

ALBERTA ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision - February 13, 2003

IN THE MATTER OF sections 91, 92, and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and sections 114 and 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an application for interim costs related to an appeal filed by David Doull and the Lake Wabamun Enhancement and Protection Association, with respect to Approval No. 18528-00-03 issued by the Director, Northern East Slopes Region, Regional Services, Alberta Environment to TransAlta Utilities Corporation, and with respect to *Water Act* Licence Amendment No. 00037698-00-02, issued by the Director, Central Region, Regional Services, Alberta Environment to TransAlta Utilities Corporation.

Cite as: Costs Decision re: *TransAlta Utilities Corporation* (13 February 2003), Appeal Nos. 01-082, 01-084, 02-002, and 02-003-CD (A.E.A.B.).

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Environmental Protection and Enhancement Act* and a Licence Amendment under the *Water Act* to TransAlta Utilities Corporation with respect to the construction, operation, and reclamation of a Water Treatment Plant at Wabamun Lake, west of Edmonton, Alberta. The purpose of the plant is to mitigate the effects of the other TransAlta operations on the Lake.

The Board received a total of eight appeals respecting the Wabamun Lake Water Treatment Plant – five with respect to the Approval and three with respect to the Licence. The majority of these appeals were filed by persons who have appeared before the Board previously with respect to TransAlta’s operations at Wabamun Lake. Only four of these appeals proceeded to a hearing, the others being dismissed or withdrawn.*

The Board had determined four issues to be heard at the hearing. Prior to the hearing date, the Lake Wabamun Protection and Enhancement Association (LWEPA) filed a motion requesting that the issues be expanded. The Board dismissed LWEPA’s motion to expand the scope of the hearing, but the Board granted an adjournment to require Alberta Environment to continue with the studies regarding the fish kills and heavy metals in the lake. The Board asked Alberta Environment to file these reports, and once it had received these reports, the Board would entertain further motions to expand the scope of the hearing, should any of the parties wish to make such motions.

Prior to the hearing recommencing, the Board received an application for interim costs from LWEPA requesting funds to engage two experts to review reports provided by Alberta Environment and TransAlta. After reviewing the application and the submissions of the parties, the Board determined that the costs requested did not reasonably and directly relate to the issues under appeal. Therefore, the Board denied the request for costs.

* The Board has made its Report and Recommendations in this matter and the Minister has accepted the Board’s Recommendations. See: *Doull et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment re: TransAlta Utilities Corporation* (18 November 2002), Appeal Nos. 01-082, 01-084, 02-002, and 02-003-R (A.E.A.B.).

BEFORE:

William A. Tilleman, Q.C., Chair;
Dr. Steve E. Hrudehy; and
Frederick C. Fisher, Q.C.

APPEARANCES:

Appellants: Mr. David Doull; and the Lake Wabamun Enhancement and Protection Association, represented by Ms. Linda Duncan and Mr. Locke Boros.

Directors: Mr. Daryl Seehagel, Director, Northern East Slopes Region, Regional Services, Alberta Environment, and Mr. Larry Williams, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Ms. Renee Craig, Alberta Justice.

Approval Holder: TransAlta Utilities Corporation, represented by Mr. Ronald M. Kruhlak and Mr. Corbin Devlin, McLennan Ross.

Intervenor: Mr. C.G.P. Spilsted.

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I. BACKGROUND

[1] On July 30, 2001, the Director, Northern East Slopes Region, Regional Services, Alberta Environment (the “Directors”¹) issued Approval No. 18528-00-03 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12² (the “Act” or “EPEA”) to TransAlta Utilities Corporation (the “Approval Holder”), repealing and replacing Approval No. 18528-00-01 and Amending Approval No. 18528-00-02, for the construction, operation, and reclamation of a Class III potable water treatment plant (the “Wabamun Lake Water Treatment Plant”) at N 20-52-4-W5M and SE 29-52-4-W5M at Wabamun Lake, west of Edmonton, Alberta. On March 8, 2002, the Director, Central Region, Regional Services, Alberta Environment, issued Licence Amendment No. 00037698-00-02 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3,³ to the Approval Holder with respect to the same facility.

