

ALBERTA ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – December 29, 2004

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 interim costs application filed by Gerald Oxtoby, Terry Little, Kelly Smith, and Mike Gallie with respect to *Water Act* Preliminary Certificate No. 00198509-00-00 issued to Capstone Energy Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Interim Costs Decision: *Oxtoby et al. v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (29 December 2004), Appeal Nos. 03-118, 120, 121 and 123-IC (A.E.A.B.).

BEFORE:

Dr. Frederick Fisher, Q.C., Chair.

PARTIES:

Appellants: Mr. Gerald Oxtoby, Mr. Terry Little, Mr. Kelly Smith, and Mr. Mike Gallie, represented by Mr. Don Bester, Butte Action Committee.

Certificate Holder: Capstone Energy Ltd., represented by Mr. Alan S. Hollingworth, Gowling Lafleur Henderson LLP.

Director: Mr. David Helmer, Director, Central Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued a Preliminary Certificate and proposed licence to Capstone Energy Ltd. on July 23, 2003, for the diversion of water from the Red Deer River for industrial (oilfield injection) purposes at SW 4-36-1-W5M near Red Deer, Alberta.

The Board received eight Notices of Appeal appealing the Preliminary Certificate and proposed licence. The Board determined the Mountain View Regional Water Services Commission, Mr. Gerald Oxtoby, the City of Red Deer, Mr. Terry Little, and Mr. Kelly Smith are directly affected and Mr. Mike Gallie will be made a party to the appeals. The appeals filed by the Butte Action Committee and Ms. Dorene Rew were dismissed.

Mr. Gerald Oxtoby, Mr. Terry Little, Mr. Kelly Smith, and Mr. Mike Gallie all filed an application for interim costs in the amount of \$7854.00.

Since the issues to be heard at the hearing are complex, and the costs were reasonable and directly associated with the preparation and presentation of their submissions, the Board granted costs in the amount of \$5,979.00 to be payable to Mr. Gerald Oxtoby, Mr. Terry Little, and Mr. Kelly Smith by Capstone Energy Ltd.

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I. BACKGROUND

[1] On July 23, 2003, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Preliminary Certificate No. 00198509-00-00 (the “Certificate”) under the *Water Act*, R.S.A. 2000, c. W-3, to Capstone Energy Ltd. (the “Certificate Holder”). The Certificate included specific terms and conditions and the proposed licence. The Certificate Holder is required to complete the terms and conditions of the Certificate before the actual licence is issued. The proposed licence allows for the diversion of water from the Red Deer River for industrial (oilfield injection) purposes at SW 4-36-1-W5M near Red Deer, Alberta.

[2] Between August 15 and September 8, 2003, the Environmental Appeal Board (the “Board”) received Notices of Appeal from the Mountain View Regional Water Services Commission (Appeal No. 03-116), Mr. Gerald Oxtoby (Appeal No. 03-118), the City of Red Deer (Appeal No. 03-119), Mr. Terry Little (Appeal No. 03-120), Mr. Kelly Smith (Appeal No. 03-121), the Butte Action Committee (Appeal No. 03-122), and Mr. Mike Gallie (Appeal No. 03-123).¹ On September 19, 2003, the Board received a Notice of Appeal from Ms. Dorene Rew.²

[3] The Board wrote to the Certificate Holder and the Director notifying them of the appeals and wrote to the Notice of Appeal filers acknowledging receipt of the Notices of Appeal. The Board requested the Director provide the Board with a copy of the records (the “Record”) relating to this appeal. The Board received the Record on August 22, 2003, and additional documents were provided on September 2, 2003.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

¹ The “Appellants” in this decision are Mr. Gerald Oxtoby, Mr. Terry Little, and Mr. Kelly Smith. The “Parties” in this decision are the Appellants, the Director, and the Certificate Holder.

