appellants had not provided any evidence of egregious error or special circumstances that would warrant the issuance of a costs award against the Director, and requested the Board dismiss the Appellants' application for costs.

V. ANALYSIS

A. Legislation and Case Law

[31] The Board has the legislative authority to award costs under section 96 of EPEA:

“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.”

[32] In *Cabre Exploration Ltd. v. Alberta (Environmental Appeals Board)*,¹⁷ the Court found the Board has wide discretion under section 96 to award costs:

“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.”¹⁸

[33] The *Regulation* provides the following directions for where final costs are appropriate:

“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:

¹⁷ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293.

¹⁸ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293, at paragraph 23.

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

The Board also considers the purposes of the *Water Act* provided in section 2.¹⁹

[34] The Board evaluates each costs application against the criteria in the legislation and the following from Costs Decision re: *Cabre Exploration Ltd.* (“*Cabre*”):

“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;

¹⁹ Section 2 of the *Water Act* states:

“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 residents of Alberta 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 trans-boundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act.”

- (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."²⁰

[35] As noted previously, section 18(2) of the *Regulation* requires that 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."

[36] The awarding of costs in civil litigation differs from costs in quasi-judicial tribunals such as the Board. The "loser-pays" principle in civil litigation is not binding on the Board. The Board considers the public interest generally and the purposes identified in section 2 of the *Water Act* when it determines whether it is appropriate to award costs in an appeal.

B. Costs against the Director

[37] Section 157 of the *Water Act* prohibits the awarding of costs against the Director where the Director acted in good faith within the Director's statutory authority:

"No action for damages may be commenced against

- (a) a person who is an employee or agent of or is under contract to the Government or a Government agency,
- (b) an inspector, investigator or Director,
- (c) a person authorized in writing by the Director under section 95 or 119 or a person authorized by a Director or investigator under section 128,
- (d) a person to whom a delegation of a power, duty or function under this Act has been made by the Minister under section 9 of the *Government Organization Act*, or
- (e) a member of the Environmental Appeals Board,

for anything done or not done by that inspector, investigator, Director, person or member in good faith while carrying out that inspector's, investigator's, Director's, person's or member's duties or exercising powers under this Act

²⁰ Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 9.

including, without limitation, any failure to do something when that inspector, investigator, Director, person or member has discretionary authority to do something but does not do it.”

[38] The Court and the Board have held that special or exceptional circumstances must exist for a cost award against the Director. The Board stated in *Cabre*:

“The legislation protects departmental officials from claims of damages for all acts done by them in good faith in carrying out their statutory duties. While a claim for costs is not the same as a claim of damages, this provision emphasizes how the legislation views the role of the [Director] differently than the role of those proposing projects. Where, on the facts of this case, the [Director] has carried out its mandate, but has been found on appeal to be in error, then in the absence of special circumstances, this should not attract an award of costs.”²¹

The Court confirmed the Board’s findings, stating that EPA employees are protected “... from claims for damages for all acts done in good faith in carrying out their statutory duties.”²²

[39] There are three special or extraordinary circumstances where the Board would consider awarding costs against the Director:

- (a) the Director acted in bad faith, meaning the Director acted in “dishonesty of belief, purpose, or motive.”²³;
- (b) the Director made an egregious error in decision-making which was a “marked departure from normal behaviour”;²⁴ and
- (c) the Director’s conduct was on the same level as the director in *Cherokee*, where the Board found that director, “acted with hubris, without balance, and that he did not consider the broader consequences of his approach,” did not comply with the Board’s requests to provide the Director’s Record and acted outside of his statutory jurisdiction.²⁵

²¹ Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 18.

²² *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293, at paragraph 33.

²³ “Bad faith,” *Black’s Law Dictionary* (11th ed. 2019).

²⁴ “Egregious,” *Black’s Law Dictionary* (11th ed. 2019).

²⁵ Costs Decision: *Cherokee Canada Inc. et al. v Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020) Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (AEAB), 2020 ABEAB 10.