[2] The Environmental Appeal Board (the “Board”) received Notices of Appeal on August 30, 2001, from Mr. David Doull and on August 31, 2001, from the Lake Wabamun Enhancement and Protection Association (“LWEPA”), (collectively the “Appellants”). The Board also received Notices of Appeal from Mr. Blair Carmichael and Enron Canada Power Corporation (“Enron”) on August 30, 2001, and from Mr. Nick Zon on September 4, 2001.⁴

¹ As the appeals are in respect to both the Approval, issued by the Director, Northern East Slopes Region, Regional Services, Alberta Environment (designated a Director under EPEA) and the Licence Amendment, issued by the Director, Central Region, Regional Services, Alberta Environment (designated a Director under the *Water Act*) reference will be made to the “Directors” in this Decision.

² As of January 1, 2002, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, has replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3.

³ As of January 1, 2002, the *Water Act*, R.S.A. 2000, c. W-3, has replaced the *Water Act*, S.A. 1996, c. W-3.5.

⁴ The appeal filed by Enron was dismissed by the Board on March 14, 2002. See: *Enron Canada Power Corporation v. Director, Northern East Slopes Region, Regional Services, Alberta Environment re: TransAlta Utilities Corporation* (26 June 2002), Appeal No. 01-081-D (A.E.A.B.). The appeal filed by Mr. Zon was dismissed on May 31, 2002. See: *Zon v. Director, Northern East Slopes Region, Regional Services, Alberta Environment re: TransAlta Utilities Corporation* (31 May 2002), Appeal No. 01-085-D (A.E.A.B.). The appeal filed by Mr. Carmichael was withdrawn on June 10, 2002. See: *Carmichael v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment re: TransAlta Utilities Corporation* (13 June 2002), Appeal Nos. 01-080 and 01-134-DOP.

A. EPEA Appeals

[3] The Board acknowledged the Notices of Appeal and requested the Approval Holder and the Directors respond to Mr. Carmicheal's request that the appeal under EPEA be held in abeyance until the Licence under the *Water Act* had been issued. In this same letter, the Board requested that the Directors provide a copy of all correspondence, documents, and materials relevant to this appeal (the "Record") by September 21, 2001.⁵

[4] On September 5, 2001, the Directors wrote to the Board concurring with the requests to hold the appeals in abeyance pending the finalization of the Licence. On September 7, 2001, the Board received a letter from the Approval Holder in which it agreed with the Directors that the appeals should be held in abeyance. On September 7, 2001, the Board notified the Parties⁶ that it would hold the appeals in abeyance pending the issuance of the Licence.

B. *Water Act* Appeals

[5] On March 8, 2002, the Director, Central Region, Regional Services, Alberta Environment, issued the Licence under the *Water Act* to the Approval Holder. The Board received Notices of Appeal with respect to the Licence on April 3, 2002, from LWEPA, and on April 8, 2002, from Mr. David Doull.⁷ The Directors and Approval Holder were notified of the appeals, and the Board requested the Directors forward a copy of all the documents related to these appeals (the "Water Record") to the Board.⁸

[6] The Board notified the Parties on April 4, 2002, confirming that it would deal with the Licence appeals in conjunction with the Approval appeals.

[7] The Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board, regarding both the EPEA appeals and the *Water Act* appeals, asking

⁵ The Directors provided a copy of the Record on September 21, 2001, and copies were forwarded to the other Parties to these appeals.

⁶ The "Parties" in these appeals are the Appellants, Approval Holder, and the Directors.

⁷ Mr. Zon did not file an appeal of the *Water Act* Licence. The Board also received a Notice of Appeal from Mr. Blair Carmichael on March 28, 2002. This appeal was withdrawn on June 13, 2002. See: *Carmichael v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment re: TransAlta Utilities Corporation* (13 June 2002), Appeal Nos. 01-080 and 01-134-DOP.

⁸ The Board received a copy of the Water Record on April 10, 2002, and copies were forwarded to the other

whether these matters had been the subject of a hearing or review under their respective legislation. Both Boards replied in the negative.