² The Board dismissed the appeal of Ms. Dorene Rew as her Notice of Appeal was filed late. See: *Rew v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (30 October 2003), Appeal No. 03-138-D (A.E.A.B.).

[5] The Mountain View Regional Water Services Commission, Mr. Oxtoby, the City of Red Deer, and the Butte Action Committee, on behalf of itself and Mr. Mike Gallie, Mr. Kelly Smith, and Mr. Terry Little requested a Stay. On September 18, 2003, the Board notified the Parties that it would not grant a Stay as the requests were premature.

[6] The Board received a reconsideration request of its decision regarding the Stay by the Butte Action Committee on September 19, 2003. In response, on October 10, 2003, the Board stated:

“The Board notes that Capstone has agreed not to undertake any work in relation to the Preliminary Certificate until the appeal has concluded. Therefore, it is the Board’s view that it is not necessary for it to consider the Stay re-consideration requests at this time. The Board, however, directs Capstone to advise the Board immediately if they undertake steps in accordance with the Preliminary Certificate. If this occurs, the Board will consider the Stay re-consideration request.”

[7] On October 6, 2003, the Board received a request for interim costs on behalf of the Butte Action Committee, Mr. Gerald Oxtoby, Mr. Terry Little, and Mr. Kelly Smith.

[8] On October 21, 2003, the Board notified the Parties that it would hold a Preliminary Hearing to hear oral arguments on the following issues:

- “1. whether the Appellants (the Mountain View Regional Water Services Commission, the City of Red Deer, the Butte Action Committee, Mr. Gallie, Mr. Oxtoby, Mr. Little and Mr. Smith) are directly affected by Alberta Environment’s decision to issue Preliminary Certificate No. 00198509-00-00 to Capstone Energy Ltd.;
2. what are the issues to be heard at a potential hearing;
3. Mr. Bester’s request for interim costs; and
4. whether the Notice of Appeal filed by Mr. Bester in appeal No. EAB 03-122 is complete or properly before the Board because it appears to only appeal the Director’s decision to reject Mr. Bester’s Statement of Concern.”

The Board held a Preliminary Hearing on November 14, 2003, to hear oral arguments, including arguments regarding the costs application.

[9] On December 1, 2003, the Board notified the Parties that all of the Appellants (except the Butte Action Committee and Mr. Gallie) have standing and are directly affected. The Board dismissed Mr. Gallie’s appeal but granted him party status because of his personal

knowledge about the Red Deer River that may be of assistance to the Board in its consideration of the other appeals. The Board dismissed the appeal of the Butte Action Committee. The Board did not grant interim costs based on the information provided prior to the Preliminary Hearing, but the Parties were notified that they were free to provide a more detailed application for costs for the Board's further consideration.

[10] On December 3, 2003, the Board received an interim costs application on behalf of Mr. Terry Little, Mr. Gerald Oxtoby, Mr. Kelly Smith, and Mr. Mike Gallie.

II. INTERIM COSTS

A. Submissions

[11] The Appellants submitted a costs application for the amount of \$8854.00.³ These costs were broken down as follows:

Legal fees:	\$6975.00 ⁴
Research costs	\$400.00
Correspondence	\$350.00
Expert witness costs	\$129.00 ⁵
Total costs	\$7854.00

[12] The Appellants stated they have consolidated their efforts in order to save on costs for legal representation and on research and preparation for the hearing. They further

³ See: Appellants' submission, dated December 3, 2003. In the application for costs, the Appellants actually requested \$7975.00 for legal costs. The Appellants stated that legal representation at three days of hearing would amount to \$6,250.00, but this should be \$5,250.00 (21 hours at \$250.00 per hour). Therefore, the Board will use \$5,250.00 for legal fees for the hearing presentation in its determination of interim costs.