[40] The onus is on the Appellants to provide evidence of special or extraordinary circumstances that would warrant costs against the Director. While the Appellants did not make any specific submissions regarding the Board's criteria for assessing costs against the Director, the Appellants alleged: (1) the Director used his powers in a punitive and arbitrary way; and (2) the Director should have realized there was no basis for issuing the Enforcement Order. The Appellants' submissions did not accuse the Director of acting in bad faith, but they did suggest the Director made an egregious error and engaged in conduct that justified a costs award.

[41] The Appellants argued the costs incurred were required to appeal the Enforcement Order, which was excessively expensive, particularly as the Appellants had already complied with the Water Management Order and had filled in the ditches. The Director submitted he was unable to confirm the Appellants had complied with the Enforcement Order until he received the Appellants' written hearing submission, which included the June 24, 2022 Wavy Lake Report.

[42] The Board has considered costs applications in other appeals with similar circumstances. In *Ross v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* ("Ross"),²⁶ the appellant withdrew the appeal before a scheduled hearing. The Board noted that section 20 of the Regulation states that an application for costs is to be made at the conclusion of a hearing. The Board found that without a hearing it could not assess the value of the parties' participation and assistance. The Board stated:

"The Board has always held that appellants have the right to withdraw their appeal at any time in the appeal process, up to and including the date of a hearing. The Board acknowledges this may result in the parties incurring expenses they might not have incurred had an appeal been withdrawn earlier in the process, but often appellants have legitimate reasons for choosing to withdraw."²⁷

[43] In *Lac La Biche County*, the director withdrew an Administrative Penalty after receiving the appellants' written submission for a hearing. The Board, quoting from *Ross*,

²⁶ *Ross v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: Gilbertson (28 August 2018), Appeal No. 16-005-CD (A.E.A.B.).

²⁷ *Ross v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: Gilbertson (28 August 2018), Appeal No. 16-005-CD (A.E.A.B.), at paragraph 82.

stated: “The Director also has the right to withdraw an Administrative Penalty at any time in the appeal process, even though an appellant may incur expenses in preparing for the hearing.”²⁸

[44] It would have been preferable if the Director had withdrawn the Enforcement Order before before the Appellants incurred expenses. However, the withdrawal of the Enforcement Order after the Director received the Appellants’ written submission does not equal an egregious error in decision-making that is a “marked departure from normal behaviour.”

[45] The Appellants claimed the Director used his legislated authority in a punitive and arbitrary manner in issuing the Enforcement Order that required the Appellants to incur significant costs to hire qualified professionals to assess the wetlands, despite evidence before the Director that the ditches were filled in and the wetlands held water.

[46] The Board finds there is insufficient evidence to prove the Director “acted with hubris, without balance, and that he did not consider the broader consequences of his approach,” did not comply with the Board’s requests, or acted outside his statutory jurisdiction.²⁹ There is also insufficient evidence the Director used the Enforcement Order in a punitive or arbitrary manner.

[47] The Board finds the Director acted in good faith, did not make an egregious error in decision-making, and conducted himself appropriately as a regulator. The Board finds no special circumstances that would warrant a costs award against the Director.

²⁸ Costs Decision: *Lac La Biche County and WSP Canada Inc. v. Compliance Manager, Regulatory Assurance Division – North Region, Alberta Environment and Parks* (28 January 2022), Appeal Nos. 20-020-021-CD (AEAB), 2022 ABEAB 5, at paragraph 30.

²⁹ *Cherokee Canada Inc. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10, at paragraphs 32, 33, and 45.

VI. DECISION

[48] The Board has determined that costs should not be awarded in this appeal and, therefore, dismisses the Appellants' application for costs.

Dated on July 24, 2023, at Edmonton, Alberta.

"original signed by"
Dr. Chidinma Thompson
Board Chair

"original signed by"
Dr. Brenda Ballachey
Board Member

"original signed by"
Mr. Dave McGee
Board Member