[8] A Preliminary Meeting was held on April 17, 2002, to determine the issues to be dealt with at the hearing scheduled for May 15 and 16, 2002.⁹ The Board notified the Parties on April 19, 2002, of the issues to be dealt with at the hearing. The issues were:

- Issue 1: the adequacy of the water balance model and the factors (e.g. surface runoff) that it relies upon as a basis for establishing the requirements for the quantity of treated water to be returned to Wabamun Lake by means of the water treatment plant;
- Issue 2: the ability of the water treatment plant, as approved, to be able to deliver the specified quantities of treated water to Wabamun Lake;
- Issue 3: the water quality of the Sundance cooling pond as it may be a factor in limiting the ability of the approved water treatment plant to deliver the quantities of water specified in the License to the quality required by the Approval; and
- Issue 4: the method and timing of providing reports to interested individuals and the actual content of the data reported as effective means to assure the Parties that the proposed mitigation is achieving the expected compensation for the impact of the Approval Holder upon water levels in Wabamun Lake.¹⁰

[9] On May 8, 2002, in preparation for the May 15 and 16, 2002 hearing, the Board received submissions on the above issues from the Director and the Approval Holder. The Appellants filed their submissions on May 9, 2002.¹¹

[10] The Board received an intervenor request from Mr. C.G.P. Spilsted on April 25, 2002. The Board requested the Parties "...provide written comments to the Board with respect to Mr. Spilsted's potential participation at the hearing of these appeals...." Upon reviewing the

Parties to these appeals.

⁹ See: Issues Decision: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment re: TransAlta Utilities Corporation* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.).

¹⁰ See: Issues Decision: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment re: TransAlta Utilities Corporation* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.).

¹¹ No submissions were received from Mr. Carmichael or Mr. Zon.

request and the Parties' submissions, the Board decided that Mr. Spilsted would be given limited intervenor status at the hearing.¹²

C. New Evidence Motion

[11] On May 9, 2002, the Board received a letter from LWEPA regarding "...water quality concerns with respect to recent developments at Lake Wabamun, made public May 8, 2002." LWEPA continued:

"We respectfully submit that [it] is incumbent on the Board to broaden the scope of the hearing to include water quality in general. By doing so, the Board will ensure it receives sufficient and full disclosure in matters related to water quality. We therefore request that in the matters before the Board at the hearing scheduled for May 15 and 16, 2002, that [the] hearing be expanded to [include] water quality in general and not limited to the narrow scope of water quality of the Sundance cooling pond."¹³

[12] The Board asked the Parties to respond to the following three questions in relation to the motion made by LWEPA:

- “1. Does the Board currently have sufficient information regarding the issues surrounding heavy metals and the fish mortality to determine whether to ‘...broaden the scope of the hearing...’?”
2. If the Board does not have sufficient information regarding these issues, should the Board adjourn the May 15 and 16 hearing, until such time that it has enough information to make this determination?
3. If the Board adjourns the hearing, what effect would an adjournment have on the parties to these appeals?”¹⁴

[13] The Board received oral submissions from the Parties on these questions at the commencement of the hearing on May 15, 2002. Based on the information presented, the Board determined there was insufficient information to justify broadening the scope of the issues to be heard at that time. However, the Board decided that an adjournment was required in order for the Directors to continue gathering information on the fish kill and heavy metals, and when the information was available, the Board would, if a motion was put forth, ultimately determine if

¹² See: Letter from the Board to the Parties and Mr. C.G.P. Spilsted, dated May 9, 2002.

¹³ Letter from LWEPA, dated May 8, 2002. The motion by LWEPA was apparently triggered by media reports that there had been fish mortality and heavy metals found at Lake Wabamun. See: "Officials probe fish kill, heavy metals near plant" *Globe & Mail* (National Edition) (10 May 2002) A7.

the issues to be heard would be broadened. The Board determined that none of the Parties would be significantly adversely affected by the adjournment.¹⁵

[14] On August 15, 2002, the Directors provided the Board and the other Parties with copies of the information regarding the investigation into the fish mortality and heavy metals. They also attached reporting and monitoring information they had received from the Approval Holder.

[15] LWEPA notified the Board that it had acquired the services of an expert to review the various reports provided by the Directors. The Board received a request for interim costs from LWEPA on August 29, 2002. The Board notified the Parties of LWEPA's application for interim costs and requested their comments by September 5, 2002.