⁴ The legal fees were further broken down as:

Preparation	3 hours @ \$250.00/hr	\$750.00
Travel Time	3 hours @ \$125.00/hr	\$375.00
Hearing representation	21 hours @ \$250.00/hr	\$5,250.00
Consultation Clients	1 hour @ \$250.00	\$250.00
Sub Total		\$6975.00

⁵ Expert witness costs claimed were as follows:

Travel expense	300 km @ \$0.38/km	\$114.00
Meal allowance		\$15.00
Sub Total		\$129.00

submitted that having one lawyer represent the group will streamline the hearing process. Also, the Appellants explained they had an engineering and technical review of the material completed at no cost to any party.⁶

[13] The City of Red Deer considered the costs requested by the Appellants to be "...quite normal..." and ought to be granted. It further stated the Certificate Holder should pay the costs.⁷

[14] The Certificate Holder argued that the Butte Action Committee had failed in its application to provide information on how it will contribute to the hearing since it did not indicate the case it will advance nor the nature of the expert's testimony. The Certificate Holder further argued the Butte Action Committee did not demonstrate the need for funding or if other funding sources were considered.⁸

[15] The Certificate Holder questioned whether the Appellants were required to pay their solicitor's fees in advance of the hearing and stated it would be "...more logical..." to request at least some of the costs at the conclusion of the hearing.⁹

[16] The Certificate Holder submitted that this is not an appropriate case to award costs against it. The Certificate Holder stated, "...it appears that the opposition to Capstone's request is mainly rooted in a philosophical opposition to any further withdrawals from the Red Deer River, particularly for oilfield injection."¹⁰ It argued that if this is the direction of the hearing, the Board's decision would have "...ramifications for future applications and the hearing becomes more of a generic inquiry into appropriate surface water use in the Province of Alberta." The Certificate Holder concluded by stating it is inappropriate for a small independent company such as it to finance such an inquiry, and therefore, each party should be responsible for their own costs.¹¹

⁶ The Appellants submitted a further letter on December 8, 2003. Although the letter was unexpected, the information provided in it was information the Board was aware of from previous written submissions and oral arguments at the preliminary hearing. It therefore did not affect the submission process and the other Parties' rights to respond.

⁷ See: Letter from City Red Deer, dated December 3, 2003.

⁸ Certificate Holder's submission, dated December 8, 2003.

⁹ Certificate Holder's submission, dated December 8, 2003.

¹⁰ Certificate Holder's submission, dated December 8, 2003.

¹¹ Certificate Holder's submission, dated December 8, 2003.

[17] The Director submitted that the costs application did not meet the test for interim costs as the application did not indicate the following:

- “• what efforts were made to identify and make use of other means or resources,
- any information that the applicants lack their own resources,
- no description of how these items of costs will enable the application to prove their case or even a general outline of the merits of their case,
- no evidence of market rate for the service, and
- no information if any further interim costs will be required.”¹²

[18] The Director submitted that there is insufficient evidence to determine if the interim costs should be awarded, and therefore the application should be denied. However, if costs are awarded, the Director argued that he is not the proper party against whom costs should be made, as there are no allegations that he was not acting in good faith.¹³

[19] The Director further submitted that the application may be premature as the issues have not yet been set.

B. Legislation

[20] 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.”

[21] 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.*:¹⁴

“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.”¹⁵

¹² Director’s submission, dated December 5, 2003, at paragraph 35.

¹³ Director’s submission, dated December 5, 2003, at paragraphs 38 and 39.

¹⁴ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001), Calgary 0001-11527 (Alta. Q.B.).

¹⁵ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraph 23.

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.]¹⁶

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

[22] Sections 18 and 19 of the *Environmental Appeal Board Regulation*, A.R. 114/93, (the “Regulations”) specify the requirements of applying for interim costs. These sections state:

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

- (2) A party may make an application for all costs that are reasonable and that are directly and primarily related to
- (a) the matters contained in the notice of appeal, and
 - (b) the preparations and presentation of the party’s submission.

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

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

¹⁶ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraphs 31 and 32.