[16] On September 10, 2002, the Board wrote to the Parties and advised: "The Board has reviewed the interim costs application filed by LWEPA and has decided to deny the application. Written reasons will follow." These are those reasons.¹⁶

II. SUMMARY OF SUBMISSIONS

A. Lake Wabamun Enhancement and Protection Association

[17] LWEPA filed an application for interim costs with the Board pursuant to section 96 of the Act. It submitted that the costs were necessary in order to obtain the services of two experts, one to review and provide comments on the contaminant aspects of the reports provided by Alberta Environment and TransAlta, and another to review the report on the fish kill investigation. LWEPA submitted that these reviews are necessary in order to respond to the reports filed by Alberta Environment and TransAlta, including the "...treatment plant and

¹⁴ See: Board's letter to the Parties, dated May 10, 2002.

¹⁵ See: Re: *Carmichael* (2003), 47 C.E.L.R. (N.S.) 21 (A.E.A.B.), (*sub nom.* Adjournment Motion: *Carmichael et al. v. Director, Northern East Slopes and Central Region, Regional Services, Alberta Environment re: TransAlta Utilities Corporation* (30 May 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, 02-003-ID (A.E.A.B.)).

¹⁶ The Board notes that it has made its Report and Recommendations in this matter and is issuing this decision to complete its record in this matter. See: *Doull et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment, re: TransAlta Utilities Corporation* (18 November 2002), Appeal Nos. 01-082, 01-084, 02-002, and 02-003-R (A.E.A.B.).

cooling pond monitoring reports, report on the official investigation into fish mortality and heavy metals in lake sediment and related announcement of further related studies.”¹⁷

[18] LWEPa submitted that it clearly met all of the qualifying criteria under the Act and the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulations”). It stated that it was granted standing by the Board as it raised matters of broad public interest and concern. It also stated that it cooperated with the other Parties in these appeals to avoid unnecessary duplication and has shared all information with the other Appellants. LWEPa further stated that:

“The claim relates only to costs reasonably, directly and primarily incurred in relation to matters currently under review by the Board, that is, determination of the terms of reference for this Appeal and in particular to the preparation and presentation of LWEPa’s submission on these matters.”¹⁸

[19] LWEPa also listed other commitments that it is involved in and stated that its current assets are less than \$6000.00. The cost of obtaining the services of one expert was stated as \$3000.00, and LWEPa anticipated the cost of the second expert would be similar. Therefore, LWEPa made an application for interim costs for a total of \$6000.00.

B. Mr. David Doull

[20] In Mr. Doull’s response, he indicated that the Act and the Board’s Rules of Practice clearly indicate that the awarding of costs is at the discretion of the Board. He concluded by stating that in other cases involving Lake Wabamun, the “...Board took it upon themselves to see if each request met the Board’s Regulations, then they would come up with what they felt was the appropriate decision. I trust the Board will follow a similar process for LWEPa’s current request?”¹⁹

C. Directors

[21] The Director submitted that the proposal submitted by LWEPa went beyond the set issues of the hearing and explored matters that were not related to the four issues as defined

¹⁷ Letter from LWEPa, dated August 29, 2002.

¹⁸ Letter from LWEPa, dated August 29, 2002.

by the Board. Therefore, the Director considered the first criterion of contributing to the hearing was not met by LWEPA.

[22] The Director did not make any comments regarding the amount of costs that should be awarded. However, he did submit that interim costs should not be awarded against the Director as "...no special circumstances have been demonstrated to indicate that costs and in particular, interim costs, should be assessed against the Director."²⁰

D. Approval Holder

[23] The Approval Holder opposed the request for interim costs on a number of different grounds. The primary ground was that the request was to cover expenses that were not related to the issues in the appeals. It argued that the legislation allows the Board broad discretion in awarding costs, but at a minimum, the costs "...must be directly related to the matters in issue and the preparation and presentation of a party's submissions on those issues." The Approval Holder argued that based on these requirements, the Board should not award interim costs in this matter. It further argued that the request was to fund a review of various reports and studies on fish mortality, heavy metals, and other general aspects of Lake Wabamun, issues that did not relate to the Water Treatment Plant or issues set by the Board in these appeals.

[24] The Approval Holder also submitted that LWEPA had failed to justify the amount of costs claimed and did not provide any information to demonstrate that it needed an award of costs. The Approval Holder further argued that there was no indication if LWEPA had attempted to find funding from other sources or if any effort was made to coordinate efforts or share resources.

[25] The Approval Holder also expressed concerns regarding the additional costs it was incurring:

"TransAlta is already participating in a review of broader issues impacting Wabamun Lake with stakeholders as stipulated in TransAlta's Wabamun Power Plant Approval. The expenses proposed by LWEPA appear to be duplicative. Finally, TransAlta is also concerned about the expenses and time it has already

¹⁹ Letter from Mr. David Doull, dated September 5, 2002.

²⁰ Letter from the Director, dated September 5, 2002.

incurred (i.e. for the hearing that was adjourned) for an appeal about a mitigative measure.”²¹

[26] The Approval Holder summarized its position by reiterating that the “...proposed expenses are unrelated to the EPEA Approval and Water Licence for the Water Treatment Plant Addition. These are the only decisions under consideration in this appeal.”²²

III. DISCUSSION

A. Legislation

[27] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA which reads as follows:

“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.”

[28] This section appears to give the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen’s Bench in *Cabre Exploration Ltd.*:²³

“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.”²⁴

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....’”²⁵ (Emphasis in the original.)

Although Mr. Justice Fraser’s comments were in relation to final costs, the principles to us seem equally relevant to interim costs applications.

²¹ Letter from Approval Holder, dated September 5, 2002.

²² Letter from Approval Holder, dated September 5, 2002.

²³ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

²⁴ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

²⁵ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 at paragraph 31 (Alta. Q.B.).

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

“18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.

(2) A party may make an application for all costs that are reasonable and that are directly and primarily related to

- (a) the matters contained in the notice of appeal, and
- (b) the preparations and presentation of the party’s submission.

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

(2) An application for an award of interim costs shall contain sufficient information to demonstrate to the Board that the interim costs are necessary in order to assist the party in effectively preparing and presenting its submission.

(3) In deciding whether to grant an interim award of costs in whole or in part, the Board may consider the following:

- (a) whether the submission of the party will contribute to the meeting or hearing of the appeal;
- (b) whether the party has a clear proposal for the interim costs;
- (c) whether the party has demonstrated a need for the interim costs;
- (d) whether the party has made an adequate attempt to use other funding sources;
- (e) whether the party has attempted to consolidate common issues or resources with other parties;
- (f) any further criteria the Board considers appropriate.”

[30] Related to this, section 33 of the Board’s Rules of Practice states:

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

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

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

[31] When applying these criteria to the specific facts of the appeal, the Board must also remain cognizant of the purpose of the Act as stated in section 2:

“The purpose of the 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 action;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; ...”

While all of these purposes are important, the Board is of the view that the shared responsibility that section 2(f) of the Act places on all Albertans “...for ensuring the protection, enhancement and wise use of the environment through individual action...” is particularly instructive in making its costs decision.

[32] The Board has stated in other decisions that it has the discretion to decide which of the criteria listed in the Act and the Regulations should apply in the particular claim for costs.²⁶ The Board also determines the relevant weight to be given to each of the criteria, depending on the specific circumstances of each appeal.²⁷ In *Cabre*, Mr. Justice Fraser noted that section “...20(2) of the Regulation sets out several factors that the Board ‘may’ consider in deciding whether to award costs...” 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.”²⁸

[33] Under section 18(2) of the Regulation, costs awarded by the Board, both interim and final, must be “directly and primarily related to ... (a) the matters contained in the notice of

²⁶ Cost Decision re: *Zon et al.* (22 December 1997), Appeal Nos. 97-005-97-015 (A.E.A.B.).

²⁷ Costs Decision: *Paron et al.* (8 February 2002), Appeal Nos. 01-002, 01-003, and 01-005-CD (A.E.A.B.).