- (4) In an award of interim costs the Board may order the costs to be paid by either or both of
 - (a) any other party to the appeal that the Board may direct;
 - (b) the Board.
- (5) An award of interim costs is subject to redetermination in an award of final costs under section 20.”

[23] 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.”

[24] The Board has generally accepted that the starting point is that costs incurred with respect to the appeal are the responsibility of the individual parties.¹⁷ We believe there is an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront.

C. Discussion

[25] The Appellants submitted a reasonable costs application and provided sufficient detail to enable the Board to determine if the request was directly related to the preparation and presentation of their arguments for the hearing.

[26] The Appellants requested a total of \$6975.00 for legal fees. Included in this total is \$375.00 for travel time that will be disallowed. The Board is of the view that parties can enlist the services of any lawyer they please, but generally, it should not be another party’s

¹⁷ Costs Decision: *Paron et al.* (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

responsibility to pay costs associated with the lawyers' time to travel to the community where the hearing is held.¹⁸ Travel time is not directly and primarily related to the issues identified. Therefore, the Appellants' claim will be reduced by \$375.00.

[27] Legal fees for the Appellants' counsel, Mr. Secord, have been calculated at \$250.00 per hour. According to the Alberta Legal Telephone Directory 2002-2003, Mr. Secord has been at the Alberta Bar for over 20 years. Based on the tariff of fees used by the Government of Alberta for outside counsel, a lawyer of his experience would be paid at the rate of \$190.00 per hour. At this rate, for the 25 hours claimed for preparation (3 hours), hearing time (21 hours), and consultation with the Appellants (1 hour), he would be entitled to claim costs in the amount of \$4,750.00.

[28] All parties should be responsible for part of the costs of an appeal, and in most cases, all other matters being equal, the Board would use half of this amount as the starting point for determining costs. This reflects the purpose of the *Water Act* as stated in section 2(d):

“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: ...

(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....” (Emphasis added.)

[29] In this case, the claim for interim costs is extremely reasonable, and, in all likelihood, does not reflect the true costs, and time, that will be required to present their evidence and arguments effectively to the Board. However, it is not up to the Board to determine if the costs claimed by the Appellants, or their counsel, adequately represent the full costs associated with preparing for and presenting their appeal before the Board. Therefore, the Board is not at liberty to modify the time and associated costs claimed, and in any event, the cost adjustment, if at all, can take place upon any party's application at the end of the hearing.

[30] In assessing whether to award interim costs, the Board must look at the issues that are to be argued before it. In this case, the issues are very complex with a high public interest element. It is important to the Board (and from us to the Minister through our Report and

¹⁸ See: Costs Decision: *Maga et al.* (27 June 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-CD (A.E.A.B.).

Recommendations) the arguments are presented effectively, and therefore, it is appropriate that counsel represent the Appellants.

[31] The Appellants have combined their efforts in presenting their appeals, thus, utilizing available resources effectively. This will reduce the possibility of any redundancy and will help in ensuring the appeal process is efficient.

[32] The Board takes judicial notice of the current difficulties facing the agriculture industry. The past few years have seen drought conditions in different areas of the prairies, making it difficult for many farmers and ranchers. During the past year, producers have had to deal with the repercussions from one case of bovine spongiform encephalopathy found in the province. The agriculture industry continues to have to deal with higher costs for inputs and lower prices for their products. The Appellants, Mr. Little, Mr. Oxtoby, and Mr. Smith, own properties immediately downstream of the site of the proposed project. These are the individuals who will be affected the most, if any one is affected, by the project, and these three Appellants are all ranchers. The Board wants participation from these individuals at the Hearing, and taking into consideration the financial uncertainties facing the agricultural community in general, and them in particular, it is understandable these Appellants may have difficulty in securing funds to obtain the services of legal counsel or other experts. In the Board's view, this unique factor mitigates strongly in favour of granting interim costs.