²⁸ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

appeal, and (b) the preparation and presentation of the party's submission." These elements are not discretionary.²⁹

[34] In determining if any costs should be awarded, the Board must also consider the public interest element of the appeal and the arguments presented. 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 *Green, Michaels & Associates Ltd.*, *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 tariffs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right."³⁰

[35] The Board has generally accepted the starting point that the costs incurred with respect to the appeal are the responsibility of the individual parties.³¹ There is an obligation for each member of the public to accept some of the responsibility of bringing environmental issues to the forefront.³²

²⁹ Costs Decision re: *Monner* (17 October 2000), Appeal No. 99-166-CD at paragraph 25 (A.E.A.B.).

³⁰ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 at paragraph 32 (Alta. Q.B.).

³¹ Costs Decision: *Paron et al.* (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

³² Section 2 of EPEA provides:

"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."

B. Application

[36] With this licit starting point in mind, the Board has assessed LWEPA's request for interim costs. As stated, under section 18(2) of the Regulations, 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 binding.³³ In the Board's view, the application filed by LWEPA does not meet these "binding" requirements and, therefore, must be denied.

[37] It is important to remember the context in which LWEPA's interim costs application was made. As indicated, LWEPA and the other Appellants filed Notices of Appeal. LWEPA's Notice of Appeal (01-084) respecting the Approval centered on requiring deadlines for returning water to the Lake and on making the obligations and provisions of the Approval binding on all TransAlta facilities around Lake Wabamun. The Notice of Appeal stated:

"Under Section 4.1.3 [of the Approval] the approval holder is not accountable for returning water on an annual basis. This section is not enforceable until December 31, 2006. This is unacceptable. ...

[It] was our understanding that AENV [(the Director)], TAU [(TransAlta)], [sic] agreed that the terms of the WLWTF [(Wabamun Lake Water Treatment Plant)] approval must provide legally binding and enforceable conditions, such that cumulative impacts from all current and future expanded TAU operations are identified and legally bound in the WLWTF approval. ...

In addition, LWEPA requested AENV take the next step to ensure that the appropriate legal mechanisms be used to legally bind both current and future owners of all existing TAU facilities impacting the Wabamun Lake watershed. ...

Further, ... [w]e were told that binding and enforceable provisions governing the return of water to the lake should and would properly form part of the conditions of the yet to be tabled WLWTF Approval.

None of the aforementioned binding and enforceable conditions were included in the WLWTF Approval! ...

The relief, which I request, is as follows:

Enforceable provisions under Section 4.1.3, requiring the approval holder TAU, or future owners of any existing TAU facility, to return 20 million cubic meters of water on an annual basis, from the WLWTF to offset historical debt. Historical

³³ Costs Decision: *Paron et al.* (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.); Cost Decision re: *Cabre Exploration Ltd.* (25 January 2000), Appeal No. 98-251-C (A.E.A.B.).

debt as outlined in the approval and defined as 51.1 million cubic meters, as at December 31, 1999.”³⁴

LWEPA’s Notice of Appeal (02-002) respecting the Licence expressed concerns about the proper calculation of the historical debt, the correctness of the water balance model, inputs into the water balance model, specific examples where LWEPA believes the water balance model is not properly modeling real life occurrences, and that “amendments must be made to other related approvals to ensure consistence in obligations imposed in all approvals.”³⁵

[38] The Board held a Preliminary Meeting and determined what issues included in these Notices of Appeal would be included in the hearing of these appeals. These issues determined to be included were: (1) the adequacy of the water balance model; (2) the ability of the water treatment plant to be able to deliver the specified quantities of treated water; (3) the water quality of the cooling pond as it may be a factor in limiting the ability of the approved water treatment plant to deliver the quantities of water to the quality required; and (4) the method and timing of providing reports to interested individuals.³⁶ Based on section 18(2) of the Regulations, a proper interim costs request must relate to one or more of these issues.

[39] As discussed, shortly before the hearing, LWEPA made a motion to expand the scope of the hearing to address “water quality in the Lake generally,” based on newspaper reports that fish kills had occurred and heavy metals had been detected at Lake Wabamun. The Board heard arguments on this motion and denied the request to expand the scope of the hearing because there was no evidence before the Board that the fish kills and heavy metals related to the matters before the Board – specifically the Approval and the Licence for the Water Treatment Plant. However, the Board decided to adjourn the hearing and require Alberta Environment to file the results of its investigation into these matters. In its decision to adjourn the hearing, the Board indicated that once the results of these investigations were complete, it would give the Appellants, including LWEPA, the opportunity to file new motions to expand the scope of the hearing.³⁷ Despite almost three months passing between the adjournment (May 15, 2002) and the

³⁴ LWEPA’s Notice of Appeal (Appeal No. 01-084), dated August 31, 2001.

³⁵ LWEPA’s Notice of Appeal (Appeal No. 02-002), dated April 3, 2002.

³⁶ See: Issues Decision: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment re: TransAlta Utilities Corporation* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.).

³⁷ See: Adjournment Motion: *Carmichael et al. v. Directors, Northern East Slopes Region and Central*

date the results of the investigation were filed (August 15, 2002), LWEPA waited until August 29, 2002 to file their application for interim costs.³⁸

[40] In its application for interim costs, LWEPA did not argue that they needed an award of costs in order to prepare and present its submissions respecting the four issues that were previously identified – in fact, the majority of those submissions were prepared in advance of the initial May 15, 2002 hearing date. Rather, it argued that an award of costs was necessary to obtain the services of two experts: one to review and provide comments on the heavy metals aspects of the reports provided by Alberta Environment and TransAlta, and another to review the report on the fish kill investigation. These were the reports filed with the Board as part of the results from the investigations. Specifically, LWEPA argued that reviews by these experts were necessary to respond to the reports filed by Alberta Environment and TransAlta, including the “...treatment plant and cooling pond monitoring reports, report on the official investigation into fish mortality and heavy metals in lake sediment and related announcement of further related studies.”³⁹ LWEPA stated that the reviews by the experts were required to enable LWEPA to respond to the Board’s request for submissions regarding the reports in an informed manner. The submissions that LWEPA was referring to were applications that the Board was prepared to entertain *expanding the scope of the hearing*.⁴⁰

[41] As stated in the Act and the Regulations, costs, if awarded, are only related to the matters included in the Notice of Appeal and for the preparation and presentation of the party’s submission at the hearing. In this case, the Board is of the view that LWEPA was not requesting an award of costs related to matters included in the Notices of Appeal nor was it asking for costs to prepare and present its submission at a hearing. Instead, it was requesting costs in order to find the grounds to add another issue to these appeals.

[42] As a result, the request for interim costs must fail. First, finding grounds to add a further issue to the hearing is not addressing an issue included in LWEPA’s Notice of Appeal. If you look at the Notices of Appeal filed by LWEPA, they are essentially focused on specific

Region, Regional Services, Alberta Environment, re: TransAlta Utilities Corporation (30 May 2002) Appeal Nos. 01-080, 01-082, 01-085, 01-134, 02-002 and 02-003-ID (A.E.A.B.).

³⁸ The Board notes that no subsequent motion was received from LWEPA to expand the scope of the hearing.

³⁹ Letter from LWEPA, dated August 29, 2002.

⁴⁰ The Board notes that these applications have been denied.

provisions of the Approval and Licence and on the water balance model. The Notices of Appeal had nothing to do with “water quality in the Lake generally.” When LWEPA filed its Notices of Appeal (on August 31, 2001 and April 3, 2002) the issue of “water quality in general” did not exist, because LWEPA was not aware of the fish kills and heavy metals, which came to light in early May 2002. As a result, there was no basis on which to award costs.

[43] Second, finding additional grounds to add a further issue to the hearing – specifically an issue relating to fish kills and heavy metals, or water quality in the lake generally – does not assist in the preparation and presentation of a party’s submission for the hearing. And again, because this is a requirement for an award of costs, the award of costs must be denied.

[44] The Board also notes that there does not appear to be a clear relationship between the review proposed by LWEPA and the issues to be considered which were: (1) the adequacy of the water balance model; (2) the ability of the water treatment plant to be able to deliver the specified quantities of treated water; (3) the water quality of the cooling pond as it may be a factor in limiting the ability of the approved water treatment plant to deliver the quantities of water to the quality required; and (4) the method and timing of providing reports to interested individuals.⁴¹ Preparing or supporting submissions for the purposes of expanding the scope of the hearing do not relate to the preparation and presentation of a party’s case for the hearing.