[33] The issues to be determined at the hearing are very complex, and the Board will be requiring the Parties to submit affidavits, perhaps rebuttal affidavits, and written submissions prior to the hearing. The time allotted for each of the Parties will be adhered to, as best as possible, and therefore, presentations at the hearing must be provided in an expeditious manner. The Board wants to hear from these Appellants, and having legal counsel available to guide the presentations and assist in preparing affidavits and submissions will help the Board, but it also ensures the concerns of the Appellants are stated explicitly and succinctly. Therefore, the Board finds these appellants should be awarded costs.

[34] The Board is also familiar with the legal counsel these Appellants have selected, Mr. Richard Secord. He is a senior member of the environmental bar in Alberta, and has appeared before the Board previously. Based on the Board's knowledge of Mr. Secord, the

Board expects Mr. Secord's assistance in this matter will ensure the Appellants' concerns are presented in an efficient manner, which the Board believes will be of benefit to all Parties.

[35] As stated above, and where the Board believes costs are appropriate, a starting point in the determination of costs is 50 percent. The Board has adjusted this amount in other decisions, both by raising and by lowering the amount awarded, depending on the level of contribution the parties made to the hearing. In this case, and for reasons stated above, the Board is willing to raise the amount above 50 percent. The Board has determined the Appellants will receive legal costs in the amount of \$4750.00. However, the Board does not believe it is standard practice for lawyers to expect to be paid their total fees *up front*. Although retainer fees may be asked for prior to the start of litigation, the remaining fees are collected at various times throughout the duration of the file. Therefore, half of the costs for legal services will be awarded to the Appellants at this time for a total of \$2375.00. The remaining \$2375.00 will be provided to the Appellants at the close of the hearing.

[36] The Appellants have included costs for legal disbursements in the amount of \$350.00. This amount sounds reasonable given the costs associated with preparing and forwarding the submissions and other correspondence to all of the Parties and other appellants. The Board accepts the claim for legal disbursements for the full amount of \$350.00. Total legal costs to be awarded will be \$5100.00.

[37] The Board has found the personal disbursement costs claimed by the Appellants are realistic. The Appellants asked for \$400.00 to cover their expenses in procuring a number of documents and reports.¹⁹ These reports appear to be relevant to the issues at hand and would assist the Appellants in preparing their arguments, and the Board is hearing them, as most of the

¹⁹ The reports listed in the Appellants' submission, dated December 3, 2003, included:
"Red Deer River Basin Studies
Environment Canada Precipitation and Snow Fall History
Dickson Dam Inflow and Outflow History
Inflow Objective study Red Deer River
Hydrogeological Study Downstream Dickson Dam
Ocean and Fisheries Fish Habitat Study Red Deer River
Wild Canada Endangered River Study
South Sask. River Flow Objective Study
Mountain Snow Conditions and Water Supply Forecasts for Alberta"

reports pertain to water studies regarding the Red Deer River. The Appellants stated the reports and other documents provided by the other Parties, were reviewed by someone at no cost. This indicates the Appellants have attempted to reduce costs as much as possible and have used alternative methods to minimize costs. The amount requested is reasonable, and therefore, the disbursement costs for obtaining the reports, \$400.00, will be awarded to the Appellants.

[38] The Appellants submitted a costs claim for \$350.00 for preparing and submitting documents to the Board, including long distance charges. Although not regularly granted, the Board will give the Appellants their full claim for costs for these items. The costs are not unreasonable and are required to ensure correspondence is received and replies forwarded to the Board and the other Parties as quickly as possible.

[39] Additional costs were claimed for travel expenses and meal allowances for their intended expert witness, Dr. David Schindler. Although the Board usually does not grant costs award for travel, the Board notes Dr. Schindler will be donating his time to appear at the hearing. It is quite reasonable, in these circumstances, to allow his travel costs to be covered. It is anticipated the evidence Dr. Schindler will bring to the hearing will be valuable to the Board when it makes decision in the matter. Therefore, the full costs claimed, in the amount of \$129.00, will be awarded to the Appellants.