[45] At the time of the Board’s decision in this matter, the Board had not made any determination that an additional issue should or would be added, and in fact no motion was received to broaden the issues. If the experts had been retained to provide assistance that directly and primarily related to the issues identified, the request for costs would have been more applicable. However, the experts were retained to look at matters that were not identified as issues. Although the issue of contaminants is a concern for LWEPA and those living and using the Lake, it was not an identifiable issue in these appeals. If LWEPA had been able to illustrate how these experts’ analyses would be directly and primarily related to the identified issues, there would have been a stronger ground on which to consider costs.

⁴¹ See: Issues Decision: *Carmichael et al. v. Directors, Northern East Slopes Region and Central Region, Regional Services, Alberta Environment re: TransAlta Utilities Corporation* (25 June 2002), Appeal Nos. 01-080, 01-082, 01-084, 01-085, 01-134, 02-002, and 02-003-ID2 (A.E.A.B.).

[46] LWEPA provided general statements as to the intent of using the experts. Under the Regulations, the party applying for costs should provide a “clear proposal” for the interim costs. When specifics are included in the costs application, the Board will have a greater appreciation as to the intended use of any costs awarded and if it is reasonable and practical to award costs in the particular circumstances. There was also no indication from LWEPA if had tried to source out other funding. It only stated that it “...endeavours to raise funds in support of its objectives and activities through memberships and donations.”⁴²

[47] In the previous Board decision, *Ash*,⁴³ the Board assessed the grounds on which interim costs should be awarded. It stated:

“The ‘reasonable’ and ‘necessary’ standards together define generally *what* the applicant must prove. The two standards overlap as they relate to how the applicant can prove its underlying case on the merits, although the ‘necessary’ standard seems to be more stringent than the ‘reasonable’ test. In order to satisfy its burden of proving why the costs sought are ‘necessary’, the applicant must provide at least a general outline of its merits case, then describe how the costs sought will enable the applicant to prove that case, and why the applicant is unable to fill that role through reliance on the resources of the other participants in the appeal or through other means. Conclusory assertions of necessity simply will not suffice.”⁴⁴

[48] One distinct difference between the present case and *Ash*, is that in *Ash*, interim costs were requested to support their presentation of the identified issues. Even with the issues identified, the appellant in *Ash* failed to convince the Board that interim costs were needed to provide a succinct and valuable presentation at the hearing.

[49] In the present case, and in our respectful opinion, LWEPA was seeking funding to try to find an issue. The purpose of interim costs is not to seek out an issue, but rather to consolidate and finalize submissions on the issues as identified by the Board. Even if its experts reviewed the reports, there was no guarantee that the Board would determine that it was appropriate to broaden the issues in these appeals.

⁴² Letter from LWEPA, dated August 29, 2002.

⁴³ Cost Decision re: *The City of Calgary (Fay Ash)* (5 February 1998), Appeal No. 97-032 (A.E.A.B.) (“*Ash*”).

⁴⁴ Cost Decision re: *The City of Calgary (Fay Ash)* (5 February 1998), Appeal No. 97-032 (A.E.A.B.) at paragraph 14.

[50] Further, although LWEPA stated that the expert it had contacted was charging approximately \$3000.00 to complete the review, no letter of intent or other documentation was provided by LWEPA to the Board to substantiate this figure. As the second expert had not been consulted or confirmed, LWEPA was estimating that his costs would be comparable to the first expert. The Board would prefer to avoid granting costs awards on speculation.

[51] One of the criteria the Board will consider is whether the party attempted to consolidate common concerns. The Board recognized and appreciated the fact that LWEPA was representing, as a group, a number of potentially independent appellants. By combining their concerns and efforts, it provided for a concise, less duplicative hearing process, and LWEPA has done a good job of representing citizens' interests in the past.

[52] As the Board finds that the Appellant failed to satisfy the onus of showing the necessity of interim costs, the Board does not have to consider whether the Director or the Approval Holder should pay costs.

IV. DECISION

[53] For the foregoing reasons, and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the request for interim costs by the Lake Wabamun Protection and Enhancement Association is denied.

Dated on February 13, 2003, at Edmonton, Alberta.

“original signed by”
William A. Tilleman, Q.C.
Chair

“original signed by”
Dr. Steve E. Hrudehy
Member

“original signed by”
Frederick C. Fisher, Q.C.
Member