[40] The Board wants to make it clear these costs are being awarded to the Appellants. Mr. Little, Mr. Oxtoby, and Mr. Smith. Costs are not being awarded to the Butte Action Committee nor for Mr. Gallie's participation in the hearing. The Butte Action Committee merely filed the application on behalf of the Appellants and Mr. Gallie as their representative, and the Appellants are entitled to enlist the assistance of the Butte Action Committee in preparing and submitting the application.

C. Who Should Bear the Costs?

[41] The Appellants did not specify against whom costs should be awarded.

[42] 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,²⁰ that costs

²⁰ See: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

should not be awarded against the Director providing his actions, while carrying out his statutory duties, were done in good faith.

[43] Based on the information the Board has at this point in time, and considering this is an application for interim costs, the Board finds no special circumstances or misconduct of the Director and, therefore, does not view this as an appropriate case in which to order costs against the Director.

[44] In previous costs decisions against a project's proponent, the Board has described the role of project proponents as being "...responsible for incorporating the principles of environmental protection set out in the Act into its project. This includes accommodating, in a reasonable way, the types of interests advanced by the parties..."²¹ As the Board has stated before, "...these costs are more properly fixed upon the body proposing the project, filing the application, using the natural resources and responsible for the projects financing, than upon the public at large as would be the case if they were to be assessed against the Department."²²

[45] The Board, if it does award legal costs, will generally base the costs award on a reasonable allowance for hearing and preparation time and will adjust this amount to reflect the other criteria the Board determines to be relevant in the specific case. As stated in *Paron*:

"In the case before the Board, virtually all of the costs are legal fees. For this category of expense, except in exceptional cases, the Board has not previously assessed costs awards on a full solicitor and client basis. (Cost Decision re: *Cabre Exploration Ltd.*, E.A.B. Appeal No. 98-251-C). Where the Board awards legal costs, the Board will generally base the costs awards on a reasonable allowance for hearing and preparation time and will adjust this amount to reflect the other criteria the Board applies under the Act and the Regulation for that case."²³

[46] Therefore, and for the reasons set out in the previous sections, the Board concludes that no such special circumstances exist to warrant costs being awarded against the Director. Costs in the circumstances of these appeals will be paid by the Certificate Holder.

²¹ See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.). In *Cabre*, the Board stated that where the Department has carried out its mandate and has been found, on appeal, to be in error, then in the absence of *special circumstances*, it should not attract an award of costs. The Court of Queen's Bench upheld the Board's decision: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.)

²² Re: *Mizeras* (2000), 32 C.E.L.R. (N.S.) 33 (Alta. Env. App. Bd.), (*sub nom.* Cost Decision re: *Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) at paragraph 33.

²³ Re: *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.) at paragraph 44.

D. Final Costs

[47] The Appellants are free to submit a final costs submission at the close of the hearing and request the Board consider any additional costs incurred, legal and otherwise. However, the Appellants must remain aware of section 19(5) of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93, which provides:

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

[48] All of the Parties and other appellants can make an application for final costs. If they choose to make an application, they are to advise the Board prior to the close of the hearing.

III. CONCLUSION

[49] The issues to be determined at the hearing are challenging, fall squarely within several of the purposes of the *Water Act* and the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and the request for costs is reasonable and likely conservative. Therefore, pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards interim costs in the amount of \$5,979.00 to be awarded to Mr. Terry Little, Mr. Gerald Oxtoby, and Mr. Kelly Smith. Costs are payable by Capstone Energy Ltd.

[50] The Board orders costs in the amount of \$3,604.00 to be paid to the Appellants by February 2, 2004, and the remaining \$2,375.00 is payable to the Appellants within 30 days after the close of the hearing.

Dated on December 29, 2004, at Edmonton, Alberta.

“original signed by”

Dr. Frederick Fisher, Q.C.
Chair